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EDITORIAL COMMENT

This edition of the MLA Report includes an impressive range of scholarly and practice-oriented submissions by MLA committees. The Committee on Uniformity of U.S. Maritime Law has provided excellent papers by Professor Michael Sturley and Committee Chair, Kimbley Kearney. Professor Sturley discusses three 2006 appellate court decisions, including conflicting decisions by the Second and Eleventh Circuits regarding the application of the Carmack Amendment to the inland leg of multimodal shipments, and a Third Circuit decision concerning the "fair opportunity" doctrine under § 4(5) of COGSA that directly conflicts with the Second Circuit's decision in *Ferrostaal, Inc. v. M/V Sea Phoenix.* Nowhere is the mandate of the Maritime Law Association to promote uniformity in the "enactment and interpretation" of maritime law implicated more directly than by these decisions. Thus, we encourage the membership to read the Uniformity Committee's work carefully.

The Spring 2007 MLA Report also includes two superb papers by Hal Watson for the Marine Insurance and General Average Committee as well as case reports by the Committees on Maritime Arbitration and Mediation, Marine Insurance and General Average, Carriage of Goods by Sea, and Recreational Boating. The topics covered in these newsletters are timely and well analyzed, and demonstrate the remarkable breadth of our practice area.

As always, we encourage the Association's committees and working groups to submit written contributions for inclusion in the next Report.

Matthew A. Marion,
Editor

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COMMITTEE ON UNIFORMITY OF U.S. MARITIME LAW
FALL, 2006

Recent Developments in U.S. Maritime Law

Three Recent Cargo Cases Raising Major Uniformity Concerns

by

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Since the Association's last meeting in New York, the federal courts of appeals have decided three cargo cases raising major uniformity concerns: the Third Circuit's May 2006 decision in *Ferrostaal, Inc. v. M/V Sea Phoenix,*[1] the Second Circuit's July 2006 decision in *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.,*[2] and the Eleventh Circuit's August 2006 decision in *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC.*[3] *Sompo* and *Altadis* are in direct conflict (as part of a six-circuit split) on the applicability of the Carmack Amendment to the inland leg of a multimodal shipment. Moreover, *Ferrostaal* is in acknowledged conflict with the decisions of seven other circuits, including dicta in *Sompo,* on the applicability of the so-called "fair opportunity" doctrine under section 4(5) of the Carriage of Goods by Sea Act (COGSA).

Extending the Carriage of Goods by Sea Act (COGSA) to Inland Carriers

By its terms, the Carriage of Goods by Sea Act (COGSA) applies only "from the time when the goods are loaded on to the time when they are discharged from the ship."[4] Despite this much-criticized "tackle-to-tackle" limitation, standard bill of lading clauses routinely extend COGSA's coverage to the periods before loading and after discharge,[5] thus purporting to cover the inland carriage and storage of the goods. Inland extensions of COGSA, however, take effect simply as contractual terms. This represents a sharp contrast

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[1]447 F.3d 212, 2006 AMC 1217 (3d Cir. 2006).
[2]456 F.3d 54 (2d Cir. 2006).
[3]458 F.3d 1288 (11th Cir. 2006).
[4]COGSA § 1(e).
[5]*See generally* Michael F. Sturley, *The Application of COGSA as a Matter of Contract,* 2A Benedict on Admiralty § 43 (7th rev. ed. 2005).

with the contractual extension of COGSA to domestic sea carriage, which—under section 13's so-called "coastwise option"[6]—results in the application of COGSA with the force of law.[7]

Because a private contractual agreement cannot avoid the application of the mandatory law that would otherwise govern a commercial transaction, the effect of a clause purporting to extend COGSA inland has long depended on whether some other law is mandatorily applicable. In *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.,*[8] the Supreme Court broke new ground by holding that the parties may choose by contract to apply COGSA's package limitation instead of state law,[9] but *Kirby* did not address the impact of mandatorily applicable federal law, such as the Harter Act or the Carmack Amendment.[10]

In *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.,*[11] the Second Circuit had to decide whether the inland portion of a multimodal shipment was subject to the Carmack Amendment as a matter of law or to COGSA under a clause in the multimodal bill of lading. The shipment at issue involved

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[6]*See generally* Michael F. Sturley, *Bills of Lading in Domestic Trade That Incorporate COGSA; The Coastwise Option,* 2A BENEDICT ON ADMIRALTY § 42 (7th rev. ed. 2005).

[7]COGSA § 13 provides, in relevant part:

> "Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act. . . ."

[8]543 U.S. 14, 2004 AMC 2705 (2004).

[9]Strictly speaking, the extension of the COGSA package limitation to inland carriage in *Kirby* was irrelevant to the displacement of state law. The *Kirby* Court actually held that the multimodal shipment was governed by [federal] general maritime law, which displaced state law. Once state law was out of the picture, the Court held that the general maritime law permitted the parties to extend the COGSA package limitation to inland carriage.

[10]George Chandler suggests that *Sompo* "challenges" *Kirby*. See George F. Chandler, III, *A Challenge to* Kirby, 4 BENEDICT'S MAR. BULL. ___ (2006) (forthcoming). To the extent that *Kirby* is viewed solely as a result-oriented decision, this suggestion is understandable. *Sompo* undoubtedly reaches a different result on very similar facts. The legal and policy issues in the two cases, however, are completely different. The vertical choice between federal and state law on which the *Kirby* Court focused implicates the Supremacy Clause and raises the significant uniformity concerns that were central to the *Kirby* analysis. The horizontal choice between two federal options (the Carmack Amendment and the general maritime law) is very different. It neither implicates the Supremacy Clause nor raises comparable uniformity concerns.

[11]456 F.3d 54 (2d Cir. 2006).

the carriage of 32 tractors from Japan to Georgia. The ocean carrier transported them safely from Tokyo to Los Angeles, but on the rail journey from Los Angeles the train derailed in Texas and the tractors were damaged. The railroad claimed that under the multimodal bill of lading it was entitled to the benefit of COGSA's $500 per package limitation. The cargo claimant responded that it was entitled to full damages under the Carmack Amendment, which applied with the force of law to the domestic rail portion of a multimodal shipment.

Because it was self-evident that a private contract could not override an applicable federal statute, the real question for the Second Circuit was whether the Carmack Amendment applied in these circumstances. Other federal circuits have split on the issue. In *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.,*[12] the Eleventh Circuit declared (in dictum) that the inland portion of a multimodal shipment from a foreign country is subject to the Carmack Amendment *only* when there is a separate bill of lading governing the inland carriage—which would suggest that the goods were not really carried under a multimodal bill of lading after all. The Fourth,[13] Sixth,[14] and Seventh[15] Circuits subsequently followed the *Swift Textiles* dictum to find the Carmack Amendment inapplicable in multimodal cases. (Shortly after *Sompo* was decided, the Eleventh Circuit also adopted its own prior dictum as a holding.[16] I discuss this case below.[17]) The Ninth Circuit[18] and some district courts,[19] in contrast, have reached the opposite result.

After a detailed review of the prior case law, the *Sompo* court concluded that the *Swift Textiles* rule was not simply dictum (meaning that it was unnecessary to that decision), it was actually inconsistent with the result in *Swift Textiles*. After carefully considering the Carmack language and history, the Second Circuit also concluded that the *Swift Textiles* rule was wrong. Agreeing with the Ninth Circuit, it held that the Carmack Amendment does apply to the

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[12]799 F.2d 6917 (11th Cir. 1986).
[13]See *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993).
[14]See *American Road Service Co. v. Consolidated Rail Corp.,* 348 F.3d 565 (6th Cir. 2003).
[15]See *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.,* 965 F.2d 391 (7th Cir. 1992).
[16]See *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC,* 458 F.3d 1288 (11th Cir. 2006).
[17]See *infra* notes 22-27 and accompanying text.
[18]See *Neptune Orient Lines, Ltd. v. Burlington Northern and Santa Fe Ry. Co.,* 213 F.3d 1118 (9th Cir. 2000).
[19]See, e.g., *Berlanga v. Terrier Transp., Inc.,* 269 F. Supp. 2d 821 (N.D. Tex. 2003). The Fifth Circuit does not yet appear to have addressed the issue. This district court decision is detailed and carefully reasoned.

domestic inland portion of multimodal carriage without regard to whether a separate bill of lading has been issued.

The *Sompo* court had two subsidiary issues to consider: Accepting the proposition that the Carmack Amendment can apply to the inland portion of a multimodal shipment without regard to the issuance of a separate bill of lading, does it matter: (1) whether the overall shipment involves an import, an export, or a domestic sea leg; and (2) whether any foreign country involved in the case must be "adjacent" to the United States? Under the current statutory language, *Sompo*'s subsidiary issues seem irrelevant. Prior to a 1978 recodification of the Interstate Commerce Act, however, the Carmack Amendment—by the language of the statute—applied "*from* any point in the United States *to* a point in an adjacent country" (in addition to purely domestic shipments), but the statute did not say that it applied *from* a point in a foreign country *to* a point in the United States. Since the 1978 recodification was not intended to change the meaning of the statute, should the current Carmack Amendment be limited to domestic shipments and exports to adjacent foreign countries?

The Second Circuit resolved both of the subsidiary issues by relying on precedent. In *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury,*[20] decided in 1920, the Supreme Court had interpreted the statutory "from . . . to" language to cover an import from Canada. Thus, the *Sampo* court reasoned, the pre-1978 statute that was recodified actually did cover imports, despite the "from . . . to" language, and in 1978 Congress simply clarified this interpretation when it dropped the "from . . . to" language in favor of "between." On the second subsidiary issue, the Second Circuit reasoned that it did not matter that Japan was not an "adjacent" foreign country because in *Project Hope v. M/V IBN Sina*[21] the court had already applied the Carmack Amendment to the domestic leg of a shipment to Egypt.

Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC[22] raises the same core issue as *Sompo*: whether the inland portion of a multimodal shipment is subject to the Carmack Amendment. The *Altadis* shipment was entirely domestic (from Cayey, Puerto Rico to Tampa, Florida), thus avoiding the subsidiary import/export and adjacent country issues. The ocean carrier transported the cargo safely from Puerto Rico to Jacksonville, but during the inland journey from Jacksonville to Tampa the truck and the container

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[20] 254 U.S. 357, 359–360 (1920).
[21] 250 F.3d 67 (2d Cir. 2001).
[22] 458 F.3d 1288 (11th Cir. 2006).

with the cargo were stolen. The district court held that the cargo claimant's suit against the ocean carrier and the trucker was time-barred under the bill of lading's one-year time-for-suit provision (which was based on COGSA § 3(6)) because process was not served on the defendants soon enough.[23] On appeal, the cargo claimant did not challenge the district court's finding on the passage of time. It instead argued that it was subject to the Carmack Amendment's two-year time-for-suit provision (which it had unquestionably satisfied). As a result, the sole issue was whether the Carmack Amendment applied to the inland leg under these circumstances.

The Eleventh Circuit overlooked *Sompo,* which had been decided less than a month before, but it reviewed the rest of the conflicting decisions. Following the weight of authority, it held that the Carmack Amendment does not apply "unless the domestic, overland leg is covered by a separate bill of lading."[24] The court also found the cargo claimant's argument to be "in tension" with the Supreme Court's *Kirby* decision.[25] Although the *Altadis* court discussed uniformity and the fact that the *Kirby* through bill of lading was a maritime contract, its real concern appears to be that the inland carrier in *Kirby* had received the benefit of the bill of lading's limitation of liability.

Sompo is an interlocutory decision, but it does not seem that the district court will have much work to do on remand. Once the railroad has a final judgment,[26] it may well decide to seek certiorari.[27] It is, of course, risky to pre-

[23]Under COGSA § 3(6), the cargo claimant's suit would have been timely because it was *filed* within one year. See Michael F. Sturley, *Time-for-Suit Provisions,* 2A Benedict on Admiralty § 163 at 16–12 & n.29 (7th rev. ed. 2005) (citing cases). The district court found the *Altadis* suit to be untimely, however, because process was not served on the defendants until after the expiration of the one-year period—as required by the bill of lading. A bill of lading clause requiring service of process within the one-year period would violate COGSA § 3(8) in cases in which COGSA applied with the force of law. Thus the *Altadis* suit would have been timely if the goods had been lost at sea (during the tackle-to-tackle period). But the courts have upheld such clauses when COGSA applies only as a contractual term. See Sturley, *Time-for-Suit Provisions, supra,* at 16–13 & n.30.

[24]Slip op. at 8 (citing *American Road Service, Shao, Capital Converting,* and the dicta in *Swift Textiles*).

[25]See *supra* notes 8–10 and accompanying text.

[26]Although the Supreme Court has the jurisdiction to review an interlocutory decision of a federal court of appeals, *compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1257, the interlocutory nature of the decision would be a factor counseling against the granting of certiorari. A petition's chances for success would generally be higher with a final judgment.

[27]The relatively low value of the *Altadis* claim, which involved the loss of a single container of cigars, makes it a less obvious candidate for certiorari.

dict what the Supreme Court will do in any given case, but the core issue in *Sompo* and *Altadis* does appear ripe for the Court's review.

The Fair Opportunity Doctrine

Although COGSA section 4(5) gives the carrier an unconditional right to limit its liability to $500 per package (in the absence of a declaration of higher value), several U.S. courts have restricted that right under a judicial invention known as the "fair opportunity doctrine."[28] Applying the doctrine, those courts have required the carrier to give the shipper a "fair opportunity" to declare the true value of the shipment. The precise definition of "fair opportunity" varies among the circuits that have adopted the requirement, but the penalty for failing to satisfy the requirement is always the loss of the statutory right to rely on the package limitation.

The Ninth Circuit first invented the COGSA version of the doctrine in 1974.[29] During the next fifteen years or so, the Second,[30] Fourth,[31] Fifth,[32] Sixth,[33] and Eleventh[34] Circuits announced their acceptance of the fair opportunity doctrine. Then the tide began to turn. In 1989, the Ninth Circuit, refusing to extend the doctrine, used particularly vigorous language that sug-

[28]For a more detailed treatment of this subject (and criticism of the fair opportunity doctrine), *see* Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act,* 19 J. Mar. L. & Com. 1 & 157 (1988). For more current information, *see* Michael F. Sturley, The Package Limitation and the Fair Opportunity Requirement, 2A Benedict on Admiralty § 166 (7th rev. ed. 2005).

[29]See Tessler Brothers (B.C.) v. Italpacific Line, 494 F.2d 438, 443, 1974 AMC 937 (9th Cir. 1974).

[30]See General Elec. Co. v. M/V Nedlloyd, 817 F.2d 1022, 1987 AMC 1817 (2d Cir. 1987), *cert. denied,* 484 U.S. 1011 (1988); Binladen BSB Landscaping v. M/V "Nedlloyd Rotterdam," 759 F.2d 1006, 1985 AMC 2113 (2d Cir.), *cert. denied,* 474 U.S. 902 (1985).

[31]See Cincinnati Milacron, Ltd. v. M/V American Legend, 804 F.2d 837, 1987 AMC 282 (4th Cir. 1986) (en banc) (per curiam).

[32]See Couthino, Caro & Co. v. M/V Sava, 849 F.2d 166, 1988 AMC 2941 (5th Cir. 1988); Wuerttembergische v. M/V Stuttgart Express, 711 F.2d 621, 622, 1984 AMC 2738 (5th Cir. 1983) (per curiam); Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 1982 AMC 929 (5th Cir. June 1981).

[33]See Acwoo Int'l Steel Corp. v. Toko Kaiun Kaish, Ltd., 840 F.2d 1284, 1988 AMC 2922 (6th Cir. 1988).

[34]See Insurance Co. of N. Am. v. M/V Ocean Lynx, 901 F.2d 934, 1991 AMC 64 (11th Cir. 1990), *cert. denied,* 498 U.S. 1025 (1991).

gested that the entire doctrine was unjustified.[35] During the last fifteen years or so, courts have adhered to the doctrine when binding precedent so requires[36] but have generally been unwilling to expand it[37] or to adopt it when writing on a clean slate. Thus in *Henley Drilling Co. v. McGee,*[38] the First Circuit not only "eschew[ed] [the] implicit invitation to augment the 'fair opportunity' doctrine,"[39] but also "refrain[ed] from embracing the 'fair opportunity' doctrine itself, in any form."[40]

Strictly speaking, the Second Circuit has adopted the fair opportunity requirement only in dicta. Although that court has repeatedly declared that a carrier must provide shippers with a "fair opportunity" to declare a higher value, it has always held on the facts before it that the requirement had been satisfied. This scenario was repeated in *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co*.[41] The cargo claimant ultimately succeeded under the Carmack Amendment,[42] but en route to that conclusion the Second Circuit concluded that the COGSA fair opportunity requirement had been satisfied.

The more striking recent development occurred in the Third Circuit, which had not addressed the fair opportunity doctrine before this year. Thus that court was free in *Ferrostaal, Inc. v. M/V Sea Phoenix*[43] to take a fresh look at the subject, unfettered by any binding precedent. In a detailed opinion, the *Ferrostaal* court rejected the views of "seven of our sister Courts of Appeals"[44] and held that the fair opportunity doctrine has no role to play under COGSA. It concluded that the common-law doctrine that the Ninth

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[35]See Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 1989 AMC 913 (9th Cir. 1989). For a more detailed analysis of the *Carman Tool* decision, *see* Michael F. Sturley, *The Future of the COGSA Fair Opportunity Requirement: Is There Life After* Carman Tool *and* Chan*?*, 20 J. Mar. L. & Com. 559 (1989).

[36]See, e.g., Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty, 408 F.3d 1250 (9th Cir. 2005); Fireman's Fund Insurance Co. v. Tropical Shipping & Construction Co., 254 F.3d 987, 2001 AMC 2474 (11th Cir. 2001).

[37]See, e.g., Unimac Co. v. C.F. Ocean Service, Inc., 43 F.3d 1434, 1995 AMC 1484 (11th Cir. 1995); Travelers Indemnity Co. v. Vessel Sam Houston, 26 F.3d 895 (9th Cir. 1994).

[38]36 F.3d 143, 1995 AMC 1047 (1st Cir. 1994).

[39]36 F.3d at 147.

[40]36 F.3d at 146 n.5. The First Circuit did not explicitly reject the doctrine but left the question open for a future case in which the issue was properly presented.

[41]456 F.3d 54 (2d Cir. 2006).

[42]See *supra* notes 11–21 and accompanying text.

[43]447 F.3d 212, 2006 AMC 1217 (3d Cir. 2006).

[44]447 F.3d at 220.

Circuit had followed when inventing the COGSA requirement had not been incorporated into COGSA but had been superseded by it. Neither Supreme Court precedent nor Congressional policy supported the imposition of a fair opportunity requirement under COGSA.

With the Third Circuit unequivocally taking a carefully considered position in acknowledged conflict with seven other circuits on an issue that has been frequently litigated and fully examined by the lower courts over thirty years, *Ferrostaal* would seem to be an obvious candidate for certiorari. The cargo claimant nevertheless failed to petition for Supreme Court review. Perhaps the value of the claim (slightly over half a million dollars) was not thought to be large enough to justify the effort, but this seems unlikely. Ferrostaal is a frequent litigant on COGSA questions and its interests in future cases would be affected by any Supreme Court decision. (If there was a subrogated underwriter, its interests would be affected even more often.) Perhaps Ferrostaal and its advisors simply recognized the strength the Third Circuit's arguments and concluded that the Supreme Court, which would be similarly unfettered by the last thirty years of lower court precedents, was likely to affirm if it heard the case. It may thus have concluded that it would be wiser to avoid the Third Circuit in future cases with fair opportunity issues and take advantage of the established law in other circuits. That may be an effective strategy in the short term, but the stage is now set for a carrier that loses a fair opportunity case in another circuit to bring this issue to the Supreme Court for final resolution.

[15010]

Seventh Circuit Proposes Better Test For Admiralty Jurisdiction But Applies Extension of Admiralty Jurisdiction Act

by

Kimbley Kearney

In *Tagliere v. Harrah's Illinois Corp.,* 445 F.3d 1012 (7th Cir. 2006), the Seventh Circuit was called upon to decide whether a personal injury claim involving a casino patron's fall from a slot machine stool fell within its admiralty jurisdiction or whether it would be governed by Illinois tort law and be time barred. Before undertaking its analysis of the jurisdictional issue, the court noted:

> The accident in our case had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land. And so whatever distinctive rules of liability admiralty courts have developed would be no better suited, and perhaps would be worse suited, to the resolution of this accident case than ordinary state tort law would be. There is, therefore, common-sense appeal to the district court's ruling that the suit is not within the admiralty jurisdiction.
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> But the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear.

Id. at 1013.

The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, extends admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water." The Seventh Circuit recognized that the Eighth Circuit takes the position that the Act serves as an independent basis of federal jurisdiction independent of the grant of admiralty jurisdiction under 28 U.S.C. § 1333(1). *Id*. at 1014, citing *St. Hilaire Moye v. Henderson,* 496 F.2d 973, 979, 1974 AMC 2661 (8th Cir. 1974). The Fifth and Eleventh Circuits have rejected that approach, taking the view that the legislative history of the Act reflects only an intent "to make clear that accidents caused by boats on navigable waters are within the admiralty jurisdiction even if the damage caused by the accident was to something on land." *Id.,* citing *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.,* 644 F.2d 1132, 1135–36, 1982 AMC 2644 (5th Cir. 1981); *Crotwell v. Hockman-Lewis Ltd.,* 734

F.2d 767, 768, 1988 AMC 1514 (8th Cir. 1984). Writing for the Seventh Circuit, Judge Richard A. Posner stated:

> We do not think that the legislative history should override the broad statutory language, which provides a clear and simple jurisdictional test for cases like this, in contrast to the vague 'maritime nexus' (or 'connection') test. ('the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity,' *Sisson v. Ruby* [497 U.S. 358, 364, 1990 AMC 1801 (1990)], that is used to determine jurisdiction under Section 1331(1), which confers but does not define admiralty jurisdiction.

Id. at 1014.

Judge Posner opined that the "main practical use of the 'connection' test has been to expel from the admiralty jurisdiction freak cases," such as plane crashes where a portion of the wreckage slides into navigable waters. *Id.* at 1014. Such "freak cases" might have been found to fall within admiralty jurisdiction if the "location rule" had been rigidly applied. *Id.* at 1015, citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 542, 1995 AMC 913 (1995). Citing the Seventh Circuit's recent jurisdictional case *Weaver v. Hollywood Casino-Aurora, Inc.,* 255 F.3d 379, 386–87, 2001 AMC 2563 (7th Cir. 2001), Judge Posner suggested that the court's use of the *Sisson* "connection test" was a type of "hair splitting" because admiralty jurisdiction can be rationalized as long as an argument can be made that the accident giving rise to the lawsuit had some disruptive effect on maritime commerce. *Tagliere,* 445 F.3d at 1015.

As an alternative, Judge Posner proposed that the existence of admiralty jurisdiction in each case be decided on the basis of "whether admiralty law or state law would make a better fit with the particular circumstances of the accident that had given rise to the suit." *Id.* It acknowledged, however, that this approach "would make the determination of jurisdiction hopelessly uncertain. It is not a price worth paying for the slightly better match of law to fact that would result." *Id.*

Ultimately, the Seventh Circuit applied the Extension of Admiralty Jurisdiction Act and concluded that the district court had erred in dismissing the case for lack of admiralty jurisdiction where it had not been shown that the casino vessel was permanently, rather than merely indefinitely, moored when the accident occurred. It reasoned that *Stewart v. Dutra Constr. Co.,* 543 U.S. 41, 2005 AMC 609 (2005), suggests that a casino boat must be *permanently* incapacitated from sailing in order for it to no longer be a "vessel" for purposes of admiralty jurisdiction. *Id.* at 1016. Thus, if the *Tagliere* casino vessel is later found to be only indefinitely moored, the slot machine accident will fall within admiralty jurisdiction.

In *A Return to Objectivity in Admiralty Tort Jurisdiction?*, Benedict's Maritime Bulletin, Vol. 4, No. 2, 94, 101 (2006), Graydon S. Staring concludes: "[The Tagliere] decision represents a sensible way of escaping the 'questions of penumbra, of shadowy marches'. . . . It embraces anything done by a vessel or her crew, to themselves or others, or by others to them, on navigable waters, and at least anything done by passengers to one another serious enough to involve action by the vessel or crew." *Id.* at 103.

As discussed by Mr. Staring in his recent article, *Tagliere* echoes earlier criticism of the prevailing jurisdictional tests. Justices Scalia and White disagreed with the subjectivity of the jurisdictional test laid down in *Sisson. Id.* at 99. In their concurring opinion in *Sisson,* the justices stated:

> The Court's description of how one goes about determining whether a vessel-related tort meets the 'significant relationship' test threatens to sow confusion in what had been, except at the margins, a settled area of the law.

Id. at 96, quoting *Sisson,* 497 U.S. at 368, 1990 AMC at 1809. The justices further criticized the prong of the majority's jurisdictional test that requires that the incident at issue pose a "'potential hazard to maritime commerce arising out of activity that bears a substantial relationship to traditional maritime activity.'" *Id.* at 98, quoting *Sisson,* 497 U.S. at 362, 1990 AMC at 1805. Of the "potential hazard to maritime commerce" and "significant relationship" tests, the justices stated:

> The sensible rule to be drawn from our cases, including *Executive Jet* [*Aviation v. City of Cleveland,* 409 U.S. 249, 1973 AMC 1 (1972)] and *Foremost [Insurance Co. v. Richardson,* 457 U.S. 668, 1982 AMC 2253 (1982)], is that a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts.
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> The latter tests [which are traditional activity and disruption of commerce] produce the sort of vague boundary that is to be avoided in the area of subject matter jurisdiction whenever possible.

Id. at 100, quoting *Sisson,* 497 U.S. at 375.

[15013]

Fifth Circuit Refuses to Recognize Exception to Economic Damage Rule

by

Kimbley Kearney

On March 23, 2006, the Fifth Circuit reversed *In re: Taira Lynn Marine Ltd., No. 5, L.L.C. Limitation Proceedings, M/V MR. BARRY,* 2004 AMC 1886 (W.D. La. 2004), a case discussed in the Fall 2004 Committee Meeting. The Fifth Circuit began its opinion by reiterating: "It is unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a propriety interest in a maritime negligence suit. *In re Taira Lynn Marine Ltd. No. 5, LLC,* 444 F.3d 371, 377, 2004 AMC 1886, 1888 (5th Cir. 2006), citing *Robins Dry Dock & Repair v. Flint,* 275 U.S. 303, 309 (1927).

Taira Lynn involved the allision of the barge MR. BARRY and T/B/KIRBY 31801 with the Louisa swing bridge in Louisiana. The cargo aboard the barge, a gaseous combination of propylene and propane, was released into the atmosphere as a result of the allision. Because of the chemical discharge, the Louisiana State Police ordered a mandatory evacuation of all homes and businesses within a certain radius of the release. Numerous business owners brought claims against the defendants for losses arising out of the accident and the subsequent evacuation.

The United States District Court for the Western District of Louisiana recognized that under existing Supreme Court and Fifth Circuit precedent, claims for economic loss unaccompanied by physical damage to proprietary interest were not recoverable in maritime tort. *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 1928 AMC 61 (1927); *State of La. ex rel Guste v. M/V TESTBANK,* 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (*en banc*). However, in *Union Oil Co. v. Oppen,* 501 F.2d 558, 559 1975 AMC 416 (9th Cir. 1974), the Ninth Circuit upheld that rule but carved out a specific exception for commercial fisherman harmed economically by an oil spill, concluding that the fishermen were foreseeable plaintiffs.

Based primarily on the Ninth Circuit's exception for commercial fisherman, the district court rejected *TESTBANK's* bright-line rule. In the opinion of the district court, the injuries suffered by the residents and businesses in the geographic area of the allision were just as foreseeable as the injuries suffered by the commercial fisherman in the *Union Oil* because damage to the swing bridge “would disrupt the only means of ingress and egress to Cypremore Point, effectively cutting off all means of transportation to and from the island.”

The Fifth Circuit declined to recognize a “geographic exception” to the *TESTBANK* rule. The court also rejected the district court’s position that the viability of economic damage claims should be determined on a case-by-case basis with consideration given to the number of claimants.

In considering whether the claimants had sustained physical injury sufficient to survive the *TESTBANK* rule, the Fifth Circuit rejected the proposition that the presence of gasoline on property owned by certain claimants was sufficient to constitute property damage because the claimants had not shown that the gas had physically damaged their property or caused personal injury. *Id*. at 379. The Fifth Circuit also rejected the claims of plaintiffs whose frozen seafood spoiled because law enforcement authorities shut off electricity during the evacuation and plaintiffs who lost materials as a result of interruption in manufacturing runs during the power shutdown. The court reasoned that the allision “did not physically cause the disruption in electrical power nor did it physically impact [the manufacturer’s] facilities.” *Id*. at 380. Any damage suffered by the plaintiffs was caused by loss of electricity, “not because of contact with the barge, the bridge or the gaseous cargo.” *Id*.

The Fifth Circuit also reversed the denial of summary judgment on claims asserted under The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 *et seq.,* and the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702. The CERCLA claims were precluded because none of the claimants alleged that they incurred costs in acting to contain the gaseous cargo. *Id*. at 382. The OPA claims failed because there was no direct injury to claimant’s property as a result of a pollution incident. *Id*. at 383.

COMMITTEE ON MARITIME ARBITRATION AND MEDIATION
Newsletter No. 24

Editor: Armand M. Paré, Jr.

1. Threshold Questions Concerning the Existence of an Arbitration Agreement and Questions of Arbitrability

   A. Incorporating the NOR and Laytime Provisions of the ASBATANKVOY

In *In the Matter of Arbitration Between Coimex Trading (Suisse) S.A. and Cargill Intl., S.A.,* 2005 U.S. Dist. LEXIS 6589 (S.D.N.Y. 2005), the parties had entered into a sales contract for the purchase and sale of ethanol to be shipped on an FOB basis. The contract of sale did not include an arbitration clause but contained a provision stating that "NOR & laytime counting to be as per ASBATANKVOY charter party form."

A demurrage dispute arose and Cargill sued Coimex in the courts in Switzerland. Coimex sought an order staying the litigation pending arbitration in New York on the ground that the incorporation of the NOR and laytime provisions from the ASBATANKVOY charter included the ASBATANKVOY arbitration clause. The court denied the stay, noting that a party can "freely select and incorporate an ASBATANKVOY substantive clause without also incorporating its arbitration provisions" and that "[e]ach clause of the ASBATANKVOY form stands on its own." The court also noted that neither New York nor London had been selected as the place for arbitration, as is contemplated under the ASBATANKVOY form.

