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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

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EDITORIAL COMMENT

Few if any events can begin to rival the magnitude of the losses suffered by our friends and colleagues in the Gulf region of the United States as a result of Hurricane Katrina. Homes, businesses, and entire communities have been devastated, and many of the approximately 200 maritime law firms doing business in the region have been directly impacted. Yet within the community of maritime lawyers the scale of devastation has been equaled by the timely and compassionate responses of the Maritime Law Association. Under the leadership of MLA President, Tom Rue—himself from a firm in Mobile, Alabama—the Association has offered help in many and varied forms—office space, assistance in resettling families, open lines of communication—to ensure that our impacted colleagues will receive assistance where needed most. No doubt the needs of our colleagues in the Gulf region will continue long after the flood waters have receded. However, it is worth noting that the Association has shown its mettle during this past month.

This Report includes newsletters by the Association's most prolific contributors: the Marine Insurance and General Average Committee, Recreational Boating Committee, Carriage of Goods by Sea Committee, and Young Lawyer's Committee. No Report would be complete without the humour and expertise of the Carriage of Goods by Sea Committee's newsletter, which is shepherded to publication by its longstanding editor, Mike Ryan, and assistant editors Ed Radzik and Dave Mazaroli. In the fifteen years that I have participated in the production of the Report, the Carriage of Goods by Sea committee has provided newsletters for every issue. Needless to say, their record is unsurpassed.

The Marine Insurance and General Average Committee's Fall 2005 newsletter provides timely updates on recent marine insurance decisions, and includes a fascinating, very practical article by Jonathan Spencer about the role of average adjusters in maritime casualties. Gene George, Josh Force, and George Proios are to be commended for overseeing this high quality work.

The Recreational Boating committee's newsletter, under the editorial guidance of Frank Degiulio, provides a compelling snapshot of the federal and state case law governing this growing and often complex area of maritime law. Likewise, as its mid-2005 newsletter documents, the Young Lawyers Committee has proven itself to be a superb resource for the other committees and an enjoyable introduction to committee work for the Association's younger members. Lastly, the Report includes a very useful list of citations, or-

dered by subject and case name, to significant pre-1996 maritime law decisions that have been published by our colleagues at American Maritime Cases. The list was prepared for the Association by the AMC's editors and in particular, former MLA president, Graydon Staring.

Written submissions for the Spring 2006 Report should be sent to me at marionlaw@hotmail.com or to LeRoy Lambert at llambert@healy.com.

Matthew A. Marion,
Editor

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, FALL 2005

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Our primary thoughts at this time are with our friends and colleagues in the areas affected by hurricanes Katrina and Rita.

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 Role of the Average Adjuster in Maritime Disasters
Some Practical Observations

By Jonathan S. Spencer[1]

**Based on remarks delivered at the 2005 VIEWPOINTS seminar of the Association of Average Adjusters of the United States held at St John's University in Manhattan on October 5, 2005.*

Introduction

It is perhaps surprising, given the extent of the profession's involvement in the settlement of general average and hull & machinery claims, how rarely average adjusting is mentioned in jurisprudence. When it is mentioned, of-

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[1]The Spencer Company "Marine Insurance Solutions" New York

ten it is in complimentary terms. For example, The Honourable Mr. Justice Mackinnon, speaking in 1935, is reported to have said that: "Your profession is a singular one—not merely because the vast majority of your fellow-citizens have not the remotest idea what your duties are; but because, above any other profession that is not actually legal, you are required to have, and in fact possess, a very exact knowledge of a very special branch of the law."

The profession itself rarely comes up in litigation but the need for and effect of an average adjustment has been addressed in some reported cases.

Wavertree Sailing Ship v. Love [1897] A.C. 373 and *Crooks v. Allen (1879) 5 QBD 38; 49 L.J.Q.B. 201* are generally taken as supporting the principle that when there is a general average, the shipowner is under an obligation to have an adjustment prepared. In *Chandris v. Argo Insurance Co. Ltd. [1963] 2 Lloyd's Rep. 65*, as reported in *Lowndes*, it was held that a contract incorporating the York-Antwerp Rules 1924, by implication, provided that an average statement should be produced in support of a claim for general average contribution, but not that a professional average adjuster must be employed.

A statement of general average is not legally binding and is not conclusive of any party's liability to contribute. *Great Eastern Associates and Farrell Lines v. Republic of India, 1978 AMC 1288*. However, a statement of general average prepared by an average adjuster is, as summarized by Buglass, *prima facie* proof of:

1. The losses, damages, and expenses which, as factual matters, are the direct consequence of the general average act;

2. The values attaching to such losses, damages, and expenses; and

3. The computations apportioning these losses, damages, and expenses between the parties to the adventure.

A personal favorite is the *Joseph Farwell, 31 Fed. Rep. 844*, one of few American cases addressing abandonment of voyage, where the court decided, in the particular circumstances applying, that there was a general average up until the completion of the discharge of the cargo, and instructed the Clerk of the court to go off and prepare an average adjustment.

Despite being all but ephemeral in the annals of admiralty law, professional average adjusters are in fact quite central to the settlement of general average and various classes of blue water hull & machinery and loss of earn-

ings claims, not to mention claims involving the liabilities of ship builders and repairers and, increasingly, claims involving brown water tonnage.

In fact, the most tangible affirmation of an Adjuster's existence can be found in the York Antwerp Rules, certain of which reflect the clear assumption that the general average will be stated by an average adjuster, and in a significant proportion of hull & machinery policies and other policies on marine property, where the average adjusters are named within the policy conditions.

The purpose of this paper is to review the principal aspects of the average adjuster's involvement as the catastrophe develops. It must be appreciated that particularly in the US and particularly where a casualty involves pollution, injury or loss of life, attorneys are likely also to be appointed and clear communication between them and the average adjusters is key to a smooth evolution of the case.

Appointment of Surveyors

As soon as the average adjuster receives instructions in a given case, and has satisfied himself that the casualty is of a magnitude that will give rise to a claim in excess of the deductible provided for in the hull and machinery policy, he will arrange the appointment of surveyors on behalf of hull & machinery underwriters. Quite often, the identity of the preferred surveyors will be found in the hull & machinery policy or, by virtue of familiarity with the account, the adjuster will know which surveying entity is preferred by the underwriters. He will usually make the appointment on underwriters' behalf and will act as a conduit for the surveyors' advance advices, their reports and, ultimately, their professional charges.

Depending on the nature of the casualty, the average adjuster might recommend the appointment of other surveyors. For example, in the case of a collision, it would often be prudent to arrange a speed and angle of blow survey, which has a forensic purpose, that of reconstructing the circumstances of the collision with the intention of establishing degrees of blame.

In the case of a general average, particularly one involving sacrifice of property (as opposed to the mere incurring of expenditures) or the forced discharge of cargo, with the concomitant risk of damage being suffered to cargo or to the ship during cargo handling, the average adjuster will recommend the appointment of a general average surveyor, also known as a surveyor in the general interest. Whilst the owners or insurers of individual items of property are likely to appoint their own, first-party, surveyors, the

objective of the surveyor in the general average interest is to apply the same uniform set of criteria to measuring the damage and expenditure to be claimed by individual parties under the general average adjustment. The general average surveyor will comment on the reasonableness of steps proposed, and their cost, from the point of view of the commonality of interests of all the parties involved in the adventure. In order to be prepared for action within a moment's notice of a casualty, the average adjuster will typically maintain a database of qualified surveyors worldwide.

Allocation of Losses and Determination of Coverage

At an early stage in the events, the shipowner is likely to require a preliminary analysis of whether he has full coverage for the losses that are in the course of being incurred and where those losses will lie. The average adjuster must make an early, provisional determination about whether a given casualty gives rise to general average and, in the case of damage to the ship, he will ascertain where coverage is to be found under the hull and machinery insurances and whether any additional investigation is going to be necessary into the cause of damage to, for example, a piece of machinery, perhaps in the form of metallurgical testing, in order to establish exactly how a claim on underwriters is to be founded.

If the casualty gives rise to general average, the average adjuster will review the general average absorption provisions typically found in the hull and machinery insurances and will then attempt to ascertain the estimated contributory values of the ship, cargo and any other property such as containers and bunkers, and an estimate of the expenditure to be incurred, in order to make a preliminary recommendation as to whether the general average might be recoverable entirely within the absorption clause or whether a declaration of general average and the involvement of the owners of the cargo and other property is unavoidable.

It must be noted that invoking the absorption clause is discretionary. Even if the general average falls within the limits of the absorption clause, the shipowner might nevertheless elect to make a claim for general average against the cargo. For example, the shipowner may choose to proceed against cargo interests if the cargo comprises a single interest and the expense of collecting security and formally adjusting the claim make economic sense; or in order to minimize the negative effect of the claim on his hull & machinery loss record.

In order to assess the full impact of the casualty from the perspective of general average, it has become increasingly important for the average ad-

juster to discover at an early stage of the case which version of the York-Antwerp rules applies. For example, wages at a port of refuge have been abolished under the 2004 rules, and if salvage is settled directly with the salvors by the individual parties to the adventure, it is no longer dealt with under the general average adjustment. This means that if a very valuable piece of cargo is sacrificed during the course of salvage efforts, it no longer has to contribute to the salvage and receives a windfall benefit. The elimination of allowances for wages and maintenance at a port of refuge has a more practical impact; often wages and maintenance make up the largest single allowance in general average when, for example, a vessel suffers engine damage and is detained at a port of refuge in order to make repairs necessary for the safe prosecution of the voyage; the average adjuster might need to ascertain whether or not those wages and maintenance will be allowable in general average before he can guide the ship owner as to whether or not the cargo should be brought in as a contributing interest.

An assessment must also be made of whether the cargo has any potential defense to the general average claim on the ground of unseaworthiness, since cargo's uncollectible proportion of general average expenditure gives rise to a claim on the P&I insurances. In these circumstances the effect of a further deductible must also be taken into consideration.

It should be noted that the great majority of general average absorption clauses in hull and machinery policies address only cargo's proportion of general average *expenditure*. If there is general average sacrifice of cargo, the shipowner is under an obligation to have a formal adjustment made up, in order to ensure that the owner of sacrificed property is made whole, unless he cares to pay for the sacrifice entirely himself. If the only sacrificial damage is to the ship, the owner has the option of claiming that damage in full under the hull and machinery policy.

If the shipowner carries any other insurances, such as insurance against loss of revenue or charter hire, the adjuster must make an early determination about whether the casualty is likely to give rise to a claim on those insurances and, if appropriate, put those underwriters on notice and give them the opportunity of arranging the attendance of their own surveyors.

Special Insurances

Any major casualty is likely to give rise to the needs for special insurances. For example, if general average expenditure is incurred, it is advisable to obtain general average disbursements insurance, also known as diminu-

tion in value insurance. The reason for this is that the general average is adjusted on the values of the property at the end of the adventure. If the ship and cargo suffer another casualty on the voyage subsequent to the general average expenditure being incurred, the contributory values at the end of the voyage might not be sufficient to meet the general average expenditures, and the situation becomes worse if the property becomes a total loss. Disbursements insurance protects that expenditure against any diminution in value of the contributing property until the conclusion of the voyage and the cost of that insurance itself is admissible as general average expenditure.

If cargo is put ashore as a general average measure at a port of refuge, for example in the course of firefighting operations or to enable repairs necessary for the safe prosecution of the voyage, it is advisable to arrange insurance on that cargo while it is ashore, and, indeed, in the U.S., it seems clear from the *MORMACMAR** decision that the shipowner is under a legal obligation to take out such insurance. If he does not, he is liable to the cargo owner for any loss sustained to the cargo in consequence of shore perils.

Consideration must also be given to protecting the ship owner's liabilities towards the forced discharged cargo, as conventional P&I cover will not remain in force once the cargo is removed from the ship.

An exposure to unusual liabilities might also arise if, for example, the ship is drydocked with cargo on board. We have also seen cases where the ship is left in such a condition after the casualty as to constitute a perceived hazard to the repairers' facilities and to their employees, such that repairers have insisted on the shipowners taking out special insurance for the potential liability arising therefrom.

Sometimes obstacles arise that can be satisfactorily removed by means of lien insurance. Salvors or the owners of a colliding vessel have a lien *in rem*, and will usually insist on satisfactory security being given before they will allow the ship to sail from the first port or place at which she safely lies after the conclusion of the salvage services or following the collision. A prolonged detention at that place can sometimes be avoided by persuading the lien holder to allow the ship to sail under the protection of lien insurance while satisfactory permanent security arrangements are put in place.

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*1947 AMC 1611. *See also* 1950 AMC 2018, 1952 AMC 1088, 1954 AMC 691 and 1956 AMC 1028.

General Average Formalities

If the decision is made that a formal declaration of general average is unavoidable, and this is a decision that is usually made with great reluctance, then the average adjuster should be aware of any formalities that might be required of the shipowner in order to make the declaration of general average valid. In the U.S. and most other countries, no particular formalities are required and a notice is prepared and sent to receivers of cargo describing the casualty, the circumstances giving rise to general average, the identity of the appointed adjusters, the security requirements and the mechanism for providing that security.

In some countries, however, particularly in South America, there is a requirement that general average be declared in a specific form within a specific time before a specific court in order for claims successfully to be pursued against cargo. The average adjuster should be mindful of these and guide the shipowner accordingly.

If cargo is to be called upon to contribute to a general average, general average security will be required. This typically takes the form of an average bond signed by the cargo owner; and an average guarantee signed by the insurer or, if the cargo is not insured, a cash deposit. If a cash deposit is to be taken from uninsured cargo, and this is a problem that arises with some frequency in a hard cargo insurance market, the average adjuster has to make some quite reliable estimate of the eventual general average and of the value of the contributing interests in order to fix the amount of the cash deposit at a percentage of contributory value adequate to ensure that the general average contribution ultimately can be collected.

If sufficient information is available by this stage, a determination can also be made about the simplification of general average. For example, if the cargo comprises a number of higher value shipments, making up, say, 80% of its total value, with numerous low value shipments accounting for the rest, it will often be economical to eliminate those low value shipments from the general average and bring only the high value shipments into contribution, demonstrating that they pay less in this way than if they were to contribute to the costs of collecting security from, ascertaining the contributory value of and applying for contribution to, the concerned in the numerous low value shipments.

A decision has to be made about the mechanism for collecting the security; this can be done by the shipowner's personnel, by the shipowner's

agents at the discharge ports or by the average adjusters. A determination must be made in each individual case as to which mechanism is going to result in the smoothest, most complete and most accurate results.

If the general average occurs quite close to the destination or involves a large number of receivers of cargo, the ship owner will need to give consideration to whether or not to exercise a lien against the cargo, and detain it in his own possession and at his own expense until general average security has been proffered, or to deliver the cargo in the hope that the receivers and their insurance will reciprocate and provide general average security after delivery, in consideration of having received the cargo without delay.

If the casualty also entails a salvage under a contract by the terms of which separate security must be given to the salvors, it will usually be more efficient for the salvage security to be collected simultaneously with the general average security, by the same entities, and this procedure must be resolved with the salvors at the earliest possible stage in the case.

The place of adjustment also must be established at an early stage. If the 2004 version of the York Antwerp Rules applies, and if there is no specific provision in the contract of affreightment, it will behoove the ship owner to select a place of adjustment in the United States. Allowances for commission having been eliminated in the 2004 Rules. To the best of my knowledge the U.S. is the only place where local adjusting practice permits a similar advancing commission.

Cash Flow

The financial consequences of the casualty will become clear at an early stage and the average adjuster will start assessing the potential of the claim for payments on account. This is a somewhat nebulous area because most hull and machinery policies are policies of indemnity, in other words, "pay to be paid." However, hull and machinery underwriters are almost invariably willing to make payments on account and, although they insist that this is a commercial concession to the insured and not a contractual obligation, the procedure has now become a matter of routine. Accordingly, when there has been a significant outlay of capital, the average adjuster will obtain repair invoices or available estimates, seek the underwriters' surveyor's approval of the expenditure that has been incurred or is in the course of being incurred, and will draw up a payment on account recommendation in order to approach underwriters for an interim payment. In the case of ma-

jor repairs, payments might be made directly to the shipyard on completion of the work or, if the repairs are truly protracted, arrangements can be made for underwriters to make progress payments as the work advances to the satisfaction of their surveyors.

Similarly, in the case of a general average, if parcels of cargo have suffered significant loss by sacrifice, the average adjuster will make arrangements for payments on account by the other contributing interests pending the completion of the final adjustment.

Preparation of the Adjustment

Average adjustments contain a narrative of the material events of the casualty and of the repairs, typically abstracts from the ship's log and reports by the ship's staff, together with particulars of all the expenditures claimed by the various parties as average. The average adjuster will already have assembled some of these during the early stages of the casualty, particularly if he has been engaged in preparing payments on account. In due course, he will identify what additional documentation and information is going to be necessary for the preparation of the final adjustment and he will propose a list of adjusting inquiries and give this to the shipowner.

If the claim involves a general average to which cargo is going to be required to contribute, the adjuster will also correspond with the concerned in cargo in order to ascertain particulars of the value of the cargo and the amount of the losses it has sustained. The practice of average adjusters in the U.S., though not necessarily in other countries, is to agree on contributory values and damage allowances with the concerned in cargo before finalizing the adjustment.

The adjuster will likely put these various inquiries on a diary system, in order to issue periodic reminders with a view to completing the adjustment as soon as possible. Accusations of being slow have been laid at our door in the past but more often than not it is the ship owners and the cargo interests who bear most of the responsibility for delay. The average adjuster gains nothing by delaying the issuance of an adjustment, and, indeed, is unlikely to earn a fee until he has finished his work.

In the course of assembling the documentation and turning it into a draft adjustment, the average adjuster must take additional steps, such as having the invoices for the expenditures to be included in the adjustment

approved by the general average surveyor, as appropriate, and by the surveyor acting on behalf of hull underwriters. Even this entails some mystery of art, because most underwriters will allow the average adjuster to use his own discretion in the adjustment of smaller bills, typically those under $5,000 or so, whereas some American underwriters require the adjuster to have all invoices, however small, approved by the underwriters' surveyor.

So far as concerns information to be received from cargo, the situation has been ameliorated somewhat by the most recent versions of the York-Antwerp Rules. These Rules allow the adjuster to estimate contributory values and allowances, if information has not been received from the cargo interests within twelve months after the termination of the adventure.

In the course of working on the draft adjustment, the average adjuster is quite likely also to sit down with a consulting surveyor in order to review certain aspects of the claim. These might include cause of damage, for the purpose of establishing the basis for the claim on the hull policy, or they might include marking up the repair accounts to identify any items not claimable, for example in terms of the exclusions contained in the Liner Negligence Clause. A consultant is often used to review allowances for consumables such as fuel and stores used in the course of removal passages, paints used in the course of repairs, and so on. It would also be appropriate to use a consultant to determine "deductions of thirds" when dealing in general average with sacrificial damage to the ship.

Recourse would also be had to consulting ship valuers when dealing with general average claims, in order to ascertain the sound market value upon which the contributory value of the ship is based. It is important to understand that although increasingly ships are deemed to be insured for their full contributory value under the hull insurance policy, even if the value agreed in the policy is less than the actual market value, a phenomenon which is not uncommon in an era of appreciating ship values, nevertheless the value for general average contribution has to be based on the commercial value and not upon the value agreed for insurance purposes.

Once this phase of the work has been completed, then depending on the procedure agreed with that particular client, the average adjuster either will go over the draft adjustment with the ship owner before finalizing it, or will submit his proposed final adjustment to the ship owner for review. If it is an adjustment dealing with general average, the agreement of the princi-

pal cargo interest might also be sought. The adjustment will then be submitted to all the debtor parties for settlement.

If the claim arises from collision, the average adjuster might also at this juncture draw up the statement of the claim against the other ship, which is likely to include not only amounts claimable by way of general average and particular average but also uninsured losses. Indeed, the average adjuster's skills readily lend themselves to drawing up statements of claim in any admiralty action.

Settlements

Finally, the average adjuster will assist with those settlements. He will deal with any inquiries received from underwriters requesting clarification of any of the allowances in the adjustment and he will likely act as the repository of funds, turning these over to the claimants by stages as they are received.

If the claim arises from a general average, and this is contested by the concerned in cargo on the ground of some breach of the contract of affreightment, the average adjuster will likely try to resolve cargo's concerns, and if he is unsuccessful he will turn the matter over to the P&I club for them to pursue. This process might also entail a readjustment of the general average, separating the ship's sacrifices from the expenditures, since the sacrifices can be claimed in full from the hull insurers; the P&I club will only reimburse the uncollectible proportion of cargo's contribution to expenditures.

I might be faulted for having addressed inadequately the topics of catastrophe and disaster. However, any claim that occurs on a ship is a catastrophe and a disaster in its own way. The aim of our intervention is to make the disaster as un-catastrophic as possible for all concerned. This takes the form of ameliorating damage to cash flow to the fullest extent possible and doing the best job we can of setting out fairly, clearly and accurately the financial positions of the respective parties.

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Newsletter Editor's note: Our sincere thanks to Jonathan Spencer for the foregoing article. He has been an unfailingly generous contributor to this Newsletter, and we are very grateful.

II. RECENT CASES OF INTEREST

LABOR CONTRACTOR MUST HOLD VESSEL OPERATOR HARMLESS FOR INJURIES TO CONTRACTOR'S EMPLOYEES

Johnson v. Seacor Marine Corp, 404 F.3d 871 (5th Cir. 2005)

Employees of a labor contractor injured while transferring between an offshore platform and a chartered transfer vessel brought separate actions against the operators of the vessels. The vessel owner brought third-party claims against the labor contractor and its liability insurer. Plaintiffs settled with the vessel operator and trials went forward on the third-party claims.

In two of the district court proceedings the judges granted summary judgment in favor of the vessel owner on the issue of whether the vessel boarding agreement signed by the labor contractor was supported by consideration. The labor contractor's agreement to hold harmless and indemnify the vessel operator in the event of injuries to the contractor's employees while being transported on the operator's vessels was supported by consideration because, while the operator owed a duty to transport employees under its agreements with the oil companies, it owed no duty to the contractor to do so prior to execution of the hold harmless agreement. Execution of the agreement gave the contractor a separate, legally enforceable right to put its employees on the operator's vessels.

The Louisiana Oilfield Anti-Indemnity Act was not applicable to preclude enforcement of the indemnity terms of the vessel boarding agreement, which was a maritime contract governed by federal maritime law.

The labor contractor further agreed to name the vessel operator as an additional assured under its comprehensive general liability (CGL) policy. That policy would have provided the operator with additional insured status, but its watercraft exclusion was not deleted as to the operator, resulting in no coverage. The operator's arguments that the insurance certificate was misleading, and that the insurer is liable under theories of negligent misrepresentation and equitable estoppel, were rejected by the Court of Appeals.

There was no negligent misrepresentation in the insurer's failure to delete the watercraft exclusion because the insurance certificate contained no incorrect information and there was no evidence of the operator's detrimental reliance on the information provided. Since the operator could not prove it was aware of the contents of the certificate provided by the insurer to the insured

labor contractor, it could not demonstrate that it relied to its detriment on the certificate. Its claim for equitable estoppel failed for the same reason.

The vessel operator was left with a judgment against the labor contractor, but not its insurer.

STATE COURT THIRD-PARTY DEFENDANT P&I CLUB MAY NOT REMOVE CASE TO FEDERAL COURT

Ribelin Lowell & Co. v. Shipowners Mutual Prot. and Indem. Assn. (Luxembourg), 365 F. Supp. 2d 1063 (D. Alaska 2005)

Plaintiff filed a state court action against its insurance broker, Ribelin, which in turn brought a third party action against the P&I underwriter, Shipowners Mutual. Shipowners removed the action to federal court pursuant to 28 U.S.C. §1441(a).

On Ribelin's motion to remand, the District Court held that removal was improper. Whether a third-party defendant may petition for removal under §1441(a) appears to be a matter of first impression in Alaska, although the Ninth Circuit Court of Appeals has addressed the issue indirectly. Federal law determines who is a plaintiff and who is a defendant for purposes of the removal statute. 28 U.S.C. §1446(a) only authorizes removal by state court "defendants." Thus, state court third-party defendants may not petition for removal.

Noting that the Sixth Circuit Court of Appeals analyzed the issue in *First Nat. Bank of Pulaski v. Curry*, 301 F. 3d 456, 463–64 (6th Cir. 2002), and concluded that "third-party defendants are not 'defendants' for purposes of §1441(a)," the District Court ruled that the third-party defendant P&I underwriter did not have the right to petition for removal. Even if Shipowners has standing to petition for removal, Ribelin's claims against it were not "separate and independent" of underlying claims in state court action, rendering removal inappropriate.

NO BINDER, NO POLICY; NO DISCLOSURE OF TRUE OWNER TO INSURER, NO GOOD FAITH—NO COVERAGE

Grande v. St. Paul Fire & Marine Ins. Co,
365 F. Supp.2d 57 (D. Me. 2005)

This was an action by a purported insured against its insurer and agent for damage to a vessel in transit, alleging that the insurer had a duty to pay

under an unissued trip insurance policy and that the agent was liable for failing to procure the policy. Judgment was granted for the defendants as a matter of law at the conclusion of trial.