   B. Claims Subject to Arbitration or Litigation at the Option of the Defending Party

In *Hughes, Hooker & Co. v. American S.S. Owners Mutual Prot. and Indemnity Assoc., Inc.,* 2005 A.M.C. 1632 (S.D.N.Y. 2005), the relevant clause in dispute read: "This Agreement is subject to American or English law and jurisdiction either in arbitration, before a single arbitrator, or before the regular courts, at the option of the defending party."

When the American Club and several other defendants were sued, they moved to stay the action pending arbitration in London. The court held that the defendants were entitled to choose arbitration and the venue where the arbitration proceeded, and thus stayed the litigation between the parties to the Agreement pending arbitration. The court also stayed the action against the remaining defendants who were not parties to the agreement based on the "district court's inherent power to control its docket." The court noted that to be entitled to such a stay, the "defendants who were not party to the agreement bear the burden of showing that Hughes Hooker [the plaintiff] will not be prejudiced by an extension of the stay to them, and the balance of hardships and interests of judicial economy favor an extension." In finding that this burden had been satisfied, the court noted that Hughes Hooker's claims against the individual defendants centered upon Hughes Hooker's interpretation of the contract subject to arbitration and that "judicial economy favors a stay." It also noted that the risk of duplicate discovery and inconsistent outcomes "further weigh in favor of a stay." In addition, the court denied Hughes Hooker's request for court ordered discovery, stating: "Plaintiffs have demonstrated no reason why the requested discovery must be had immediately."

C. "General Average/Arbitration To Be in London" and Anti-Suit Injunctions

In *Ibeto Petrochemical Indus., Ltd. v. M/T "BEFFEN",* 412 F. Supp.2d 285 (S.D.N.Y. 2005), plaintiff filed suit in the U.S. District Court for the Southern District of New York "to protect time for suit" regarding the alleged contamination of base oil carried from the United States to Nigeria. Plaintiff also commenced arbitration on the same claim in London but then advised defendants it was discontinuing the London arbitration and intended to pursue litigation in Nigeria. It then moved voluntarily to dismiss its New York action under Federal Rule of Civil Procedure ("FRCP") 41(a)(2). Defendant opposed this motion, moved to stay or dismiss the New York action, and moved to compel arbitration in London. It also sought an "anti-suit injunction" barring the plaintiff from proceeding in Nigeria.

The court denied plaintiff's request for a voluntary dismissal. It reasoned that dismissal under FRCP 41(a)(2) is only appropriate "when it will not prejudice the defendants." The court considered there was prejudice in dismissing the case because the defendants had answered and had pled "counterclaims" consisting of the motion to dismiss or stay pending arbitration. The court further noted that plaintiff's intent to litigate in Nigeria "also counsels against granting the voluntary dismissal."

The court then ruled that the matter was subject to a "broad" arbitration clause that stated: "general average, arbitration to be in London, English law to apply." As to whether it should stay or dismiss the action pending arbitration, the court indicated it would stay the action because dismissal rendered an order to arbitrate immediately appealable which, in its view, recent Second Circuit decisions had directed district courts to avoid.

The court then dealt with the defendants' motion to enjoin the plaintiff's litigation in Nigeria. Deciding to enjoin plaintiff's threatened action in Nigeria, the court relied on certain "factors" found in *China Trade & Dev. Corp. v. M.V. Choong Yong,* 837 F.2d 33, 35 (2d Cir. 1987). The court first found that there would be a "frustration of a policy" in the enjoining forum, *i.e.,* the federal policy of promoting arbitration if the suit were not enjoined. Second, applying the "vexatious" factor in *China Trade,* the court found that the Nigerian court would not apply the principles of COGSA and that this "may result in widely disparate results in these two actions." As to "equitable considerations", the court reasoned that discouraging "forum shopping" was a further reason to grant the "anti-suit injunction." Finally, with respect to "delay, inconvenience, expense, inconsistency or a race to judgment," the court determined these considerations favored granting the injunction.

D. Written Agreement to Arbitrate Not Found But Not Refuted

In *Banks v. Mitsubishi Motors Credit of America, Inc.,* 435 F.3d 538 (5th Cir. 2006), the court ordered the parties to arbitrate even though the written arbitration agreement could not be found, since proof was offered to rebut an affidavit that an arbitration agreement had been entered into.

E. When Is an Arbitration Agreement Mandatory?

In *Usinor Steel Corp. v. M/V MARILIS T,* 2005 A.M.C. 338 (D. Minn. 2004), a contract provided "arbitration, if any to be settled in Paris by Chambre Arbitrale Maritime." The issue was whether this was a mandatory arbitration clause or whether it permitted a claimant to file suit. The court held that the agreement was mandatory, adopting the decision in *Usinor Steel Corp. v. M/V Koningsberg,* 2004 A.M.C. 438 (S.D.N.Y. 2004) and rejecting a contrary decision in *Eurosteel Corp. v. M/V Millenium Falcon,* 2002 WL 1972266 (N.D. Ill. 2002).

F. Who Is Bound to Arbitrate Under an Arbitration Agreement?

In *Masefield AG v. Colonial Oil Indus., Inc.,* 2006 U.S. Dist. LEXIS 5792 (S.D.N.Y. 2006), an arbitration was pending before the International Chamber of Commerce ("ICC"). The defendant, Colonial Oil, had argued to the ICC that Colonial should be entitled to proceed in the arbitration not only against Masefield America, the party named in the contract, but also against Masefield

AG and Masefield Ltd. The ICC informed the parties that this issue would be put to the Tribunal for decision. Plaintiffs Masefield AG and Masefield Ltd. then sought a declaratory judgment in the U.S. District Court in New York that they had no obligation to arbitrate and sought an injunction barring the defendant from proceeding against them in arbitration.

The federal district court in New York determined initially that the decision respecting arbitrability was for the court, and not the ICC Tribunal, to make. The court then looked to various potential theories under which a party could be bound to arbitrate, including the "estoppel" theory, "agency" theory and "alter ego/piercing" theory. As to the "estoppel" theory, the court said that "a non-signatory may be bound by an agreement containing an arbitration provision when the non-signatory knowingly exploited and accepted the benefits of the agreement." However, in this case, it found that the plaintiffs were not bound to arbitrate on this theory because certain benefits they had received were indirect and did not arise from the agreement itself.

The court noted that under the "agency" theory, a signatory which has acted as an agent may bind its principal to arbitrate under *Merrill Lynch Investment Managers v. Optibase, Ltd.,* 337 F.3d 125 (2d Cir. 2003). Here, however, the court found that the defendants had failed to establish an agency relationship. Finally, with respect to the "alter ego/veil-piercing" theory, the court said that "to satisfy this there must be complete domination over a signatory" which "employed that domination to injure another signatory" and that "the conduct at issue must reveal 'a virtual abandonment of separateness'" of the two companies. The court found the facts of the case did not meet this standard. Based on this finding, the court granted a preliminary injunction barring the defendant from arbitrating with the plaintiffs.

In *In the Matter of Arbitration between Dun Shipping Ltd. and Amerada Hess Shipping Corp.,* 2005 U.S. Dist. LEXIS 23114 (S.D.N.Y. 2005), a magistrate recommended a finding that Knock Tankers, which had signed a charter "as Managers to Owners", was not acting as the registered owners' agent in doing so. The magistrate further recommended, however, that the registered owners' claims against the charterer should be subject to arbitration under the charter on the "estoppel" theory both because there was a close relationship between the registered owners and the "Managers for Owners" and because the registered owners' claims against the charterer "are bound up with the terms of the charter party" (at 15). The magistrate further recommended a finding that the shipper not be bound by the charter because the evidence did not prove it was the principal for whom the charterer had entered into the charter party.

G. Questions of Illegality of the Contract

In *Buckeye Check Cashing Inc. v. Cardegna,* 126 S.Ct. 1204 (2006), an action was filed in Florida state court against a check cashing company, alleging that the check cashing company's activities were illegal inasmuch as they charged usurious rates of interest under Florida law. The check cashing company moved to arbitrate under written arbitration provisions. When the case reached the Florida Supreme Court, the state court held that since the issue of illegality brought into question the very existence of the contracts, a court, and not arbitrators, should determine whether the contracts were legal and enforceable. On appeal, the United States Supreme Court reversed and held that the questions of illegality and the enforceability of the contracts were for arbitrators to decide. It found the issue controlled by its prior decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), which had held that issues of fraud in the inducement to enter a contract were for arbitrators to decide and courts should only become involved if there were questions of whether there was fraud in the inducement (or illegality) respecting the arbitration clause itself. It further reconfirmed that these rules applied both in state and in federal court under its prior decision in *Southland Corp. v. Keating,* 465 U.S. 1 (1984).

H. Alter-Ego

In *CVG Ferrominera Orinoo, C.A. v. Transportes Ferreos de Venezuela, C.A.,* 2006 U.S. Dist. LEXIS 302 (S.D.N.Y. 2006), three parties, Ferrominera, Transferven and Segmar had all agreed to arbitrate certain disputes in a post-event arbitration agreement which provided: "all claims between [Ferrominera] and defendants [Transferven] and SEGMAR LIMITED will be and hereby are submitted to maritime arbitration in the city of New York before three arbitrators." During the arbitration Ferrominera raised the point that Transferven and Segmar were alter egos. The arbitration panel declined to address this issue absent a court order. Ferrominera, therefore, sought an order that the alter ego issue was subject to arbitration.

In holding that this issue was subject to arbitration, the district court in New York noted that the arbitration agreement was "extremely broad", and concluded that the "all claims" language in the arbitration agreement included the alter ego claim. The court added, however: "It should be noted that this is not a case in which a third party is being pulled into an arbitration agreement by the veil piercing allegation. Ferrominera, Transferven and Segmar entered into the agreement together in 2004."

I. Managing Agents and *In Rem* Claims

In *Zarepta Chemical, K.S. v. Solae, LLC*, (S.D.N.Y. 2005) (not yet reported), claims for cargo loss and damage arose under a contract of affreightment ("COA") that listed the managing agent as "owner" but did not name the vessel owners in the COA. The claimant sought to arbitrate with the registered owner, the managing agent, and the vessel *in rem.* The vessel and the managing agent sought injunctions barring arbitration from proceeding against them. The district court enjoined arbitration against the vessel *in rem* on the ground that it had not been arrested. It also enjoined arbitration against the "managing agents" on the ground that the actual owners of the vessel were eventually disclosed when bills of lading were issued.

J. Guarantors

In *Deiulemar Compania di Navigazione Spa v. Dabkomar Bulk Carriers Ltd.,* 2005 U.S. Dist. LEXIS 40783 (S.D.N.Y. 2005), Magistrate Pitman found that the assets of a purported guarantor of a charter party subject to arbitration were not subject to attachment because the guaranty had never been authorized by the purported guarantor or anyone validly acting on its behalf. Hence, there was no valid "maritime claim" against the guarantor.

K. Refusing to Enforce an Agreement for London Arbitration between American Companies

In *Ensco Offshore Co. v. Titan Marine L.L.C.,* 2005 A.M.C. 1861 (S.D. Tex. 2005), an oil rig located 90 miles off the coast of Louisiana was damaged in a hurricane. Under a written salvage agreement, a salvage company agreed to tow the rig to Brownsville, Texas for repair. The salvage agreement provided for English law and arbitration in London. Both the salvage company, Titan, and the rig owner, Ensco, were American companies. When Titan demanded arbitration, Ensco opposed it, claiming that the arbitration clause violated § 202 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S. Code, § 201 *et seq.* Section 202 of the Convention states in relevant part:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign state.

The court first determined that since its diversity jurisdiction had been invoked, Texas law, and not English law, should govern the interpretation of the agreement. The court then found there was no foreign connection involved, stating that "upholding a foreign arbitration provision in an agreement between two U.S. citizens would thwart the stated public policy of Congress in enacting § 202. In other words, parties cannot contract around § 202." The court, therefore, found the London arbitration agreement between the parties "to be unenforceable under the Convention due to the dictates of § 202 and hereby GRANT[ED] Ensco a declaratory judgment to that effect."

L. Failure to Specify a Specific Charter Party in a Bill of Lading Purporting to Incorporate a Charter

In *Keytrade USA, Inc. v. AIN TEMOUCHENT M/V,* 2005 A.M.C. 948 (5th Cir. 2005), a vessel had been time chartered from its registered owner, CNAN, to Progress Bulk. Progress Bulk subchartered the vessel to Keytrade. Both charters provided for London arbitration. A bill of lading was issued which did not specifically refer to either charter although it contained standard language that "[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

Suit was filed against Progress Bulk and CNAN on a cargo claim. On motion by Progress Bulk and CNAN, the case against Progress Bulk was stayed on the basis of the arbitration clause in the charter, but the suit against CNAN was not stayed because, in the district court's view, the arbitration clause in the bill of lading had not been properly incorporated. On appeal, the Fifth Circuit reversed, holding under the facts there was "no confusion" as to which charter was referred to, even although the charter was not precisely identified in the bill of lading. It, therefore, stayed the action pending arbitration against CNAN.

2. Arbitration Subpoenas

In *Trammochem v. A.P. Moller,* 2005 A.M.C. 1643 (S.D.N.Y. 2005), arbitrators in New York issued a subpoena for the production of documents held by a third party in Houston, Texas. The subpoena was served and was returnable in Houston. The third party declined to produce the documents, and the party seeking the documents moved in the U.S. District Court in New York to compel production. The court ruled that § 7 of the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), authorized the arbitrators to issue subpoenas and noted that this power was not subject to the 100 mile limit set out in FRCP 45. Thus, the court assumed the subpoena issued by New York arbitrators and served in Houston was valid. The court then reasoned that it had jurisdiction to compel enforcement of the subpoena because § 7 of the Arbitration Act provided that a petition to compel enforcement may be made in "the United States district court for the district in which such arbitrator, or a majority of them, are sitting." It then affirmed the decision of the district court compelling enforcement of the subpoena.

In *Stolt-Nielsen S.A. v. Celanese AG,* 430 F.3d 567 (2d Cir. 2005), arbitrators in New York issued a document subpoena on two non-parties, Stolt-Nielson S.A. and its former in-house counsel. Stolt objected on the ground that § 7 did not authorize pre-hearing depositions and claimed the subpoenas in question were "thinly disguised" attempts to subvert this limitation.

The court found that the subpoenas called for the non-parties to attend a hearing, that all three arbitrators had been present at the hearing, and that one witness testified at that hearing. The court, therefore, affirmed the district court's decision to compel attendance and production of witnesses and documents under § 7. The court also rejected Stolt's argument that the arbitrators' subpoena power under § 7 should only apply to hearings where the core issues in the case were being heard at the hearing.

In the related case of *Odfjell ASA v. Celanese AG,* 328 F. Supp.2d 505, 507 (S.D.N.Y. 2005), the court, following the Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 408 (3d Cir. 2004), declined to compel a pre-hearing arbitration subpoena for documents and testimony of a third party witness on the ground that § 7 only empowered arbitrators to subpoena witnesses to appear before them and did not authorize pre-hearing depositions.

3. Post-Award Challenges

A. Failure to Make Disclosures

In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.,* 2006 WL 52276 (5th Cir. 2006), a sole arbitrator failed to disclose that he had previously acted as co-counsel in an unrelated case with one of the attorneys representing one of the parties to the arbitration. The court said that in "a non-disclosure case, the integrity of the process by which arbitrators are chosen is at issue." The court noted that under § 10 of the Arbitration Act, an award may be vacated when there is "evident partiality" in the arbitration. The court reasoned that "evident partiality is demonstrated from the non-disclosure, regardless of whether actual bias is established." The court thus concluded that the particular failure to disclose the past relationship as co-counsel "might have conveyed the impression of possible partiality to a reasonable person" and, on this basis, confirmed the district court's decision to vacate the award. The court, however, reversed that part of the district court's order compelling the parties to refrain from advising the new arbitrator of the first award and any rulings made by the first arbitrator on the ground that this was an impermissible intrusion on the arbitration process by the court.

B. Manifest Disregard

In *Onebeacon America Ins. Co. v. Turner,* 2006 U.S. Dist. LEXIS 12021 (S.D. Tex. 2006), an arbitration panel had made an award of attorney's fees in an admiralty case despite the fact that the "Fifth Circuit has held that general maritime law does not permit an award of attorney's fees." On a challenge to the award of attorney's fees, the court found that "[t]here was no evidence in this case that the arbitral panel was aware of the Fifth Circuit law regarding attorney's fees in cases governed by maritime law and intentionally disregarded it." In addition, the court stated that in the Fifth Circuit an award cannot be vacated on the grounds of "manifest disregard" unless in "all the circumstances," the award would result in "significant injustice." The court found there was no significant injustice in the award of attorney's fees in this case. It did, however, vacate an award of the arbitrators' expenses against the losing party because the contract had specified that the fees for each of the party-appointed arbitrators were to be paid by the person selecting its arbitrator and the panel had exceeded its power by disregarding this provision.

In *IMC Maritime Group, Inc. v. Russian Farm Community Project,* 2006 U.S. App. LEXIS 4088 (2d Cir. 2006), the losing party to an arbitration award argued that the panel had obliged it to "conclusively disprove" the weather reported in the vessel's deck log and that the improper imposition of this burden constituted manifest disregard of the law by the panel. The court rejected this contention, however, finding that the panel had, in fact, reviewed and considered all the weather evidence, that this argument did not rise to the level of "manifest disregard", and that the "Panel's use of the term 'conclusively' was merely an inartistic use of that word."

C. Alleged Inability to Present a Defense in Arbitration

In *Jiangsu Changlong Chemicals, Co. v. Burlington Bio-Medical & Scientific Corp.,* 399 F. Supp.2d 165 (E.D.N.Y. 2005), the court confirmed a Chinese arbitration award under the Convention and rejected the petitioner's claim that it had been "prevented from adequately presenting its defense."

D. Finality

In *Appel Corp. v. Katz,* 2005 U.S. Dist. LEXIS 26972 (S.D.N.Y. Dec. 2, 2005), the court was faced with petitions to confirm two separate, inconsistent arbitration awards in the same case. The first award, which may not have been signed by the arbitrators, was dated April 15, 2005. A second award, which was signed, was dated April 18, 2005, and was sent out by the AAA to the parties. In the court's view, the AAA had decided to give the arbitrators an extension of the time to issue an award on April 15 and the AAA considered that the April 15 award was not a final award. The court, in confirming the April 18 award and rejecting the April 15 award, said "[t]he proper course is to defer to the AAA's administration of arbitration." It also reasoned that the April 15 award was not a "final" award and, hence, was not entitled to enforcement.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, SPRING 2006

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

I. NEWS AND INFORMATION

THE SOPHISTICATED ASSURED EXCEPTION TO THE DOCTRINE OF *CONTRA PROFERENTEM* IN MARINE INSURANCE LAW

Harold K. Watson[1]

Contra proferentem: The Rule and Its Rationale

One of the hoariest canons of contract construction is *verba fortius accipiuntur contra proferentem,*[2] which counsels the court to construe ambiguous contract language against the party who drafted that language. It has sometimes been remarked that *contra proferentem* serves as a "last resort" or "tiebreaker," which comes into play only when all other extrinsic evidence has failed to indicate the parties' true intent.[3] There is also considerable authority that *contra proferentem* carries particular weight where the parties to the contract had an unequal bargaining position. Some courts explain that the party with superior power was the one to draft the contract, and thus had an unfair opportunity to mold the contract language to its ben-

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[2]From the authors' review of the cases, it would appear that *contra proferentem* is a strong candidate for the most frequently misspelled legal term in American case law.

[3]Restatement (Second) of Contracts § 206 cmt. a; *see also, e.g., Republic of China v. National Union Fire Ins. Co. of Pittsburgh,* 151 F. Supp. 211, 226 (D. Md. 1957), *rev'd in part, aff'd in part,* 254 F.2d 177 (4th Cir. 1958).

efit.[4] Other courts justify the doctrine by the public policy protecting weaker parties.[5] Indeed, some courts have opined that the *sole* reason for the *contra proferentem* doctrine is the unfairness inherent in contracts of adhesion.[6]

This has led to the complaint that some courts treat *contra proferentem* as a rule that "the insurer always loses," with strong support in the case law.[7] For example, in some states, once the court concludes that the policy is ambiguous, the rule requires the ambiguity to be construed in the assured's favor.[8] On the other hand, the Fifth Circuit once balanced this principle against the rule that "a contract of marine insurance must be interpreted in the light of practical, sound common sense."[9] Other courts take pains to explain that the policy language is unambiguous in order to demonstrate why *contra proferentem* should not apply against a marine insurer.[10] As one commentator put it, "[w]hen the court has determined to find for the insurer, the catch phrase 'insurance is just like any other contract' usually leads the charge toward a finding of no coverage. When the court favors the policyholder and inclines toward finding coverage, it begins its discussion with a recitation of the *contra proferentem* principle."[11] All of these approaches find their way into the marine insurance jurisprudence.

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[4]*See, e.g., National Bank v. Ins. Co.,* 95 U.S. 673, 679 (1877) (the insurer's "attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance").

[5]*See United States v. Seckinger,* 397 U.S. 203, 216 (1970) ("This principle [contra proferentem] is properly accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations").

[6]*See, e.g., Eagle Leasing Corp. v. Hartford Fire Ins. Co.,* 540 F.2d 1257, 1261 n.4 (5th Cir. 1976).

[7]*See Greenly v. Mariner Mgmt. Group, Inc.,* 192 F.3d 22 (1st Cir. 1999) (Selya, J.) ("Insurance policies are contracts of adhesion, and amphibolous language is to be construed against the insurer and in favor of maximizing coverage"); *Duzich v. Marine Office of America Corp.*, 980 S.W.2d 857, 868 (Tex. App.—Corpus Christi 1998, pet. denied) (upon finding an ambiguity, the court automatically construed the marine insurance policy against the underwriters); *see also M/V Bodena,* 829 F.2d at 306 ("If an insurance contract is ambiguous it will generally be construed against the insurer who drafted it in order to provide coverage for losses to which the policy relates. This principle applies to all types of insurance policies including maritime policies."); *Kalmbach, Inc. v. Ins. Co. of the State of Penn.,* 529 F.2d 552, 555 (9th Cir. 1976).

[8]*See, e.g., Gonzales v. Mission American Ins. Co.,* 795 S.W.2d 734, 737 (Tex. 1990).

[9]*Aetna Ins. Co. v. Houston Oil & Transp. Co.,* 49 F.2d 121 (5th Cir. 1931), *citing Peters v. Warren Ins. Co.,* 39 U.S. 99, 109 (1840).

[10]*See, e.g., Klein's Moving and Storage, Inc. v. Westport Ins. Corp.,* 196 Misc. 2d 735, 766 N.Y.S.2d 495 (N.Y. Sup. 2003).

[11]Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation,* 42 Drake L. Rev. 807, 822 (1993).

There are, however, limitations on the applicability of this rule where the assured had a hand in drafting the policy or is a sophisticated entity with relatively equal bargaining power to the insurer. This article will explore the development of these exceptions to the rule of *contra proferentem* in the context of marine insurance litigation.

The Marine Insurance Contracting Environment

Much insurance law, at least in this country, has been hammered out in the context of personal lines insurance, and it should not be surprising that the doctrine of *contra proferentem* has long been applied to insurance policies issued to unsophisticated individuals.[12] In the typical case involving personal lines insurance, the assumptions underlying the doctrine are all applicable—personal lines policies are invariably standard form policies, and the typical insured purchasing personal lines insurance has no say in the language of the policy. While the personal lines insurance purchaser may be offered a menu from which various items may be chosen or declined, each menu item is "off the shelf," a standard form product that neither the purchaser nor the individual underwriter accepting the risk has authority to vary. A more classic contract of adhesion could scarcely be envisioned.

There is undoubtedly a great deal of marine insurance that is marketed in a similar fashion; the pleasure craft owner or the owner of a small commercial vessel will be unlikely to find an insurer that will offer anything more than a selection of coverage options documented with standard form wordings on a take-it-or-leave-it basis. Under these circumstances, the legal principles developed in the context of personal lines insurance are equally applicable.[13]

But a significant amount of marine insurance involves a very different contracting model. For a start, the insured is not always the "little guy" in the transaction; a large oil company insuring a fleet of vessels may well have assets equal to or greater than any of the insurers to whom the risk is presented. And large marine risks are invariably placed by brokers who represent a large number of insureds, and can thus use collective market strength as a negotiating tool. Accordingly, the conception of a contracting environment where the insurer always has the economic clout to impose its will is in many cases unrealistic.

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[12]*See Ingersoll Milling Mach. Co. v. M/V Bodena,* 829 F.2d 293, 306 (2nd Cir. 1987); *Yeaton v. Fry,* 9 U.S. (5 Cranch) 335, 351 (1804) (Marshall, C.J.) (distinguishing between portions of the marine policy drafted by the insurer and the insured).

[13]*Greenly v. Mariner Mgmt. Group, Inc.,* 192 F.3d 22, 27 (1st Cir. 1999).

The conception of a contracting environment where the purchaser's only choices are to select a variety of off-the-shelf menu items is similarly often unrealistic. Particularly in "soft markets" when rates are low, brokers are often able to obtain coverage using manuscript wordings that are tailored to maximize coverage for the insured's benefit. While these manuscript wordings will frequently be based on a standard form wording, significant portions of the wording will be deleted or modified by the broker to suit the client's needs. Accordingly, the insurer is not the drafter of the language of the policy, or at least not the sole drafter.

Finally, even when standard wordings are used to document the agreement of the parties, it is arguably unrealistic to view the wording as language chosen by the insurer. First, while standard forms typically have their genesis in such organizations as the American Institute of Marine Underwriters or the Joint Hull Committee, and are thus drafted by a group of underwriters, the particular insurer involved in a coverage dispute will probably have had no input into the language of the policy. Secondly, as noted, large marine risks are invariably placed by brokers acting on behalf of the prospective purchaser, and the initial choice of what forms will be used to document the transaction will be made by the broker on the placing slip that is presented to the insurers. When a broker submits a risk to an insurer inquiring whether the insurer is interested in subscribing to a policy based upon a form such as the American Institute Time Clauses that has been in existence for years and been generally accepted by both underwriters and the marine broking community, it is questionable to state that it is the insurer that has selected the policy language.[14]

With this commercial framework in mind, I will turn to the treatment of the doctrine of *contra proferentem* by the courts.

***Contra proferentem* in the Marine Insurance Jurisprudence**

English antecedents

Early on, however, the English courts rejected the notion that *contra proferentem* should automatically apply in marine insurance cases. The seminal case is *Birrell v. Dryer,*[15] where the House of Lords rejected an attempt to use *contra proferentem* to automatically resolve the case against underwriters. In *Birrell,* the policy contained the language "warranted no St. Lawrence

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[14]*See Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co.,* 632 F.2d 1068 (3d Cir. 1980), cert. den. 451 U.S. 986 (1981).
[15][1884] 9 App. Cas. 345 (H.L.) (appeal taken from Scot.).

between the 1st of October and the 1st of April." The vessel was lost during wintertime navigation of the Gulf of St. Lawrence. The potential ambiguity arose from the fact that there are two St. Lawrences in Canada: a gulf and a river that feeds into that gulf. The assured contended that "St. Lawrence" meant only the river, while the underwriters argued that it included both the river and the gulf. The parties more or less agreed that the Gulf of St. Lawrence was considerably more dangerous than the St. Lawrence River.

The lower court divided almost evenly in favor of the assured. Two judges held that the language unambiguously included both the river and the gulf named "St. Lawrence," and another two judges held that the language was ambiguous, that custom and usage of trade did not resolve the ambiguity, and that therefore the doctrine of *contra proferentem* should resolve the matter against the underwriters. The fifth judge agreed with the *contra proferentem* reasoning, but expressed "doubts."

The House of Lords reversed, and the speeches of the Lords set out a new way of thinking about the *contra proferentem* doctrine. The Earl of Selborne believed that the language unambiguously included both the river and the gulf. Lord Blackburn concluded that the language was ambiguous, so he was not able to resolve the case so quickly. He raised and rejected *contra proferentem* because the assured had drafted the warranty at issue, and was motivated to draft the language narrowly to lower the premium:

> Reliance was placed by some of the judges below on the maxim "fortius contra proferentem." I do not think the description of the district excluded can be considered as the words of one party more than the other. The shipowner knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the slip a description of that district in order to induce the underwriters to agree to a lower premium.
>
> I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite. . . .

Thus, he believed it would be improper to use *contra proferentem* to resolve the case. Ultimately, Lord Blackburn was persuaded that geographers and mapmakers had long applied the names to both the river and the gulf, and that this reading would best serve the need for a "fixed limit" on liability.

Lord Watson held that the words "no St. Lawrence" (as opposed to "*the* St. Lawrence") unambiguously excluded both the river and the gulf, yet he also took the time to reject the *contra proferentem* argument. Lord Watson noted that the assured's agent had inserted the provision, not the underwriters. Though this would technically require him to apply *contra proferentem* against the assured, he rejected the application of the doctrine altogether because the provision could be equally attributed to both parties in light of their interest in the transaction:

> That the underwriters may be rightly held to be the proferentes with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the proferentes; but I think the substance of the warranty must be looked to; and that, in substance, its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy; and that appears to me to be as much the concern of the shipowner as of the underwriters.

Birrell v. Dryer set out two important principles that continue to guide the courts in maritime insurance cases. First, not all language in an insurance contract is language of adhesion that was drafted by the underwriters. Second, when a policy is thoroughly negotiated, it has been authored by both sides, and there is no reason to favor one party over the other.

Since *Birrell v. Dryer*, "there has been a movement towards applying the rule [of *contra proferentem*] more closely in accordance with the facts of the case" rather than as an automatic rule disfavoring the underwriter.[16]

[16] 1 MUSTILL & GILMAN, ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE at 112 n.69 (16th ed. 1981).

Thus, in *A/S Ocean v. Black Sea & Baltic General Ins. Co., Ltd.,*[17] two judges expressed the view that *contra proferentem* must be assessed based on the facts of the case and not as an automatic rule. Thus, if *contra proferentem* applied to a slip prepared by the assured's broker—neither judge thought it did—it would nonetheless apply against the assured and not the underwriters.[18] Yet where it was clear that the underwriters had drafted the language, the courts would continue to apply the *contra proferentem* rule against them.[19]

The American Experience: The Road to *Eagle Leasing*

American courts have followed a similar line of reasoning, and have taken it much farther. In early American decisions, courts were quite willing to apply *contra proferentem* against the assured if the assured was the party that drafted the language at issue.[20] Indeed, another early case added the thought that the assured sometimes has the superior bargaining position because it alone knows the geography and business circumstances that will impact the scope of the risk.[21] In 1904, the Southern District of New York expressly relied on the *Birrell* reasoning to resolve a marine insurance dispute over whether Rondout Creek could be said to form part of the "Hudson River."[22] Based on the reasoning in *Birrell* the court concluded that the creek was apart from the river, so the scow's loss at Rondout Creek was not within the policy's warranties.[23]

The reasoning of *Birrell v. Dryer* was again quoted and adopted at length in *Canton Ins. Office v. Independent Transp. Co*.[24] In *Canton Insurance Office,* the steamer Vashon traveled between Seattle and a summer resort during the summer months.[25] The vessel was insured by a policy that stated "Vessel warranted employed in the general passenger and freighting

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[17] [1935] 51 Ll. L. Rep. 305 (A.C.).
[18] *Id*. at 307, 310.
[19] *Forestal Land, Timber & Rys. Co., Ltd. v. Rickards,* [1942] A.C. 50, 70 Ll. L. Rep. 173, 184.
[20] *See, e.g., Miller v. Citizens' Fire, Marine & Life Ins. Co.,* 12 W. Va. 116 (1877) ("The language in question here being not that of a condition, but of the written part of the policy, which was furnished by the insured, ought to be construed not strictly against the insurer, but fairly."); *London Assur. Corp. v. Thompson,* 170 N.Y. 94, 100–103, 62 N.E. 1066 (1902) (insured under reinsurance contract was "an insured of wide experience" and thus was not entitled to protection).
[21] *Kirk v. Home Ins. Co.,* 86 N.Y.S. 980 (N.Y. App. 1904).
[22] *Hastorf v. Greenwich Ins. Co.,* 132 F. 122 (S.D.N.Y. 1904).
[23] *Id*.
[24] 217 F. 213 (9th Cir. 1914).
[25] *Id*. at 213.

business on Puget Sound, within a radius of thirty miles from Seattle."[26] The Vashon sank while unattended at its winter moorings in the Duwamish River, which is a tributary of Puget Sound.[27] The assured filed a claim and contended that the provision was ambiguous because "warranted employed in the general passenger and freighting business on Puget Sound" could have been a mere description of the vessel's normal practice instead of a limit on liability.[28] The assured also claimed that the vessel came within "Puget Sound" because the Duwamish River is a tributary of Puget Sound.[29] Because of these alleged ambiguities, the assured claimed that it should prevail under the rule of *contra proferentem*.[30] The Ninth Circuit rejected that argument on several grounds: the assured's construction of the contract was not reasonable, the risk of leaving a vessel unattended was a different risk than the one described in the policy, and so on.[31] The court enthusiastically quoted *Birrell v. Dryer*, but it is unclear how that case advanced the court's reasoning.[32] Nothing in the opinion explicitly states that the warranty had been inserted by the assured or its agent, though it had been "written on the margin of the policies."[33] It appears that *Birrell* simply reinforced the court's conclusion that the assured's reading of the contract would be absurd, because it would have led to a different conclusion in *Birrell*.[34] Nonetheless, *Birrell* was embraced by the court, and *Canton Insurance Office* would in turn have an effect on later courts.

American courts soon recognized that broker-drafted language was not to be construed against the underwriters. For instance, in *Marine Transit Corp. v. Northwestern Fire & Marine Ins. Co.,*[35] the district judge made note that "the contract was prepared by brokers acting for the assured, and consequently is not to be most strongly construed against the company." This is a straightforward application of the ideas in *Birrell* and its progeny in the United Kingdom, and subsequent cases have reached the same result.[36]

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[26]*Id.* at 214.
[27]*Id.*
[28]*Id.*
[29]*Id.*
[30]*Id.*
[31]*Id.* at 216–17.
[32]*Id.* at 215.
[33]*Id.* at 214.
[34]*See id.*
[35]2 F. Supp. 489, 492 (E.D.N.Y. 1933), *aff'd and modified on other grounds,* 67 F.2d 544 (2nd Cir. 1933).
[36]See, e.g., *J. Ray McDermott & Co., Inc. v. Fidelity & Cas. Co. of N.Y.,* 466 F. Supp. 353, 361 (E.D. La. 1979).

Yet the usual rule continued to be applied, with some exasperation. Judge Learned Hand bitingly criticized the way that marine insurance slips were cobbled together and reiterated the need for an "unsparing use of the canon contra proferentem":

> It is idle, we know, to protest against the shiftless composition of marine policies as they issue in this port; the underwriters prefer them so and the owners and shippers are either helpless, or indifferent, or both. The amorphous result which so often confuses parties and courts and breeds litigation will no doubt persist, and we must struggle as we can to impose coherence upon conglomerate jargon irresponsibly put together at random. But we may and should insist upon the most unsparing use of the canon contra proferentem; that is, upon the underwriter's disclosing a plain path out of the jungle he has made.[37]

The facts of the case do not contradict *Birrell* or *Canton Insurance Office,* however. The underwriters attempted to rely on a portion of the New York standard fire insurance form that had been incorporated by reference, though Judge Hand pointed out that terms like "buildings" and "tenants" had no application to the fleet of barges at hand.[38]

The view that *contra proferentem* does not always favor the assured reached its American apex in Judge Wisdom's opinion in *Eagle Leasing Corp. v. Hartford Fire Ins. Co*.[39] In that case, the barge *NL-701* sank in the Gulf of Mexico during the period in which it was insured by Hartford.[40] Shortly after the expiration of the policy, the tanker *S/S Western Sun* allegedly struck the wreck of the *NL-701.*[41] The tanker's owners, Sun Oil, sued the barge's owners, Olin, for negligently failing to mark the wreck.[42] But Hartford refused to defend Olin on the ground that the allision had taken place after the policy expired.[43] The district court concluded the contract was unambiguous and found coverage because the alleged negligent act—failing to properly mark the wreck—had occurred during the policy period.[44] But the Fifth Circuit

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[37] *Schmutz v. Employees' Fire Ins. Co.,* 76 F.2d 119, 122 (2nd Cir. 1935).
[38] *Id.*
[39] 540 F.2d 1257 (5th Cir. 1976).
[40] *Id.* at 1258.
[41] *Id.*
[42] *Id.* at 1259.
[43] *Id.*
[44] *Id.* at 1260.

reversed. Starting from the view that the contract was ambiguous, Judge Wisdom then proceeded to explain why the doctrine of *contra proferentem* should not conclude the case.[45] His view was not based on which party had authored the language, but rather on the fact that the assured was a large corporation that could take care of itself:

> We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers. In substance the authorship of the policy is attributable to both parties alike. Significantly, the policy in question is not the usual printed form but what is known as a "manuscript" policy, containing some standard printed clauses but confected especially for Olin. It is true, of course, as the trial judge observed, "scriveners of insurance policies are acutely aware of the meaning and effect of the language." We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts.[46]

Judge Wisdom's support for this proposition was *Canton Insurance Office*.[47] But where *Canton Insurance Office* and its predecessor *Birrell* had focused on the actual authorship of the language at issue, Judge Wisdom instead focused on the relative size and experience of the assured.[48] He dismissed the fact of authorship by noting that the contract largely had been written from scratch.[49] Where the assured is a large corporation, Judge Wisdom reasoned, it does not matter that the insurer drafted the language, because both parties understand its import equally well.[50] Indeed, Judge Wisdom asserted that *contra proferentem* only applies where the insured has no bargaining power.[51]

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[45]*Id*. at 1260–61.
[46]*Id.* at 1261 (cite omitted).
[47]*Id*.
[48]*Id*.
[49]*Id*.
[50]*See id*.
[51]*Id*. at 1261 n.4.

Eagle Leasing and Choice of Law

Eagle Leasing has not been without its critics. Under the much-maligned but still governing decision of the United States Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,*[52] issues of marine insurance are governed by state law in the absence of well-established federal precedent, and Judge Wisdom assumed that his opinion would have to be grounded in Missouri law, the law of the state in which it was issued and delivered. He stated that Missouri courts would reach the same conclusion, but cited only cases stating that insurance contracts are to be construed "consonant with the apparent objective and intent of the parties."[53] Judge Posner has noted that Missouri has steadfastly ignored the *Eagle Leasing* decision and has continued to apply *contra proferentem* to sophisticated insureds,[54] and one could argue that Judge Wisdom's claim that he was applying Missouri law was a subterfuge for deciding the case the way he thought it should come out.

Any criticism that state law was not faithfully followed is itself subject to criticism, however. First, prior to *Eagle Leasing* the Missouri courts had apparently not addressed the question of whether a sophisticated insured could take advantage of the doctrine of *contra proferentem.* Accordingly, in the absence of what the Missouri courts would do when faced with an essentially novel issue, the Fifth Circuit cannot be faulted for assuming that the Missouri courts would adopt what the Fifth Circuit considered to be the more enlightened approach.

Moreover, on another level, one might ask why the court felt it had to justify its decision as representing how the Missouri courts would decide the issue. As noted, the Missouri courts had apparently not addressed the issue, and, in a very real sense, Judge Wisdom was faced with what might be called a "reverse *Wilburn Boat*": What law supplies the rule of decision when there is no well-established principle of either state or federal maritime law? It is certainly arguable that in such a situation, the federal court is free to fashion a rule of federal maritime law rather than trying to guess in an *Erie*—court fashion what rule the state court would adopt.

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[52] 348 U.S. 310 (1955).

[53] *Id*. at 1262, *citing Baltimore Bank & T. Co. v. United States Fidelity & G. Co.,* 436 F.2d 743, 746 (8th Cir. 1971).

[54] *May Dept. Stores Co. v. Federal Ins. Co.,* 305 F.3d 597, 600 (7th Cir. 2002). *But see Koch Engineering Co., Inc. v. Gibraltar Ins. Co.,* 878 F.Supp. 1286 (E.D. Mo. 1995), *aff'd,* 78 F.3d 1291, reh. den. (concluding that Missouri adopts the sophisticated insured exception).

Current status of the sophisticated assured exception in marine insurance law

In *Eagle Leasing,* Judge Wisdom emphasized the sophistication of the assured instead of authorship.[55] The very few cases since *Eagle Leasing* involving marine insurance or maritime losses leave open the question of whether mere size and sophistication of the insured will entitle the insurer to avoid application of *contra proferentem.*

In *Ogden Corp. v. Travelers Indemnity Co.,*[56] a dispute involving coverage under a general liability policy for the sinking of an ocean-going integrated tug/barge unit, the insurer argued that not only should the rule of *contra proferentem* not be applied against it, but that the rule should be applied against the assured on the theory that the assured's broker had drafted the policy. The court not only refused to go this far, but rejected the notion that a negotiated policy should not be construed against underwriters:

> Although Ogden did in fact negotiate with Travelers, it cannot be said that Ogden completely drafted the provisions in question so as to cause the Court to apply a limited exception to the general rule by construing ambiguities in favor of the insurer. Thus, ambiguities, if any, are to be construed in favor of Ogden.

In *Eagle Leasing,* there is no suggestion that the particular language at issue had been drafted by the insured or its representatives; the Fifth Circuit had considered sophistication and the fact that the insured had negotiated the terms of coverage and had thus had the opportunity to negotiate the provision in question sufficient to negate application of the doctrine of *contra proferentem. Ogden* would thus seem to be in direct conflict.

At almost the same time, however, another judge in the Southern District of New York was reaching the opposite conclusion and finding the reasoning of *Eagle Leasing* much more convincing. In *Golden Eagle Liberia v. St. Paul Fire & Marine Ins. Co.,*[57] the policy in question incorporated a form that had originally been drafted by the insured's broker "decades ago." The court rejected the insurer's argument that the provision in question should be construed against the insured, stating that "it is questionable whether the *contra*

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[55]Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 Drake L. Rev. 807, 809 (1993).
[56]681 F.Supp. 169, 174 (S.D.N.Y. 1988).
[57]688 F.Supp. 353, 399 (S.D.N.Y. 1988), *vacated as per settlement,* 718 F.Supp. 1097.

proferentem rule applies at all in a case such as this where two sophisticated parties bargain for a contract."

Since the issue in question will be governed by state law, at least where there is state law precedent on point, resolution of this issue may well vary greatly depending on applicable state law. While a canvassing of all state law decisions is beyond the scope of this article, a sampling of representative cases may be helpful. Some courts have rejected outright the notion that mere sophistication of the assured is, in and of itself, a sufficient basis for not construing policy ambiguities against the insurer.[58] In *Pittson Company Ultramar America v. Allianz Insurance Company,*[59] the Third Circuit reviewed the cases regarding a "sophisticated insured" and explained that "read in conjunction, these cases indicate that the dispositive question is not merely whether the insured is a sophisticated corporate entity, but rather whether the insurance contract is negotiated, jointly drafted or drafted by the insured."[60] In that case, the assured's broker had prepared the draft of a marine insurance policy and had negotiated the language with the underwriters.[61] The contracts were "not contracts of adhesion and [were] more properly treated as traditional, jointly-negotiated contracts."[62] Accordingly, the court refused to apply "the general rule favoring coverage."[63] Other courts have appeared to have adopted the notion that sophistication and economic size are sufficient in and of themselves to avoid the application of *contra proferentem* against the insurer.[64]

A Balanced Approach?

There are undoubtedly situations where large sophisticated assureds purchase insurance policies that have been drafted by insurers and offered on a "take-it-or-leave-it" basis. In these situations, *contra proferentem* would apply if the contract were something other than insurance, and there is no reason to make an exception for insurance. As the Washington Supreme

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[58]See, e.g., *General Ins. Co. of America v. City of Belvedere,* 582 F.Supp. 88 (N.D. Cal. 1984)

[59]124 F.3d 508 (3d Cir. 1997).

[60]*Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co.,* 124 F.3d 508, 521 (3rd Cir. 1997).

[61]*Id*.

[62]*Id*.

[63]*Id*.

[64]*Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co.,* 632 F.2d 1068 (3d Cir. 1980), cert. den. 451 U.S. 986 (1981) (applying Pennsylvania law); *McNeilab, Inc. v. North River Ins. Co.,* 645 F.Supp. 525 (D.N.J. 1986), *aff'd,* 831 F.2d 287 (3d Cir. 1987) (applying New Jersey law).

Court explained, if an insurance policy is a nonnegotiable form, there is no reason to construe it differently for a smaller business than for a more profitable one.[65] Of course, neither is there any reason to apply a version of *contra proferentem* in these situations that differs from its usual role as a "tie breaker" to resolve ambiguities when all other means of determining the parties' intentions have failed.

However, the large, sophisticated purchaser of marine insurance who has no options but accepting what is offered is probably the exception rather than the rule. Given the number of available markets, the competitiveness of those markets, and the sophistication and bargaining power of the major brokers who tend to represent large companies in negotiating their insurance programs, courts should be reluctant to assume that the large consumer of marine insurance had no say in negotiating the policy at issue.

Moreover, courts should be reluctant to resort to *contra proferentem* to resolve disputes arising under form contracts that have been in use for many years, particularly when the use of the form in question has been proposed by the broker. The court in *Golden Eagle Liberia* made short shrift of the argument that a broker's wording that had been around for decades should automatically be construed against the assured; the same approach should equally apply to forms originally drafted by the underwriting community that are as well-understood by the broking community as by insurers.

Of course, there may well be clauses within an insurance policy that can be attributed to one party or the other, and if disputes arise involving those provisions, the rule of *contra proferentem* should apply to the provision in question. The undecipherable warranty hastily written by an underwriter on a slip may well be deserving of application of *contra proferentem* if the court cannot otherwise figure out what it means; if for no reason other than self-protection the courts should encourage parties to express their intentions with clarity. But similar treatment should also be afforded to brokers' wordings that are intentionally left vague with the specific intention of invoking *contra proferentem* against the underwriters and thus expanding coverage beyond what was intended.

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[65]*Boeing Co. v. Aetna Cas. & Surety Co.,* 784 P.2d 507, 514 (Wash. 1990). *See also St. Paul Fire and Marine Ins. Co. v. Metpath, Inc.,* 38 F. Supp. 2d 1087 (D. Minn. 1998) ("sophisticated insured" rule will only be applied where the insured actually negotiated the policy language); RESTATEMENT (SECOND) OF CONTRACTS § 211 (standardized agreements should be interpreted "to effectuate the reasonable expectations of the average member of the public" even if this rule advantages more sophisticated insureds who "contract[] with knowledge of an ambiguity or dispute").

Needless to say, discarding *contra proferentem* in these situations would complicate the resolution of insurance disputes, particularly in jurisdictions that apply the rule that policy ambiguities are automatically construed against the insurer and that thus exclude any extrinsic evidence of the parties' intent—the court would be required to hear evidence of how the language of the policy came to be, and gain an understanding of the relative bargaining position of the parties. But judicial convenience is no reason to avoid doing substantive justice, and while *contra proferentem* has its place as a rule of last resort where it is clear that one of the parties is truly responsible for the court's inability to know what was intended, it is not a good substitute for taking the time and effort to understand the commercial realities of the industry and transaction in question. The sophisticated assured exception, while subject to application in inappropriate circumstances, at least requires the court to focus on the real issue at hand in contract interpretation, determining the intention of the parties.

Newsletter Editors' Note: Our sincere thanks to Hal Watson for the foregoing article.

II. RECENT CASES OF INTEREST

Deviation from Navigation Warranty and Inexperienced Crew Void Policy of Insurance

Connecticut Indem. Co. v. Palivoda,
2005 U.S. Dist. LEXIS 24511, 2005 AMC 2047 (M.D. Fla. 2005)

The insured purchased a paddlewheel vessel for $330,000 and obtained a policy of insurance with the plaintiff insurer. The insured and several of his friends intended to sail the vessel from the Mississippi River to Virginia. Neither the insured nor any of the "crew" had any experience with paddlewheel vessels or experience navigating the Gulf of Mexico.

The policy covering the voyage contained a navigation warranty that the vessel would not deviate from the "inland waterway around Gulf of Mexico to Okeechobee Canal." The insured hired an experienced paddlewheel Captain and began the voyage. When the vessel arrived in Apalachicola, Florida, the insured (over the objections of the Captain) decided to save time by crossing the Gulf of Mexico. The vessel then sank in heavy weather seventy miles offshore.

The insurer denied coverage and filed suit arguing that the insured had breached: (1) the navigation warranty, (2) the warranty of seaworthiness, and

(3) the negative implied warranty of seaworthiness. On the issue of the navigation warranty, the insured argued that there was no inland waterway between Apalachicola and Tampa, Florida, and as a result, the vessel did not deviate from the prescribed route. The court rejected this argument, finding the Gulf Intracostal Waterway was the prescribed route since it is the waterway around the Gulf of Mexico. Because the insured decided to cross the Gulf of Mexico, the insured breached the warranty. Turning to the warranty of seaworthiness and the negative implied warranty of seaworthiness, the court held that the insured breached the policy by setting sail with an inexperienced crew.

Insureds' Misrepresentation Warranted Policy Rescission and Denial of Coverage

Waters v. New York Prop. Ins. Underwriting Assoc.,
9 Misc.3d 1126(A), 2005 WL 2934822 (Sup.Ct., N.Y. County 2005)

The insureds were homeowners who obtained coverage for a cottage on a piece of property adjoining their residence. The cottage was a small structure in poor repair, near a beach, and had no water, gas, or telephone connection. The owners used it only to store various items. On the application for insurance, they were required to describe it as either "owner occupied," "non-owner occupied," or "seasonal." They chose "owner occupied." The policy they received contained an exclusion for property that was "vacant or unoccupied beyond a period of sixty (60) consecutive days." More than sixty days after coverage arose, the cottage was damaged by fire. The insureds' claim was denied on the basis of the 60 day vacancy exclusion quoted above. The insureds sued the carrier and the broker. The court held:

1. The exclusion was clear and unambiguous, and excluded coverage for the damage to the cottage. The insureds' statement on the application that the cottage would be "owner occupied" was a material misrepresentation, warranting rescission of the policy.

2. The insureds had a duty to review the application for insurance and correct any errors on it. By signing it, the insureds implicitly represented that they were aware of its contents and that those contents were correct.

3. The insureds had no claim against the broker, because they were presumed to have read and understood their policy, which unambiguously excluded coverage for "vacant or unoccupied" property. Given their presumptive knowledge of the exclusion, they were unable to

point to anything the broker might have said to the contrary that they could reasonably have relied on.

Insurer Not Required to Defend Policy Holder Due to Unreasonable Nine Month Delay

Admiral Indemnity Co. v. Pancas Restaurant,
9 Misc. 3d 1121A, 2005 N.Y. Misc. LEXIS 2358
(Sup.Ct., N.Y. County 2005)

The plaintiff insurance company was the insurer of a restaurant. Plaintiff moved for summary judgment against defendants, the building's owner, an additional insured on its policy, and the owner's insurance company, claiming that their nine month delay in informing plaintiff of a lawsuit brought by one of the restaurant's employees violated their duty under the policy to notify plaintiff of a claim "as soon as practicable." The defendants cross-moved for summary judgment, claiming that plaintiff had unreasonably delayed in disclaiming coverage. The court granted plaintiff's motion, finding that defendants had no valid reason for the nine month delay. It denied defendants' motion, finding that plaintiff's delay in denying coverage was reasonable in light of its need to investigate the accident.

Despite the Unexpected Resignation of the Claims Specialist, 36 Days to Disclaim Too Long—Staff Problems Not a Valid Excuse—§ 3420(d) Requirement of Notice of Intent to Disclaim Policy Does Not Apply to Notice Between Insurers

Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.,
2005 WL 3435238 (N.Y. App. Div., 1st Dept. 2005)

The insurer, Royal, first learned of potential grounds for disclaiming on March 20, 2003, and then received further information supporting those grounds on April 8, 2003. Royal disclaimed in writing on May 14, 2003 (*i.e.,* sixty days after first learning of grounds to disclaim, and thirty-six days after receiving the supporting information). Royal defended the length of time it took to disclaim by showing that its original claim-handler had quit his job suddenly and it had taken time to hire a replacement and get her up to speed.

Royal argued that the situation caused by the unexpected resignation was beyond its control, and that therefore the delay in issuing the notice of disclaimer was reasonable. The court rejected this argument, finding that it was readily apparent that Royal's staffing problem was not an external factor beyond its control like a computer system failure. Indeed, the court found that Royal's need to replace its claims specialist while it was investigating the claim was "irrelevant" and observed that "[p]laintiffs should not have to wait until their insurer sorts out its employment affairs before receiving timely notice of a disclaimer." Therefore, the court found the notice of disclaimer was untimely as a matter of law.

The court also addressed the notice of intent to disclaim provisions of New York Ins. Law § 3420(d) between insurers. In *Bovis,* AIG argued that Royal's disclaimer was also ineffective with respect to AIG because it was untimely under Ins. Law § 3420(d). In other words, AIG argued that § 3420(d) was intended to protect not just insureds and claimants, but also other insurers. The court rejected that argument, reasoning that the statute was never intended to protect other insurers, but only to protect those parties it specifically identifies: "the insured and the injured person or any other claimant."

Insurer Obligated to Defend Insured Against Patron's Claims of Injuries From Bar Altercation

Mumford v. 854 Gerard Ave. Corp.,
(N.Y. App. Div., 1st Dept. 2006) (Unreported)

Defendant insured moved for summary judgment against third-party defendant insurer, and alleged breach of contract, claiming the insurer owed a duty to defend under its insurance policy for plaintiff's claims of injury sustained in an altercation on defendant's business premises. The insurer argued that it had disclaimed coverage based on a policy exclusion applicable to assault and battery claims. The court observed that plaintiff's first cause of action alone required the insurer's defense of the entire action as the complaint's allegations were susceptible to an interpretation that fell within the policy's coverage and outside the assault and battery exclusion. Further, the court found the insurer's notice to defendant was ineffective to disclaim coverage as the notice referenced the wrong policy exclusion, and the insurer's second notice with the correct exclusion was untimely.

New York Insurance Department's Argument that ACV Payment was Necessary Lacked Merit

SR International Business Insur. Co. Ltd. v. World Trade Center Properties LLC, 407 F.Supp. 2d 587, 2006 U.S. Dist. LEXIS 1185 (S.D.N.Y. 2006)

On June 8, 2005, the court denied Silverstein Properties' motion to compel Swiss Re to pay actual cash value ("ACV") up to its share of a one-occurrence policy limit in an amount exceeding $796 million. In its June 8, 2006 opinion, the court rejected Silverstein's claim that under the controlling WilProp form not to require an immediate payment of the full amount of ACV would violate New York's statutory fire policy, which guarantees to a policy holder who suffers a loss the lesser of either the full ACV or the repair and replacement cost of the property. Silverstein moved for reconsideration, arguing that the court had overlooked a September 14, 2005 amicus memorandum by the New York Insurance Department which asserted that failure to require immediate payment of the ACV would deprive the insured party electing to rebuild of the benefit of a replacement cost policy. The court denied Silverstein's motion for reconsideration, finding that the court did not "overlook" the amicus memorandum which (1) post-dated the June 8, 2005 opinion, and (2) lacked merit as the New York Insurance Department's argument would call for payment of an arbitrary sum in excess of what it says is necessary at a time that may be so long delayed as to imperil rebuilding efforts, and would not solve the problem of the insured for whose benefit the argument was advanced.

Newsletter Editors' Note: Our sincere thanks to Zachary M. Barth for the foregoing summaries.

Longshoreman's Enforcement Suit is Premature Where Compensation Award is Still on Appeal

Christensen v. Stevedoring Servs. of Am.,
430 F.3d 1032, 2005 U.S. App. LEXIS 26645 (9th Cir. 2005)

Plaintiff longshoreman appealed an order by the U.S. District Court for the District of Oregon dismissing his action against defendants, his employer and an insurer, to enforce an award of attorney's fees and costs, pursuant to 33 U.S.C.S. § 921(d) of the Longshore and Harbor Workers' Compensation Act, for lack of subject matter jurisdiction. The dismissal was based on the fact that plaintiff's appeal of his underlying compensation award was still pending.

Because defendants had paid the amount of the attorney's fee award, that part of plaintiff's claim was mooted. However, he continued to seek other fees and costs. The district court thus granted summary judgment because it found that the underlying compensation award was not final, given plaintiff's appeal to the Department of Labor's Benefits Review Board.

The circuit court agreed, declining to give weight to the Board's decision in *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.,* as urged by plaintiff. 33 U.S.C. §§ 921 and 928 did not distinguish between appeals by plaintiffs or defendants. 33 U.S.C. § 921(a) stated that a compensation order was final

30 days after it was filed, unless appealed, and 33 U.S.C. § 928(a) provided that an award of attorney's fees and costs was to be paid after the compensation order became final. That defendants had not appealed the compensation award did not alter the fact that plaintiff did. Absent a final compensation award, the district court lacked jurisdiction to hear his enforcement action. The court of appeals affirmed the judgment of the district court.

Insurer Entitled to Rescind Policy for Insured's Misrepresentations and Failures to Disclose

New Hampshire Ins. Co. v. C'est Moi, Inc.,
2005 U.S. Dist. LEXIS 39036 (C.D. Cal. 2005)

Plaintiff insurer filed a motion for summary judgment in its action against defendant insured, seeking rescission of the insured's policy based on misrepresentation or concealment under maritime law. The insured filed a motion for partial summary judgment.

The insured owned a 56-foot boat for which the insurer issued a one-year yacht policy. The policy included a provision that voided coverage if the insured intentionally concealed or misrepresented any material fact or circumstance relating to the insurance, or the insurance application, before or after a loss. Subsequently, the boat took on water and sank. The insurer learned that the insured had misrepresented the boat's purchase price, failed to disclose a prior loss by the insured on another boat, and failed to disclose that the boat was not insured when the insured applied for the policy. The court held that the insured was bound by the duty of *uberrimae fidei*, or "uttermost good faith," to reveal, even if not asked, every fact within the insured's knowledge that was material to the risk. Because the duty was codified by Cal. Ins. Code § 1900(b), the parties could not contract around it by limiting the duty with regard to intentional misrepresentations or concealments. The court held that the insurer was entitled to summary judgment on its rescission claim pursuant to Cal. Ins. Code § 1904 due to the misrepresentations and concealments, and denied the insured's motion for partial summary judgment.

Vague Counts of Complaint Against Insurer Dismissed Without Prejudice

Bepko v. St. Paul Fire & Marine Ins. Co.,
2005 U.S. Dist. Lexis 39066 (D. Conn. 2005)

Pursuant to Fed. R. Civ. P. 12(b)(6), defendant insurer moved to dismiss Counts Two and Three of plaintiff judgment creditor's complaint. Count Two alleged a breach of the implied covenant of good faith and fair dealing, while Count Three alleged violations of Conn. Gen Stat. § 38a-816 of the Connecticut Unfair Insurance Practices Act (CUIPA), and Conn. Gen. Stat. § 42-110a of the Connecticut Unfair Trade Practices Act (CUTPA).

Count Two failed to allege that the insurer's denial of coverage resulted from conscious wrongdoing because of dishonest purpose or moral obliquity. Some factual allegation in the pleadings of bad faith, even a minor one, was necessary to put the insurer on notice. The creditor's claim provided no reasonable indication that the insurer had breached its duty to act in good faith and deal fairly. Although the creditor referenced both CUIPA and CUTPA violations in Count Three, there was no clear assertion as to whether the CUTPA claim was premised on a CUIPA violation or that they were claimed independently. The creditor asserted that by failing and refusing to defend or indemnify its insured, the insurer violated one or more or the subsections of Conn. Gen. Stat. § 38a-816. The insurer argued that the creditor's CUIPA allegations were so vague that the insurer did not have notice as to which subsection or subsections the creditor alleged were violated. Moreover, the insurer asserted that individual acts did not violate CUIPA and a single failure to defend or indemnify an insured did not rise to the level of a § 38a-816 violation. The court agreed and dismissed without prejudice to an amendment if filed within 15 days.

No Oral Contract to Repair Allision Damage to Render Yacht "As Good as New"

Genie-Lyn Ltd. v. Del. Marine Operators,
2006 U.S. Dist. LEXIS 1587 (W.D.La., Lafayette Div. 2006)

In January of 1999, while moored at a dock in Morgan City, Louisiana for owner's work, the yacht Enchantress, built in 1969, was struck and damaged by barges from defendant Delaware Marine's tow. The next day Delaware Marine's representative met with the owners of plaintiff Genie-Lyn, Mr. and Mrs. Reeves, and the captain of the yacht. According to his trial testimony, the Delaware Marine representative admitted liability and promised to "fix your boat." Mr. Reeves testified that the promise was "you'll be fixed as good as new," but neither Mrs. Reeves nor the yacht's captain recalled anything more specific than "we're going to fix your boat."