Applying Maine law, the District Court held that providing an insurance quote that specifically stated "Coverage is NOT BOUND" did not bind trip insurance coverage. The issuance of an oral binder only obligated the insurer to provide coverage in line with its standard policy, and hence did not create coverage for damage to a charter boat that occurred outside the geographical limits of the charter policy. Moreover, the agent could not be held liable absent evidence that stand-alone trip coverage could have been procured under the circumstances.

Under Maine law, a putative insured must disclose in its application for insurance all known circumstances that materially affect the insurer's risk, including ownership interests in a vessel. Here, the purported insured's failure to disclose that it was his cousin, not he, who had purchased the vessel and was the owner of record rendered the policy voidable at the insurer's option under the doctrine of *uberrimae fidei*. Negligence and equitable estoppel arguments against the agent were defeated under the same doctrine due to the purported insured's misrepresentations.

INJURED TRUCK DRIVER'S SUIT AGAINST BANKRUPT TERMINAL'S INSURER IS SOLIDLY TIMELY

Torres Vazquez v. Commercial Union Ins. Co.,
367 F. Supp. 2d 231 (D. P.R. 2005)

A truck driver whose truck was lifted and dropped on a pier by a shore-based crane as he was delivering a container to be loaded aboard a vessel brought an action against a bankrupt marine terminal's liability insurer. The vessel, truck, container and crane were all owned by Sea Land Services, Inc., which also employed the plaintiff driver. The crane was, and had been for some times, leased and maintained by the terminal, which also employed the crane operator.

On the insurer's motion to dismiss, the District Court held that it lacked federal admiralty jurisdiction over the truck driver's claim for unseaworthiness under the Extension of Admiralty Act. The tort occurred on the pier rather than in navigable waters, the crane was neither an appurtenance of the vessel nor mounted on or physically connected to the vessel, and the

crane was never under the control of the vessel or its personnel. The truck driver's claims for unseaworthiness were therefore stricken.

The court further held that the truck driver stated a timely claim for intentional infliction of emotional distress under Puerto Rico law. Suit was originally filed within the one year stature of limitation under local law against the terminal, which denied the existence of an insurance policy in response to discovery. The Puerto Rico statute runs from "discovery by the injured party of the injury and of its author rather than at the time of the injury.... [and] insured defendants in tort actions are solidarity [sic] liable with its [sic] insurer." *Id.* at 240. Once plaintiff became aware of the existence of the insurer, the complaint was amended to add it as a party, "and, since the solidarity doctrine allows for the timely inclusion of a solidarity tortfeasor as long as the original claim is considered to be timely, the action against Royal was not time barred." *Id.* at 240.

INSURED DENIED SUMMARY JUDGMENT ON POLICY APPLICATION'S POLLUTION LOSS HISTORY QUESTION

Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.,
370 F. Supp. 2d 974 (D.Alaska 2004)

In a vessel pollution insurer's declaratory judgment action seeking to void a policy due to its insured's failure to disclose material facts, the insured's motion for summary judgment on its claim that a question on the insurance application was ambiguous was denied.

In cases such as this, invoking the court's admiralty jurisdiction, federal common law applies to choice-of-law determinations. This dispute between an Alaskan vessel owner and British insurer over the validity of a marine pollution policy negotiated in Washington state was thus governed by Alaska law. The vessel and insured were located in Alaska, the insured risk was likely to occur in Alaska waters, and since the policy was silent on the subject, the insurer would have to make payment in the state where the insured was located.

Question 5 on policy application read: "5. Pollution Loss History." Defendant's agent answered it: "None." Lloyds claimed that Inlet in fact had a prior pollution loss history which, had it been disclosed, would have resulted in denial of the application. Inlet contended that the question was ambiguous because it could be read as directed to both the applicant and the vessels (as Lloyds alleges) or solely to the vessels (as Inlet says it was answered). However, the court concluded there was no evidence in the record

that Inlet reasonably interpreted the question as it alleged, and denied summary judgment. It more likely did not interpret the question at all, since the form was filled out by its insurance agent, Totem, and there was no evidence that Totem interpreted the question in the manner suggested by Inlet.

It is unlikely that the insurance agent found the question ambiguous or thought that it was limited to the vessel's history:

> The court must express a significant degree of skepticism that Totem, an insurance agency familiar with underwriting practices, would interpret "prior pollution history" as being limited to the vessels to the exclusion of the applicant for insurance. Vessels do not cause toxic spills; it is the operators of vessels who cause spills. Anyone who has ever completed an application for automobile insurance knows that it is principally the driving records of the insured drivers of the vehicle that is of interest to the insurance company.
>
> Whether the court were to apply Alaska or Federal law to this issue the result would be the same. The court is unable to render a ruling as a matter of law based upon supposition or a hypothetical situation. Because Inlet failed to introduce any evidence that the application form was *in fact interpreted* in the manner ascribed to it by Inlet, and because it is illogical to assume that it would have been considered ambiguous by Totem, the court cannot hold as a matter of law under the facts presented that the question "Pollution Loss History" is ambiguous.

Id. at 977–978.

DISMISSAL OF INSURER'S DECLARATORY JUDGMENT ACTION ENDS RACE TO COURTHOUSE

Great Amer. Ins. Co. v. A.G. Ship Maintenance Corp.,
368 F. Supp. 2d 364 (S.D.N.Y. 2005)

This lawsuit involved a liability insurer's action seeking a declaration of no coverage for personal injury claims settled by assured companies that provided various services to shipping lines and terminal operators in New Jersey ports. The defendants' motion to dismiss was granted due to the insurer's "procedural fencing" in filing suit in the Southern District of New York after the insureds advised they were about to sue in New Jersey for declaration of coverage, and for other factors.

The defendants were headquartered in New Jersey and supplied various services in the ports of Newark, Elizabeth and Bayonne. The court agreed that filing a federal court action in New York just before the defendants commenced suit in New Jersey state court demonstrated that "the declaratory remedy " 'is being used for "procedural fencing" or [in] a "race to res judicata' ", citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282–83, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995).

In addition, the applicability of federal admiralty jurisdiction was deemed unclear; the lack of a substantial reason to exercise federal jurisdiction could increase the friction between federal and state judicial systems; and state court afforded a remedy at least equal to any available in federal court.

INDEMNITEES AND DUTIES TO DEFEND INJURY CLAIM OF SHIPYARD CONTRACTOR'S EMPLOYEE

Ingalls Shipbuilding v. Federal Ins. Co.,
410 F.3d 214 (5th Cir. 2005)

A skilled labor contractor's employee who was injured on a vessel being equipped with a derrick sued the vessel owner and other contractors working on the project. The shipowner filed third-party actions against the shipyard and other contractors seeking insurance defense, indemnity and coverage. The shipyard fourth-partied the plaintiff's employer for indemnity and defense and made a separate claim against the employer's insurer.

After all claims were consolidated, the plaintiff settled with the shipowner and other contractors. The shipowner continued its action against the contractors and their insurers for reimbursement of its share of the settlement. The District Court granted the shipowner summary judgment against the two insurers and the shipyard operator, entering final judgments as to the amounts owed, and granted summary judgment to the plaintiff's employer and its insurer on the shipyard's claims. The vessel owner, insurers and shipyard appealed.

The Court of Appeals held that the contractor's agreement to indemnify the shipyard did not apply to the shipowner's claim that the shipyard had breached its agreement to provide the owner with insurance coverage against injury claims by the contractors' employees. The plain language of the provision's first clause limited the contractor's responsibility to injuries or damage caused *by* the contractor, its subcontractors, agents and employees. In the present case the injury was *to* one of its employees. The second clause

of the provision indemnified the shipyard against claims by third persons arising out of the shipyard/contractor agreement. Here, the claims arose out of the shipyard's breach of its contract with the *shipowner* by failing to obtain insurance coverage, not its contract with the *labor contractor*.

The skilled labor contractor's comprehensive general liability insurer was not obligated under its policy to cover the shipyard named as an additional insured for the shipyard's breach of its contract with the shipowner. A policy endorsement limited coverage to the indemnity obligations assumed by the labor contractor in its agreement with the shipyard, which, as set forth above, did not extend to the shipyard's breach of *its* contract with the shipowner.

Under Mississippi law, the CGL insurer of the welding contractor had a duty to defend the shipowner as an additional insured from a personal injury claim asserted by the employee of another contractor, where the policy covered the liability of the shipowner arising out of the welding contractor's work *or* the shipowner's negligent supervision of the contractor. The shipowner/additional insured gave the insurance company timely notice of the claim where written notice was delivered four and a half months after the complaint was amended to name the primary insured as a defendant, thus triggering the additional insured's coverage. The timing of notice did not prejudice the insurer, which actively participated in settlement proceedings on behalf of primary insured.

Applying the choice-of-law rules of the forum state, Mississippi, the court concluded that Texas law governed the insurance contract, where the insurer, a Pennsylvania corporation, and the welding contractor, a Texas corporation with its principal place of business in Texas, had negotiated and entered into the insurance contract in Texas, and the shipowner/additional insured was a Delaware corporation with its principal place of business in Texas. Under Texas law, the insurer's actual knowledge of the suit naming its additional insured as a party was sufficient to trigger its duty to defend, when coupled with the shipowner's suit demanding a defense, with or without delivery by shipowner of actual suit papers filed on behalf of the injured workman to the insurer, which never requested them or objected to the adequacy of the shipowner's notice and demand for a defense.

Under Texas law, the prevailing party was entitled to an award of reasonable attorney's fees, to be determined by the District Court on remand after deciding whether the insurer had breached its duty to defend the shipowner.

[Our thanks to Committee Secretary Zachary M. Barth for the following summaries.]

[14305]

NEW YORK COURT OF APPEALS CONTINUES TO APPLY THE "NO PREJUDICE" RULE IN LATE NOTICE DISPUTES

Argo Corp. v. Greater N.Y. Mutual,
2005 WL 756613 (N.Y. App. 2005)

In Argo Corp. the court affirmed the dismissal of a policyholder's coverage complaint for failure to provide timely notice and held that an insurer can properly disclaim coverage based on late notice of a lawsuit without demonstrating prejudice. In early January 1997, the underlying plaintiff slipped and fell on an icy sidewalk owned by the policyholder. In late February 2000, the plaintiff filed suit against and effected service on the policyholder. The policyholder was served with a notice of default judgment in November 2000 and notice of the entry of default judgment in February 2001. The policyholder did not notify its insurer of the underlying suit until early May 2001 and the insurer disclaimed coverage based on the late notice.

The policyholder then brought a declaratory judgment action and the trial court ruled in favor of the insurer, holding that the policyholder failed to notify its insurer "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The trial court held that the notice was late as the underlying lawsuit was not brought to the attention of the insurer until 14 months after the policyholder had received the summons and complaint, 6 months after service of the default, and 3 months after default had been entered. The intermediate appellate court affirmed the trial court's ruling.

The New York Court of Appeals agreed. In its opinion, the court noted New York's long-standing adherence to the rule that a failure on the part of a policyholder to provide timely notice of an occurrence vitiates coverage, and that no showing of prejudice on the part of the insurer is required. The court explained that the "no prejudice" rule clearly applied to late notice of a lawsuit under a liability insurance policy and that "[a] liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves." The court held that application of the "no prejudice" rule is clearly justified in these circumstances because late notice of a lawsuit in the liability insurance context is likely to be prejudicial.

[14306]

BREACH OF CONTRACT RESULTING IN CUSTOMERS' NEGATIVE PERCEPTION OF BEVERAGE IS A PHYSICAL LOSS COVERED UNDER POLICY

Customized Distribution Services v. Zurich Ins. Co.,
No. A-1586-03T1 (App. Div. 2004)

Customized Distribution Services ("CDS") was sued by Campbell Soup Company ("Campbell") for failure to rotate and ship a beverage that CDS was storing in its warehouse. Campbell claimed that CDS's failure to rotate and ship the product before its expiration date forced Campbell to sell the product at less than 50 percent of its original value. CDS then sought coverage for the loss under a Warehousemen's Liability policy that covered for "'loss' caused by a 'covered cause of loss' to 'covered property.'" The policy defined "covered causes of loss" to mean "risk of direct, physical 'loss' to 'covered property'…" unless excluded. The policy excluded coverage for loss resulting from a "delay, loss of use, loss of market, or any other consequential loss."

The carrier, Zurich, denied the claim, arguing that there was no "direct, physical" loss because there was no "change" in the product; rather, there was merely a reduction in the value of the product. Zurich also contended that Campbell's claim arose from the failure to rotate and ship the product in advance of the expiration date and, as such, the loss resulted from a delay and/or loss of use of the product, which was excluded from coverage.