Suit was filed on behalf of the yacht's owner, Genie-Lyn, and Lloyds, its subrogated insurer, under a policy which provided replacement of "new for old," and required the vessel's repair at present cost without reduction for depreciation or resulting vessel improvement. Plaintiffs claimed all repair costs actually paid by Lloyds, alleging that the conversation with Delaware Marine's agent created an oral contract to repair the Enchantress "as good as new," without any reduction under otherwise applicable tort principles of betterment and depreciation.

The court ruled that it did not need to choose between federal admiralty law and Louisiana law in determining whether there was an oral contract. Both bodies of law recognize oral contracts and require proof of the same elements: "offer, acceptance, consideration, and most importantly a 'meeting of the minds.'" Given the conflicting testimony as to what was promised at the meeting, the court concluded that "there was not a meeting of the minds as required by either body of law." For the same reason it rejected plaintiffs' claims of promissory estoppel and detrimental reliance.

Absent a contract, plaintiffs were entitled to recover compensatory damages in tort under federal maritime law. The purpose of such damages is to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred. Since the property involved was not a total loss, plaintiffs were entitled to no more than the cost of restoration of the yacht to its condition prior to the wrong. "A maritime tort defendant is not to be held liable for property damage he has not been shown to have caused or for the cost of repairs that enhance the value of the damaged property compared to its pretort condition." The fact that Lloyds was obligated to repair "good as new" under the replacement value clause of its policy does not alter that result, since the tortfeasor, "absent some contractual obligation, is not obligated to repair the vessel to a condition better than that which existed at the time of the allision."

Denial of Coverage for a Failure to Disclose That Did Not Affect Insurer's Risk Assessment Was Not Warranted

Grande v. St. Paul Fire & Marine Ins. Co.,
2006 U.S. App. LEXIS 2567 (1st Cir.2006)

Appellant insured made a claim for insurance coverage following a maritime loss to appellees, the insurance company and its agent. The U.S. District Court for the District of Maine granted the insurance company's motion for judgment as a matter of law at the close of the insured's case during the trial before a jury. The insured appealed.

The insured's cousin paid for a new sailboat in Miami with the understanding that the insured would own and operate the vessel and pay him back. The insured contacted the agent and requested coverage for chartering the vessel in Maine and for his trip from Florida to Maine. The insured listed himself as the owner and sole operator on the application. The agent notified the insured that he was covered by the insurance company for his trip. The new sailboat was damaged during the trip and was a total loss. The insurance company denied coverage. The district court entered judgment as a matter of law for the insurance company because the insured failed to disclose his cousin's interest in the sailboat. The appellate court found that judgment as a matter of law was not justified since the cousin had testified that he never intended to possess or operate the sailboat, the insured said that he owned the sailboat, owing his cousin the purchase price, and it was not clear why that arrangement affected the insurance company's risk assessment. Because the court of appeals disagreed with the lower court's premise as applied to the contract claim, the negligence and estoppel claims also had to be remanded.

The judgment of the district court was vacated and the matter remanded for further proceedings consistent with the decision. Costs were awarded to the insured on the appeal.

Umbrella Policy Issuer Did Not Owe Defense to Sender of Unsolicited Commercial Faxes

St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.,
405 F. Supp. 2d 890 (N.D. Ill., E. Div. 2005)

Plaintiff insurer filed a motion for summary judgment on its second amended complaint. The second amended complaint sought a declaration that the insurer had no duty to defend or indemnify defendant insureds against class action claims that alleged that defendants transmitted unsolicited commercial facsimiles (faxes) in violation of the Federal Telephone Consumer Protection Act (FTCPA), 47 U.S.C.S. § 227(b)(1)(C).

The insurer provided coverage to the insureds under an umbrella policy that was excess of an underlying policy. The insureds tendered the FTCPA suit to the insurer. The insurer denied coverage because there was no evidence of exhaustion of the underlying limits. The insureds argued that the insurer had a duty to defend under one of three policy provisions. The court disagreed. The first provision was an advertising injury provision. The Illinois Supreme Court had not yet construed such a provision, although both a federal appellate court and a state appellate court had done so, with differing results. The court believed that the state high court would follow the federal decision.

Under that decision, the advertising injury provision only applied to instances where the content of advertising material violated a right of privacy. Under the subject complaint's allegations, the invasion of privacy was based upon the receipt of the fax, not its content. A personal injury provision did not apply as it also was limited to injury caused by the content of published materials. Finally, a property damage provision did not apply to the alleged loss of ink and paper. The insurer's motion for summary judgment was granted.

Policy's Twelve Month Commencement Provision Barred Coverage Action

In the Matter of the Complaint of Martin Marietta Materials, Inc., 2006 U.S. Dist. Lexis 10002 (W.D. Ky., Paducah Division 2006)

Martin Marietta filed a petition for exoneration from or limitation of liability arising from potential liability for personal injuries to one Lester Baggett. It also filed a third party complaint for indemnity against PKC Properties, alleging that it was a named insured under a policy purchased by PKC from third party defendant Zurich American Insurance, which had refused to provide Martin Marietta with a defense and indemnify it for attorney's fees and costs incurred in connection with the limitation proceeding.

The court ruled that Martin Marietta was a named insured under the Zurich policy, with the right to a defense in accordance with the policy's terms, but denied its claims against PKC for indemnity because Martin Marietta could not prove that it had not acted negligently in causing Baggett's injuries.

On cross motions for summary judgment by Martin Marietta and Zurich, the court held that interpretation of the policy was governed by the law of Georgia, where Zurich signed the policy and maintained its claims office that processed Martin Marietta's claim for vexatious refusal to defend, giving Georgia "the most substantial contacts with the conduct of the parties."

Zurich contended that the alleged harm to Martin Marietta occurred in August of 2003 when it refused to provide coverage, so that the suit against it, brought in May of 2005 was untimely under the policy's Twelve (12) Month Commencement Provision, which states:

> **6. Litigation**
>
> No suit, action or proceeding brought by the Insured against the Company for the recovery of any claim under this Policy shall be sus-

> tainable in any court of law or equity unless the same *be commenced within twelve (12) months after this Company has denied liability for payment of claim*; except that in the case of a claim arising under the Collision Clause, no suit or action shall be sustainable unless brought within twelve (12) months next after the Insured shall have discharged his liability. Provided however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein. (emphasis added).

Finding that the clause was enforceable under Georgia law to bar the action for coverage, the court denied Martin Marietta's motion for summary judgment and granted Zurich's motion.

Insured's Failure to Exercise Due Diligence and Breach of Implied Warranty of Seaworthiness Barred Recovery from Insurer for Sinking

J & A Fleeting, Inc. v. Fireman's Fund McGee Marine Underwriters, 2006 U.S. Dist. LEXIS 81 (E.D. Ky. 2006)

Plaintiff insured filed an action against defendant insurer, seeking to recover money allegedly owed under a marine insurance policy. The insurer moved for summary judgment.

The insured's boat sank while docked in a river due to a pump failure in the boat's shaft alley. The insurer refused to pay under a marine insurance policy, and the insured filed an action to recover the amount allegedly due. In granting the insurer's motion for summary judgment, the court determined that, under the Inchmaree clause in the contract of insurance, the insured was required to exercise due diligence as a condition of the insurer's obligation to pay. The evidence presented by the insurer tended to show that this duty was breached when the boat was kept in service despite a known pump problem. Additionally, the boat was left unattended at night. The court also noted that there was an implied warranty of seaworthiness. The insured was required to overcome the rebuttable presumption that the boat was unseaworthy in this case because the boat sank in calm water. No competent evidence was produced in this regard; the testimony of the owner's president regarding seaworthiness was not enough. Finally, the superceding clause did not excuse the lack of diligence because there was no evidence that a mysterious electrical event had caused the boat to sink. The motion was granted.

[15050]

Warehouse Endorsement Provided All-Risk Coverage of Goods

N. Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc., 413 F. Supp. 2d 295 (S.D.N.Y. 2006)

Plaintiff insured sued defendants for breach of a marine insurance policy. The insured moved for summary judgment, arguing that defendants were liable for the insured's loss of cordless telephones at a warehouse in China. Defendants cross-moved for summary judgment, arguing first, that the policy did not cover the insured's loss and second, that the insured's claim was time-barred under the policy.

The insured had demonstrated that the warehouse endorsement in the policy at issue provided all-risk coverage for the goods shipped to the warehouse. Because the insured had demonstrated the existence of all-risk coverage for its loss, it did not need to prove the cause of the loss. Moreover, defendants had not argued that any express exception to the coverage was applicable. Further, defendants had not carried their burden of demonstrating that the cause of action accrued more than one year before the insured preserved its right to file suit. Accordingly, the court would not grant summary judgment on defendants' time-bar argument. However, the insured had not demonstrated that defendants took any action that would have lulled a reasonable insured into delaying the filing of the litigation.

The insured's motion for summary judgment was granted in part and denied as to its claim that its delay in filing the action was caused by defendants. Defendants' cross-motion was denied.

Newsletter Editors' Note: Items for future issues may be submitted to George N. Proios, Law Office of George N. Prios, 1350 Broadway, Suite 1507, New York, NY 10018; Gene B. George, Ray, Robinson, Carle & Davies P.L.L., 1717 East 9th Street, Suite 1650, Cleveland, OH 44114-2878; Joshua S. Force, Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C., Twenty-Eight Floor, 909 Poydras Street, New Orleans, Louisiana 70112-1033.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, FALL 2006

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

I. NEWS AND INFORMATION

"UNDERWRITING INTENT" AND INTERPRETATION OF MARINE INSURANCE POLICIES

Harold K. Watson*

1. Introduction

Most standard form marine insurance policies have been around so long that the "intention" of the drafters can only be surmised from the language used and what we know about particular claims that might have inspired particular clauses.[1] With manuscript policies of recent origin, on the other hand, it is sometimes reasonable to ask what the parties intended by including particular language, since the parties who drafted and agreed to the wording are living human beings who could at least in theory shed some light on why the policy was drafted as it was. Accordingly, it has become a common practice in analyzing insurance policies to attempt to determine actual "underwriting intent" by interviewing or deposing the underwriters and brokers who were "present at the creation."

This can be an important inquiry, depending upon what is meant by "underwriting intent." There is a great deal of confusion, however, about

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[1]For example, we know with a fair degree of certainty that the Inchmaree clause was included in hull and machinery policies in response to the holding in *Thames & Mersey Marine Ins. Co. v. Hamilton Fraser & Co.,* 12 App.Cas. 484 (H.L.1887).

what constitutes "underwriting intent," and, depending upon what questions one asks in making the inquiry, the answers one gets can be of varying help. This article will explore the various "levels" of underwriting intent, and evaluate the significance of this concept in light of established rules of contract interpretation.

Of course, this issue is not specific to marine insurance law, and there are in fact few cases where the issue has been raised in a marine insurance context. Accordingly, most of the cases that will be cited will of necessity be non-marine insurance cases.

2. The Setting

To appreciate how the issue of underwriting intent arises, it is necessary to have some understanding of how manuscript insurance policies are created. Typically, a risk will be presented to an underwriter on a "slip," which sets forth in rather skeletal form the coverage that the broker wants to obtain for his client, the assured. The slip will serve as the basis for the negotiations between the parties. In many cases, at least some of the clauses may be well-recognized insurance forms, but there may be additional manuscript clauses set forth in the slip. In many cases, however, many issues will not be spelled out at all; it is not at all uncommon for the parties to agree to bind coverage with nothing more spelled out than that the language of the policy is "TBA" ("to be agreed").

The contract between the parties must then be fleshed out with a "wording" that spells out what risks the underwriter agrees to cover, what exclusions to coverage there will be, etc. More often than not, this document will be physically prepared by the assured's representative, the broker. Often the broker will start with a recognized form, such as the London Standard Drill Barge form, but the broker will then tailor this document to suit his client's needs, or will cobble together various bits and pieces of various forms or wordings that the broker has used for other clients. This wording will then be presented to the underwriter for his review and agreement. Once the wording has been agreed upon, it will be incorporated into a policy. It is against this background that the notion of "underwriting intent" must be evaluated.

3. What is "Underwriting Intent"?

The term "underwriting intent" can mean a variety of things, and the significance that attaches can vary greatly from controlling the parties' legal rights and obligations to being legally irrelevant, depending upon what one means by the term "underwriting intent." Accordingly, it is important to first set forth how this term is used and abused.

At one level is the intention of the parties as evidenced by the words that the parties put down on paper in an insurance wording, which is of course always relevant. This is always the starting point in policy interpretation, and often the finishing point as well. However, often insurance policies are subject to different interpretations, and one or more of the parties may want to introduce evidence extrinsic to the policy of "underwriting intent" to determine the rights and obligations created by the policy.

The next level of "underwriting intent" is the parties' intent at the time they contracted, as evidenced by what the parties may have said or done at the time of contracting. If in the course of negotiating the terms of coverage the underwriter and broker discuss whether the policy would cover a specific fact situation, that evidence can be of extreme legal and commercial significance.

However, very rarely is this what assureds, brokers, and underwriters' representatives have in mind when they suggest that the underwriters "intended" to cover or not cover a particular type of loss. Instead, what is usually involved is unexpressed intent. Unexpressed intention itself breaks down into two basic types. In some instances, the underwriter who wrote the risk or the broker who placed the risk had a specific fact pattern in mind at the time of contracting. Insurance policies tend to develop by accretion; a claim presents a difficult coverage issue, and policy language is crafted to expand, limit or clarify coverage to meet a market need or to avoid similar disputes in the future. For example, the so-called "Social Responsibility" clause often included in energy package policies that provides coverage for the cost of recovering human remains[2] probably came into being in response to *Grupo Protexa, S.A. v. All American Marine Slip*,[3] where the underlying reason for removing the wreck of a vessel was to obtain bodies for burial, but coverage was unavailable because removal was not "compulsory by law." When faced with the question of whether an underwriter intended to cover

[2]A typical social responsibility wording will provide that "in the event of any occurrence resulting from a peril insured against hereunder which caused the death of or injury to any person . . . then Underwriters will indemnify the Insured for the voluntary evacuation or recovery of human bodies or remains (including search costs). . . ."

[3]753 F.Supp. 1217 (D.N.J. 1990), *reversed,* 954 F.2d 130 (3d Cir. 1992), *on remand,* 1993 WL 166275 (D.N.J. May 12, 1993), *affirmed* 20 F.3d. 1224 (3d Cir. 1994).

the cost of wreck removal under a social responsibility clause, an underwriter who was familiar with the details of the *Grupo Protexa* litigation might well have to honestly answer that that was precisely what he intended to cover.

More frequently, however, what is meant by "underwriting intent" is something much more ephemeral. Insurance wordings tend to be fairly voluminous documents, and while a cautious underwriter will read the wording before agreeing to its terms, this exercise has its shortcomings in terms of forming any precise "intent," since until a particular fact situation presents itself in the form of a claim, it is very difficult to have anything more than an impression of what general situations a clause is intended to address, and a particular claim will involve nuances that the underwriter did not and could not have foreseen at the time he agreed to write the risk and when he reviewed the wording. Accordingly, very frequently, when one asks an underwriter whether by agreeing to incorporate particular language into the wording he intended to cover a particular type of loss, the underwriter will never have given any thought to the particular situation presented. To use a concrete example, an underwriter who was not familiar with the *Grupo Protexa* litigation might well have never considered whether by agreeing to cover the cost of body recovery he was agreeing to cover the cost of voluntarily removing the wreck of a vessel as well as the bodies contained in the wreck. In such a situation, the best the underwriter can do is say what he would have thought if he had considered it. Thus, in reality what one often gets when one asks an underwriter what he intended is just the underwriter's interpretation of the policy language at the time the question is posed. This is conceptually a very different thing from intent existing at the time of contract formation.

With this background, we can discuss how the courts have treated these different levels of "underwriting intent."

4. The Legal Relevance of "Underwriting Intent" in General

The rules of construction for marine insurance policies are similar to the rules of construction for ordinary insurance policies.[4] Further, because insurance policies are contracts, they are construed according to the general

[4]*See Kalmach, Inc. v. Ins. Co. of State of Pa., Inc.,* 529 F.2d 552, 555 (9th Cir. 1976) ("[W]e can see no significant difference between construction of an ordinary insurance policy and one with marine insurance overtones."); *see also Continental Oil Co. v. Bonanza Corp.,* 677 F.2d 455, 461 (5th Cir. 1982)(declining to rest its holding on a choice between federal maritime and state law because of the similarity between their insurance principles).

rules for contract interpretation.[5] As such, courts must interpret marine insurance policies so as to give effect to the parties' intent.[6]

But what "intent" is at issue? First, it is a fundamental principle of contract law that courts must construe and interpret ambiguous contract provisions in accordance with the intent of the contracting parties at the time the contracts were formed.[7] Secondly, the purpose of contract law is to protect the reliance interest that parties have in view of the agreement that they have reached. Since I have no basis to rely upon your unexpressed intentions, nor you on mine, the "intent" at issue is the mutual intent of the parties that they have expressed by the words and conduct. Accordingly,

> [i]t makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. . . . Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.[8]

Accordingly, even if the parties have a firm "intent" at the time they enter into the contract, that intent is meaningless unless they somehow manifest it, and the parties' subjective, unexpressed intent concerning a particular policy provision is irrelevant.[9]

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[5] *Valmont Energy Steel, Inc. v. Comm. Union Ins. Co.,* 359 F.3d 770, 773 (5th Cir. 2004)(construing a policy under Texas law); *American Int'l. Specialty Lines Ins. Co. v. Canal Indemn. Co.,* 352 F.3d 254, 262 (5th Cir. 2003)(construing a policy under Louisiana law).

[6] *Heinhuis v. Venture Associates, Inc.,* 959 F.2d 551, 553 (5th Cir. 1992).

[7] *Gulf Chemical & Metalurgic Corp. v. Associated Metals & Minerals Corp.,* 1 F.3d 365, 369 (5th Cir. 1993) (applying Texas law); *Cruz v. The Home Ins. Co.,* 511 So.2d 22, 23 (La. Ct. App. 1987).

[8] *Eustis Mining Co. v. Beer, Sondheimer & Co.,* 239 F. 976, 984-985 (S.D.N.Y. 1917) (per Hand, J.).

[9] *See Provident Life and Accident Ins. Co.,* 274 F.3d at 992 (finding that, because a policy amendment was unambiguous, the insured's subjective understanding of the amendment is not relevant); *see also Clardy Man. Co.,* 88 F.3d at 352 (while applying Texas law to an insurance policy, the Court states "We must enforce the unambiguous language of the contract as written, and the applicable standard is 'objective intent' evidenced by the language used, rather than the subjective intent of the parties.").

And the second level of unexpressed intent, *i.e.*, the contracting party's after-the-fact supposition of what he would have intended if he had in fact thought about the issue in question is of even less relevance:

> In many disputes arising out of contemporary business transactions, however, the parties gave little or no thought to the impact of their words on the case that later arose. . . . The court will then have no choice but to look solely to a standard of reasonableness. Interpretation cannot turn on meanings that the parties attached if they attached none, but must turn on the meaning that reasonable persons in the positions of the parties would have attached if they had given the matter thought.[10]

Accordingly, while the interpretation of an insurance policy does involve determining "intent," it is a particular type of intent, and any inquiry into intent has to focus on intent that has been objectively manifested.

5. Expressed Intent: Unambiguous Policy Language

Unless the policy is ambiguous, even expressed intent is legally irrelevant in determining the meaning of an insurance contract. Although not a marine insurance case, *Mustang Tractor & Equipment Co. v. Liberty Mutual Insurance Company*[11] illustrates this principle. There, the policy excluded coverage for pollution unless the pollution was "sudden and accidental." The plaintiff claimed that the word "sudden" could mean either "unexpected" or "something that occurs quickly, rapidly or abruptly,"[12] and sought to introduce evidence surrounding the clause's adoption to show that this was what was intended.[13] The insurer claimed that, by trying to admit such evidence, the plaintiff was attempting "to create an ambiguity where none exists. . . ."[14] Applying Texas law to the dispute, the Fifth Circuit stated:

> Texas law requires that courts strive to effectuate the intentions of the parties as they are expressed in a contract. . . . Only if a contract remains ambiguous, despite the application of these principles, may

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[10] E. Allan Farnsworth, CONTRACTS § 7.9 at 491 (1982).

[11] *Mustang Tractor & Equipment Co. v. Liberty Mutual Ins. Co.,* 76 F.3d 89, 91 (5th Cir. 1996).

[12] *Id.*

[13] While not spelled out in the opinion, presumably the assured wanted to introduce evidence that the insurance industry had told regulators that the term "sudden and accidental" was essentially the same as the term "accidental" that had been contained in previous versions of the pollution exclusion.

[14] *Id.*

> we consider extrinsic evidence. . . . Parol evidence of intent is admitted to explain an ambiguous provision, never to create the ambiguity.[15]

After finding that the plain meaning of the word "sudden" included a temporal element, the court held that, because there was "only one reasonable interpretation of the word as it is used in this policy, it is not ambiguous."[16] Therefore, the court held that the plaintiff was prohibited from offering extrinsic evidence of the intent of the parties regarding the word "sudden".[17]

This principle could have important practical tactical ramifications. In coverage litigation, a typical tactic of assured's counsel is to seek to depose the claims and underwriting personnel in an attempt to get testimony that will suggest that the assured's interpretation is correct. Under the broad leeway allowed under modern discovery rules, it is often difficult to get a court to preclude a party from conducting discovery, but if the policy is unambiguous, one can argue that discovery is not "reasonably calculated to lead to the discovery of admissible evidence," since evidence relating to the meaning of the policy will be inadmissible. In any event, one can argue that discovery should be deferred until the court has concluded that the policy is ambiguous on a motion for summary judgment.[18]

There is one potential exception to the rule that extrinsic evidence of the parties' discussions is inadmissible unless the policy is ambiguous; some courts have held that such statements can bind an insurer under a promissory estoppel theory.[19] In *Travelers Indemnity Co. v. Holman,* the insured approached his insurance agent and inquired whether there would be coverage for the operations he intended to conduct on his property.[20] The agent

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[15]*Id.*

[16]*Id.* at 92.

[17]*Id. But see Morton International v. General Accident Ins. Co.,* 124 N.J. 1, 629 A.2d 831 (N.J. 1993), holding that evidence of industry statements to regulators was admissible to contradict the clear meaning of policy language.

[18]See, e.g., *Ameron, Inc. v. Ins. Co. of North America*, 1995 WL 139223, No. 93-56180, at *1 (9th Cir. March 29, 1995)(upholding district court's decision to prohibit insured from deposing underwriter regarding intent because a policy cannot be interpreted based on "the subjective beliefs of the insurer.").

[19]See *Travelers Indemnity Co. v. Holman*, 330 F.2d 142, 151 (5th Cir. 1964); see also *Nova Casualty Co. v. Wasertein,* 424 F.Supp.2d 1325, 1337–38 (S.D. Fla. 2006)(after finding that an unambiguous pollution exclusion precluded coverage for the insured's claim, the court held that the underwriter's post-contractual assurances that the policy covered the insured's renovation costs amounted to a promissory estoppel that bound the underwriter to such promise).

[20]*Id.*

posed the question to the underwriting department of the insurance company, which assured the insured that his present policy covered the operations and that no further coverage was needed.[21] The Fifth Circuit stated that an interpretation of the relevant policy provisions was not necessary because the underwriter's post-contractual assurances subjected the underwriter to liability under the theory of promissory estoppel.[22] Initially, the court noted that, while the coverage of an insurance policy cannot normally be extended by the doctrine of estoppel, promissory estoppel was an exception to this rule.[23] The court then reiterated the promissory estoppel rule:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[24]

The court pointed out that the underwriter "knew better than anyone else that there would be reliance,"[25] and that the insured in fact relied on the promise by not purchasing additional insurance.[26] Consequently, the court held that the circumstances satisfied the promissory estoppel rule, and the underwriters were liable for the promised coverage.[27]

The exception to the general rule that extrinsic evidence is inadmissible in the absence of ambiguity recognized in *Holman* is probably of fairly limited application, since promissory estoppel by definition requires a promise of sufficient specificity to give rise to a second contract, and it is probably uncommon for an underwriter to make such assurances. However, underwriters would be well aware that their discussions can form the basis for a claim that the terms of coverage have been altered.

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[21]*Id.* at 148.
[22]*Id.* at 150–51.
[23]*Id.* at 150. Other courts applying the doctrine of promissory estoppel to insurance coverage have recognized the doctrine as an exception to the normal rule that estoppel cannot expand the scope of a policy's coverage. See *Nova Casualty Co.*, 424 F.Supp.2d at 1337–38 ("[T]he general rule in applying equitable estoppel to insurance contracts provides that estoppel may be used defensively to prevent a forfeiture of insurance coverage, but not affirmatively to create or extend coverage. . . . The exception to this rule is the doctrine of promissory estoppel. . . .").
[24]*Id.* at 151.
[25]*Id.*
[26]*Id.*
[27]*Id.*

6. Use of Extrinsic Evidence to Resolve Ambiguities

If the language in question is ambiguous, on the other hand, extrinsic evidence tending to show the parties' intent is admissible. Courts will occasionally question whether this is permissible under the parol evidence rule, which bars consideration of prior and contemporaneous oral agreements that are inconsistent with the terms of the written agreement.[28] However, the parol evidence rule only bars the introduction of extrinsic evidence to vary a written agreement; it does not preclude the introduction of extrinsic evidence to explain an ambiguity. Accordingly, if the policy is ambiguous, extrinsic evidence should be admissible to show the intent of the parties.[29]

But what kind of extrinsic evidence is relevant to the issue at hand? As discussed above, the relevant issue is the intent of the parties at the time they contracted. Accordingly, if the underwriter expresses views regarding the extent of coverage to the assured or the broker in discussions or negotiations prior to binding the risk, this evidence would presumably be relevant in determining the mutual intention of the parties, since a statement by one party to a contract at the time of contracting will logically affect the other party's understanding of what is intended.

Similarly, other evidence that would tend to show what both parties understood at the time of contracting could logically show what they mutually intended. To use the example discussed above, in a dispute over whether the Social Responsibility clause provided coverage for the cost of removing the wreck of a vessel to obtain bodies for removal, it might be relevant to show that both the underwriter and the broker had been involved in *Grupo Protexa.*

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[28] *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.,* 993 F.2d 1178, 1182–83 (5th Cir. 1993).

[29] Some courts hold that if the policy is ambiguous, it must automatically be construed against the insurer. Most courts and commentators reject this view, and conclude that the rule of interpreting ambiguities against the drafter is only applicable if the court cannot conclude how the policy should be interpreted after receiving any extrinsic evidence bearing on the subject. *See* Barry R. Ostrager and Thomas R. Newman, HANDBOOD ON INSURANCE COVERAGE DISPUTES § 1.01[c] (9th ed. 1998). Moreover, as this writer has discussed in a previous article in this publication, the better view is that *contra proferentem* is inapplicable to manuscript policies. See Harold K. Watson, *The Sophisticated Assured Exception to the Doctrine of Contra Proferentem in Marine Insurance Law,* Spring 2006 Newsletter, Committee on Marine Insurance and General Average, Maritime Law Association of the United States.

Statements made after the contract has been concluded, however, are more problematic. First of all, the statement will not necessarily reflect even what the party making the statement intended at the time of contracting. As discussed above, in many instances neither party will have thought about the particular situation that is presented by the claim, and, accordingly, a statement by an underwriter as to what he "intended" is often really just a statement of how he presently would interpret the provision in question, which should be irrelevant in determining how the contract should be interpreted.

Moreover, even if one of the parties can honestly state that he recalls what he was thinking about at the time of contracting, this is of questionable relevance in interpreting the contract, since the relevant issue is the mutual and expressed intentions. The purpose of allowing extrinsic evidence is to determine the mutual intention of the parties, and the statement of one of the parties after the contract has been agreed upon only goes to show the intent of one of the parties, and cannot logically show what the other party reasonably understood the contract to mean.

Accordingly, most courts that have addressed this issue have concluded that testimony regarding what was intended is inadmissible. For example, in *General Star Indemnity Company v. Custom Editions Upholstery Corporation*,[30] the court prohibited the underwriter from offering testimony that it believed its policy did not cover the claim in question. The court held that the determination of the parties' intent at the time they entered into the contract is not governed by their unexpressed, subjective views.[31] The court stated:

> The 'subjective views of [the insurer's] officials, never communicated to [the insured] until litigation' cannot establish the parties' intent. . . . Plaintiff presents no evidence that it communicated this intent to Custom Editions at the time the insurance policy was issued. . . . Thus, this evidence of intent is irrelevant in determining the proper interpretation of the policy.[32]

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[30]*General Star Indemnity Co. v. Custom Editions Upholstery Corp.,* 940 F.Supp. 645 (S.D.N.Y. 1996); *see also Ameron, Inc. v. Ins. Co. of North America,* 1995 WL 139223, No. 93-56180, at *1 (9th Cir. March 29, 1995)(upholding district court's decision to prohibit insured from deposing underwriter regarding intent because a policy cannot be interpreted based on "the subjective beliefs of the insurer.").

[31]*Id.*

[32]*Id.*

Board of Education, Yonkers School District v. CNA Insurance Company,[33] takes a similar view in part, but in some ways appears to depart from these principles. There the issue was whether the insurer was obligated to pay the costs the assured had incurred in defending a racial discrimination suit. The court concluded that the policy unambiguously required the insurer to pay the defense costs, and one might have expected no further discussion. However, the insurer had argued that the "underwriting intent" was to exclude coverage, relying on the deposition testimony of its claims manager. The court made short work of this argument:

> Undisclosed opinions of "underwriting intent" acquired after the fact have little weight in construing an insurance policy and will not be considered to raise a genuine issue of material fact. This is the case especially where, as here, such opinions contradict the interpretation compelled by the applicable canons for the construction of contracts.[34]

The testimony of the insurer regarding "intent" was thus irrelevant for all the reasons we have discussed—extrinsic evidence of intent is inadmissible unless the contract is ambiguous; evidence of the unexpressed intent of one party to the contract is irrelevant to prove the mutual intention of the parties, and the intent at issue is the intent at the time of contracting.

While the court could probably have ended its opinion there, it went on to give additional bases for its opinion. When the insurer was first put on notice of the claim, the insurer wrote a letter that stated that it "will respond for defense and investigation costs in connection with this litigation,"[35] and then proceeded to monitor the progress of the litigation, request status reports and invoices, notify its reinsurer of its exposure for defense costs, etc. The court concluded that this also supported the conclusion that the policy afforded coverage, since the "practical interpretation of a contract, prior to litigation, is deemed of great, if not controlling, influence."[36] The insurer had also written an internal memorandum stating that the policy does "provide coverage for costs of investigation and defense of legal actions." The court concluded that this and other similar statements could be construed to be an "admission."[37] While the court was probably correct in both regards in that

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[33]647 F.Supp. 1495 (S.D.N.Y. 1986).
[34]*Id.* at1505.
[35]*Id.* at 1506.
[36]*Id.* at 1505.
[37]*Id.* at 1507.

case, the court's conclusions regarding the relevance of post-contracting actions and statements can easily be misapplied.

First, like any question involving extrinsic evidence, such evidence of the parties' "practical interpretation" of the policy should be inadmissible if the policy is unambiguous. In *Continental Oil Company v. Bonanza Corp.,*[38] the assured argued that the insurer's practice of not insisting on payment by the assured precluded the insurer from relying on the "pay to be paid" provision in the P&I policy. The court rejected this argument,[39] presumably because the policy unambiguously stated that the underwriters were only liable when the assured "shall have become liable to pay and shall have paid." The court's reference to the post-contracting statements and actions in *Board of Education, Yonkers School District v. CNA Insurance Company* only makes sense if one reads the opinion as implicitly conditioning these alternative bases on the policy being ambiguous, since evidence of the insurer's interpretation and admissions by the insurer should not be admissible to aid in interpreting an unambiguous contract of insurance.

Assuming that the evidence of "practical interpretation" was admissible, the court's reliance on the insurer's handling of this particular claim makes sense, since the insurer's actions that evidenced its belief that these costs were indeed covered could logically be taken as some evidence that the insurer had understood at the time of contracting that there was coverage for these expenses. However, evidence of "practical interpretation" in other claims is far more suspect. Almost all insurance claims are fact specific, and one must be very careful about drawing the conclusion that an insurer intended to cover claim A because it afforded coverage for claim B, since there can well be a variety of factors that distinguish the two claims. Moreover, unless the previous claims involve the same assured, evidence of "practical interpretation" would only tend to show the intention of the insurer, and unless the assured can be shown to have known of this practice, would logically be irrelevant to show the parties' mutual intention.

Post-contracting statements must also be scrutinized before one concludes that they are relevant to the policy interpretation. In *Board of Education, Yonkers School District v. CNA Insurance Company* the statements were internal memoranda that analyzed the coverage question at issue, and presumably were directed to the interpretation of the policy. As noted, however,

[38]706 F.2d 1365 (5th Cir. 1983) (en banc).
[39]*Id.* at 1369 n. 3.

often an underwriter's statements about the meaning of the policy are merely the underwriter's statement about how he would interpret the policy, not what he understood it to mean at the time he accepted the risk. A skillful lawyer can often get an underwriter to admit that the assured's lawyer's interpretation of the policy language is reasonable, and as a practical matter it may be very difficult for an insurer to get around an admission of this nature, but in theory such a statement should have no more impact than an underwriter's testimony that he did not intend for the policy language to cover the loss in question. Courts should be careful to distinguish whether testimony of this nature relates to intent at the time of contracting, and lawyers investigating coverage issues and defending underwriters in coverage litigation should take care to make sure that their clients understand this distinction.

7. Conclusion

"Underwriting intent" properly understood is of course critical to policy interpretation, but its legal relevance is often misunderstood. This does not mean that it is not commercially relevant; an underwriter who really intended to cover a particular loss may well want to pay for commercial or ethical reasons even if the policy unambiguously excludes coverage. But hopefully a proper understanding of the role of underwriting intent in policy interpretation will enable insurers to properly understand the decisions they have to make.

Newsletter Editor's Note: Our sincere thanks to Hal Watson for the foregoing article.

II. RECENT CASES OF INTEREST

No Sovereign Immunity Defense

Northern Ins. Co. of New York v. Chatham County, Georgia,
126 S. Ct. 1689, 2006 U.S. LEXIS 3449 (S.Ct. 2006)

Petitioner insurer filed suit against respondent/county due to damages to its insureds' boat caused by a malfunctioning drawbridge. The District Court granted the county's motion for summary judgment on the ground that the suit was barred by sovereign immunity and the U.S. Court of Appeals for the Eleventh Circuit affirmed. *Certiorari* was granted as to whether an entity not entitled to Eleventh Amendment immunity could assert sovereign immunity in an admiralty suit.

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The county owned, operated, and maintained a drawbridge over a river. A boat owner, the insured, requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned and a portion of it fell, striking the boat and causing damages in excess of $130,000. The county conceded that Eleventh Amendment immunity did not extend to counties, but nonetheless contended that it was immune under the universal rule of state immunity from suit without the state's consent. The county argued that the Court's cases recognized a distinct "residual" immunity that permitted adoption of a broader test than that applied in the Eleventh Amendment context to determine whether an entity is acting as an arm of the State. The Supreme Court held that because the county could claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, it was subject to suit.

The county failed to demonstrate that it was acting as an arm of the state in operating the drawbridge. An entity that does not qualify as an "arm of the state" for Eleventh Amendment purposes cannot assert sovereign immunity as a defense to an admiralty suit. The judgment of the Court of Appeals was reversed.

Material Misrepresentation in Policy Application Warrants Rescission

Commercial Union Ins. Co. v. Pesante,
2006 U.S. App. LEXIS 20391 (1st Cir. 2006)

Appellant insurer brought a declaratory judgment action against appellee insured in the United States District Court for the District of Rhode Island, seeking a declaration that it was not liable under a marine insurance policy issued to the insured for losses incurred by the insured's vessel. The insurer appealed the district court's entry of judgment for the insured and denial of the insurer's motion for summary judgment.

The insurer issued a policy to the insured which contained an express warranty that the only commercial use of the insured vessel was to be for lobstering. The insured admitted that he never engaged in lobstering, but instead used the vessel for gill netting. Insurance for gill net vessels was more expensive due to greater risk. The district court based its denial of summary judgment on a finding that there was no causal relationship between the insured's breaches and the losses suffered.

On appeal, the insurer argued that the insured made a material misrepresentation in his application for insurance and that the policy was therefore voidable under either federal or Rhode Island law. Reversing, the court found it clear that the insurer would not have insured the vessel at the quoted price had it known the true nature of the vessel's use. Therefore, the misrepresentation was material and R.I. Gen. Laws § 27-18-16 (2006) governed. Because of the material misrepresentation made in the policy application, the policy was voidable from the beginning. Under Rhode Island law, the insurer's decision to rescind on the basis of the material misrepresentation had to be upheld. The court reversed the judgment of the district court and directed entry of judgment for the insurer.

The Meaning of "Operated By"

Gfroerer v. Ace Am. Ins. Co.,
2006 U.S. App. LEXIS 12975 (2d Cir. 2006)

The U.S. District Court for the Western District of New York granted summary judgment in favor of defendant insurer, concluding (with the aid of extrinsic evidence) that the "High Performance Vehicle Endorsement" of the marine insurance policy was valid as to first party coverage issues because "operated by" was not reasonably susceptible to any meaning but "actually driving" and was, therefore, unambiguous. Plaintiff insured appealed.

The U.S. Court of Appeals for the Second Circuit held that the district court's consideration of the extrinsic evidence on a motion for summary judgment was clear error under New York law. However, because the error was harmless, the appellate court affirmed the grant of summary judgment in favor of the insurer. Looking within the four corners of the insurance policy, the term "operated by" unquestionably referred to the operation of the insured's particular vessel, which was precisely described as a thirty-eight foot Donzi 38 ZX "high performance vessel." In light of the Donzi's performance capabilities, the only one capable of truly operating such a vessel was the actual driver. Therefore, ignoring the extrinsic evidence and reading the policy in light of the insured's basic knowledge of the particular vessel which he sought to insure, the appellate court believed that the average insured would have understood the term "operated by" to mean, clearly and unambiguously, "directly and physically controlled by." The judgment of the district court was affirmed.

Insurer has Burden of Proving Insured Breached Warranty

Henry's Marine Serv. v. Fireman's Fund Ins. Co.,
2006 U.S. App. LEXIS 12770 (5th Cir. 2006)

In a declaratory judgment action regarding coverage under a boat broker's policy, defendant insurer appealed the judgment of the U.S. District

Court for the Eastern District of Louisiana: (1) granting summary judgment for plaintiff insured on the issue of coverage, (2) refusing to allow the insurer to amend its pleadings, and (3) refusing to exclude evidence offered by the insured on the issue of damages.

The Court of Appeals held that the District Court did not err as a matter of law in finding that coverage existed. The policy provision at issue was an explicit warranty. Therefore, in order to negate coverage, the insurer had to prove that the insured breached the warranty. Because the insurer presented no evidence to show a breach, it did not meet its burden. There was no abuse of discretion in the District Court's denial of the insurer's motion for leave to amend. Because the insurer filed its motion almost five months after the deadline for amendments set by the scheduling order, Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 16(a) applied, which required the insurer to show good cause. The insurer's admission that it did not previously assert the grounds for the motion to amend—that it thought it would prevail on other grounds—did not constitute good cause. Finally, there was no abuse of discretion in the District Court's decision not to exclude the insured's evidence of damages under Fed.R.Civ.P. 37(c) for not meeting the requirements of Fed.R.Civ.P. 26(a)(1)(C), because, while the insured's initial response was not perfect, it was not a failure to disclose under Rule 26(a)(1).

The judgment of the District Court was affirmed.

***Pennsylvania* Rule Burden Shifting Inapplicable Where Statutory Faults Were Unrelated to Cause of Casualty**

Halliburton Energy Services v. Denet Towing Services, Inc.,
No. 05-30723 (5th Cir. 2006)

A barge owned by Halliburton suddenly listed to port while being towed by a Denet Towing tug on the Mississippi River near New Orleans, causing seven of eight large cargo tanks containing dry bulk barite mounted to the deck of the barge to break free and fall overboard.

Halliburton sued Denet and various insurers for damages under maritime tort, contract and cargo damage theories, and for the costs of the cargo recovery and contribution under CERCLA. Halliburton alleged that the tug's master negligently lost control of the tow and/or negligently took an unseaworthy barge under tow; that Denet breached the towage contract by failing to deliver the barge to its destination; and that it breached its warranty of workmanlike service by failing to provide a towing vessel and crew adequate to perform the contract. Denet responded that Halliburton tendered an unseaworthy barge due to cracks and holes near the waterline that were not apparent on visual inspection.

The U.S. District Court for the Eastern District of Louisiana, following a bench trial, found for defendant Denet. The Court of Appeals affirmed.

The Court of Appeals agreed with the trial court that the tug's statutory violations (the master had been on duty for 18½ hours in the relevant 24 hour period, and failed to have a second licensed operator on board) were unrelated to the cause of the casualty, the unseaworthiness of the barge. Therefore, the *Pennsylvania* burden shifting rule did not apply. The Supreme Court did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable or remote.

The Meaning of "Less Unlikely" and "More Likely than Not"

Sycamore Mngmt., Ltd. v. Intl. Marine Terminals Partnership,
No. 05-30271 (5th Cir. 2006)

Sycamore sued International Marine Terminals ("IMT") for damages resulting from the collision of Sycamore's vessel, the M/V Global Spirit, with several barges on the Mississippi River. After a bench trial, the U.S. District Court for the Eastern District of Louisiana found for Sycamore. The Court of Appeals affirmed.

As the vessel was proceeding up the river at about 2:00 a.m., a chain at IMT's terminal parted, allowing eight barges to drift out into the river. The ship's pilot reported colliding with some unidentified barges, and the damage was consistent with collision with a barge. There was no evidence that any other barges were on the river in the vicinity at the time.

The parties' marine surveyors examined the barges, which displayed little or no visible damage, and disagreed as to whether they could have caused the damage to the vessel. The trial court reasoned that it must choose between two unlikely scenarios: 1) the ship collided with some unknown phantom object rather than the barges; or 2) the ship did collide with the barges, which displayed little or no recent damage. Issuing its ruling orally, the court stated at one point that as a matter of practicality the latter seemed "less unlikely" and was therefore adopted by the court as the explanation.

On appeal, IMT argued that the district applied an incorrect legal standard, substituting a "less unlikely" standard for a more likely than not (i.e., preponderance of evidence) one. The U.S. Court of Appeals for the Fifth Circuit disagreed, noting that the District Court's order specifically invoked the "more likely than not" standard in two other places. The Court of Appeals also concluded that the trial court's form of words ("although both scenarios are seemingly unlikely, as a matter of practicality, the latter is less unlikely than the former, and thus probably occurred") was not inconsistent with the application of a preponderance standard.

The Meaning of "Specific Jurisdiction"

Fortis Corporate Ins. v. Viken Ship Mngmt.,
2006 WL 1549113 (6th Cir. 2006)

Fortis, a cargo insurer, as subrogee of the cargo owner, sued Viken Lakers and Viken Ship Management, the Norwegian owner and manager respectively of a fleet of ocean-going cargo vessels, for seawater rust damage to a cargo of steel coils carried aboard the M/V Inviken from Szczecin, Poland, to Toledo, Ohio. The vessel was under a long-term time charter to FedNav International, a Canadian company, and subchartered for the voyage in question to Metallia LLC, a U.S. company.

The U.S. District Court for the Northern District of Ohio, Western Division, at Toledo, granted defendants' motion to dismiss for lack of personal jurisdiction. The Sixth Circuit Court of Appeals reversed, holding that:

1. the defendants purposely availed themselves of the forum state by rigging their ships for Great Lakes transport;

2. the claims arose out of activities within the state of Ohio, when the vessel delivered damaged cargo in the state; and

3. the exercise of specific personal jurisdiction over the defendants was reasonable.

"Specific jurisdiction" subjects a defendant to suit in the forum state only as to claims that arise out of or relate to a defendant's contacts with the forum state. In contrast, "general jurisdiction" is established when a defendant has continuous and systematic contacts with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims.

The vessel owner defendants subjected themselves to specific jurisdiction both by rigging their ocean-going vessel to allow the charterers to transport cargo to Great Lakes ports, including ports in the forum state, Ohio, and by making frequent calls at Great Lakes ports. The exercise of specific personal jurisdiction was reasonable, as required by due process, where discovery across borders had posed few problems, all relevant witnesses spoke English, Ohio has a strong interest in ensuring that shipments to its ports are reliable, and the subrogee's interest in obtaining relief was particularly strong because it had sued only the foreign defendants.

Storage Tank Leakage Claims Not Barred by Policy Exclusions

Wolf Lake Terminals, Inc. v. Mut. Marine Ins. Co.,
2006 U.S. Dist. LEXIS 42090 (N.D. Ind. 2005)

Plaintiffs, bulk liquid storage companies, sued defendant insurers, seeking reimbursement for the indemnification and defense costs incurred during the course of environmental remediation at two sites, prejudgment interest, and attorneys' fees. In addition to the parties' cross motions for summary judgment, the storage companies filed a motion for a default judgment against one insurer and a motion to strike certain affidavits and exhibits.

Because the insurers did not respond to the storage companies' arguments that the contamination at issue fell within the policy definition of "personal injury" and was not excluded by either the "sudden and accidental" or "absolute pollution" exclusions under Indiana law, the court concluded that the companies were correct. Despite these concessions by the insurers, the storage companies still had to show that the contamination occurred during the relevant policy period in order to establish that the policy actually was triggered. Because the insurers did not provide countervailing evidence to refute the companies' claims with respect to four tanks, the court found that the contamination occurred at and around these tanks during the policy period. However, a genuine issue of material fact as to when the contamination began at one tank precluded the court's legal determination as to whether the insurers had to reimburse the costs associated with that tank. In addition, although prejudgment interest was otherwise readily calculable, the issue regarding the tank in question and the remaining dispute over the appropriate deductible precluded an award of interest.

The cross-motions for summary judgment were granted in part and denied in part; the companies were successful with their claims as to four out of the five storage tanks at issue. The companies' motion for default judgment was denied, and the motion to strike was denied except with respect to one paragraph of a witness affidavit.

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Insurer Could Not Rescind Policy After Insured Brought Coverage Action

Atmel Corp. v. St. Paul Fire & Marine Ins. Co.,
416 F. Supp. 2d 802 (D. Cal. 2006)

Plaintiff insured sued defendant insurer alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The insurer counterclaimed, alleging rescission, breach of contract and intentional misrepresentation, and raised rescission as one of several affirmative defenses. The insured moved for partial summary judgment, and the insurer for summary judgment on all counts.

The insured obtained a general liability and errors and omissions insurance policy from the insurer. The insured was sued by a customer for damage caused by defective computer chips. The insurer refused to provide a defense to the litigation. After the insured brought the present action, the insurer unilaterally rescinded the policy on the grounds that the insured knew about the computer chip problem before the policy was issued and failed to disclose it in the application for insurance. The court found that under Cal. Ins. Code § 650, the insurer could not unilaterally rescind the policy because the insured had already filed suit to enforce its rights under the policy. However, the insurer could raise rescission as a counterclaim and as an affirmative defense. There were issues of fact as to whether the insured misrepresented or concealed information in its application and whether the information that was not disclosed was material. The evidence did not show that the insurer intentionally relinquished its right to rescind after knowledge of the facts of the computer chip problem.

The insured's motion for partial summary judgment was granted in the respect that the insurer was precluded from unilaterally rescinding the insurance policy after the insured filed a lawsuit to enforce the policy, but was denied in all other respects. The insurer's motion for summary judgment was denied.

Attorney's Fees and Costs Not Recoverable Absent Proof of Bad Faith

The Connecticut Indemnity Co. v. Perrotti,
No. 3:01-1410 (D. Conn. 2005)

The defendant's request for an award of attorneys' fees and expenses incurred in defending a declaratory judgment action was denied because he failed to establish that the plaintiff insurer had acted in bad faith. The established rule in the Second Circuit is that an award of fees and expenses in an admiralty action is discretionary with the district judge upon a finding of bad faith. This rule trumps any state law on the subject.

The defendant's separate request for an award of attorney's fees for defending the underlying action is denied without prejudice to renewal because it cannot reasonably be determined from the invoices submitted: (1) whether the work was performed in defense of that action or the present one, and, if so, (2) whether the charges are duplicative of fees already awarded by the court.

State Law Applied to Helicopter Owner/Platform Owner Contracts

Alleman v. Omni Energy Servs. Corp.,
434 F. Supp. 2d 405 (E.D. La. 2006)

Plaintiffs, including subcontractor employees, sued defendant helicopter owner for damages related to an accident. The helicopter owner and third-party plaintiff insurer filed a third-party complaint against third-party defendant platform owner seeking indemnification and defense costs, or, alternatively, contribution. The helicopter owner and the platform owner cross-moved for partial summary judgment as to contractual indemnification.

The accident occurred when a helicopter attempted to land on an oil production platform in the Gulf of Mexico. The helicopter owner argued that its contracts with the platform owner were governed by general maritime law. The platform owner argued that state law applied, as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356, and that the indemnity clause was unenforceable under the Louisiana Oilfield Anti-Indemnity Act (LOAIA), La. Rev. Stat. Ann. § 9:2780. The court determined that state law applied to the contracts through the OCSLA because: (1) the contracts were non-maritime contracts since the agreements did not have a maritime purpose and the purpose of the contract, to transport workers to and from platforms over water in an aircraft, was not to effectuate maritime commerce, and (2) the LOAIA did not conflict with federal law. However, summary judgment was inappropriate because it could not be determined whether the LOAIA barred the helicopter owner's claims, since there had been no judicial determination of whether it was at fault for the accident. The court denied the partial summary judgment motions.

[15072]

More than Breach of Warranty Required to Void Coverage

Chambers v. Joshua Marine, Inc., 430 F. Supp. 2d 580 (E.D. La. 2006)

Plaintiff project manager, who broke his ankle while he was a passenger on a crewboat, sued defendant, which was the crewboat owner and operator. He subsequently filed a supplemental and amended complaint with the intent of bringing a direct action against defendant insurer pursuant to La. Rev. Stat. Ann. § 22.655. The insurer sought summary judgment on the ground that the insurance policy in issue did not cover the operator because the operator breached several conditions or express warranties that it was bound by when it accepted the policy, and that it was subject to the standards of *uberrimae fidei*, or "utmost good faith." Specifically, the insurer claimed that the boat was being operated in violation of the policy's seaworthiness, licensed captain, and persons on board warranties. However, the court held that the *uberrimae fidei* doctrine was not entrenched federal precedent, and that Louisiana had a substantial and legitimate interest in the application of its own insurance laws. While the mere breach of a warranty was sufficient to void coverage under the doctrine, La. Rev. Stat. Ann. § 22:619(A) required an intent to deceive as well. Because the insurer had to prove that the operator had the intent to deceive in addition to breaching a warranty, the court held that there were genuine issues of material fact that would best be resolved by the trier of fact, and denied the insurer's motion for summary judgment.

The Meaning of "Standard Time"

Empire Fire & Marine Ins. Co. v. Cont'l Cas. Co.,
426 F. Supp. 2d 329 (D. Md. 2006)

Plaintiff insurance carrier brought an action as a result of a dispute between plaintiff and defendant insurance carrier over the obligation of each insurance carrier, if any, to indemnify and defend an insured pursuant to commercial automobile insurance policies. The parties filed cross motions for summary judgment.

On May 7, 2004, at 12:28 a.m. daylight saving time, a driver was involved in an automobile accident while operating a tractor-trailer owned by the insured. Plaintiff claimed that because daylight saving time was in effect, the accident actually occurred on May 6, 2004, at 11:28 p.m. standard time. The language and the statutory intent of the Uniform Time Act, 15 U.S.C. §§ 260–267, established that during a designated period, the standard time of each zone was advanced one hour. Thus, within a particular zone, the advanced, daylight saving time became the standard time for that zone during the designated period. Md. Ann. Code Art. 1, § 35 did not exempt Maryland from daylight saving time. No legislation had been enacted in Maryland that would have exempted the state from the observance of daylight saving time. Thus, Maryland was required to observe daylight saving time, and to abide by the statutory definition of "standard time" when daylight saving time was in effect. The court concluded that daylight saving time was the standard time when daylight saving time was in effect and, accordingly, plaintiff's policy rather than defendant's was in effect at the time of the accident.

Plaintiff's motion for partial summary judgment was denied. Defendant's motion for summary judgment was granted.

Misrepresentations as to Size Matter

Am. Home Assur. Co. v. Masters' Ships Mgmt. S.A.,
423 F. Supp.2d 193 (S.D.N.Y. 2006)

Plaintiff marine insurers sought a declaratory judgment that the marine insurance policy issued to defendants, a vessel owner and the manager of the owner's vessel, was voidable *ab initio* because of defendants' alleged breaches of the duty of utmost good faith, or, alternatively, that they could deny coverage because defendants could not show a valid claim and because the vessel was unseaworthy. Defendants counterclaimed for coverage and damages.

The insurers underwrote hull and machinery insurance on the vessel. The insurers thought that they were insuring a fleet, based on representations by defendants that there was another vessel and plans were to acquire a third vessel. In fact, the owner sold the second vessel before the inception of the policy and never acquired the third vessel. The insurers testified that, had they known that they were insuring only one vessel, they either would not have underwritten the risk or would have demanded a higher premium. The owner's sole remaining vessel ran aground. There was substantial evidence that the manager ordered the destruction of certain of the ship's logs and a computer. Although defendants claimed that the ship was a total loss, the insurers' expert testified otherwise. The court held that defendants made intentional, material misrepresentations concerning the size of the owner's fleet, that the insurers reasonably relied on those misrepresentations in making coverage decisions, and that the proper remedy for defendants' breach of the duty of utmost good faith was a declaratory judgment that the policy was voidable *ab initio* at the insurers' instance. In any event, defendants could not show a valid claim under the policy. The court denied defendants' judgment on their counterclaims.

All-Risk Coverage Reached Warehouse in China

N. Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.,
413 F. Supp.2d 295 (S.D. N.Y. 2006)

Plaintiff insured sued defendants for breach of a marine insurance policy. The insured moved for summary judgment, arguing that defendants were obligated to indemnify it for the insured's loss of cordless telephones at a warehouse in China. Defendants cross-moved for summary judgment, arguing that the policy did not cover the insured's loss and that the insured's claim was time-barred under the policy.

The warehouse endorsement in the policy at issue provided all-risk coverage for goods shipped to the warehouse. Because the insured had demonstrated the existence of all-risk coverage for its loss, it did not need to prove the cause of the loss. Moreover, defendants had not argued that any express exception to the coverage was applicable. Further, defendants had not carried their burden of demonstrating that the cause of action accrued over a year before the insured preserved its right to file suit. Accordingly, the court would not grant summary judgment on defendants' time-bar argument. However, the insured had not demonstrated that defendants took any action that would have lulled a reasonable insured into delaying the filing of the litigation.

The insured's motion for summary judgment was granted in part and denied as to its claim that its delay in filing the action was caused by defendants. Defendants' cross-motion was denied.

No Federal Court Jurisdiction Over Driver's Injury on Dock

Torres Vazquez v. Commercial Union Ins. Co.,
417 F. Supp. 2d 227 (D.P.R. 2006)

Plaintiffs, an employee and others, sued defendants, a terminal and its insurer, seeking compensation for damages that the employee allegedly suffered while employed as a driver for a trucker. The insurer moved for summary judgment, claiming lack of subject matter jurisdiction.

Plaintiffs alleged that the employee was injured at a port when a crane, which was leased by a terminal, its parent, and others, lifted a container that was still attached to the employee's truck. The court determined that the proper rule under which to challenge federal jurisdiction was Fed.R.Civ.P. 12(b)(1), rather than Fed.R.Civ.P. 56. There was no jurisdiction under 28 U.S.C. § 1337(a), because plaintiffs did not set forth facts sufficient to state a cause of action arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and or monopolies. There was no complete diversity of citizenship as required by 28 U.S.C. § 1332, because plaintiffs, the terminal, and the insurer were all citizens of Puerto Rico. The terminal's citizenship was Puerto Rican because its principal place of business was in Puerto Rico. Under § 1332(c)(1), the insurer's state of citizenship was the same as its insured because the claims were pursuant to Puerto Rico's direct action statute. In addition, plaintiffs did not pierce the corporate veil with respect to the terminal's parent.

The court treated the insurer's summary judgment motion as a motion to dismiss and granted the motion. The court dismissed the federal claims with prejudice and dismissed the state claims without prejudice.

Insurer in Contempt of Bankruptcy Court Order for Failure to Pay Indemnity Claims

In re Suncruz Casinos LLC,
2006 Bankr. LEXIS 746 (Bankr. S.D. Fla. 2006)

Confirmed Chapter 11 cases came on for hearing on the joint motion of the post-confirmation Plan Administrator for the liquidating debtors, and their primary secured creditor, seeking an order under 11 U.S.C. §§ 1129, 105(a), and Fed. R. Bankr. P. §§ 9020, 9014, holding the debtors' maritime insurer in civil contempt and awarding sanctions for violation of the permanent injunction entered as part of the Order confirming the Chapter 11 Plan.

The Confirmation Order included specific injunctive language regarding the right of any party to assert a pre-confirmation claim. The question before the court was whether certain actions taken by the insurer since entry of the Confirmation Order violated the terms of that injunction such that the insurer was in contempt of court for acting in a manner prohibited by the Order. The insurer's failure to indemnify and reimburse the Plan Administrator under the liability policies was based solely and exclusively on the insurer's insistence that the policies were no longer in force by virtue of the debtors' failure to pay "Release Calls." Because it failed to file an Administrative Expense Claim, the insurer was barred by the permanent injunction contained in the Order and by virtue of the provisions of 11 U.S.C. § 1141. The insurer's failure to pay the indemnity claims was, therefore, a direct and knowing violation of the provisions of the Order. Because the insurer knew of the provisions of the Order and failed to abide by them, its actions were willful. The court accordingly found that the insurer was in civil contempt of court.

The motion was granted. The insurer could purge its contempt on a preliminary basis by the payment of all outstanding claims for indemnification made by debtors or the Plan Administrator since February 20, 2005, as to which the insurer had no good faith objection. The insurer was directed to honor and continue to honor all contractual obligations it had under the policies, without regard to the debtors' non-payment of release calls.

Subrogated Insurer Bound by COGSA Package Limitation

Mitsui Marine & Fire Ins. Co. v. Hanjin Shipping Co.,
2006 Ga. App. LEXIS 675; 2006 Fulton County D. Rep. 1778
(Ct. App., Ga. 2006)

Plaintiff insurance company brought a subrogation claim against a shipping company and a railroad, seeking reimbursement for a claim paid on goods damaged in shipment. The trial court granted summary judgment in favor of the shipping company, finding that liability was limited by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 *et seq.,* to $500 per package. The insurance company and the railroad appealed.

The shipping company contracted to ship yarn bobbins brought by the insured from Japan to the United States, and then to an Alabama rail facility. The bobbins were damaged while being hauled by the railroad on land. The shipping company argued that if it was liable at all, liability was limited to $500 per package, since its bills of lading with the freight-forwarding company incorporated COGSA's package limitation. The appellate court held that the $500 per package limit applied and that each pallet, containing three bobbins, was a "package." The appellate court affirmed. The railroad enjoyed the benefit of the liability limit, even though it was not a party to the bills of lading. The insured and the insurance company were bound by the liability limitations negotiated by the freight-forwarding company that the insured had hired. The definition of "Merchant" in the bills made no difference. An intermediary bound a cargo owner to the liability limits it negotiated with downstream carriers, and neither privity of contract nor a traditional agency relationship were required. It did not matter whether the insurance company proceeded in contract or tort.

Plaintiffs Lacked Standing to Sue for Declaration of Coverage

Barron v. Shelter Mut. Ins. Co.,
2006 Mo. App. LEXIS 1105 (Ct. App., Mo., 2006)

Respondent family of children killed in a boating accident dismissed its original personal injury and wrongful death lawsuit upon settlement and filed a declaratory judgment action against appellant insurer of the defendant boaters in the original suit, seeking additional coverage under the insurer's policy. The Circuit Court of Buchanan County, Missouri, granted the family's motion for summary judgment. The insurer appealed.

On review, the appellate court did not reach the merits of the insurer's appeal because it found that the trial court had erred by granting summary judgment. Because the family's petition did not state a claim upon which relief could be granted, the trial court lacked jurisdiction to consider the family's claim. The family failed to present a justiciable controversy because it did not make the insured boaters from the original suit parties to the declaratory judgment action, and the boaters were indispensable parties. The family did not have a judgment against the boaters or a settlement establishing their liability. Furthermore, family members were not parties to the insurance contracts between the boaters and the insurer, and were not third-party beneficiaries. Because they had not yet secured a judgment against the boaters, the family did not stand in the boaters' shoes. Hence, there was no justiciable controversy, and the family lacked standing to request a declaration that coverage existed under the boaters' insurance policies.