While the trial court agreed with Zurich, the Appellate Division reversed, finding no requirement in the policy that the product's material or chemical composition must be altered. The court stated that coverage would be available if the loss arose from the bottles containing the product being broken where the beverage itself would remain undamaged and unaltered. Moreover, the court held that the inclusion of the term "risk" within the definition of "covered causes of loss" supported the finding that the policy did not require any actual physical damage to or alteration of the material composition of the product. Because the court believed that Campbell's product had changed based on the customers' negative perception of the beverage, it concluded that this change was the "functional equivalent" of damage of a material nature or an alteration in physical composition. The court believed that if Zurich intended to provide a narrower scope of coverage it was "incumbent" on Zurich to "clearly and specifically rule out coverage in the circumstances where it was not to be provided."

Turning to the exclusion, the Appellate Division focused on the parties' reasonable expectations and assumed that both CDS and Zurich understood the "delay, loss of use" exclusion to bar coverage for losses that CDS may incur as a result of delay or loss of use, not losses of use suffered by its customers. Moreover, the court concluded that CDS's liability did not arise from a delay or loss of use because the market for Campbell's beverage was not lost but instead the value of the product was diminished due to customer perception. Finally, the court agreed with CDS that to adopt Zurich's interpretation that "loss of use" should be construed to mean the product's diminished utility would render the coverage illusory.

A COMPREHENSIVE GENERAL LIABILITY POLICY ISSUED TO MARITIME BUSINESS IS A MARITIME CONTRACT SUBJECT TO ADMIRALTY JURISDICTION

Folksamerica Reins. Co. v. Clean Water of New York, Inc.,
2005 U.S. App. Lexis 13041 (2d Cir. 2005)

The insured, Clean Water, obtained a policy providing (1) Shiprepairer's Legal Liability (SLL) and (2) modified Commercial General Liability (CGL) coverage. Notably the policy had over 12 named insured parties who were in the business of either ship repair, marine oil transport, marine cargo transport, or ship tank cleaning. After an employee of Clean Water's subcontractor sued Clean Water alleging negligence, the insurer, Folksamerica, sought avoidance and rescission of the CGL policy and a declaration that it was not obligated to defend or indemnify Clean Water.

The United States District Court for the Eastern District of New York concluded that the CGL policy was not "marine insurance" and did not have a "purely" or "wholly" maritime character. The district court observed that CGL coverage was a type of insurance used by many businesses to cover day-to-day operations, and that any maritime risks were "merely incidental."

On appeal the U.S. Court of Appeals for the Second Circuit observed that there are two established rationales for asserting maritime jurisdiction over contracts that are not "wholly" maritime. The court stated that the first rationale is where a claim arises from a breach of maritime obligations when the maritime obligations are severable from the non-maritime obligations. The second is where the non-maritime obligations are "merely incidental" to the maritime obligations. The court then looked to recent Supreme Court precedent which indicated that the relevant inquiry is not whether the non-maritime obligations are "incidental," but rather, whether the primary object

of the contract is maritime. Under this analysis the court reasoned that the policy was "primarily or principally concerned with maritime objectives."

In reaching this conclusion the Second Circuit found that the maritime nature of the claim depended on the coverage provided by the policy and the "predominant purpose" of the policy should be determined by "the dimensions of the contingency insured against and the risks assumed." Turning to the policy at issue the court observed that even though the CGL policy excluded some maritime risks, it insured against others. The court then analyzed each risk in light of the business operations of the insured. In light of the fact that the policy provided CGL and SLL coverage, the court held that the policy was marine in nature: "Combined, the CGL and SLL provisions round out the insureds' coverage for maritime transport operations and give fairly robust ship repair and maintenance coverage."

LONG TERM LIVE-IN BOYFRIEND IS NOT A MEMBER OF A "HOUSEHOLD" AND HOUSEHOLD EXCLUSION IN BOAT INSURANCE POLICY IS NOT APPLICABLE

Continental Ins. Co. v. Roberts, 2005 WL 1313692 (11th Cir. 2005)

The underlying plaintiff/boyfriend had an "intimate" relationship with the insured/girlfriend for over 20 months. Among other things the two had been living with each other and the plaintiff had a cell phone and credit cards in the insured's name.

The plaintiff suffered severe injuries after diving off the insured's boat. The insurer offered the plaintiff $25,000 which was the maximum under the policy for "family members." According to the policy if the plaintiff was not a member of the same household as the insured he would be entitled to $100,000. The policy defined "family members" as "any member of the named insured's household." "Household" was not defined in the policy.

The trial court held that the word "household" was ambiguous and thus could require a relationship by blood, marriage, or adoption. The appeals court agreed, finding that the couple did not have to show that their interpretation of the policy term "household" was more correct than the insurer's, only that the term was ambiguous. Once it was shown that the term was ambiguous the term would be construed against the insurer, allowing coverage up to $100,000. One judge dissented, noting that the couple chose to "litigate by day and copulate by night."

[14309]

BREACH OF LAY-UP WARRANTY CONTAINED IN POLICY PRECLUDES COVERAGE UNDER NEW YORK LAW

New Hampshire Ins. Co. v. Dagnone,
2005 WL 936929 (D.R.I. 2005)

The insured's 49-foot motorboat went adrift during a storm, damaging the vessel and two sailboats docked nearby. At the time the vessel's engines had not been winterized and the vessel was waiting to be put in dry storage ashore. The insurer filed a declaratory judgment action and the court held that the insurer did not have to provide coverage as the insured had breached the policy's lay-up warranty, which provided: "Your yacht must be laid-up and out of commission during the period shown on the declarations." The court relied on the fact that the engines were not antifreezed and winterization was not completed at the time of the accident. Turning to causation the court held that under New York law the insured's breach of the policy foreclosed coverage "irrespective of the relation between the breach and the damage."

INSURED WAS NOT IN BREACH OF MARINE INSURANCE POLICY WARRANTY AT TIME OF ACCIDENT AND INSURER IS NOT ENTITLED TO VOID POLICY

Commercial Union Ins. Co. v. Pesante,
359 F.Supp.2d 81 (D.R.I. 2005)

The policy included a warranty by the insured that the "only commercial use of the insured vessel(s) shall be for lobstering." Despite giving this warranty the insured was a gill fisherman.

Thereafter, the insured's vessel collided with a 21-foot Boston Whaler, injuring several occupants, who then sued the insured. Commercial Union sought to void the policy based on the breach of the lobstering-only warranty. In support the insurer submitted an affidavit that it would have charged a 25% higher premium had the insured stated that he was to use the boat for gill netting, which poses a higher risk of loss. While the court agreed there was "no question" the insured breached the warranty, the court held that the breach did not cause the loss as the boat was not engaged in gill netting at the time of the accident, and thus the insurer was not entitled to rely on the warranty to avoid coverage for the accident.

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COMMITTEE ON RECREATIONAL BOATING NEWSLETTER, SPRING/SUMMER 2005

Editor: Frank P. DeGiulio

Exclusion for Loss Caused by Insured's Criminal Negligence Does Not Render Coverage "Illusory"

The U.S. Court of Appeals for the First Circuit affirmed the district court's judgment in *Littlefield v. Acadia Insurance Co.*, 2004 U.S. Dist. LEXIS 8410 (D.N.H. 2004) (previously reported in 13 BOATING BRIEFS NO. 2), agreeing that a yacht policy unambiguously excluded coverage for a wrongful death claim where the operator, a permissive user, was convicted of criminal negligence in connection with the incident. *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1 (1st Cir. 2004).

On August 11, 2002, a 36-foot pleasure boat operated by Daniel Littlefield, the policyholder's son, struck another vessel on Lake Winnipesaukee in New Hampshire, killing one of the latter vessel's occupants. After the deceased's widow brought a wrongful death action against Littlefield in New Hampshire state court, Littlefield filed a complaint for declaratory relief against Acadia, the insurer that issued the yacht policy to his father, seeking a declaration that Acadia was obligated to defend and indemnify him in connection with the wrongful death suit. Acadia removed the case to federal court.

Meanwhile, Littlefield was indicated on two counts of criminally negligent homicide, one for negligently causing the death of another as a result of operating a boat while under the influence of alcohol, and the second for negligently causing the death of another as a result of failing to keep a proper lookout.

A jury subsequently acquitted Littlefield on the first count but convicted him on the second, a Class B felony under New Hampshire law.

Acadia moved for summary judgment in the declaratory judgment action, citing two provisions in the yacht policy. One provision excluded coverage for "any loss, damage or liability willfully, intentionally or criminally caused or incurred by an insured person." Another provision excluded coverage for "any loss, damage or expense arising out of or during any illegal activity on your part or on the part of anyone using the insured's property with your permission."

Littlefield filed a cross-motion for summary judgment, claiming that the first exclusion was ambiguous in that a "willfully, intentionally or criminally caused or incurred" loss could be reasonably construed to refer only to losses incurred in the commission of a willful or intentional crime. He also argued that giving effect to the exclusions would result in a large number of non-covered losses and would therefore violate the public policy in favor of compensating victims who are unintentionally injured by insureds.

The district court agreed with Acadia that coverage in the wrongful death matter was clearly excluded by the policy's reference to losses "criminally caused or incurred by an insured person." The court also agreed that enforcement of this exclusion was not contrary to public policy.

On appeal by Littlefield, the First Circuit initially observed that the Acadia policy contained a choice-of-law clause which specified that regardless of forum, the policy "shall be governed by and construed under the general Maritime law of the United States of America." However, since there was no federal statute governing the interpretation of the policy and there apparently was no judge-made rule of construction specifically applicable to marine insurance policies, the court elected to interpret the contract according to New Hampshire state law. Moreover, the court noted, the litigants had proceeded on the premise that New Hampshire law would apply to the coverage dispute.

Next, the court found that the phrase "any loss, damage or liability willfully, intentionally or criminally caused or incurred" was not reasonably susceptible to the interpretation urged by Littlefield. According to the court, the word "criminally" simply entailed the commission of a crime; it did not require a more culpable mental state such as willfulness or intent. Thus, Littlefield's conviction for the crime of negligent homicide was itself sufficient to trigger the exclusion, notwithstanding the fact that Littlefield admittedly did not intend to cause the collision.

Littlefield's reliance on the doctrine of *ejusdem generis* was similarly rejected. Littlefield suggested that the word "criminally" as used in the phrase "willfully, intentionally or criminally" should be construed to refer only to those crimes having an element of willfulness or intent. The court found that resort to this canon of interpretation was not appropriate since the term "criminally" had its own clear, unique meaning and entailed acts which, though unintentional, were nonetheless proscribed by law.

Finally, Littlefield contended that enforcement of the exclusion would violate public policy by making coverage "illusory." Specifically Littlefield ar-

gued that insurance coverage would be unavailable in a wide array of cases in which a negligent operator could theoretically be subject to prosecution for criminal negligence. The court pointed out, however, that in this case Littlefield was in fact convicted of a felony, and, even if he had been prosecuted for a lesser crime, any conviction under New Hampshire law would still have required proof of the requisite level of culpability. Since losses resulting from civil negligence were not affected by policy's criminal exclusion, coverage was not illusory and there was no contravention of public policy.

Racing Exclusion in Policy Held Applicable to Any "Contest of Speed"

Friends and companions Robert Crockford and Ted Collingsworth each purchased high performance speed boats capable of speeds of up to 110 knots, and regularly used the boats together on Lake Tarpon, Florida. During one of their outings on the Lake, the two boats collided, resulting in Collingsworth's death and in serious injuries to Crockford. There was no speed limit in effect on Lake Tarpon at the time. Eyewitnesses provided testimony that the two boats were traveling "side-by-side" at between 80 to 85 knots prior to the collision. An official accident investigation concluded that the boats were "racing (unsanctioned) south on Lake Tarpon" when the collision occurred. However, Crockford testified that the two were "simply enjoying driving fast across the water as our boats were designed to do" and denied that they were racing.

Crockford filed suit against Collingsworth's estate to recover for his personal injuries. The estate gave notice of the suit to Continental Insurance Company, which had issued a marine liability policy covering Collingsworth's boat through Boat U.S., and demanded a defense and coverage. Continental denied coverage for Crockford's claim based on a policy exclusion which provided as follows: "[W]e will not cover powerboats while engaged in any speed race or test. We do cover predicted log cruises or similar competitions and sailboat racing."

Continental filed a declaratory judgment action in Florida state court seeking a declaration that no coverage was owed in connection with Crockford's claims as a result of the policy's racing exclusion. The trial court rejected the insurer's position, holding that the racing exclusion was ambiguous and therefore must be construed in favor of coverage. Continental appealed.