The summary judgment was reversed and the family's petition was dismissed.

The Meaning of "Follow the Fortunes"

Granite State Ins. Co. v. Ace Amer. Reins. Co.,
No. 604347/04 (N.Y. Sup. Ct., N.Y. Co. 2006)

Plaintiff insurers sued their reinsurer, ACE, for indemnification of monies paid by plaintiffs on claims by five separate insureds for losses in toxic tort (asbestos and toxic chemical exposures) or property damage actions. Plaintiffs' motion for summary judgment was granted as to four of the five claims, and denied as to the fifth with leave to renew following completion of discovery to determine whether plaintiffs had acted in bad faith by paying that claim.

[15078]

Plaintiffs purchased a total of 11 facultative reinsurance policies from ACE, covering 11 policies of insurance issued to the five insureds, all evidenced by identical facultative reinsurance certificates that contained the following clauses.

> 1. APPLICATION OF CERTIFICATE
>
> The Reinsurer agrees to indemnify the Company against loss or damage which the Company is legally obligated to pay under the Company's policy reinsured, resulting from occurrences taking place during the period this Certificate is in effect, subject to the Reinsurance Accepted limits shown in the declarations. The liability of the Reinsurer shall follow that of the Company and, except as otherwise specifically provided herein or designated as non-concurrent reinsurance in the declarations, shall be subject in all respects to all of the terms and conditions of the Company's policy except such as may purport to create a direct obligation of the Reinsurer to the original Insured.
>
> * * *
>
> 4. LOSS SETTLEMENT
>
> All claims involving this reinsurance, when settled by the Company shall be binding on the Reinsurer, which shall be bound to pay its proportion of such settlements. . . .
>
> Payment of its proportion of the loss and expense paid by the Company will be made by the Reinsurer to the Company promptly following receipt of proof of loss. . . .

After plaintiffs submitted timely claims for reimbursement, ACE claimed late notice and demanded responses to numerous questions and requests for documentation, which it contends were never fully answered. Plaintiffs commenced the action when it became clear that payment would not be forthcoming, and move for summary judgment on the basis that the unambiguous language of the policies called for ACE to pay claims "promptly following receipt of proof of loss."

The court noted that while a presumption of prejudice applies to late notice received by an insurer from an insured, no such presumption applies to late notice of a claim between an insurer and its reinsurer. Under New York law the reinsurer must demonstrate how it was prejudiced by late notice. ACE had produced no evidence of prejudice, and would be unlikely to do so after any amount of discovery. Its demand for further discovery was “rather dubious, as ACE, if anyone, should know if it was prejudiced.”

The Application of Certificate clause sets out the “follow the fortune” doctrine, pursuant to which the reinsurer must indemnify its reinsured and is not in a position to second guess good-faith determinations made by its reinsured to pay claims. The clause leaves a reinsurer little room to dispute the reinsured’s conduct of the case.

There is no ambiguity in the phrase “proof of loss,” and no need to read industry standards into its interpretation, as ACE contends. Plaintiffs’ loss is simply the monies they were required to pay under their policies with their insureds.

The purpose of the “follow the fortunes” clause is to forestall extensive scrutiny of a cedent’s settlement by its reinsurer. Absent fraud or bad faith, which is not shown as to four of the five claims, ACE cannot prevail simply by arguing that it is unsatisfied with how plaintiffs settled the claims.

Having received over 200 boxes of records from plaintiffs, as to which all claims of privilege were waived, ACE could not convince the court that more discovery was needed with respect to the claims on which summary judgment was granted in plaintiffs’ favor. As to the remaining claim, involving only a single insured, a limited factual question warranted some further discovery.

Insurers had Burden of Proof on Lack of Due Diligence Defense

Secunda Marine Services Ltd. v. Liberty Mut. Ins. Co.,
2006 NSCA 82 (Nova Scotia Court of Appeal 2006)

Appellants, insurers under a policy of marine insurance, sought reversal of a decision and order entered by a Nova Scotia Supreme Court Justice after a three-day trial, holding that appellants were required to indemnify the respondent vessel owner (and named insured) Secunda for losses incurred as a result of damage to its tug, Chebucto Sea. The Court of Appeals dismissed the appeal with costs to respondent.

While towing a barge from Prince Edward Island to Newfoundland, the tug lost its propeller and tail shaft. The cost of repairs was close to Canadian

$700,000.00. The insurers refused to indemnify Secunda, claiming that a lack of due diligence caused the tail shaft to break.

The Court of Appeals addressed two primary issues:

1. Who has the burden of proving that the loss did, or did not, result from lack of due diligence on the part of the shipowner/insured?

2. Did the loss occur as a result of lack of due diligence?

The appellate court concluded that the trial judge was correct in placing the burden of proof on the appellant insurers; and that his finding that the loss did not result from any lack of due diligence on the part of the vessel owner should not be disturbed. After reciting the tug's history of repairs, dry-dockings and general and special inspections, the court pointed out that only one day after the insurance policy in question came into effect, the tug lost pitch control to the propeller while entering Stephenville Harbor with the barge in tow. Inspection by divers revealed that the tail shaft had broken off at the flange, resulting in the loss of the propeller. Metallurgical examination established that the tail shaft failed as a result of corrosion fatigue cracking which caused a brittle fracture.

Secunda brought suit for breach of the insurance contract after the underwriters refused to pay the claim, because of Secunda's alleged lack of due diligence in maintaining the vessel. The trial judge found that Secunda had exercised due diligence, complied with all statutory requirements, and used reasonable care in maintaining its vessel. He awarded full damages in the amount of $699,135.80, together with costs of $25,349.07 and prejudgment interest of $120,673.65. The Court of Appeals affirmed the award in all respects, and added an award of costs on appeal.

The appellate court noted that a trial judge's findings of fact, and inferences drawn from those facts, were not to be disturbed unless it could be shown that they were "the result of some palpable and overriding error." On questions of law, the trial judge must be correct. "The standard of review is one of correctness." Mixed questions of fact and law are reviewed under the palpable and overriding error standard unless the alleged error could be traced to an error of law that could be isolated from the mixed question of fact and law. If the legal principle in issue was not "readily extricable," the mixed issue of law and fact would be reviewed under the palpable and overriding error standard.

As to the issue of burden of proof of absence or presence of due diligence, the trial transcript revealed that counsel for both sides were so confident that they agreed to have the case decided on its merits without regard to who bore the burden. In any event, the trial court correctly concluded that want of due diligence by the shipowner was not shown to have caused the casualty.

In the policy in question, the Inchmaree Clause was deleted and, for an additional premium, the Liner Negligence Clause was inserted to provide broader coverage. Thus the policy read:

> In consideration of *additional premium of included* (*sic*), it is understood and agreed that the ADDITIONAL PERILS (INCHMAREE) Clause of the attached policy is deleted and in place thereof the following inserted:
>
> > Subject to the conditions of this Policy, this insurance also covers:
> >
> > a. Breakdown of motor generators or other electrical machinery and electrical connections thereto; bursting of boilers; *breakage of shafts;* or any latent defect in the machinery or hull;
> >
> > b. Loss of damage to the subject matter insured directly caused by:
> >
> > 1. Accidents on shipboard or elsewhere, other than breakdown of or accidents to nuclear installations or reactors on board the Insured Vessel;
> >
> > 2. Negligence, error or judgment or incompetence of any person;
> >
> > excluding under both "a" and "b" above only the cost of repairing, replacing or renewing any part condemned solely as a result of a latent defect, wear and tear, gradual deterioration or fault or error in design or construction;
> >
> > *provided such loss or damage* (either as described in said "a" or "b" or both) *has not resulted from want of due negligence by the Assured* (s), the Owner(s) or Manager(s) of the vessel, or any of them. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel. [Emphasis the Court's].

The Liner Negligence Clause is an extension of the Inchmaree Clause intended to provide additional coverage, but each clause excludes coverage for damage caused by the want of due diligence of the assured, the owners or the managers of the vessel. The Liner Negligence Clause, in general, is said to cover all accidental damage to the vessel, its hull and machinery.

The Liner Negligence Clause covers the breakage of shafts whatever the cause; the exclusion in the clause is only for want of due diligence by the insured and/or the manager of the vessel. Once an insured proves a *prima-facie* case supporting coverage, the burden shifts to the insurers to prove the loss was caused by an exclusion, which was not done here.

The clear weight of Canadian and U.S. judicial authority confirms that because "want of due diligence" is an affirmative defense for insurers, the burden is on the insurer to bring itself within the exclusion. The trial judge did not err in finding that Secunda had exercised due diligence (defined as "reasonable care in the circumstances") in the maintenance of its vessel, so that appellants were liable under the terms of the policy to indemnify it for the full amount of the loss. There was no "palpable and overriding error" in the trial court's findings of fact or the inferences drawn from those facts.

Newsletter Editor's Note: Items for future issues may be submitted to Gene B. George, Esq., Ray, Robinson, Carle & Davies P.L.L., 1717 East 9th Street, Ste. 1650, Cleveland, OH 44114-2878, ggeorge@rayrobcle.com.

[15083]

COMMITTEE ON RECREATIONAL BOATING NEWSLETTER, SUMMER 2006

Editor: Frank P. DeGiulio

Dueling Presumptions: *Oregon vs. Pennsylvania* with a Twist

In re Superior Construction Co., 445 F.3d 1334 (11th Cir. 2006)

After dark on December 29, 2001, a twenty-five foot pleasure boat carrying twelve passengers and operated by William Brock allided with a stationary, unoccupied barge, the *Mobro 605,* in the Cedar River in Jacksonville, Florida. The boat was traveling at 22 knots at the time of impact. Brock admittedly had consumed alcohol earlier in the evening and toxicology tests taken three hours after the accident showed that he had a blood alcohol level of 0.112, well above the legal intoxication limit of 0.08 under Florida law. The barge was under bareboat charter to Superior Construction Company, which was engaged in a project to widen the Blanding Boulevard Bridge. On the night of the incident, the barge was moored parallel to the bridge, blocking all but 38 feet of the 120-foot wide navigational channel. According to eye-witnesses, only three of ten navigational lights installed on the barge were operating. Passengers on Brock's boat who had not consumed alcohol testified that the barge was virtually "invisible" until immediately prior to the allision. Brock and the twelve passengers sustained serious injuries as a result of the accident.

The barge owner, Superior, filed an action pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. § 181, *et seq.* ("the Limitation Act") in the U.S. District Court for the Middle District of Florida. Following a bench trial, the district court found that the barge operator Superior was not entitled to limit its liability and furthermore, that Superior was solely at fault for the allision notwithstanding the evidence of Brock's intoxication. The district court awarded in excess of $19 million to the injured claimants. Superior appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.

In a rather remarkable decision, the Eleventh Circuit affirmed the district court's judgment and, in so doing, engaged in a lengthy discussion of the interplay between the legal presumptions created by the doctrines known as the *Pennsylvania* Rule and the *Oregon* Rule where both are applicable, and the application of the *Pennsylvania* Rule where there is evidence of intoxication by a vessel operator. *In re Superior Construction Co.,* 445 F.3d 1334 (11th Cir. April 14, 2006).

The *Oregon* and *Pennsylvania* Rules take their names from the court decisions in which they were originally created. Both rules create legal presumptions which impact the burden of proof obligations of parties in a maritime collision case. The *Oregon* Rule creates a rebuttable presumption of fault against a moving vessel that strikes a stationary object or vessel which can be overcome only upon proof that the allision was the fault of the stationary object, that the moving vessel was operated with reasonable care or that the allision resulted from an inevitable accident. Under the *Pennsylvania* Rule, a finding by the court that a vessel or its operator violated a statute or regulation intended to prevent collisions creates a presumption of fault which can be overcome only by proof that the violation "could not have been" a cause of the accident.

On appeal, Superior argued that the district court had erred in finding that the barge constituted an unlawful obstruction to navigation in violation of 33 U.S.C. § 409, thereby giving rise to a presumption of fault by Superior under the *Pennsylvania* Rule, which, according to the district court, Superior could not overcome, and further that the district court had erred in finding that Brock's intoxication "could not have been" a cause of the accident so as to permit Brock to overcome the presumption of fault imposed upon him by the *Pennsylvania* Rule and, therefore, to escape the imposition of comparative fault for the allision.

In its opinion the Eleventh Circuit first addressed whether both rules were applicable. The court held that where a moving vessel strikes a stationary object or vessel, the *Oregon* Rule applies in the first instance to impose a burden of proof of fault on the moving vessel. However, if the moving vessel establishes that the stationary object or vessel violated a statute or regulation, the initial presumption falls away and the burden of proof is shifted to the stationary vessel by the virtue of the *Pennsylvania* Rule to show that its violation could not have been a cause of the accident. Finally, the court recognized that if the stationary vessel then establishes that the moving vessel or its operator also violated a statute or regulation, both vessels must then prove that their statutory violations could not have been a cause of the incident in order to escape the imposition of fault—if neither can overcome the *Pennsylvania* Rule presumption, the court must apportion liability between them based on comparative fault.

The Eleventh Circuit held that the positioning of the barge by Superior violated 33 U.S.C. § 409, which states: "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft . . ." and, therefore, that the district court had correctly found that the burden of proof shifted from Brock to Superior to prove that Superior's statutory violation could not have been a cause of the collision under the *Pennsylvania* Rule and that Superior could not overcome the presumption of fault imposed against it.

The court of appeals then turned to Superior's argument that the district court had erred in its finding that Brock had no comparative fault for the allision because he had overcome the *Pennsylvania* Rule's presumption imposed against him by proof that his operation of the boat while intoxicated "could not have been" a cause of the allision. At trial the parties had presented conflicting expert testimony regarding Brock's toxicology tests. Brock's expert gave an opinion that his injuries would have caused his blood alcohol level to increase after the accident, making the results of the test inconclusive as to his intoxication level at the time of the incident. Superior's expert testified that the results of the toxicology test taken three hours after the incident meant that his blood alcohol level was even higher at the time of the incident.

However, the court of appeals noted that the district court had assumed for the purposes of its opinion that Brock's blood alcohol level exceeded the permissible levels under both Florida statutes and federal law at the time of the allision, thereby placing him in violation of a statute and subjecting him to the burden of the *Pennsylvania* Rule to prove that his legal intoxication could not have been a cause of the collision. On appeal Superior argued that it was "impossible" as a matter of law for the district court to conclude that Brock had satisfied his *Pennsylvania* Rule burden and that a court must always apportion some fault to a vessel whose operator was legally intoxicated at the time of an incident.

The court of appeals rejected Superior's argument, holding that the *Pennsylvania* Rule creates a rebuttable, but not insurmoutable, burden of proof that may be overcome in an appropriate case, even where a vessel operator has violated a Boating Under the Influence statute. The court found the district court had "ample evidence" from which to conclude that Brock's intoxication "could not have been" a cause of the allision. Specifically, the appellate court pointed to expert testimony that Brock's operation of the boat prior to the allision was proper in all respects and indicative of no impairment of his motor skills or mental facilities. More importantly, according to the court, was the testimony by Brock's passengers that the barge was virtually invisible until immediately prior to impact, indicating that the allision could not have been avoided by Brock even if he had been stone sober.

[15086]

First Circuit's Final Warning to Buyers—Record Your Bill of Sale

Mullane v. Chambers, 438 F.3d 132 (1st Cir. 2006)

The U.S. Court of Appeals for the First Circuit recently issued a decision which may represent the final installment in Dr. David Mullane's eight year litigation saga arising from his seemingly routine purchase of the yacht LADY B GONE in 1998. The message to buyers is clear: record your bill of sale immediately.

Dr. Mullane purchased the federally documented LADY B GONE from David and Angela Murphy pursuant to a bill of sale, dated July 2, 1998. As part of the transaction Mullane paid $98,000 to satisfy an existing preferred ship's mortgage on the boat held by Eastern Bank and a separate unsecured loan of $40,000 owed by Murphy. Mullane did not immediately file the bill of sale from Murphy with the National Vessel Documentation Center. On August 28, 1998, the local sheriff's department seized the yacht to enforce two state court writs of execution held by the Murphy's judgment creditors. The creditors had previously obtained judgments against Murphy totaling $97,000.

Five days after the yacht was seized by the judgment creditors, Mullane recorded his bill of sale with the National Vessel Documentation Center. Mullane filed suit in the U.S. District Court for Massachusetts and sought possession of the yacht as well as a determination that the creditors' claims against the vessel were invalid. In the first trial, the district court held that the seizure of a federally documented yacht to execute on state law judgments held by the creditors of the former owners was invalid, even though the new owner had not recorded the bill of sale at the time of the seizure. According to the district court, Mullane was a bona fide purchaser for value without notice of claims and, therefore, took the vessel free and clear of all encumbrances. *Mullane v. Chambers,* 206 F.Supp.2d 105 (D.Mass. 2002).

The judgment creditors appealed the district court's decision in the first trial to the U.S. Court of Appeals for the First Circuit. The First Circuit reversed and remanded. *Mullane v. Chambers,* 333 F.3d 322, 2003 AMC 1740 (1st Cir. 2003). On appeal, the judgment creditors argued that their seizure of the yacht was proper because Mullane's unrecorded bill of sale was invalid as to them under 46 U.S.C. § 31321 of the Federal Maritime Lien Act. 46 U.S.C. § 31321(a)(1) states in relevant part: "A bill of sale . . . whenever made, that includes any part of a documented vessel . . . must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, *against any person* except: (A) the grantor, mortgagor, or assignor; (B) the heir or devisee of the grantor, mortgagor, or assignor; and (C) *a person* having actual notice of the sale. . . ."(emphasis added).

Construing the language and intention of 46 U.S.C. § 31321, the Court of Appeals for the First Circuit agreed that judgment creditors are included among the "persons" protected by the statute and that Mullane's unrecorded bill of sale could not preclude the judgment creditors' seizure unless Mullane could prove that the creditors had actual notice of the sale at the time of the seizure. Noting that the district court did not make any findings regarding the creditors' notice, the circuit court reversed and remanded the case for further proceedings on the issue.

A second trial was conducted following remand to the district court. The district court concluded that the judgment creditors did not have actual or constructive notice of Mullane's purchase of the boat at the time of their seizure on August 28, 1998 and that the creditors' liens were, therefore, valid. *Mullane v. Chambers,* 349 F.Supp.2d 190 (D.Mass. 2004). At the second trial, Dr. Mullane argued that even if the judgment creditors' state law liens were valid, he was entitled to a superior maritime lien on the vessel under the "rule of advances" because he had satisfied the outstanding Eastern Bank mortgage at the time of the sale. The district court rejected Mullane's argument, holding that no maritime lien existing in favor of Mullane. Mullane appealed again.

In its most recent decision, *Mullane v. Chambers,* 438 F.3d 132 (1st Cir. 2006), the First Circuit considered whether the district court correctly held that Mullane's satisfaction and discharge of the Eastern Bank mortgage did not create a maritime lien in his favor. The district court's decision was affirmed. At the second trial in the district court Mullane had argued that his discharge of the Eastern Bank mortgage created a maritime lien in his favor under the common-law principle known as the "rule of advances." The rule of advances provides a lien to a person who satisfies an outstanding or future lien on a vessel—typically by paying for necessaries provided on behalf of a third party. The court of appeals held that maritime liens, including liens created under the rule of advances, are intended only to benefit "strangers" to the vessel and that a maritime lien can never arise in favor of a vessel owner or others who directly control a vessel's affairs.

Owners of Chartered Houseboat Can Maintain Limitation Action

In re Houseboat Starship II,
No. 2005 U.S. Dist. LEXIS 36237 (M.D. Tenn. Dec. 12, 2005)

The owners of a chartered houseboat, and two individuals with management and operational responsibilities for the vessel, were entitled to maintain a limitation action in connection with personal injury claims by passengers for exposure to carbon monoxide, according to the U.S. District Court for the Middle District of Tennessee. *In re Houseboat Starship II*, 2005 U.S. Dist. LEXIS 36237 (M.D. Tenn. Dec. 12, 2005).

The alleged carbon monoxide exposure occurred on the third day of a charter voyage on Dale Hollow Lake, when the houseboat was temporarily moored to an island. The affected passengers sued the two individual owners, who operated and chartered the vessel to them, as well as the companies that manufactured the vessel, its exhaust system, and related components. The owners and operators filed a petition for exoneration from or limitation of liability, which the boat's manufacturer sought to have dismissed for lack of admiralty jurisdiction and on the basis that the operators were not "owners" within the meaning of the Limitation of Liability Act, 46 U.S.C. §§ 183, 185.

According to the court, the standard for admiralty tort jurisdiction was met inasmuch as the houseboat "was in use to facilitate travel on the Dale Hollow Lake, a navigable waterway," and "such usage falls within the maritime activity of riverboat travel that clearly impacts maritime commerce." This was so even though the houseboat happened to be moored to an island at the time of the alleged carbon monoxide leak. In this regard, the court distinguished the Ninth Circuit's decision in *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996), which found admiralty jurisdiction lacking in a case of carbon monoxide exposure aboard a houseboat made fast to the shore of Lake Havasu. In *Hernandez,* the passengers had not yet commenced their trip, whereas in this case the incident occurred mid-voyage, a distinction the court deemed significant.

The court went on to state that under *Richardson v. Harmon,* 222 U.S. 96 (1911), the Limitation Act itself supplied an independent basis for federal subject matter jurisdiction, such that the limitation proceeding could have been maintained even if the passengers' alleged exposure did not qualify as a maritime tort. Compare *Seven Resorts v. Cantlen,* 57 F.3d 771 (9th Cir. 1995); *David Wright Charter Serv., Inc. v. Wright,* 925 F.2d 783 (4th Cir. 1991).

Finally, the court declined to dismiss the limitation action as to the two individuals who, though not owners of the vessel, did appear to have substantial control over its operation, including chartering the vessel to customers and providing maintenance services. This was sufficient, at least at the preliminary stage of the proceedings, to treat these individuals as "owners" entitled to seek limitation.

[15089]

Yacht Manufacturer Wins Dismissal of Buyer's Contract and Warranty Claims

Gricco v. Carver Boat Corp.,
2005 U.S. Dist. LEXIS 33108 (D. Md. Dec. 15, 2005)

In *Gricco v. Carver Boat Corp.*, the U.S. District Court granted summary judgment to a yacht manufacturer on a buyer's claims for breach of contract, breach of implied warranty for a particular purpose, breach of express warranty, and violation of the Maryland Products Guaranty Act.

In 2001, plaintiffs Barbara and Joseph Gricco purchased a Carver yacht from a dealer in Maryland who had bought the boat wholesale from Carver. Carver provided the Griccos with a warranty guaranteeing repair of defective materials or workmanship for a limited period of time. The yacht was allegedly beset with leaks, mildew and a listing problem, which Carver made several (allegedly unsuccessful) attempts to remedy. In the ensuing litigation, the Griccos attributed the ongoing problems to defects in design rather than defects in material or workmanship.

As to the breach of contract claim, the Griccos maintained that even though they had no direct sales contract with Carver, they were the intended beneficiaries of the contract between Carver and the dealer. The court rejected this contention, finding no evidence that Carver and the dealer "intended their contract to benefit anyone but themselves." Carver's knowledge that the yacht would ultimately be sold to a consumer was not sufficient to treat the Griccos as the intended beneficiaries of the original sales contract.

The Griccos also claimed that Carver had breached an implied warranty of fitness for a particular purpose, *i.e.,* that Carver had reason to know they were purchasing the vessel for the specific purpose of having and using a quality luxury watercraft. The court saw no basis for such a claim, inasmuch as there was no evidence that the Griccos' reasons for acquiring the vessel were different from those of the typical yacht buyer. A desire to engage in luxury yachting was not sufficiently unique to give rise to an implied warranty of fitness for a particular purpose. Moreover, the court noted, there was no indication that Carver was aware of the "particular purpose" for which the Griccos would use the yacht, given that the Griccos at the time of their purchase were communicating only with the dealer.

The Griccos' claim for breach of express warranty was based on the limited warranty given by Carver at the time of purchase and on certain statements found on Carver's website commending the quality and desirability of its products. The court found the limited warranty inapplicable because it guaranteed only that Carver would make certain repairs to the yacht, not that the yacht itself was properly designed. As to the statements on Carver's website, the court viewed these as general expressions of opinion or "mere puffery," which lacked particularity and "did not relate specifically to any of the yacht's characteristics about which the Griccos complain."

As to the claim under the Maryland Consumer Products Guaranty Act, which "serves as a gloss on warranties" and forces sellers "to live up to any guarantees they attach to their products" within a reasonable time," the court found no grounds for recovery. The Act allows an aggrieved buyer to seek an injunction ordering the seller to comply with the warranty, compensation for "reasonable incidental expenses" incurred as a result of the seller's failure to live up to its guarantee, and attorneys' fees and costs.

In the court's view, it was relatively clear that the Griccos were alleging a design defect rather than a failure by Carver to comply with the written warranty to repair defective materials or workmanship. Indeed, the Griccos maintained it was not feasible to attempt further repairs given the alleged defect in the yacht's design. Finally, there was no indication that the Griccos had incurred compensable "incidental expenses" on account of Carver's allegedly ineffective attempts to remedy the problems with the vessel.

The court noted in closing that despite the award of summary judgment in Carver's favor on these four claims, the Griccos had asserted in their amended complaint three other causes of action against the dealer that remained to be addressed: unfair and deceptive trade practices, fraud in the inducement, and negligent misrepresentation.

Court Gives Full Effect to Waiver-of-Subrogation in Marina Slip Agreement but Limits Enforceability of Indemnity Clause

In re Johnson, 2006 U.S. Dist. LEXIS 2996 (S.D. Ala. Jan. 17, 2006)
In re Johnson, 2006 U.S. Dist. LEXIS 2987 (S.D. Ala. Jan. 17, 2006)

In two concurrent decisions, the U.S. District Court for the Southern District of Alabama deemed enforceable a waiver-of-subrogation provision in a marina berth lease/storage agreement, *In re Johnson*, 2006 U.S. Dist. LEXIS 2996 (S.D. Ala. Jan. 17, 2006), but found an indemnity clause unenforceable to the extent it reached damages caused by the marina's own negligence or other culpable fault. *In re Johnson,* 2006 U.S. Dist. LEXIS 2987 (S.D. Ala. Jan. 17, 2006).

A fire broke out on Arden Johnson's Sea Ray Sundancer while berthed at the Dog River Marina and Boat Works in Mobile, Alabama. Mr. Johnson's vessel was damaged, along with three other boats and the marina itself. Mr. Johnson brought a limitation action and asserted a claim against the marina for negligence and breach of bailment. Mr. Johnson's insurer, which had paid over $600,000 in connection with the incident, intervened to assert a subrogation claim against the marina.

Mr. Johnson's contract with the marina contained the following waiver-of-subrogation clause:

> [Vessel] Owner waives any right or claim against the Marina for damage sustained by Owner which is covered under any insurance policy, and Owner shall cause Owner's insurance carriers to waive their respective rights of subrogation with respect to the same, and to so notify the Marina.

The marina argued that the provision prevented Mr. Johnson from recovering losses already paid by his insurer, and barred his insurer's subrogation claim entirely. The court agreed. In the court's view, the provision was unambiguous as a matter of law. Thus, the court rejected Mr. Johnson's and his insurer's reliance on post-contractual conduct to "concoct ambiguity." Although the marina had permitted Mr. Johnson to berth his vessel without verifying that he had obtained his insurer's assent to waive subrogation, this did not reflect an intent to exclude the provision from the berthing agreement or to relieve Mr. Johnson from its operation.

The court noted that under *Fluor Western, Inc. V. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1970), waiver-of-subrogation clauses were not contrary to public policy. Similarly, Mr. Johnson and his insurer failed to show the clause was unconscionable. Even if the contract were entered on a take-it-or-leave-it basis, this was not sufficient to render the provision unenforceable. There also appeared to be other marinas in the vicinity that Mr. Johnson could have approached before deciding to berth his vessel at the Dog River Marina. In any event, the court found the waiver-of-subrogation provision to be substantively reasonable, such that it should not be overcome by unequal bargaining positions or an alleged lack of alternative berthing facilities in the Mobile area.

Mr. Johnson also argued that the indemnity clause in the marina contract was ineffective, or alternatively, violated the public policy disfavoring exculpatory agreements. The clause stated as follows:

> Owner shall, to the extent owner may do so without violating the terms and conditions of Owner's liability insurance policy, indemnify, and hold Marina harmless against all damage caused by Owner or Vessel to Marina's property, docks, pilings and bulkhead and against all claims, including cost of litigation and reasonable attorney's fees by third parties arising from owner's use of the above-described slip/space. Owner shall maintain a liability insurance policy for property damage and/or personal injury arising from the use of Vessel with minimum limits of $ 300,000.00.

Mr. Johnson's insurance policy expressly excluded coverage for "liability assumed by [the policyholder] under any contract or agreement." He, therefore, argued that there could be no indemnity owed under the slip agreement because assuming such an obligation would "violat[e] the terms and conditions of [his] policy." The court found that the plain meaning of the term "violate" is to "breach, break, or disregard," and that Mr. Johnson did not breach his insurance contract by agreeing to indemnify the marina; rather, he would simply forego coverage for that particular item while the remainder of the policy remained in full effect.

The court found the clause to be ambiguous, however, in its use of the phrase "Owner shall . . . indemnify . . . Marina . . . against all damage caused by Owner or Vessel." This language could have meant that Mr. Johnson had to indemnify the marina for: (1) damage resulting from the concurrent fault of the marina and Mr. Johnson or his vessel, or (2) damage caused exclusively by Mr. Johnson or his vessel. Because both were reasonable interpretations, the court adopted the former construction, as urged by Mr. Johnson who had not drafted the agreement.

Viewed in this light, the clause was exculpatory in that it would have required Mr. Johnson to indemnify the marina for its own negligence. Because the contract did not clearly and unequivocally reflect that the parties' intended such a result (*i.e.*, that the marina would be indemnified even if wholly at fault), the court held that it was unenforceable to that extent. The marina would, however, still be entitled to indemnification in the event Mr. Johnson or his vessel were found to be the sole cause of the marina's losses.

[15093]

Sailboat Racing—Applicable Standards

Krelick v. Alter, No. 05-00231
(N.Y. Sup. Ct., Monroe County) (Jan. 18, 2006)

This unreported decision involved a claim for personal injuries arising out of a collision during a sailing race. The plaintiff moved for summary judgment, arguing that the decision of the race protest committee, which found the defendant at fault for the collision under the Racing Rules of Sailing, acted as collateral estoppel and further, that the defendant's conceded violation of Rule 12 of the Inland Rules of the Road entitled the plaintiff to judgment as a matter of law on the issue of liability. The court denied the plaintiff's motion, finding in the first instance that the decision of the protest committee could not provide a basis for collateral estoppel since the "hearing" lacked the necessary attributes of a "full and fair" adjudication. The court also found that although the defendant admitted that he failed to yield to the plaintiff's boat in violation of Inland Rule 12, there was a triable issue of fact for the jury on the issue of the plaintiff's comparative fault based on the plaintiff's alleged violations of various racing and Inland Rules requiring a privileged vessel to take evasive action to avoid a collision.

Note: the Newsletter Editors thank Committee Member James E. Mercante for bringing this decision to their attention.

Marina Fires

In re Rhoten, 397 F.Supp.2d 151 (D. Mass. 2005)

(Read the instructions!) This decision from the U.S. District Court for the District of Massachusetts involves a limitation of liability action arising out of a marina fire. The fire allegedly resulted from overheating of a 30 amp shore power cord on the limitation plaintiffs' pleasure boat. The court accepted expert testimony that the cause of the fire was the direct result of the plaintiffs' failure to properly install "locking rings" to secure the power cord to the power inlet, which resulted in overheating, and their failure to detect the signs of overheating, such as discoloration of the power cord, and to take preventative action. The decision is significant in that the court determined that the plaintiffs' negligence was the direct result of their conceded failure to read and apply the directions in the power cord "owner's manual" which, if followed, would have prevented the fire. Limitation was, therefore, denied. The decision is recommended reading for anyone involved in pleasure boat fire cases.

Note: the Newsletter Editors thank Committee Member David J. Farrell for bringing this decision to their attention

Spoilation of Evidence

Golden Yachts, Inc. v. Hall, 920 So.2d 777 (FL. Ct. App. 2006)

William Hall sustained permanent injuries when a cradle supporting a boat that he was examining for possible purchase collapsed in the dealer's boat yard. The remains of the collapsed cradle, which consisted of manufactured metal stanchions assembled with hardware and wood provided by the boat yard, were photographed extensively shortly after the incident by the boat yard and by an investigator hired by the cradle manufacturer. However, when the plaintiff's attorney demanded an opportunity to inspect the damaged cradle one year after suit was filed, the yard was unable to produce the cradle. The plaintiffs moved for sanctions and the imposition of a negative inference against the boat yard. The trial judge denied the motion for sanctions but granted the request for a negative inference against the yard. In response the yard moved to exclude at trial any evidence relating to its alleged conduct surrounding the loss of the cradle. The trial judge allowed the evidence to be presented at trial. The jury returned a verdict against the boat yard.

The boat yard appealed, arguing that it was error for the trial court to have allowed the plaintiff to present evidence regarding the loss of the cradle at trial and to also permit a negative inference instruction to be submitted to the jury. The court of appeals affirmed the trial court's judgment, holding that remedies for spoliation are within the discretion of the trial judge and that cumulative or multiple remedies may be imposed in an appropriate case.

Yacht Sales

Tyson v. Louis Marine Ltd., 2005 Conn. Super. LEXIS 2813
(Ct. Sup. Ct. 2005)

Philip Tyson, a Chief Executive Officer of a substantial company, signed a sales contract to purchase a 57 foot Rival Navigator motor yacht from the defendant dealer. The agreed purchase price was $798,000. Tyson gave the dealer a deposit of $100,000 when he signed the contract. Although the dealer

The trial court granted the broker's motion for summary judgment, finding the broker could not be held liable to the buyer as the seller's agent. Nuckolls appealed. The appellate court held that under Georgia law, in the absence of evidence that the broker had actual knowledge of the mortgage lien, it could not be held vicariously liable as the agent of the seller for the seller's fraud.

Roberts v. Legendary Marine Sales,
65 Mass. App. 198 (Mass. Ct. App. 2005)

William Roberts, a Massachusetts resident, purchased a "new" Fountain Lightning power boat from the defendant dealer, a Florida company, for $130,000. Roberts's interest in the boat resulted from an internet advertisement by the Florida dealer. Roberts never traveled to Florida to inspect the boat, and the entire transaction was conducted by telephone and written correspondence. The dealer had never before sold a boat to a Massachusetts' resident. After the purchase the boat was delivered to Roberts in Massachusetts and he discovered various defects.

Roberts brought suit against the Florida dealer in Massachusetts state court alleging breach of warranty, misrepresentation and a violation of the Massachusetts Unfair Trade Practices Act. The dealer filed a motion to dismiss for lack of personal jurisdiction. The trial court granted the dealer's motion and Roberts appealed. The appellate court reversed the trial court's dismissal of the suit, holding that the dealer's alleged misrepresentations regarding the boat were communicated to Roberts in Massachusetts and that these contacts were sufficient to subject the dealer to the jurisdiction of the Massachusetts courts.

Negligent Entrustment

Kelly v. Di Cerbo, 2006 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 2006)

Colleen Kelly was seriously injured when the boat on which she was a passenger was struck by another power boat operated by Christopher DiCerbo, a minor. The boat operated by Christopher was owned by an unrelated party, Jerome Morgan. Kelly sued Christopher, as the boat's operator, as well as his parents and the boat's owner under a negligent entrustment theory. The parents and the owner moved for summary judgment on the negligent entrustment claim. The trial court denied the summary judgment motion, finding that there were triable issues of fact with regard to whether the owner and the parents were negligent in allowing the minor to operate the boat. An appeal followed.

The appellate court affirmed the trial court's decision with respect to the claim against the parents, but reversed the decision with respect to the boat owner. Although Christopher testified that he needed his parents' permission to operate the boat and the plaintiff Kelly had not produced evidence to prove the parents were actually aware that the boat was being operated by their son on the date in question, the appellate court held that a triable issue of fact was created by other evidence including affidavits of neighbors, who stated that Christopher had often operated the boat in a reckless manner and that the parents' automobile was present at the time of the incident. As to the claim against the owner of the boat, the appellate court held that the owner was entitled to summary judgment because no evidence had been offered by the plaintiff to prove he was present on the date in question or had knowledge of any prior reckless operation of the boat by the minor.

Jurisdiction and Procedure

Wilson v. Suzuki of Orange Park, Inc.,
2005 U.S. Dist. LEXIS 34207 (M.D.Fla. 2005)

Robert Wilson sustained injuries while operating a jet ski shortly after the defendant had performed repairs and maintenance on the steering gear. Wilson sued Suzuki in state court to recover damages and demanded a jury trial. Suzuki removed the case to the federal district court on the basis of admiralty jurisdiction. Wilson then moved to remand the case to state court. However, Wilson's original remand petition failed to argue that removal based on admiralty jurisdiction alone was improper and violated his rights under the Savings to Suitors Clause, 28 U.S.C. § 1333. In fact, Wilson raised that argument only in a subsequent pleading filed more than 30 days after removal. Accordingly, the district court denied Wilson's motion to remand, holding that his claims fell within the court's admiralty jurisdiction and that Wilson had waived his objection to removal based on the Savings to Suitors Clause by failing to raise the argument within 30 days of removal.

Clements v. Preston, 2005 U.S. Dist. LEXIS 34414 (S.D.Ala. 2005)

David Clements and Dean Preston signed a sales contract whereby Clements agreed to sell Preston a 1987 Tiara power boat for $99,000. Preston gave Clements a deposit of $9,600 when the contract was signed. The contract required Preston to close the transaction on March 17, 2005 but he was unable to close on that date due to financing problems. When Preston could not close, Clements decided to cancel the sale.

Clements then filed a suit against Preston in the U.S. District Court for the Southern District of Alabama, seeking a declaratory judgment that he was entitled to cancel the sale and to retain both the boat and the buyer's deposit as liquidated damages. Clements alleged both diversity of citizenship and admiralty jurisdiction as the bases of subject matter jurisdiction.

Clements and Preston filed motions for summary judgment against each other. The district court, *sua sponte,* dismissed Clements' suit for lack of subject matter jurisdiction, holding that a contract for sale of a vessel does not fall within admiralty jurisdiction and that diversity jurisdiction was lacking because the amount in controversy between the parties did not exceed the jurisdictional threshold of $75,000. Specifically, the court held that because Clements had sought only declaratory relief in his complaint, the amount at issue could not be measured by the agreed sales price of $99,000. According to the court, the only monetary amount at issue was the $9,600 deposit. The remainder of relief sought by Clements was simply the "psychic value" of knowing that he had properly cancelled the sale.

Aquae Intl. Inc. v. M/Y OSIANA II,
2005 U.S. Dist. LEXIS 25144 (D. Mass. 2005)

The plaintiff initiated the action by arresting the defendant pleasure yacht to assert a lien for unpaid repair charges. A counterclaim was filed against the plaintiff in the name of the defendant vessel only, alleging that the repairs were not authorized. The district court thereafter permitted an individual, Curt Feuer, to intervene as the "next friend" of the vessel in order to prosecute the counterclaim, believing that Feuer was the boat's owner. It subsequently came to light that the boat was owned by a Cayman Island's corporation in which Feuer was the sole shareholder. The plaintiff then moved to dismiss the counterclaim on the grounds that Feuer was not a real party in interest and that a claim cannot be prosecuted solely in the name of a vessel. The district court granted the plaintiff's motion to dismiss, holding that the theory of personification of a vessel for purposes of *in rem* jurisdiction does not "authorize a vessel to prosecute an action . . . in its own name."

Government Liability

Fortner v. Tennessee Valley Authority,
2005 U.S. Dist. LEXIS 28036 (E.D.Tenn. 2005)

The plaintiff, Fortner, sustained injuries when his small fishing boat was swamped downstream of the Fort Loudoun Dam on the Tennessee River. His boat capsized when the dam operator released water through the spillway, creating subsurface currents and turbulence below the dam. The Tennessee Valley Authority ("TVA") had erected billboard-size signs below the dam reading "Warning Dangerous Waters."

Fortner sued the United States through the TVA, alleging that the TVA had negligently failed to adequately warn him of the danger that existed to boaters during spillway operation. The TVA then moved for summary judgment, arguing it was immune from liability to the plaintiff because its decisions regarding the number, nature and content of the posted warning signs were subject to the discretionary function exception to the waiver of sovereign immunity contained in the Flood Control Act, 33 U.S.C. § 702. The district court granted the government's motion and dismissed the case.

McMellon v. United States, 395 F.Supp.2d 422 (S.D.W.Va. 2005)

The McMellon case arose from injuries sustained by jet ski operators on the Ohio River in West Virginia in August, 1999. The operators of the jet skis mistook the Robert C. Byrd Lock and Dam for a bridge. When they finally realized they were not encountering a bridge, it was too late. The vessels and their operators plunged over the gates of the dam into the water below, a vertical distance of about 25 feet. Although there were several warning signs posted above the dam, the jet skiers did not see them. Local boaters testified that the warning signs were either obscured by vegetation or difficult to read.

In a prior issue we reported on the Fourth Circuit's decision in the *McMellon* case, in which the court overruled its prior decisions and held that maritime claims against the U.S. Government under the Suits in Admiralty Act ("SAA") are subject to an implied discretionary function exception. 13 Boating Briefs No. 2 (Mar. L. Ass'n. 2004). Following the appeal the circuit court remanded the case to the district court in West Virginia for further proceedings.

On remand, the government moved for summary judgment, arguing that its actions or omissions relating to the posting of warnings were shielded from liability by the discretionary function exception to the waiver of sovereign immunity. The district court denied the government's motion, finding that federal statutes mandated the posting of "conspicuous" warning signs above the dam, therefore, the Army Corp of Engineers' decisions relating to how and where the signs should be posted were not discretionary and, thus, not within the ambit of the sovereign immunity exception.

[15100]

Northern Ins. Co. v. Chatham County,
2006 U.S. LEXIS 3449 (U.S. Ct. April 25, 2006)

In a unanimous opinion by Justice Thomas, the Supreme Court held that a local governmental entity not qualifying as an "arm of the state" cannot assert sovereign immunity as a defense to an admiralty suit. The case arose from a 2002 allision on the Wilmington River in Georgia, between a pleasure boat and a drawbridge owned and operated by Chatham County. The bridge tender opened the bridge to allow the vessel to pass but a malfunction caused one of the spans to descend and strike the vessel.

The vessel's insurers brought suit in admiralty against the County, which prevailed in the trial court and in the Eleventh Circuit on the basis of sovereign immunity. According to the Eleventh Circuit, even though the County did not qualify as an "arm of the State" entitled to immunity under the Eleventh Amendment, the concept of "residual sovereign immunity" still protected it from suit.

The Supreme Court reversed the circuit court, holding that the County could *not* invoke Eleventh Amendment immunity given its apparent concession that it was not an "arm of the State." With respect to concept of "residual sovereign immunity," which the County said ought to apply in instances where the local government exercises a "core state function" like operating a drawbridge over navigable waters, the Court saw no reason to treat an admiralty suit differently than any other case, and cited *Workman v. New York City*, 179 U.S. 552 (1900), for the general rule that local governmental entities are subject to suit in federal court, whether at law or in admiralty.

Insurance Coverage

Commercial Union Ins. Co. v. Lord, 392 F. Supp.2d 402 (D.Ct. 2005)

The WANDERLUST, a pleasure boat owned by Franklin Lord, sank off the coast of St. Thomas, USVI, on April 29, 2003, as a result of an engine room explosion. Lord made a claim of $450,000 against Commercial Union under a marine insurance policy issued by defendant in 2001. The insurer denied coverage and filed an action seeking a declaratory judgment that the policy was void *ab initio* based on Lord's alleged misrepresentations in the original insurance application. In the insurance application, Lord stated that he had purchased the vessel "new" from a Canadian builder in 2000 for $450,000. In fact, Lord had purchased the partially completed hull in 1996 from a third party in Virginia for $48,000 and completed construction in Rhode Island, allegedly for a total cost of $450,000, in 2000. The court found that the misrepresentations by Lord were material to the insurer's acceptance of the risk and violated the insured's duty of utmost good faith to the insurer. The court granted the insurer's motion for summary judgment, finding that the policy in question was void.

Connecticut Indemnity Co. v. Perrotti, 390 F.Supp.2d 158 (D.Ct. 2005)

The plaintiff insurer commenced a declaratory judgment action seeking a determination that the marine policy on Perrotti's 121 foot yacht was void due to alleged misrepresentations in the policy application regarding the identity of the registered owner, the vessel's home port and the intended navigational limits. The insurer had previously issued a rescission notice and had refused to provide Perrotti with a defense to a suit for personal injuries by a crew member.

The district court held that the policy was enforceable and that the insurer had breached the contract by failing to provide a defense to the personal injury action. In reaching its decision, the district court held that the policy language prevented the insurer from relying on the doctrine of *uberrimae fidei* or utmost good faith under which an insurer may ordinarily avoid coverage based on material misrepresentations or omissions of the insured, regardless of whether the misrepresentations or omissions were intentional. The relevant policy included the following clause: "All coverage provided by us will be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, whether before or after a loss." The court concluded that any misrepresentations by the insured were unintentional and, thus, could not provide a basis for the insurer to avoid coverage under the policy.

COMMITTEE ON CARRIAGE OF GOODS BY SEA
CARGO NEWSLETTER NO. 46

Editor: Michael J. Ryan
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DISHARMONY AT SEA . . . .

In re M/V DG HARMONY and Consolidated Cases, No. 98-8394 (S.D.N.Y. Oct. 18, 2005) (Chin, J.). (*See* Carriage of Goods by Sea Committee, Cargo Newsletter 45 for other Hazardous Material cases.)

In November 1998, the M/V DG HARMONY suffered an explosion and fire off the coast of Brazil. The crew fought the fire for some time; however, the vessel ultimately had to be abandoned. The vessel continued to burn for three weeks and most of its cargo was destroyed or damaged. The vessel itself was declared a constructive total loss and eventually scrapped.

Eighteen lawsuits were filed by cargo, vessel and other interests seeking recovery for damages suffered as a result of the casualty. All claims were settled except those of certain cargo and vessel interests against defendant PPG Industries, Inc. ("PPG"), who manufactured calcium hypochlorite hydrate ("Cal-Hypo"), a bactericide used to purify water. Ten of the containers aboard the vessel contained 120 drums each of Cal-Hypo, manufactured and shipped by PPG.

Plaintiffs asserted theories of strict liability, breach of warranty, failure to warn and negligence. The case was bifurcated and the issue of liability was tried to the trial court without a jury. The court issued a detailed Opinion (55 pages) which covered the casualty, including the vessel, its crew, the voyage, the fire, and the investigation.

As to the cargo, the decision set forth specific details about the Cal-Hypo, the transportation of hazardous materials, the shipment of Cal-Hypo on the vessel, a P&I circular which had alerted members concerning the shipment of Cal-Hypo, PPG's prior knowledge of the risk presented by the shipping of Cal-Hypo, and its use of 300 pound drums in shipment. The district court also referred to other lawsuits involving Cal-Hypo and covered the testing of Cal-Hypo which had been performed after the fire on the vessel. The court then addressed the cause and origin of the fire based on experts' reports. The factual recitation, supported by extensive reference to depositions, exhibits and trial transcript covered some 44 pages.

The court observed that the matter essentially involved a products liability case in the maritime context and noted that products liability law is "part of the general maritime law." The court first considered the issue of strict liability and then considered the failure to warn and negligence claims together. In light of the conclusions on these claims, the court did not reach the breach of warranty claim.

As to strict liability, the court referred to COGSA, 46 U.S.C. § 4(6), and the governing decision, *Senator Linie GmbH and Co. KG v. Sunway Line, Inc.,* 291 F.3d 145 (2d Cir. 2002), which stands for the proposition that a shipper will be held strict liability for damages resulting directly or indirectly from a shipment where neither the shipper nor the carrier had actual or constructive pre-shipment knowledge of the danger of that cargo.

Here, the court found the Cal-Hypo clearly qualified as goods of an inflammable, explosive or dangerous nature and indeed was treated as such by all parties. As between plaintiffs and PPG, PPG was in a better position to ascertain the true nature of the goods and the court also noted that PPG was not merely the shipper, but also the manufacturer of the Cal-Hypo.

The court found § 1304(6) of COGSA imposed liability on shippers for "all damages and expenses directly or indirectly arising out of or resulting from . . . [the] shipment." The court rejected defendant's argument that this provision only applied to the charterer who issued the bill of lading and that the bill of lading extended no right under COGSA to any other party.

The court also rejected the shipper's arguments that the carrier had consented to transport the cargo with "knowledge of its nature and characteristics" and that the bill of lading issuer and vessel interests had failed to exercise due diligence to make the vessel seaworthy. First, the court found that the vessel interests' consent to carry the cargo was given without knowledge of the full risk and dangers presented by transportation of the shipment in 300 pound drums. (The shipment was comprised of 4 drums placed on a wooden pallet, shrink-wrapped in plastic, with a total of 120 drums being placed in each unventilated container, stacked 3 high with very little air space. PPG selected the pallets, loaded the drums onto the pallets, shrink-wrapped the drums and then placed the pallets into the container. There was no separation between the pallets on each side of the container or between the layers and the containers were not refrigerated.). Second, notwithstanding plaintiff's argument on unseaworthiness, the crew had stowed the Cal-Hypo in full compliance with the IMDG Code, followed instructions fully, did not fail to use due diligence and the ship was not rendered unseaworthy. Accordingly, the court found in favor of plaintiffs on the strict liability claim.

As to failure to warn and negligence, the district court found plaintiffs would still prevail. Noting that PPG manufactured and shipped the product, the court also found the shipment was unreasonably dangerous when it left the shipper's control and the shipper failed to give adequate warnings on the handling and transportation of the product. Judge Chin concluded that the hazard was foreseeable as there were sufficient red flags to have caused the shipper to exercise reasonable care and to have investigated further the dangers presented. Accordingly, the trial court concluded that PPG had a duty to provide a warning that would fully inform vessels and others in the distribution chain of all the risks involved in shipping Cal-Hypo in the manner in which it was shipped in the instant case and that it had breached that duty.

REPOSE DOESN'T NECESSARILY MEAN TRANQUILITY. . . .

Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co., Ltd.,
No's. 04-4265, 04-5571, and 04-6028 (2d Cir. Oct. 17, 2005)

The MSC CARLA was lengthened by the insertion of a midsection in 1984. The work was done by appellant. The ship was sold four times before being purchased in 1995 by a Panamanian company and renamed the MSC CARLA. In 1997, the ship broke in two along the weld lines, the crew was airlifted to safety and the aft section was towed to the Canary Islands where it was inspected and its cargo salvaged. The flooded front section sank along with its cargo.

The ship's operator and owner filed a limitation proceeding in the Southern District of New York. Almost 1,000 receivers of lost cargo brought third party complaints against the Korean shipyard alleging defective lengthening work. The P&I Club of the owner and operator settled with cargo interests and joined the actions against the shipyard to recover amounts paid in settlement.

In pretrial proceedings before the district court, the shipyard argued that the court lacked personal jurisdiction and commenced actions in a Korean court requesting declaratory judgments of non-liability. The federal court in New York then issued an anti-suit injunction requiring the shipyard to request suspension of the Korean action. The shipyard requested the suspension but appealed the injunction, again arguing that personal jurisdiction was lacking. On appeal, the U.S. Court of Appeals for the Second Circuit vacated and remanded the anti-suit injunction, directing the district court to conduct an evidentiary hearing as to personal jurisdiction.

On remand, the district court conducted an evidentiary hearing and concluded that it had jurisdiction. The shipyard then moved for summary judgment, arguing in part that plaintiffs could not prevail under the potentially applicable laws of England, Korea, Sweden or Panama. The district court denied the motion, concluding the shipyard had waived its choice of law defense by failing to select a particular foreign law until the summary judgment stage. The district court reasoned that the alternative pleading style failed to provide sufficient notice, as required by Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 44.1. The district court saw no need to conduct a choice of law analysis and applied United States law. At the trial, the shipyard was found liable in negligence and strict liability.

On appeal, the Second Circuit considered only one issue—the applicability of foreign law—and concluding that it was dispositive, reversed. Initially, the court agreed that what constituted reasonable notice under Fed.R.Civ.P. 44.1 and waiver of the foreign law issue fell within the discretionary powers of the district court and would be reviewed for abuse of discretion (rather than a *de novo* standard). However, once the court moved beyond the issue of reasonable notice, it would review any determinations concerning the appropriate choice of law *de novo.*

On the question whether the shipyard had waived the application of foreign law by simultaneously pleading the applicability of English, Swedish, Korean or Panamanian law, the appellate court reviewed the district court's waiver determination. The appellate court found that proper notice had been given under Fed.R.Civ.P. 44.1, and concluded that the applicability of foreign law had not been waived. Thus, in its view, the district court had exceeded its discretion.

In its decision, the appellate court observed that notice under Fed.R.Civ.P. 44.1 requires only that a party call attention to the fact that the issue will be raised, as contrasted with argument with notice, where a party must lay out, among other things, the provisions of foreign law, the bases for its relevance and the application of foreign law to the facts of the case. Noting that the proper determination of foreign law could be a complicated task, the court observed that Fed.R.Civ.P. 44.1 was intended to assist courts with their work and while courts would be free to enlist the parties in this effort, ultimately, the responsibility for correctly identifying and applying foreign law rests with the courts. Here, the appellate court recognized "alternative pleading or choice of law issues as satisfying the notice requirements of Rule 44.1" and thus found the shipyard's alternative notice reasonable.

The Second Circuit then analyzed the choice of law issue under the factors enumerated in *Lauritzen v. Larsen* and *Carbotrades P.A. v. Bureau Veritas*, 99 F.3d 86. Taking these factors together, the court found Korean law would apply. In the final sentence of its decision, the court found Korean law barred the cargo interests and the P&I Club from recovering against the shipyard due to statutes of repose and in a footnote referred to two Korean statutes (one of which dealing with product liability was enacted subsequent to the lengthening in 1984 and the breaking of the vessel in 1997). The district court's finding of liability was, therefore, reversed, and a petition for rehearing was subsequently denied.

SHIPMENT FROM BRAZIL, STOLEN IN BRAZIL, BUT NEVER MIND THAT. . . .

Eli Lilly do Brasil, Ltda. v. Federal Express Corp.,
2005 U.S. District Lexis 22128 (S.D.N.Y. Sept. 13, 2005)(Lynch, J.)

A shipment of pharmaceuticals was to go from Sao Paolo, Brazil, to Iwate, Japan, but was hijacked and stolen during land transportation in Brazil while under the care of defendant's subcontractor. The value of the shipment was estimated to be at least $800,000.00.

Plaintiff initially moved for summary judgment to dismiss defendant's limitation defense, which was based on the Warsaw Convention. Defendant conceded the Warsaw Convention was inapplicable, but cross-moved for partial summary judgment to limit its liability in accordance with federal common law. Plaintiff opposed the application of federal common law and cross-moved for a determination that Brazilian law governed defendant's liability.

The federal district court in New York dismissed the affirmative defense concerning the application of the Warsaw Convention on consent. The defendant argued that, apart from the Warsaw Convention, its liability was governed by federal common law and limited by the terms of the airbill which would result in a limitation of $28,863.00. Plaintiff countered with the argument that Brazilian law should apply and that under Brazilian law any limitation of liability contained in the contract would be vitiated if the carrier was found to have acted with gross negligence.

The court considered which choice of law rules it should apply, *i.e.*, federal or state. It noted the complaint stated a claim exclusively under federal common law and thus triggered the court's federal question jurisdiction. It went on to find that federal common law provide the appropriate rule of decision for determining whether U.S. or Brazilian law should apply.

The court went on to analyze the issue, looking to the Restatement (Second) of Conflicts of Law. Despite certain aspects in which Brazil would have a greater interest than the United States, the district court noted that it was of overall greater importance under the principle of § 6 that the application of Brazilian law would invalidate the liability limitations to which the parties had voluntary bound themselves. Thus, even taking into account the considerable contacts which Brazil had in the transaction, they were not so strong as to occasion "unsettling the private agreement of these particular parties, who, to the extent they were aware of Brazilian law, opted to contract around it." Accordingly, the court found United States federal common law was applicable and, as such, limited the carrier's liability pursuant to the terms of the contract.

PORTS OF CALL . . . South Africa (Krugerrands or Diamonds would be nice, but a P&I Club Letter will do)

The M/V Bow Neptune, Startankers AS and the Amer. Steamship Owners Mut. Prot. and Indemn. Assoc. Inc. v. Methyl Company Ltd., No. A62/2005 (High Court of South Africa, Durban and Coast, Local Div. June 21, 2005) (Kruger, J.)

The High Court of South Africa (Durban and Coast Local Division) considered the nature of security for proceedings to be pursued in London arbitration or in an action before the Commercial Court in Antwerp, Belgium.

The claim was for alleged contamination of a chemical shipment from Belgium to Korea. The arrest of the vessel was ordered along with an order to the effect that the vessel was to be released on the provision of security "to the satisfaction of the Applicants or the Registrar." Security was tendered in the form of a P&I Club letter of undertaking, which was rejected when the parties disputed the acceptable wording. As the matter could not be resolved, an application was made, as a matter of urgency, to release the vessel against the furnishing of the security tendered. The issue before the court was not the terms and conditions of the letter of undertaking which was tendered, but whether the letter was adequate security within the ambit of the South African Admiralty Jurisdiction Regulation Act ("Act"). The court ordered the release of the vessel after finding the letter of undertaking tendered was indeed adequate security.

The court subsequently issued its reasons for the Order. There was no dispute that the arrest was conducted within the terms of the arrest statute or that the vessel remained "under arrest" pursuant to the governing statute pending its release on the furnishing of a bank guarantee or letter of undertaking. The court referred to various other cases where P&I Club letters were accepted as proper security and stated it could find no reason why, from a practical point of view, a P&I Club letter of undertaking would not constitute adequate security under the Act: "Both the bank guarantee as well as the P&I Club letter of undertaking are couched in similar terms. They are both private contractual undertakings given by either the bank or the Club/insurance company to secure an Applicant's claim against a Respondent either before or after arrest." The court was satisfied that the letter of undertaking furnished constituted sufficient security within the ambit of the Act.

NOTICE MUST BE GIVEN, BUT ENOUGH INFORMATION WILL DO. . . .

Siemens Power Transmission and Distrib., Inc. v. Norfolk Southern RR. Co., 2005 U.S. App. LEXIS 17202 (11th Cir. Aug. 16, 2005)

The seller of an electric transformer retained a company to arrange for shipment of the transformer from Norfolk, Virginia to Florida. Arrangements were made with a rail carrier for transportation. An electronic impact recorder was installed to record any excessive shocks that might occur during transportation and cause damage to the transformer. The transformer was shipped from Germany by ocean vessel and then to the railroad. The bill of lading in question provided that, as a condition precedent to recovery, claims must be filed in writing with the carrier within nine months after delivery of the property.

After arrival, the electronic impact recorder was reviewed and revealed that the transformer had been exposed to forces in excess of the shipper's established threshold for safe carriage of the device. Additional testing revealed that it was not operating properly and needed repair. According to the shipper, all the forces that caused damage to the transformer had occurred while in the custody of the railroad.

A letter indicating the shipper's intent to claim the costs of repairs was sent to the railroad indicating the letter was a Notice of Intent to File a Claim.

The letter also stated that at that time the cost of repairs could not be enumerated but estimated repairs to be $25,000.00. A day later, an invitation was sent to the railroad to send a representative to inspect the transformer. The railroad did not respond to either communication nor did it send a representative to the inspection.

After inspection, the transformer was to be sent back to Germany for repairs and the railroad was informed that the estimated cost of repairs was in the neighborhood of $700,000–$800,000. The railroad sent a transformer consultant to conduct an investigation before the transformer was shipped back to Germany. After the transformer arrived in Germany, the railroad was informed that the transformer would be available for inspection. Subsequently, the shipper instituted an action against the railroad, seeking some $791,136.00 for damage to the transformer.

In its complaint, the shipper alleged it had timely filed a proper claim with the railroad prior to bringing suit. At the close of discovery, the railroad moved for summary judgment on the grounds that the shipper had not satisfied a condition precedent for bringing suit because it had not filed a valid claim with the railroad within nine months of the damage to the transformer.

The district court granted the railroad's motion to dismiss on the basis that suit was time barred, determining that the shipper's letters did not satisfy ICC regulations, when strictly interpreted, because the letters failed to include a claim for a specific or determinable amount of damages. This appeal followed.

The appellate court reviewed the district court's grant of summary judgment *de novo.* Noting the Supreme Court's decision in *Georgia, Florida and Alabama Railway Co. v. Blish Milling Co.,* 241 U.S. 190, the court remarked that the purpose of a requirement in a bill of lading that claims for damage be presented in writing within a certain time after delivery was not to allow the carrier to avoid liability, but to secure "reasonable notice" for the carrier. Accordingly, the Supreme Court held that such requirements did not require documentation in a particular form as long as that purpose was served.