On March 24, 2005, the Florida Court of Appeal reversed the trial court's decision and remanded the case to the trial court. *Continental Ins. Co. v.*

Collingsworth, 2005 Fla. App. LEXIS 3956 (Ct. App. 2005). On appeal the Collingsworth estate argued that the words "any speed race" in the exclusion (quoted above) are ambiguous and should be interpreted to refer only to formal or officially sanctioned races. In support of its argument, the estate pointed to the language in the balance of the exclusion which creates an exception for "predicted log cruises" and "sailboat racing," arguing that both could only be interpreted to refer to formal, organized events and thus informed the meaning of the words "any speed race." The court of appeals turned the estate's own argument against it, holding that the existence of the defined exceptions means that the exclusion was otherwise intended to be all encompassing.

The Court of Appeals held that the meaning of the words "speed race" must be construed according to the common meaning of the term which, according to Webster's dictionary, is "a contest of speed." The court therefore held that the words "any speed race" are clear and unambiguous and mean "any contest of speed regardless of whether it is sanctioned, unsanctioned, official or unofficial." The court remanded the case to the trial court, noting that it remained to be determined whether or not Crockford and Collingsworth were in fact racing at the time of the casualty.

Violation of Named Operator Warranty Voids Coverage for Hull Damage

In *Gfroerer v. ACE Amer. Ins. Co.*, 2005 A.M.C. 404 (W.D.N.Y. 2004), the U.S. District Court for the Western District of New York held that the defendant insurer had no first-party property coverage obligation for the constructive total loss of the insured boat, where the insured was found to have violated the policy's named operator warranty. The plaintiff Gfroerer obtained a marine policy from ACE which provided liability and hull coverage for his 1000 horsepower, 38 foot Donzi power boat, with an agreed hull value of $100,000. The policy contained a "High Performance Vessel Endorsement" which included a "Named Operator" warranty. The warranty contained in the issued policy provided as follows: "Warranted by the insured that the coverage provided by this policy applies only if the insured vessel is operated by: MARK F. GFROERER."

After purchasing the policy Gfoerer decided to sell the boat. On September 6, 2003, two prospective buyers and their "high-performance vessel expert" accompanied Gfoerer aboard the Donzi on a sea trial. During the trial Gfroerer permitted the buyers' expert to drive the boat and, while

the expert was at the helm, the boat flipped over and ejected all of the occupants. The boat was rendered a constructive total loss. Gfroerer filed a claim with the insurer for the agreed hull value. ACE denied the claim based on violation of the Named Operator warranty.

Gfroerer sued ACE, arguing that New York state insurance law prohibits the issuance of a marine policy unless it includes coverage for losses arising from operation of the vessel by a permissive user, thus rendering the policy's warranty unenforceable and, in the alternative, that he was in fact "operating" the boat at the time of the casualty as he understood the meaning of that policy term. Cross-motions for summary judgment were filed by the parties.

The District Court first considered Gfroerer's argument that the warranty was unenforceable under New York state law. The New York insurance code includes a statute which prohibits an insurer from issuing a marine policy covering "liability arising from the ownership, maintenance or operation of any ... vessel ... *unless it contains a provision ... insuring the named insured against liability ... as a result of negligence in the operation ... of such ... vessel ... by any person operating ... the same with the permission, express or implied, of the named insured*."

Although concluding that the statute did in fact apply to the policy issued by ACE on Gfroerer's Donzi (because it was not an "ocean-going vessel"), the court held that the statutory prohibition applies only to *liability* coverage and does not prevent parties to a marine policy from agreeing to limit the availability of first party property coverage for loss or damage to the insured vessel and to exclude damage caused during operation by a permissive user. Accordingly the court held that the policy's Named Operator warranty was valid and enforceable as to first-party property damage claims by the insured.

Gfroerer argued in the alternative that the term "operated by" in the warranty is ambiguous and in his interpretation simply meant that he, as the named operator, must have "ultimate control for the vessel." The court rejected the argument, holding that the term "operated by" was not ambiguous and was not reasonably susceptible to any meaning other than the equivalent of "driving." In dismissing Gfroerer's claim that he was "confused" about the meaning of the warranty, the court found that he should have raised the issue when the policy was negotiated if confusion about the meaning existed in his mind. The District Court granted summary judgment on the hull loss claim in favor of the insurer ACE.

[14316]

Good Faith Purchaser Acquires Vessel Free of Bank's Security Interest

In September 2001 John Meskell purchased a 66-foot Chapparral with $31,601 in financing provided by Key Bank. Meskell signed a Note and a Security Agreement in connection with the loan. The Note prohibited Meskell from transferring ownership or possession of the boat without the Bank's consent. Shortly after his purchase, Meskell obtained a Massachusetts state registration number for the boat and a certificate of title naming the Bank as first lienholder. The Bank did not file a UCC financing statement documenting its security interest.

In late 2002, without the Bank's permission, Meskell delivered the boat to a broker with the understanding that the broker would market the vessel for sale on Meskell's behalf. After several months John Bertone agreed to buy the vessel for $44,000. Before the sale the buyer arranged for a title search which revealed no record of liens or financing statements against the boat. At the closing, Bertone received a bill of sale and a written sales agreement stating that the vessel was to be delivered free of "any liens, mortgages or bills" or, in the alternative, that all existing liens would be satisfied through deductions from the proceeds of sale.

The buyer Bertone paid the sales price to the seller's broker and immediately after the closing arranged to federally document the boat with the U.S. Coast Guard. Shortly after the closing, the broker delivered a check to Meskell for about $7,000, a figure which represented the sale proceeds after deduction of the broker's commission, costs, and the amount necessary to satisfy the balance on Meskell's loan from Key Bank. Rather than forwarding the payoff amount to the Bank, however, the broker absconded with all the remaining sale proceeds, leaving the Bank's lien unsatisfied.

After learning that the broker had disappeared with the sale proceeds and that the Key loan had not been satisfied, the seller Meskell filed suit against the buyer Bertone in Massachusetts' state court alleging conversion of the boat. Bertone answered and filed a counterclaim against Meskell demanding that he satisfy the outstanding loan in accordance with the sales agreement. Key Bank filed a separate civil action in replevin against Bertone and Meskell, asserting that Meskell's breach of the Note through unauthorized sale of the boat entitled the Bank to immediate possession of the vessel. The two cases were consolidated.

Following a trial, the Massachusetts Superior Court held that Bertone was the rightful owner of the boat and took title free of Key Bank's security interest. *Meskell v. Bertone*, 18 Mass. L. Rep. 423, 55 U.C.C. Rep. Serv. 2d (Callaghan) 179 (Mass. Super. 2004).

The court initially considered whether the broker was authorized to act as the seller's agent for the purpose of selling the boat and accepting the purchase price from the buyer. The court found that the broker had both actual and apparent authority and that the buyer was entitled to rely on that authority as binding the seller.

As to the right of possession of the boat, the court found that Key Bank was not required to file a financing statement in order to perfect its security interest in the boat because the loan to Meskell was a purchase money security interest within the meaning of UCC Article 9. Thus, perfection of the bank's security interest was automatic.

Accordingly, the Bank's perfected purchase money security interest would take priority over Bertone's ownership interest, unless Bertone established that he fell within the Article 9 exception for consumer transactions. The court held that in order to obtain the protection of the exception Bertone must prove that he purchased the vessel in a "consumer-to-consumer" transaction, for value, in good faith, and without knowledge of the Bank's preexisting security interest.

In this case, although Bertone bought the vessel through a broker, he was aware that Meskell, a consumer, was the actual seller. According to the court this knowledge created a consumer-to-consumer transaction within the meaning of the Article 9 exception. The court also found that Bertone acted in good faith, crediting his testimony that he had no knowledge of the Bank's lien at the time of sale. The court held that Bertone took title to the boat free and clear of the bank's security interest and that the bank's sole remedy was against the seller Meskell for breach of the Note and security agreement.

II. OTHER RECENT CASES OF INTEREST

Jefferson Ins. Co. v. Roberts, 349 F. Supp. 2d 101 (D.Ma. 2004).

The United States District Court for the District of Massachusetts granted summary judgment to the plaintiff Hull & Machinery insurer, holding that the policy in question excluded casualty damage to the insured boat's en-

gines. The insured, William Roberts, purchased a 12 year old boat which had been refitted with two-year old twin 600 horsepower engines. Roberts sought Hull & Machinery insurance through an insurance broker. The policy contained an exclusion stating that damage to engines on vessels over 10 years of age was not covered unless caused by fire or lightening. After reviewing a "highlight sheet" prepared by the broker which outlined the coverage (but not the policy itself), Roberts specifically questioned whether the two-year old engines on his boat would be fully covered for all risks. The broker assured him that full coverage would apply because the engines were less than 10 years old. The engines sustained serious damage as a result of a casualty during the policy period. Roberts filed a claim for the loss.

The insurer denied coverage based on the exclusion for damage to engines on vessels more than 10 years old and filed a declaratory judgment action against Roberts. In the lawsuit Roberts argued that the policy language was ambiguous and did not clearly exclude coverage for the engine damage. Roberts also maintained that the broker was acting as the insurance company's agent when he specifically represented that the policy would provide full coverage for the two-year old engines notwithstanding the age of the boat itself and, therefore, the insurer should be estopped from invoking the exclusion. The district court rejected both positions. The court found that the policy language clearly and unambiguously excluded engine damage on vessels over 10 years old, regardless of the age of the engines themselves. The court also found that the insurance broker in question was an independent broker who had no express or implied agency relationship with the insurance company. Finding that no agency relationship existed, the court held that the broker's misrepresentations regarding the policy's coverage could not bind or be used against the insurance company.

LeBlanc v. M/V NAUMACHIA, 2005 A.M.C. 506 (D.R.I. 2005).

In 1998, Robert LeBlanc and his then fiancee Melony Kenyon planned to buy a vessel to be used in a charter fishing business and as a pleasure boat for the couple. They located a suitable 47 foot Hatteras with a sale price of $147,000. Because of LeBlanc's poor credit history, their initial joint mortgage application was rejected. Melony Kenyon reapplied in her own name, the application was approved and Kenyon became the sole titled owner. For three years the couple operated a charter business with LeBlanc serving as captain and also used the boat for personal recreation with family and friends.

The charter operation was not profitable and Melony Kenyon paid the mortgage payments and on-going repair and improvement costs from her

own funds. When the business, and the relationship, went on the rocks, LeBlanc filed suit against the vessel, *in rem*, asserting maritime liens for unpaid captain's wages and for amounts which he allegedly paid for supplies, maintenance and repairs in an amount exceeding $130,000. LeBlanc argued that his lien claims for wages and necessaries took priority over the lien of National City Bank, which held a preferred ship mortgage on the boat. The bank intervened in the lawsuit to assert its rights under the mortgage.

The bank argued that LeBlanc was a joint venturer with Kenyon in the ownership and operation of the boat and, therefore, was not entitled to assert any liens as a matter of law. Following a trial the district court held that LeBlanc could not assert any maritime liens against the vessel if he was a joint venturer with Kenyon in the enterprise. After reviewing the evidence the court found that the enterprise exhibited all of the characteristics of a joint venture relationship and that LeBlanc could not therefore assert any maritime liens against the vessel.

Broadley v. Maspee Neck Marina, Inc.,
2005 U.S. Dist. LEXIS 2752 (D. Ma. 2005)

The plaintiff sustained personal injuries on a dock owned by the defendant marina and filed suit. The plaintiff leased a slip for his boat at the marina and had signed a written contract which contained a broad and lengthy exculpatory clause by which the lessee agreed not to assert any claim for damages of any kind against the marina, regardless of the nature of the claim. The plaintiff's complaint sought a declaration that the contract was unenforceable as a matter of public policy and also alleged that the marina's negligence caused his injuries. The complaint invoked admiralty jurisdiction as the basis of the court's subject matter jurisdiction. The marina filed a motion to dismiss the plaintiff's complaint for lack of admiralty subject matter jurisdiction. The marina argued that the contract claim could not support admiralty jurisdiction because it contained both maritime and non-maritime elements and the plaintiff's injury was limited to alleged negligence in the maintenance of shoreside property.

The court rejected this contention, holding that the marina contract was a maritime contract and, moreover, that the dispute over the enforceability of the exculpatory clause directly affected "maritime interests." As to the plaintiff's negligence claim, the court agreed with the defendant that the claim alone would not support admiralty jurisdiction, but held that the court could consider the claim under its supplemental jurisdiction since the contract claim was sufficient to support admiralty jurisdiction.

[14320]

Miller v. Rinker Boat Co., Inc.,
815 N.E.2d 1219 (Ill. App. Ct. 2004)

The Illinois Court of Appeals reversed the trial court's grant of summary judgment to a pleasure boat manufacturer in a products liability action brought by the estate of a boat owner killed when he slipped on the motorboat's transom, hit his head and drowned in the Mississippi River near Quincy, Illinois. The evidence at trial showed that the decedent slipped either on the boat's transom, which did not have a non-skid surface, or on the swim platform, which according to the plaintiff's experts had a defective or insufficient non-skid surface. The plaintiff's complaint alleged that the manufacturer was strictly liable under Illinois product liability law for manufacturing a defective or unreasonably dangerous product and for failure to provide adequate warnings regarding the dangers of standing or stepping on the boat's transom.

The appellate court reversed the trial court's grant of summary judgment to the manufacturer in part on the grounds that the lower court had improperly failed to apply the "danger-utility" test whereby a manufacturer must prove that the benefits of a design outweigh the risk of danger inherent in the design in order to escape liability. The trial court held that the "danger-utility" test was not applicable to the plaintiff's claim under Illinois precedent because the danger of slipping on a wet boat deck is open and obvious and because the transom and swim platforms were "simple products."

The appellate court held that it is the entire boat, not any component, which must be considered in determining whether a product is "simple" so as to exempt it from the danger-utility test. Moreover, the appellate court held that a genuine issue of material fact existed as to whether the danger posed by wet boat decks is "open and obvious" to an ordinary consumer and thus, summary judgment was improper.

Complaint of Lavender,
2004 U.S. Dist. LEXIS 25550 (S.D.FL. 2004)

The owner of a 62 foot sailboat which caught fire while undergoing repairs on land in Dania Beach, Florida, filed a petition pursuant to the Shipowner's Limitation of Liability Act, 46 U.S.C. §181, *et seq.* in connection with damage to nearby vessels caused by the fire.

The petitioner's boat was undergoing major repairs and the all seacocks had been removed. The claimants in the limitation case moved to dismiss

for lack of subject matter jurisdiction. The district court held that admiralty jurisdiction was lacking because the boat had been withdrawn from navigation and, as a result, the "locality" prong of the test for admiralty tort jurisdiction could not be satisfied.

The court distinguished the holding in *American Eastern Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979) wherein the court held that admiralty jurisdiction existed as to claims arising from a fire in a "dry-store" marina where small pleasure boats were stored in covered racks on land when not in use on the grounds that the boats in *American Eastern* had not been removed from navigation.

Ninth Circuit Affirms Dismissal of Claims Against Coast Guard for Alleged Negligent Response to Boating Emergency

While kayaking in Hawaii, the plaintiff husband, an American citizen, and his wife Nahid, an Iranian national, encountered heavy weather. A witness observing from land telephoned the U.S. Coast Guard, which, after a brief delay, dispatched one of its cutters to the area. A search began but was suspended as darkness fell. Winds swept the kayak out to sea where Nahid was attacked by a shark and died. Her husband washed ashore on an island and was rescued three days later.

Nahid's husband, her estate, and her parents brought a wrongful death action against the kayak rental company and later added the United States as a defendant, alleging that the Coast Guard conducted a negligent search and negligently failed to contact local authorities who had ready access to helicopters and more suitable rescue vessels. Since the claims against the United States were not brought within the two-year time frame available under the Public Vessels Act (PVA) and the Suits in Admiralty Act (SAA), plaintiffs attempted to assert their claims under the Federal Tort Claims Act (FTCA). The district court found the FTCA inapplicable and granted summary judgment in favor of the United States. *Taghadomi v. Extreme Sports Maui*, 257 F. Supp. 2d 1262, 2002 AMC 2365 (D. Haw. 2002).

The Ninth Circuit recently affirmed the district court's decision in *Taghadomi v. United States*, 401 F.3d 1080 (9th Cir. 2005).

The FTCA waives the sovereign immunity of the United States for certain torts, but, under 28 U.S.C. §2680(d), the Act does not apply to claims "for which a remedy is provided by" the PVA or the SAA, the two statutes which generally waive U.S. sovereign immunity in cases of maritime tort committed

by a public vessel or by a federal agency. In this case, the parties agreed that the "negligent-search claim" sounded in admiralty, but plaintiffs argued that the "failure-to-communicate claim" (i.e., the claim involving the Coast Guard's alleged failure to contact local authorities better situated to effect a rescue) was not maritime in nature and could therefore be brought under the FTCA.

The Ninth Circuit held, however, that the latter claim was indeed cognizable in admiralty, as both the maritime "situs" and "nexus" tests were satisfied. Although the alleged negligence took place on land at the Coast Guard's offices, the resulting injury manifested itself on navigable waters. According to the court, this was sufficient to satisfy the status test under Ninth Circuit precedent, which focused on the site of the injury rather than the location where the negligence originated. The nexus test was likewise satisfied, since negligence in the coordination of a rescue operation would affect the safety of both the persons and property at sea, and search-and-rescue operations have an historic connection to traditional maritime activity.

Having determined that both claims against the United States were maritime in nature, the court then considered whether the claims might nevertheless be brought under the FTCA. Since the failure-to-communicate claim involved an alleged maritime tort committed by a federal agency, the court held that the plaintiffs were required to bring it within the SAA's two year statute of limitation and, having failed to do so, could not now invoke the FTCA.

With regard to the negligent-search claim, although the Coast Guard cutter was a "public vessel" alleged to have committed a maritime tort, the court held that Nahid's parents, as citizens of Iran, were afforded no remedy under the PVA due to a reciprocity provision in that statute which waives U.S. sovereign immunity for claims by foreign nationals only in cases where the claimants' nation would permit a similar suit by an American citizen. Since Iran would not permit suits by U.S. citizens under similar circumstances, the PVA reciprocity requirement was not satisfied. The SAA was likewise unavailable to Nahid's parents in light of the U.S. Supreme Court's decision in *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), which held that in cases involving a public vessel, a foreign national cannot proceed under the SAA if doing so would circumvent the PVA's reciprocity requirement.

Since neither the PVA nor the SAA provided a remedy to Nahid's parents for their negligent-search claim, a literal reading of the FTCA's admiralty

exception should have allowed their claim to go forward. See 28 U.S.C. §2680(d). Relying on the Supreme Court's rationale in *Continental Tuna*, however, the Ninth Circuit held that since the parents were foreign nationals whose claim involved a public vessel, their claim against the United States could proceed only if the PVA reciprocity requirement was satisfied. Since in this case it was not, the Ninth Circuit held that the district court had properly dismissed their negligent-search claim.

Recreational Marine Employment Act of 2005

In March 2005, a Bill known as the Recreational Marine Employment Act of 2005 (H.R. 940) was introduced in the U.S. House of Representatives by the primary sponsor, Congressman Ric Keller of Florida. There are currently 16 co-sponsors on the House Bill. If enacted the proposed legislation would amend the Longshore and Harbor Worker's Compensation Act to exempt all workers in the recreational boating industry from the LHWCA.

In 1984, Congress attempted to exempt employees in the recreational boating industry from the LHWCA by amending the statute to make it inapplicable to employees performing work on boats 65 feet in length and under. Such workers were then, and are now, covered by state workmen's compensation statutes.

Proponents of the legislation maintain that further amendment of the LHWCA is necessary, primarily because the size of recreational boats has increased dramatically since the 1984 amendment exempting vessels less than 65 feet in length. According to a press release by the House Committee on Education and the Workforce, there are more than 400,000 recreational boats with a length of more than 65 feet registered in the United States today. The LHWCA imposes criminal and other penalties on employers who fail to provide LHWCA coverage when required. Because workers at any given facility may perform work on boats both over and under 65 feet in length, the current statutory scheme essentially requires an employer to maintain two forms of insurance – both Longshore and state workers'compensation coverage.

According to the House Workforce Protections Subcommittee Chairman Charles Norwood, the amendments to the LHWCA are required because "U.S. companies are losing jobs in this industry to foreign competitors, [i]n large part [due] to the increased costs for many employers who, under current law, must maintain duplicative workers' compensation coverage under both state workers' compensation law and under the Longshore Act."

According to proponents, the practical impact of the additional insurance requirements imposed by the Longshore Act is a significant loss of American jobs because U.S. employers are put at a competitive disadvantage to overseas competition. It is said that one in five boat projects have migrated from the U.S. to Canada or elsewhere because of the additional cost of duplicative insurance coverage mandated by the Longshore Act, according to a press release from Mr. Norwood's subcommittee.

The proposed legislation would exempt the recreational boating industry from the LHWCA by amending the statute to exclude "individuals employed by or at, or engaged in the construction or maintenance of, a recreational marine facility or structure," and any "individuals employed principally to build, repair, test, maintain, accommodate, buy, sell, store, restore, transport by land, or dismantle a recreational vessel." The proposed legislation defines a "recreational vessel" as "a vessel manufactured principally for pleasure use."

COMMITTEE ON CARRIAGE OF GOODS BY SEA
CARGO NEWSLETTER NO. 45

Editor: Michael J. Ryan
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COURT FINDS ALLEGED NOTICE ONLY SKIN DEEP ...

Scholastic Inc. v. M/V KATINO, No 02 Civ. 2997 and
02 Civ. 6389 (S.D.N.Y. March 31, 2005) (Chin, J.)

Two containers of activated carbon were shipped aboard the M/V KATINO at New York and one day after departure, a fire was discovered. The fire started in one of the containers containing the activated charcoal (which had been impregnated with potassium hydroxide). As a result of the fire, a number of containers and cargo were damaged, including the activated carbon. Litigation commenced and, eventually, all claims were settled except for the supplier's claim against the intermediary hired by it to arrange for the shipment and the intermediary's claim against the supplier for contractual indemnification for attorneys' fees and other litigation costs.

[Various suits were brought which named the supplier as a defendant. All of those claims were settled, with the supplier paying some $1 Million for damaged cargo (approximately half of the value of the damaged cargo).]

The court considered the supplier's claim regarding whether the intermediary was a freight forwarder or an NVOCC. Noting that both a freight forwarder and an NVOCC perform similar functions, the court also noted the differences between them. A freight forwarder "simply facilitates the movement of cargo to the ocean vessel, gives advice on licensing requirements and letter of credit intricacies and arranges to have the cargo reach the Port in time to meet its sailing" while an NVOCC, in contrast, does not merely arrange for transportation of goods, but takes on the responsibility of delivering the cargo. The most fundamental difference between a freight forwarder and an NVOCC is that an NVOCC issues a bill of lading.

Considering the potential liability of the intermediary as an NVOCC, the court referred to the Second Circuit decision in *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F. 145 (2nd Cir. 2002), which made clear that under §4 (6) of COGSA, a shipper of dangerous goods is strictly liable for damages resulting directly or indirectly from such shipment. Neither the

shipper nor the carrier had actual or constructive preshipment knowledge of its danger. The court found the activated carbon to be the instigator of the fire and clearly goods of an "inflammable, explosive, or dangerous nature", and noted that neither the supplier nor the ocean carrier had either actual or constructive knowledge of the risk of fire presented by the impregnated activate carbon.

The court then pointed out that, while both parties recognized the relevance of *Senator Linie Supra* and §4(6) of COGSA to the supplier's liability, both parties had ignored the implications of that decision to the intermediary's liability as an NVOCC. In *Senator Linie*, an NVOCC was also held strictly liable for damages sustained by the fire, the NVOCC qualifying as a shipper in relationship to the actual ocean common carrier. Thus, the intermediary could be held strictly liable as a "shipper" of dangerous goods for damage to the other cargo for the same reasons that the supplier would be strictly liable to the parties with whom it had settled.

At the same time, the court found that the supplier could not recover from the intermediary for contribution or indemnification because of a provision in the bill of lading issued by the intermediary to the supplier. The bill covered goods of a flammable, hazardous or dangerous nature and indemnified the intermediary for failing to properly disclose the nature of such goods.

For this contractual indemnification provision to apply, the intermediary NVOCC was obligated to show that the supplier had failed to fully disclose in writing the nature and character of the dangerous goods. The court found the intermediary had made such a showing and rejected the supplier's argument that it had provided sufficient information to the intermediary disclosing the dangerous nature of the goods. The supplier had furnished a product information sheet describing certain dangers of activated carbon. However, the court found the information merely warned the end user about the risk that activated carbon could generate enough heat to burn skin, which was a far cry from speaking to a spontaneous heating and combustion. In the court's view, this was especially true since the supplier also claimed it had no actual or constructive knowledge of the danger itself.

In sum, the court found the supplier had not fully disclosed the dangerous nature of its product. Therefore, the supplier was required by the indemnity provision in the bill of lading to indemnify the intermediary NVOCC, which in turn had no duty to indemnify the supplier for its settlement payments. For the same reasons, the court also rejected the supplier's claim for damage to its own cargo.