The Circuit Court also reviewed precedents from other circuits and agreed with the First, Second, Fifth, Sixth and Ninth Circuits that a minimum claim requirement contained in § 1005.2(b) of the ICC Regulations applied to contested as well as voluntarily resolved claims. After analysis, the court concluded that the question of whether the letters sent to the railroad constituted a valid claim should be determined according to the minimum requirements of § 1005.2(b).

Keeping in mind the purpose of the ICC Regulations and the Supreme Court's admonishment that statutes and regulations should be interpreted in light of their common-law backdrop, the Eleventh Circuit construed 49 CFR § 1005.2(b) liberally and concluded that the shipper's Notice of Claim, which specified a damage range of $700,000–$800,000, satisfied the minimum claim requirements. The letters constituted written notice of damage with a clearly communicated intent to hold the railroad liable. The letters indicated that the claim would be significant and gave the railroad more than enough information to begin an investigation which the railroad in fact did, sending its expert to inspect the transformer. The range specified by the shipper included a minimum/maximum amount, unlike a "hundred dollars more or less" and the actual damages claimed fell within that range. The court rejected the railroad's arguments that a claim for damaged goods is not valid unless the exact amount of damages is stated and disagreed with the railroad's assertion that its decision to view the section liberally in light of its purpose would allow shippers to bypass the mandated claims process by asking a court to determine whether a carrier should pay a claim which was not presented properly in the first place.

In this case, the shipper indicated its intent to hold the railroad liable, gave the railroad multiple opportunities to inspect the transformer and provided a damage range for the minimum/maximum amount in which its claim ultimately fell. It considered the shipper's claim sufficient even though it did not specify a certain quantum of damages. Accordingly, the decision of the district court was reversed and the case remanded for proceedings consistent with the appellate court's opinion.

BUY AMERICAN. . . .

Royal Ins. Co. of Amer. and Ford Motor Co. v. Orient Overseas Container Line Ltd., No.03-2574 (E.D. Mich. Sept. 29, 2005), (Hood, J.)

Suit was brought for damages resulting from the loss of cargo on an overseas shipment due to "inclement weather." Plaintiffs alleged that the goods were either lost at sea or delivered in such a state of disrepair as to be unusable.

The ocean carrier alleged a $500 per package limitation. Plaintiffs then filed a motion for partial summary judgment striking that defense. In their motion, plaintiffs argued that the Hague-Visby Rules should govern. The ocean carrier and a third party defendant filed motions for partial summary judgment, requesting an order limiting liability to $500 per package.

The shipment had been made pursuant to a service agreement covering the transportation of numerous ocean containers said to contain automatic transmissions in racks for transportation from France to Montreal, Canada, for ultimate delivery to various destinations in the United States and Montreal itself. The containerized transmission units were loaded on board the third party defendant's vessel pursuant to a slot charter, with the defendant issuing its own bill of lading. During the voyage, some 4,387 transmission units stowed in 26 containers were lost. Additionally, plaintiffs alleged 840 transmission units in 6 other containers were damaged, and claimed $5,700,299.20 *in toto.*

Defendants argued based on the *Kirby* case that COGSA's $500 package limitation applied as a matter of law, although the transmissions were loaded in France for delivery to Montreal by ship. The district court noted that a multimodal contract, so long as it requires substantial carriage of goods by sea, is a maritime contract and its character as a maritime contract is not defeated simply because it also provides for some inland carriage. The court also noted, however, that *Kirby* did not go so far as to say that federal law applies whenever the final destination is in the United States.

The court next discussed decisions where COGSA was held applicable to shipments from a foreign port to a "foreign port" and then to its ultimate destination in the United States, and noted that while these cases were not "controlling authority," they provided guidance to the court. Under the particular facts, the court found that the plaintiff had contracted for delivery of the transmissions from France to cities across the United States. The bills of lading all specified as the places of delivery cities within the United States. In addition, the court noted it was dealing with an intermodal bill of lading pursuant to which the carrier's responsibility began at the Specific Place of Receipt and ended at the Specific Places of Delivery. Finding the final destinations were several cities within the United States as well as Montreal, the court stated it would be strange indeed to permit defendant to limit its liability based simply on the port of discharge listed in the bills when transporting goods to final destinations within the United States.

The court then dealt with several provisions in the service agreement and bill of lading and, although noting they were not models of careful draftsmanship, found that the bill of lading contemplated that COGSA might apply even when the carriage was not to, from, or through a United States port *per se.* Thus, the court concluded that COGSA applied because the transmissions were destined for the United States and held that the defendants were entitled to raise the COGSA package limitation.

Dealing with the package limitation issue, defendants argued that the containers should be the package while plaintiffs argued that each transmission should be deemed a package. The court rejected both arguments, finding a declaration made on behalf of plaintiffs made clear that the racks which held the transmissions constituted the package within the meaning of COGSA. These were described as "articles of transport" and their sole function was to provide an accessible and practical means of transportation for numerous transmissions during intercontinental shipments. The racks could appropriately be deemed the result of some amount of preparation for the purpose of transportation which also facilitated handling.

As the issues before the court did not include the issue of proof of physical damage, that portion of defendants' motion was dismissed without prejudice.

A FISH STORY. . . .

Eimskip, The Iceland Steamship Co., Ltd. v. Atlantic Fish Mkt., Inc.,
417 F.3d 72 (1st Cir. 2005)

A carrier sued for freight charges and attorneys' fees with respect to shipments of frozen herring transported from Massachusetts to Estonia. The shipments were booked by "Atlantic", although the bills of lading listed "Mayflower" as the shipper, and Atlantic received the freight invoices and paid the charges. Atlantic also purchased the fish, paying a part of the purchase price when the fish was unloaded and the balance upon its arrival.

A month later three more shipments were made in essentially the same manner. The district court found that Atlantic was responsible for booking two of the shipments, negotiating the freight rates and receiving the cargo in Estonia. It also found Atlantic represented to the carrier and Mayflower that it would pay the freight. When the herring arrived in Estonia the freight, totaling $91,840.00, remained unpaid. The carrier put a hold on the cargo. Mayflower told the carrier that Atlantic had not yet paid the purchase price for the herring and stated that it did not wish the cargo to be released to Atlantic. Eventually, Atlantic promised it would pay the freight and the carrier released the herring after Mayflower agreed to its release. Atlantic still did not pay the freight charges and suit ensued. The district court held that Atlantic was primarily liable for the freight because of its representations and the course of dealing and that it was also liable for collection costs, which included specified costs and attorneys' fees of approximately $62,000.

On appeal, Atlantic claimed it was neither the shipper nor the consignee and should not be liable for freight charges under COGSA. The U.S. Court of Appeals for the First Circuit found that COGSA, while applicable to shipments such as the one involved, did not create a cause of action for or regulate the collection of freight charges, nor did the United States Bills of Lading Act. Absent a relevant statute, the general maritime law would apply and anyone who contracted to pay for ocean freight could thus be held liable in accordance with ordinary contract law as applied in maritime matters. The appellate court recognized that oral contracts are valid under general maritime law, and found sufficient evidence that Atlantic had agreed to pay the freight, and thus was liable without regard to whether Atlantic was a party to the bill of lading or not.

As to attorneys' fees, Atlantic claimed the district court had erred in failing to give it time to respond to the request for fees and should have reduced the amount because the fees sought were about two-thirds of the underlying freight claim and therefore excessive. The appellate court tracked the chronology of the matter and rejected the argument that Atlantic did not have enough time to respond to the claim. As to the amount, the court stated:

> On the merits of the objection, we think it is hopeless. There is no necessary relationship between the amount of the freight owed and the cost of collection, the latter depending on the complexity of the facts and legal issues, the number of depositions and documents, and the length of trial. Nor is the plaintiff carrier, in the fact of recalcitrance, required to forgo suit on amounts [**14] owed to it because the costs of collection—to be paid by a defendant—equal or exceed the initial debt. So far as we can tell, counsel's fee was well earned.

The court went on to reject arguments raised for the first time in the reply brief and affirmed the judgment in the case, "admirably handled by the district court."

CARMACK CARRIER IS ON TIME. . . .

AIG Aviation, Inc. v. On Time Express, Inc.,
2000 U.S. District LEXIS 22303, (D. Ariz. Sept. 30, 2005) (Duncan, Mag.)

Cargo was damaged in an automobile accident that occurred while the defendant "On Time", under contract with an airline, was transporting the goods from Phoenix, Arizona to Santa Fe Springs, California. The air carrier's insurance provider covered the loss for the damaged cargo and sued On Time, alleging negligence, breach of bailment and liability pursuant to the Carmack Amendment. The defendant moved to dismiss, asserting that under the Carmack Amendment, the federal remedy was the sole and exclusive remedy and that the state law claims of negligence and breach of contract could not be converted into a Carmack claim, as the underwriter argued.

The district court set forth the history of the Carmack Amendment and found an interstate shipper's sole remedy against common carriers for damage to goods is found under the Carmack Amendment and noted that virtually every circuit that had addressed the issue had held that the Carmack Amendment preempts state law remedies for loss or damage to goods shipped by common carriers. At the same time, some courts have allowed plaintiffs to assert state law claims if the claim was outside Carmack's preemptive effect, which extends only to the shipment and delivery of goods and not to events occurring prior to or after the shipment and delivery. The instant action was for damage resulting from the shipment and delivery of goods interstate and, as such, was governed by the Carmack Amendment. Thus, the counts for negligence and breach of contract were dismissed, leaving only the Carmack claim to be determined.

Newsletter Editor's Note: Appreciation is again given to the contributions of Michael Marks Cohen and David L. Mazaroli. Members are requested to send along any interesting cases from their particular areas.

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COMMITTEE ON CARRIAGE OF GOODS BY SEA
CARGO NEWSLETTER NO. 47

Editor: Michael J. Ryan
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STRICT LIABILITY ISN'T ALWAYS STRICT. . . .

Contship Container Lines, Ltd. v. PPG Indus., Inc.,
2006 W.L. 751358 (2d Cir. March 21, 2006)

An ocean carrier sued the shipper of Calcium Hypochlorite ("Cal-Hypo") for damages arising when the cargo overheated, causing an on-board fire. The district court found the proximate cause of the fire was the carrier's failure to consider the impact of heat on the cargo when it stowed the cargo over heated fuel tanks, and, therefore, dismissed the carrier's claims against the cargo owner for strict liability and failure to warn.

On appeal, the appellate court considered whether a carrier may recover against the shipper in strict liability for loss caused by cargo that is known to be dangerous, and whether a shipper satisfies its duty to warn by disclosing the "dangerous characteristics of cargo in less than specific terms." The district court found, based on expert testimony, that the critical temperature for the shipment was 47°C. The IMDG Code required stowage of Cal-Hypo away from sources of heat if temperatures in excess of 55°C would be encountered for a period of 24 hours or more. The carrier argued that this standard rendered stowage reasonable at temperatures below 55°C absent contrary advice from the shipper. The shipper acknowledged that it was aware that the critical temperature of the drums of Cal-Hypo was lower than 55°C. Therefore, the carrier argued that the shipper owed it a duty to warn, and alternatively, argued that the shipper was strictly liable for shipping latently dangerous cargo.

The Second Circuit noted its review of the district court's findings of fact—including allocations of fault among the various parties—was based upon the clearly erroneous standard. Looking to COGSA, and particularly 46 U.S.C. § 1304, the court noted that with respect to goods of an inflammable, explosive or dangerous nature, the shipper will be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipments where the carrier has not consented with knowledge of the nature or character of the goods. Thus, the court framed the issue in dispute: "is strict liability of a claim available to a carrier that knew the cargo was flammable but had reason to think it was safe enough under the conditions of stowage?"

The Circuit Court noted that shippers will be held strictly liable for losses caused by inherently dangerous shipments where neither the shipper nor the carrier appreciates that the cargo is inherently dangerous. (Quoting *Senator Linie*, 291 F.3d at 148). However, the court also stated that a carrier cannot invoke strict liability if it knows that a cargo poses a danger and requires gingerly handling or stowage, and nevertheless exposes the cargo to general conditions that trigger the known danger, regardless of whether the carrier is aware of the precise characteristics of the cargo:

> A carrier that exposes a cargo to heat with knowledge of its flammability may or may not ultimately prevail—depending on the particulars of what it and the shipper knew and their respective duties—but it cannot prevail on strict liability.
>
> * * *
>
> In this case, such a 'nature and character' inquiry defeats *Contship*'s strict liability claims. The 'nature and character' of Cal-Hypo is that it is flammable at elevated temperatures. Knowing Cal-Hypo's tendency to lose thermal stability when heated, *Contship* stowed it in a super heated spot. *Contship* may not invoke strict liability where it brought about the very danger it knew to lie latent in its cargo.

As to the carrier's argument that the shipper failed to warn, the appellate court found liability for failure to warn would only be appropriate if there were evidence that a warning would have altered the carrier's actions:

> Professional carriers might be reasonably expected to exercise caution, and *not* stow flammable compounds in the hottest hold on a ship, at temperatures exceeding 47°C—that is, 115°F; but *Contship* emphasizes the supposedly reliable stability of Cal-Hypo at or below 55°C, absent the circumstances that PPG knew and *Contship* did not.

The court considered this argument dubious, noting that the IMDG Code itself advised carriers to stow potentially unstable materials with critical temperatures over 35°C in conditions at least ten degrees cooler than the critical temperature. (Referring to the *M/V DG Harmony, see* Committee of carriage of Goods by Sea, Cargo Newsletter 46). The court found the carrier's contention that it could reasonably expect danger only at or above the critical temperature of 55°C to be undermined by the cited warning in the IMDG Code against stowage at temperatures greater than 45°C.

The Second Circuit thus held that the district court's findings on the issue of causation were fatal to the carrier and not clearly erroneous. Specifically, the district court had found that the carrier was unconcerned with the effect of heat on the shipment and additional warnings would not have averted the loss and that no one involved in stowing the Cal-Hypo was much concerned with the IMDG Code's 55°C warning. The stowage of the Cal-Hypo entirely disregarded the factor of heat. The court stated the likely effect of a warning is a fact question best left to the finder of fact and concluded that the district court's finding on this point was not clearly erroneous. The court, therefore, affirmed the decision of the district court.

FU, THE FLYING FELINE. . . .

Wysotski v. Air Canada,
2006 W.L. 581093 (N.D. Cal. March 6, 2006) (Breyer, J.)

Plaintiffs flew on Air Canada from Toronto to San Francisco. They flew with their five pet cats, including their 14 year old FU (apparently pronounced "EFF-YOU"), which was in an individual crate. According to the plaintiffs' amended complaint, the air carrier assured them that their cats would be handled with care, and that the crates would be hand-carried on and off the airplane. At San Francisco, when the plaintiffs went to retrieve the cats, the crate that had contained FU was damaged and the feline was missing. Plaintiffs alleged that the crates were placed on a steel ramp leading down from the airplane and the crates accelerated, smashing into the ground. Although the plaintiffs were permitted to search for FU in the area around the airplane for 20 minutes, FU was never located.

Plaintiffs sued under the Warsaw Convention and state law. The action against Air Canada was stayed pending the company's bankruptcy reorganization. During that time Continental Airlines was dismissed from the case after reaching a settlement with plaintiffs. The plaintiffs now sought to lift the stay because Air Canada's reorganization was completed. They asserted they presented their claims against "insurance proceeds only."

In the bankruptcy proceeding, the monitor appointed by the Ontario Supreme Court awarded plaintiffs $226.75 U.S. for violation of the Warsaw Convention, which assigns an award of U.S. $9.07 per pound. The monitor estimated that the cat and its crate weighed 25 pounds and calculated the award accordingly. The monitor noted the Warsaw Convention excluded punitive and emotional damages and his decision included the caveat that a dispute notice must be filed within ten days or the value of the claim would be deemed to be as set out in the Notice of Revision or Disallowance. The plaintiffs did not dispute the award and accepted two shares of stock as satisfaction. Ultimately, the bankruptcy court entered a permanent injunction discharging and restraining affected, unsecured claims and all proceedings with respect thereto.

Subsequently, plaintiffs argued to the U.S. District Court that their claims were not fully satisfied by the bankruptcy proceeding and that the value of the missing cat exceeded the insurance deductible of $1,500.00 which rendered it an/"excluded claim" that could be pursued. The district court, in considering the state law claims, noted that the Warsaw Convention preempts not only state-law claims that could be asserted under the Convention, but all causes of action for damage to persons or cargo suffered during international transportation:

> In other words, the Convention is the exclusive source of any remedy that can be obtained in connection with an inquiry arising out of international air transport; if a claim cannot be asserted under the Convention, it cannot be asserted at all.

Plaintiffs argued that the air carrier's misrepresentations concerning the care that would be provided and the carrier's refusal to permit adequate searching after the cat went missing occurred prior to air transportation and subsequent to air transportation and thus were actionable under state law.

The court rejected this argument, commenting that the Warsaw Convention would cease to be an exclusive remedy and the Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) would be gutted—if plaintiffs who could not assert state law claims for the act itself were nonetheless permitted to sue under state law for *ex ante* representations that the act would not occur or *ex poste* failure to redress the harm. Accordingly, the court found all of plaintiff's causes of action collapsed into its claim for breach of the Warsaw Convention.

As to the bankruptcy order, the district court found the plaintiffs had submitted a claim in the bankruptcy proceeding, received an award, were offered an opportunity to challenge the award, and declined to do so. While plaintiffs argued that the same claim adjudicated by the bankruptcy court should have received a different damages determination, the court found the argument would more appropriately be filed in the bankruptcy court that sanctioned the damages' determination, stating:

> It is not within this Court's jurisdiction or authority to second guess another court's valuation of FU *the Flying Feline*; in fact, the principles and purpose of *res judicata* preclude the Court from doing so. If plaintiffs want to proceed with their arguments concerning Fu's damages calculation, they must do so in the bankruptcy court that originally adjudicated the claim, to the extent they still can.

The court dismissed the state-law claims as preempted by the Warsaw Convention and dismissed the plaintiffs' remaining claim under the Warsaw Convention without prejudice to pursuing the action in the appropriate bankruptcy court.

MALANGA—("Probably the most hypoallergenic food in the world . . . closely related to the taro root")

C.I. Aldea Ltda. Inc. v. American President Lines, Ltd., Inc.,
No. 05-21651 (S.D. Fla. March 8, 2006) (Lenard, J.)

A bill of lading was issued for a shipment of white malanga for transportation from Cartagena, Colombia, to Port Everglades, Florida. It was alleged that the shipment was delivered in damaged condition resulting in damages of some $32,857.00. The figure was calculated by multiplying the per carton price by 1,151 cartons and subtracting the amount received for the sale of the damaged product.

The malanga was packaged into 1,151 corrugated fiberboard cartons. The bill of lading provided that the cartons were consolidated into 20 packages. In actuality, a large number of the cartons were stacked onto 18 pallets and the remaining cartons were either placed on the floor of the container or hand stacked atop additional pallets. The record contained conflicting evidence presented by the plaintiff as to how many cartons were stacked and banded on pallets and as to the location of the remaining cartons and there was no explanation as to whether the statement contained in the bill of lading, *i.e.*, 20 packages, was incorrect. Defendant offered no evidence as to how many cartons were palletized or regarding the locations of the unbanded cartons, if any.

Defendant carrier asserted that its liability was limited to COGSA's $500 per package limitation for the 20 cartons listed as "packages" on the face of the bill of lading. The bill of lading had the number 20 under no. of pkgs. and described the shipment as "20 pkgs with 1,151 cartons. . . ." Conversely, Plaintiff asserted that the COGSA limit should be based on the total number of cartons or, in the alternative, on 18 pallets plus the remaining cartons. Defendant was silent on the issue and accordingly, on this basis alone, the court found that defendant was not entitled to summary judgment.

Even assuming the number of pallets utilized in the shipment and listed on the bill of lading as packages constituted COGSA packages, the district court found defendant had failed to demonstrate the absence of a genuine issue of material fact as to its assertion that the total number of pallets was 20. The court found that both cartons and pallets actually used in the shipment could be considered packages and, as such, would constitute an ambiguity which would be resolved against the carrier. Thus, the COGSA liability limitation would be calculated on the basis of each of the 1,151 cartons.

The court referred to the 1968 Brussels Protocol, which though not applicable *per se,* contains a provision that where a container, pallet or similar article of transportation is used, the number of packages enumerated in the bill of lading as packed in such articles of transport shall be deemed to be the number of packages or units. The court found that while pallets were used to consolidate goods, the bill of lading identified the cartons that were stacked on to those pallets and, referring to the 1968 Brussels Protocol as "international standards", found the package limitation applied to each carton.

CARGO GETS CUSTOMIZED. . . .

Rossetti v. Charleston Freight Station, Inc.,
354 F. Supp.2d 612 (D. S.C., Charleston Div.) (Duffy, J.)

The plaintiff shipped goods from Spartanburg, South Carolina, to Geneva, Switzerland, with carriage by sea from Charleston, South Carolina, to Le Havre, France. The ocean carrier retained the defendant, who was engaged in cargo handling, container stuffing and stripping, as well as U.S. Customs' inspection of cargo. The defendant took possession of the container bearing plaintiff's goods and at some point opened the container to perform a customs inspection. The plaintiff contends that the defendant unwrapped and unboxed many of his goods and left them in this condition for shipment. The plaintiff alleged his goods were damaged in an amount in excess of $100,000 during shipment.

Initially, the complaint was filed in state court. However, the defendant freight station removed the action to federal court on the ground that COGSA provided plaintiff's exclusive remedy. It then moved for summary judgment, contending that plaintiff was limited to $500 and that summary judgment should be granted in that amount.

The U.S. district court referred to *Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar,* 993 F.2d 415 (4th Cir., 1993), which adopted the Second Circuit's holding in *Mitsui & Co. v. American Export Lines, Inc.,* 636 F.2d 807 (2d Cir. 1981) that when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the package.

The court noted precedent holding that where a bill of lading refers to both containers and other units susceptible of being COGSA packages, it presents an ambiguity which could be resolved against the carrier unless the parties have clearly and expressly agreed to treat the container as the COGSA package. The defendant freight station argued that the parties had agreed to treat the container as a package and pointed to language in the bill of lading concerning the receipt of one container for the purposes of calculating the package limitation.

The district court rejected the contention that this constituted a clear and unequivocal agreement to treat the container as a COGSA package, as the bill of lading also showed that "169 pieces" were declared by the shipper. In the opinion of the court, the language relied on was non-bargained for boiler plate. It found, given that the bill of lading referenced the number of separate "pieces" on its face, the bill was ambiguous and must be construed against the defendant freight station. Accordingly, the court rejected the freight station's attempt to invoke the $500 package limitation.

(*Newsletter Editor's Note: Although the bill of lading referred to the contents as 169 pieces, the decision shows the goods inside the container were wrapped and boxed; at page 613.*)

A GUATEMALAN TALE. . . .

FAT Intl. Corp. v. Great White Fleet (US) Ltd.,
2006 W.L. 661042 (S.D.N.Y. March 16, 2006) (Fox, Mag. J.)

Plaintiff brought suit for the loss of cargo, which was hijacked while being trucked from Puerto Barrios, Guatemala, to Guatemala City, Guatemala. The cargo had been transported by sea to Puerto Barrios. Plaintiff alleged its cargo was stolen because the defendant had breached its duty of proper delivery under the parties' maritime contract by transferring the cargo to an unauthorized trucker at the port. The plaintiff also sought damages as a sanction for an alleged act of evidence spoliation.

Defendants moved for summary judgment, asserting that the court lacked subject matter jurisdiction and thus could not entertain plaintiff's claims for breach of contract, breach of bailment, breach of fiduciary duty, negligence and spoliation of evidence. The defendants maintained that the contract of carriage upon which the plaintiff relied for subject matter jurisdiction had been fully performed when plaintiff's cargo was stolen during its overland sojourn.

Plaintiff cargo owner opposed the summary judgment motion, arguing that its claim was within the district court's admiralty jurisdiction because the defendants had misdelivered the subject cargo and, in doing so, breached a maritime contract. The bill of lading covering the shipment from Miami to Puerto Barrios did not provide for inland transportation of the cargo upon its arrival at the port in Guatemala. The plaintiff's Customs house broker in Guatemala had hired a third party to represent the plaintiff's interest at the port. The employee was responsible for securing the inland transportation of the cargo. Inquiry was made as to whether plaintiff could use its own trucker to haul the cargo, which was still in the carrier's container. It was explained that only approved truckers could haul the carrier's containers under the following options: (1) the cargo could be removed from the carrier's container, reloaded into a container other than the carrier's and then transported in any matter desired; or (2) if cargo was not to be stripped from the container, then an approved trucker would have to be hired. An invoice was issued for the cost of transportation to the inland warehouse and plaintiff paid the amount listed on the invoice.

A trucker took possession of the cargo without any demand by the carrier that the trucker display the original bill of lading. Following Customs inspection, the cargo was removed from the port. The plaintiff had purchased insurance for the cargo it sent to Guatemala which provided that when the cargo was in overland transit, certain security measures would be employed. At the time of the theft, none of the required security measures had been put in place.

Based on the foregoing, defendants moved for summary judgment for lack of subject matter jurisdiction because the claim arose from a theft that occurred under an overland transportation contract. The court found that an alleged breach of contract of carriage by misdelivery to an authorized person, predicated on the carrier's alleged failure to require the presentation of the original bill of lading before surrendering the goods, is a maritime claim and, that the claim was, therefore, within the court's admiralty jurisdiction.

As to plaintiff's assertion that the district court had jurisdiction since the action involved a federal question, the court noted admiralty claims are not included within the scope of federal question jurisdiction. As to supplemental jurisdiction, the claims arose from a common nucleus of operative fact and, therefore, the court would exercise its discretion and address the plaintiff's state law claims under its supplemental jurisdiction authority.

Regarding plaintiffs' breach of contract claim, the court considered COGSA, the Harter Act and the Pomerene Act. The court noted that COGSA applied during ocean carriage, but that the incident occurred subsequent to discharge. Under the Harter Act, the court noted proper delivery may be either actual or constructive and, although failing to require presentation of the original bill of lading might expose the carrier to liability for misdelivery, notably absent from the common law obligation of proper delivery is the duty to take up original bills of lading before delivering the goods (referring to *Chilewich Partners,* 853 F. Supp. at 755). The court stated:

> There is no 'absolute' duty on the carriers to take up original bills of lading before delivery where this duty is imposed neither by the terms of the contract of carriage nor by the mutual understanding or agreement of the parties nor by the requirements of applicable federal law.

Further, the court noted that, in the context of the Pomerene Act, where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill but improper acquisition of it or improper subsequent conduct, the mere technical failure to require presentation and surrender the bill will not make the delivery a conversion.

Under the governing standards, the district court found a constructive delivery analysis was unnecessary. As to actual delivery, the court found failure to require presentation of the bill of lading before releasing the cargo did not cause the loss. The loss was caused by a failure to request that the cargo be held at the port until the security required under the insurance policy could be arranged for, and the interdiction of the truck carrying the goods by highwaymen. In essence, the plaintiff's claim arose from the manner in which the cargo was transported from the port and not from the actual transfer of the cargo. Accordingly, on the record as a whole, the court found that the contracted trucker was authorized by plaintiff, the legal holder of the bill of lading, to accept delivery of the cargo on plaintiff's behalf and that, as a matter of law, defendants established that proper delivery was effected.

The court went on to consider whether there was a breach by defendants with respect to standard operating procedures. It found the parties had failed to agree upon standard operating procedures but that neither COGSA nor the Harter Act required an ocean carrier to abide by standard operating procedures. As to breach of fiduciary duty, the trial court found plaintiff had failed to establish the elements needed to succeed on this cause of action. The court thus found that the defendants did not breach any duty owed to plaintiff because proper delivery of the property was effected.

The court also considered arguments of spoliation and alter ego as well as proper service of process. As to the latter, there was no evidence that the Clerk of Court had addressed and dispatched the Summons and Complaint by registered mail and plaintiff failed to file a receipt of service or any other proof of service. The court granted the defendants' motions except as to the claim that the court was without subject matter jurisdiction.

SODA POP AND SEAWATER. . . .

Atl. Mut. Ins. Co. v. CSX Lines, L.L.C., 432 F.3d 428 (2d Cir. 2005)

A containership carrying, among other things, several containers full of various Pepsi concentrates held in plastic drums, embarked on a voyage from Puerto Rico to New Jersey. In the face of a storm upon departure from the load port, the Master ordered the vessel's ballast tanks to be filled to help stabilize the vessel. As a result of an uncapped pipe, left open by a recent shipyard repair of the ballast system, ballast water flooded one of the vessel's cargo holds completely submerging the bottom tier of containers, including one container holding 720 drums of Pepsi Free Concentrate.

Upon arrival at the discharge port, Pepsi's quality control representative inspected the cargo and upon finding all of the pails to be wet, declared the pails unfit for use. Subsequently, the carrier's representatives were given access to survey the cargo, but were not permitted to open the pails or take samples of the contents. Despite the carrier's protests, Pepsi destroyed the cargo. Pepsi retained a batch sample of the cargo and conducted a specific gravity test on the sample and alleged that a change in specific gravity from the original batch samples indicated the pails had been contaminated.

Pepsi's underwriters filed suit in the district court for cargo damage under COGSA. Following preliminary discovery, the ocean carrier filed a motion for summary judgment to dismiss the case as a spoliation sanction for destroying the cargo without allowing the ocean carrier to collect and test the cargo. The district court found that Pepsi had improperly destroyed the cargo and as a sanction excluded the specific gravity test from evidence. The district court dismissed the case finding that the specific gravity test was the only evidence of damage and, without it, Pepsi could not make out a *prima facie* case for cargo damage. Dismissal was premised upon the fact that Pepsi could not show that the cargo was *actually* contaminated.

Underwriters appealed, arguing that the district court had erred in finding that Pepsi failed to make out a *prima facie* case. The Second Circuit held that a *prima facie* case can be established by evidence that, as a practical matter, cargo could no longer be used in the intended market. In this case, the court found that because the cargo had been "adulterated" under the standards of the Food Drug and Cosmetic Act, Pepsi could not take the risk of placing the good into the market and risking criminal or civil prosecution under the Act. The market reality made the cargo worthless and thus, according to the Second Circuit, damaged for purposes of establishing a *prima facie* case of cargo liability under COGSA. The Second Circuit reversed the district court finding that Pepsi had met its *prima facie* burden and remanded the case for an assessment of the measure of damages.

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