As to the intermediary's potential liabilities as a freight forwarder, the court stated a freight forwarder's liability to a shipper is limited to negligence in the supervision of the transport of cargo. The supplier made no argument that the intermediary was negligent in its selection of companies that performed the transportation services, but rather, argued for an expansive notion of the duties of the intermediary as a freight forwarder. However, the court rejected the supplier's argument that the intermediary had assumed the obligation to identify any hazard associated with impregnated activated carbon. To the contrary, the intermediary had complied with the procedures and industry standard in relying on the supplier to tell it whether the cargo was hazardous, and the supplier had repeatedly assured the intermediary that its activated carbon was non-hazardous. The court noted its findings were consistent with the Second Circuit's conclusion in *Senator Linie* that a shipper could be expected to have greater access to and familiarity with goods and, if an unwitting party must suffer, it should be the party in a better position to ascertain ahead of time the dangerous nature of the shipped goods.

Dealing with the intermediary's counter claim for attorneys' fees and expenses for depositions and expert witnesses, the court found that under either the bill of lading or COGSA, the intermediary was entitled to indemnification for such expenses incurred in the litigation that arose from the supplier's failure to disclose the dangerous nature of its goods.

PLAINTIFF PLUNKED BY PYROTECHNIC PELLETS ...

Elders Grain Co. Ltd. v. M/V RALPH MISENER, 2005 FCA 139, No. A-436-03 (April 15, 2005 Fed. Ct. of Appeal, Canada)

During the unloading of a cargo of alfalfa pellets from a vessel in Quebec City, it was discovered that the cargo was on fire. In a subsequent action for damages, the cargo interest claimed the clean bill of lading issued by the vessel's master was proof the cargo was in good condition when it was loaded on the ship. However, the trial Judge (a distinguished Gentleman) concluded that the vessel interest had successfully rebutted the *prima facie* presumption of good condition and also found the cargo to be of a dangerous nature. The vessel interest asserted that the alfalfa pellets were dangerous material that spontaneously self-ignited during unloading and that the cargo interest had a strict duty to warn of the dangerous nature of the cargo. The trial court held for the vessel interest.

On appeal, the Federal Court of Appeal in Canada initially dealt with the standards of review as to how questions of law and issues of fact were

to be treated. The appellate court noted that, although a clean bill of lading is generally accepted as establishing *prima facie* proof of the apparently good condition of the cargo, that proof is merely a rebuttable presumption. The bill of lading shows only the apparent order and condition of the goods and thus, serves simply as rebuttable proof of the presence or absence of visible damage at the time of loading.

In the present case, the master and first mate testified at trial that a cloud of dust was thrown off as the cargo was being loaded and that, although they could see the pellets entering the hold, the cloud of dust obscured their vision. The trial Judge, after considering the evidence, including the fact that the cargo was loaded at high speed, held that, under the circumstances, the clean bill of lading did not constitute *prima facie* evidence of loading in good order and condition. The appellate court found no error in the lower court's interpretation and application of the law or in the trial Judge's findings of fact.

As to the trial court's holding that the cause of the loss was spontaneous combustion of the cargo, the trial Judge considered the cargo interest's argument that a cigarette might have caused the loss. However, the court preferred the evidence given by the vessel interest expert as to spontaneous combustion. The appellate court found no overriding error in the trial court's finding of fact.

As to the nature of the goods, the trial Judge found the cargo was indeed dangerous and, if not properly stored, could ignite. In its affirmance, the appellate court noted that the lower court's finding encompassed a mixed question of law and fact and concluded that the cargo interests were responsible for the loss they had suffered as a result of the fire because they had shipped goods of a dangerous nature without making the carrier aware of the goods' nature and character. The trial Judge had relied on the House of Lords decision in the *Giannis NK,* which held that Article IV, Rule 6 of the Hague Rules imposed strict liability upon the cargo owner, and also noted this view of Article IV, Rule 6 had also been adopted by the Second Circuit in *Senator Linie GmbH v. Sunway Lines*. Conversely, the cargo interest had argued that if the IMO Code had been consulted it would have been found that alfalfa pellets were classified as dangerous goods; however, at the time of the shipment, masters were required to have onboard *either* the IMO Code *or* the 1984 Edition of the Code of Safe Practices for Solid Bulk Cargoes. This latter publication was onboard when the alfalfa pellets were loaded and, while the IMO Code noted them as dangerous material, the 1984 Edition of the Code of Safe Practices for Solid Bulk Cargoes

did not. The master of the vessel was under no obligation to have a copy of both codes.

Finding no error in the trial Judge's interpretation of the law nor any overriding error in his findings of fact, the appellate tribunal stated that it would not disturb his decision and added that adopting a construction of Article IV, Rule 6 that was consistent with that the holdings of the Second Circuit Court of Appeals and the House of Lords promoted the important goal of maintaining international uniformity in maritime law.

SO LET IT BE WRITTEN; SO LET IT BE DONE ...

Mitsui Sumitomo Ins. Co. Ltd. v. Watkins Motor Lines, Inc.,
No. 03-2741 (N.D. Ill. Feb. 7, 2005)(Samuel Der-Yeghiayan, J.)

A motor carrier failed to deliver a shipment of projectors with a value of $85,100 to its intended destination. The court granted summary judgment to the plaintiff on liability under the Carmack Amendment. The court also denied a motion to limited liability, without prejudice, for failure to follow the requirement of its Local Rule 56.1, and the motor carrier filed a second motion seeking to limit liability. The motor carrier argued that its tariff limited liability to $25.00 per pound.

The bill of lading was prepared by the shipper on its own bill of lading form, which provided that the shipment was "subject to classifications and lawfully filed tariffs in effect on the date of the issue the bill of lading." Apparently, the motor carrier had not filed any tariffs. However, it argued that its unfiled tariffs should be read into the bill of lading to limit damages.

However, the court noted the bill of lading was specific as to "lawfully filed tariffs" and stated that the shipper would be precluded from changing the terms of the agreement since it had prepared the document: "the document is of such clarity that (the motor carrier) should have had no misunderstanding as to what tariffs were covered...." The court noted it would be unfair to allow the motor carrier to alter the terms of the contract at the very point the shipper sought to enforce them and unfair to presume that the shipper somehow knew there was hidden meaning which would expand the scope of the limitations despite the unambiguous language in the bill of lading.

[14330]

ASPIRATIONS DON'T MAKE IT SO ...

North American Specialty Ins. Co. v. Pilot Air Freight Corp.,
No. 1:04-414 (N.D. Ga. April 4, 2005) (Thrash, Jr., J.)

A subrogated underwriter sued a carrier under the Carmack amendment after paying its assured $45,000 for damage to a shipment of electrical and lighting equipment that was being moved from Atlanta, Georgia to Kentucky. The defendant move for partial summary judgment based on the package limitation in its standard waybill. The defendant also asserted that its standard invoice contained the same limitation of liability language. Thus, it sought to limit its damages to $2,250, citing precedents in the Eleventh Circuit.

In its decision, the court noted that in order to effectively limit its liability, a carrier must: (1) maintain an appropriate tariff; (2) obtain the shipper's agreement as to the level of liability that will apply; (3) give the shipper reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. As regards maintaining a tariff, prior to 1995 carriers were required to file their tariff. However, the filing requirement was eliminated by the ICC Termination Act of 1995, and carriers must now provide shippers with the tariff if the shipper requests it.

Here, the court found the defendant carrier had failed to meet its burden. There was no evidence that a bill of lading or waybill had been issued, and the court rejected the carrier's argument that the defendant's invoice could take the place of the bill of lading because it contained the limitation of liability provision. At the same time, there was no evidence that the invoice was provided to the shipper prior to moving the shipment. Rather, the defendant conceded that the shipper received the invoice after the shipment was delivered. Absent proof that the carrier had issued a receipt or bill of lading prior to moving the shipment, the court concluded that the defendant had failed to satisfy the fourth requirement for establishing an enforceable package limitation.

The defendant also argued that the shipper had previously received its standard waybill, which contained the limitation provision. Nonetheless, the court found even if the prior course of dealing showed that the shipper had knowledge of the provision, this alone was not sufficient to establish that the shipper had been given a reasonable opportunity to choose between

different levels of liability on this particular occasion. Nor in the court's view was prior notice sufficient to establish that the shipper had agreed to a limit of liability for this particular shipment: "thus, the defendant must show that (the shipper) affirmatively chose to abide by a lower value of its shipment." (citing cases). The court thus found that the defendant carrier had failed to establish an agreement by the shipper to limit liability, and denied the defendant's motion for partial summary judgment.

NEW YORK, NEW YORK; IT'S A WONDERFUL TOWN ...

Wildwood Imports v. M/V ZIM SHANGHAI,
2005 Westlaw 425490 (S.D.N.Y. Feb. 20, 2005) (Mukasey, J.)

A shipment of lamp parts from Hong Kong to Norfolk, Virginia was arranged with an NVOCC. The NVOCC, in turn, arranged for carriage by an ocean carrier. The goods were damaged en route and the consignee commenced suit against the actual carrier and the NVOCC. The actual carrier also asserted a third party claim against the NVOCC.

By motion, the NVOCC moved to dismiss the complaint against it for a lack of personal jurisdiction and improper venue. The bill of lading contained a forum selection clause which provided that where cargo originated in or was destined for the United States, jurisdiction would lie with the U.S. District Court for the Southern District of New York.

The court held the forum selection clause was mandatory and binding on the NVOCC, given its role as agent for the shipper. The court also noted the plaintiff was bound by the forum selection clause despite the fact that it had not entered into the bill. As to the NVOCC, the court found it had waived its objection to personal jurisdiction by entering into the bill of lading with the actual carrier. With respect to venue, absent a strong countervailing consideration, the mandatory forum selection clause prompted the court to reject a change of venue.

Finally, in response to the NVOCC's motion to transfer under 28 U.S.C. §1406 (a), the court noted that transfer would only be ordered where venue was shown to be improper. Here, in light of the forum selection clause, venue was proper in the district chosen. The court denied the NVOCC's motion, stating that even if it had been brought under 28 U.S.C. §1404, the NVOCC had not made any showing to justify transfer of the action.

RR SAYS IT'S RESPONSIBLE; THEN SAYS IT'S NOT. COURT SAYS IT IS ...

American Home Assur. Co. v. Hapag Lloyd Container Linie GmbH, No. 03-5462 (S.D.N.Y. March 21, 2005) (Scheindlin, J.)

A shipment of engines moving from Illinois to Singapore became a total loss when the train carrying them on the inland leg of the transportation derailed. Plaintiff moved for partial summary judgment, and sought to strike the railroad's limitation of liability defense. The railroad cross-moved for partial summary judgment on its right to limit liability. The court denied the plaintiff's motion and granted the railroad's cross-motion, limiting its liability to $500 per package. A consent judgment was entered holding the ocean carrier and the railroad jointly and severally liable for $1000 (2 packages). The judgment also provided for severance of the issue of indemnity as between the ocean carrier and the railroad.

The ocean carrier then moved for summary judgment, seeking indemnification, including attorneys' fees and expenses, from the railroad. The railroad opposed the motion, arguing that: (1) it was not obligated to indemnify the ocean carrier because no ruling had been made as to its liability or negligence and (2) even if the railroad was obligated to indemnify, the ocean carrier was not entitled to recover its attorneys' fees and expenses.

The court first considered the railroad's argument that there was never a judgment or determination of its liability and that the consent judgment was a result of stipulation and agreement, rather than a ruling of the court. Dealing with the consent judgment, the court stated that consent judgments are more than mere stipulations and agreements between the parties once they are reported to the court during a trial or other significant court room proceeding. When a judgment is entered upon them, they are accorded the status of a judicially enforceable decree. The court, therefore, found the railroad had conceded its liability to the plaintiff and was bound by this concession in the adjudication of any remaining issues in the suit.

The court noted there was no contractual provision between the railroad and the ocean carrier with regard to the indemnification issue. Thus, the court applied common law principles of indemnification, and noted: "The Second Circuit has long recognized that a primary wrongdoer must indemnify a party whose liability is secondary or vicarious" (citing cases). In reviewing the facts, the court noted that the damaged goods were within the

exclusive custody of the railroad and that the railroad had not provided any explanation for the derailment or raised any possibility that the losses were due to the ocean carrier's fault. Instead, the railroad merely submitted a copy of the contract with a statement suggesting the ocean carrier had failed to prove liability and that its alleged negligence was insufficient to defeat summary judgment. The court, however, found the railroad to be the primary wrongdoer and liable to indemnify the ocean carrier.

As to attorneys' fees and expenses, the court held that legal fees and expenses incurred in defending the claim fell squarely within the obligation to indemnify. The railroad asserted there were unusual complexities in the case and that attorneys fees should not be awarded. However, the court found there were no unusual or unprecedented complexities on which to base an exception based upon equitable principles.

The court then considered fees generated while prosecuting the indemnity claim. It noted that the rationale for indemnity obligations requires indemnitors to hold indemnitee harmless from costs incurred as a result of the indemnitor's wrongful conduct. This reasoning does not include fees and expenses incurred to establish the indemnitor's obligation, which falls within the ordinary rule requiring a party to bear its own expenses of litigation.

Referring to an exception where a party has conducted an action in bad faith, vexatiously, wantonly or for oppressive reasons, the trial court noted that courts generally are reluctant to uphold awards under the bad-faith exception absent "clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment, delay or other improper purposes." While the railroad had rejected a tender of defense as to the plaintiff's claims and refused to concede their responsibility to indemnify, the court did not consider this amounted to a bad-faith pursuit of frivolous contentions. Noting that the railroad was not obligated to provide a defense nor agree to indemnification, the railroad may have reasonably believed it might prevail with respect to this claim. Therefore, it might reasonably have been concluded that the facts supporting the claim "might be established", not whether such facts "had been established."

Accordingly, the court granted the ocean carrier's motion for indemnification for its attorneys' fees and expenses incurred in defending the action, but not for fees and expenses it had incurred in bringing the motion requesting indemnification.

[14334]

TRUCKER LEAVES TRAILER ALONE;
GUESS WHAT HAPPENS ...

Nicolas Smith v. Transport Canpar S.E.C.,
(Quebec Dist. Ct., Montreal Div. Feb. 1, 2005) (Gouin, J.)

A shipment consisting of four boxes containing 284 articles of clothing was carried in a trailer for transportation by truck. The trucking company parked the trailer overnight in a secluded area on the property of its subcontractor in a rural location and during the night, the four boxes were stolen. Suit followed.

The defendant trucker admitted the cargo theft did not constitute an act of God or *force majeure*, however, it asserted that the plaintiff was not a real party in interest. The invoice governing the sale stated the sale was on a free on board basis. Nonetheless, the court rejected the trucker's argument based on testimony that the shipper remained fully liable for the merchandise until its delivery to the place of business of the purchaser.

The trucker also argued that it was entitled to a limitation of $100 per box. However, the court found nothing in the evidence demonstrating there was any agreement, written or verbal, between the parties concerning a package limitation.

Finally the defendant argued that the quantum of damages was excessive, and claimed that the merchandise was taken from other clients in favor of the particular purchaser. The court dismissed this contention, noting the replaced merchandise was not sold to other clients but was transferred to the intended purchaser and that the plaintiff had lost profits from the other stores which it would have otherwise gained with respect to those other sales. There were also other occasions on which alarms were set off in adjacent places, requiring the police to regularly attend the premises. Moreover, no particular precautions were taken by the defendant with respect to the goods involved. On the facts, the court found the trucker responsible for the full value of the goods.

Newsletter Editor's Note: Thanks for the contribution of cases are again extended to Messrs. Michael Marks Cohen and David L. Mazaroli. Other contributions will be gratefully received and are encouraged.

[14335]

YOUNG LAWYERS COMMITTEE OF THE MARITIME LAW ASSOCIATION

Spring 2005 Newsletter (Vol. 2005-1)

"THEORETICALLY QUARTERLY" [1]

Two years ago, Josh Force noted how quickly time passed during his tenure as Young Lawyers Committee Chair, and as I write this message to you, I can hardly believe that it is now my turn to pass the YLC gavel.

One of our priorities in the YLC over the last two years was the re-establishment of the liaison system whereby YLC members would serve as links to the various standing committees. Our liaisons took on the important job of communicating to the rest of the YLC the current projects of the MLA's committees (which served to introduce our newest members to the work done by those committees) and helped solicit volunteers for new or ongoing projects for those committees. In the past, YLC liaisons quickly rose to officer positions within their liaised committees. We wasted no time in finding volunteers and appointing them as the new liaisons to the various committees. Soon, though, the MLA experienced its most significant change in decades as the MLA's substantive committees were reorganized. In the process, many of our young lawyer liaisons have now become officers in these newly reconstituted committees, and many are responsible for the publication of the newsletters of these other committees. If you have an interest in the work of one of the other substantive committees, please don't hesitate to contact the YLC liaison to that committee. While thus far it seems that our liaison system has been successfully revived, I will leave it to our new Chair to decide whether additional liaisons are needed where our appointed YLC liaison has become a committee officer.

As acquisition of CLE credits has become increasingly more important to our members, the YLC has responded. In conjunction with our Resort Meeting at Boca Raton in the Fall of 2003, three members of our committee took on the daunting task of researching the law of quarantine and applied their research in an attempt to predict how that law might be applied in the case of an epidemic such as SARS. Also at that meeting, another YLC presenter discussed the ethical ramifications of the use of new technology. In so doing, we

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[1] *MLA Report Editor's Note:* This edition of Theoretical Quarterly was received after the publication deadline for the Spring 2005 MLA Report. Asterisks appear where dated material has been omitted.

not only provided to the membership at large important CLE credit, but we also demonstrated our ability to respond to current, breaking-news topics with thoughtful, insightful and careful research. At our "Away" Meeting at New Orleans in the Fall of 2004, we organized a highly successful CLE presentation at our own meeting (more on this below) and ensured that CLE credit was awarded at various other committee meetings. Many of you are also involved in the project to report on each state's CLE requirements for use by both the CLE Committee and the Special Committee for planning future MLA CLE events, and your hard work and diligence in this regard is greatly appreciated. Our involvement in CLE on behalf of our Association has been commended by President Tom Rue, Board Representative Liz Burrell, and by the other officers and board members of our Association. I will leave it to our new Chair to announce which of our members will be presenting CLE at the Resort Meeting at Scottsdale this coming Fall.

We have been involved in a number of extraordinary projects on behalf of our Association over the last two years, contributing mightily to the betterment of the MLA, and on behalf of myself, my fellow YLC officers and the MLA, I wish to thank all of our volunteers who gave so willingly of their time. Our Association is stronger and more responsive to the needs of its members because of your hard work.

During the past two years, we have worked hard to improve the YLC and to make it more responsive to your needs. We have discussed, and when possible began to implement our collective ideas in this regard. I know that our new slate of officers will continue this important work and I encourage you to voice your ideas on improving the YLC or the MLA to them.

I also thank all of you who have attended our meetings or have otherwise shown an interest in the YLC, and I congratulate those of you who have been raised to Proctor status in the Association.

On a more personal note, I also thank those of you who expressed your support to me and my wife through our recent tragedy. Your actions and your words of encouragement were truly heartwarming and demonstrated one of the highest and most profound purposes of our Association—the fostering of friendship. Thank you.

Finally, I apologize for my tardiness in getting this issue of TQ out to you, but time has been short since our last meeting, and as Mark Twain once remarked, "it usually takes me more than three weeks to prepare a good impromptu speech."

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Fall Meeting 2004 CLE

For those of you who missed our Fall Meeting at New Orleans, you missed an amazing presentation by The Hon. Edith Brown Clement, U.S.A.J. (5th Cir.) and panelists Josh Force of New Orleans, Doug Muller of Charleston, Joe Tabrisky of Rancho Palos Verdes, and Jim Moseley, Jr. of Jacksonville, who delivered a lively and spirited discussion of "*Current Maritime Developments and the Future of the Maritime Practice*". Attendees received 1.2 CLE credits, thanks in part to the hard work of our panel and in part to the work of our volunteers who digested the cases discussed at that meeting. Below, you will find these digests:

Spector v. Norwegian Cruise Line Ltd.
356 F. 3d 641 (5th Cir. 2004)
Digest by Mike Black of Miami

This case involves the issue of whether Title III of the Americans with Disabilities Act ("ADA") applies to foreign-flagged cruise ships.

In 1998 and 1999, the disabled plaintiffs and their companions took cruises aboard the *Norwegian Sea* and *Norwegian Star* out of the Port of Houston to foreign ports of call. Both ships were flagged in the Bahamas. The disabled Plaintiffs alleged that physical barriers on the ships denied them access to 1) emergency evacuation equipment and emergency evacuation-related programs; 2) facilities such as public restrooms, restaurants, swimming pools, and elevators; and 3) cabins with a balcony or a window. The companions allege that they were discriminated against and denied access to the ship's facilities and amenities because of their known association with the disabled plaintiffs.

NCL moved to dismiss the complaint for failure to state a claim. The trial court, among other rulings, ruled that foreign flagged vessels are subject to Title III of the ADA. NCL appealed that ruling to the Fifth Circuit and the Fifth Circuit reversed after a *de novo* review. The Fifth Circuit examined the intent of Congress to apply the ADA to foreign flagged ships. The court reviewed several cases involving other national laws including the Labor Management Relations Act of 1947, the National Labor Relations Act, and Title VII and concluded that those cases prohibit United States courts from applying domestic laws to foreign-flagged ships without specific evidence of congressional intent. Although Congress may enact legislation that governs foreign-flagged

cruise ships operating in U.S. waters, it must clearly indicate its intention to do so. The court then went on to say that there was no indication in the language of the ADA itself or in its legislative history that Congress intended Title III to apply to foreign-flagged cruise ships. The court emphasized the importance of avoiding conflicts with other nations' laws to justify its narrow construction of Title III.

The court rejected the Plaintiff's argument that the Supreme Court applied the National Prohibition Act to foreign flagged vessels in *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), by distinguishing that case on the basis that the structural changes to the ships that the Plaintiffs are demanding to comply with the ADA in this case would amount to an impermissible extraterritorial application of a domestic law. The Fifth Circuit then proceeded to specifically reject the holding of the Eleventh Circuit Court of Appeals in the case of *Stevens v. Premier Cruises, Inc.*, 215 F. 3d 1237 (11th Cir. 2000), which ruled that Title III did apply to those aspects (restaurants, retail stores, health spas, etc.) of foreign flagged cruise vessels that qualify as public accommodations. The Fifth Circuit stated that the 11th Circuit disregarded the Supreme Court's admonition that before applying domestic law in the "delicate field of international relations", Congress must clearly express its intent to do so. Lastly, the Fifth Circuit rejected the opinions of the Department of Justice and Department of Transportation that the ADA applied to foreign-flagged cruise ships because those were only "opinions" and not formal adjudications or rulemaking.

In conclusion, the Fifth Circuit held that foreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so.

Otto Candies, LLC v. Nippon Kaji Kyokai Corp.
2003 A.M.C. 2409 (5th Cir. 2003)
Digest by Chuck Diorio of Baltimore

Holding: A marine classification society may be liable for negligent misrepresentation but these types of claims should be strictly and carefully limited.

Summary: Otto Candies entered into a contract with Diamond Ferry Company ("Diamond") to buy a high speed, aluminum hulled passenger vessel named the *SPEEDER*. Diamond operated the *SPEEDER* as a coastal ferry in Japan from 1995 to 1998. In 1998, Diamond took the *SPEEDER* out of service and allowed her Nippon Kaiji Kyokai Corporation ("NKK") classification to lapse. As a condition of sale to Otto Candies, a clause in the

contract required that NKK make current the *SPEEDER*'s classification, free of any deficiencies.

On January 5, 2000, NKK issued a classification certificate to Diamond that indicated the *SPEEDER* was certified with no outstanding deficiencies. Otto Candies then bought the *SPEEDER*, and she was transported from Japan to a Mobile, Alabama shipyard. When the *SPEEDER* arrived in Mobile, Otto Candies arranged for a survey by the American Bureau of Shipping ("ABS") so that the vessel's classification could be transferred from NKK to ABS. The ABS surveyor discovered a number of significant deficiencies that required extensive repairs before ABS would classify the *SPEEDER*. Otto Candies had the *SPEEDER* repaired at the shipyard at a cost of $328,096.43. Once repairs were completed, ABS issued an interim class certificate.

Otto Candies filed suit against NKK based on the tort of negligent misrepresentation for the cost of the repairs. To establish a case of negligent misrepresentation under §552 of the *Restatement (Second) of Torts*, Otto Candies had to establish that: (1) NKK, in the course of its profession, supplied false information for Otto Candies' guidance in a business transaction; (2) NKK failed to exercise reasonable care in gathering the information; (3) Otto Candies justifiably relied on the false information in a transaction that NKK intended to influence; and (4) Otto Candies thereby suffered pecuniary loss.

The court found that NKK was liable to Otto Candies for negligent misrepresentation but also agreed that these types of claims against maritime classification societies "should be strictly and carefully limited." Broader imposition of liability upon classification societies would increase their risk management costs and rebound in higher fees charged to the societies' clients throughout the maritime industries. Even so, the facts of this case allowed NKK to be liable to Otto Candies.

The court found NKK liable of negligent misrepresentation because NKK was aware: (1) that a certification of the *SPEEDER* was directly related to the pending sale of the *SPEEDER* to Otto Candies; and (2) that the certification would be used to guide Otto Candies' decision to buy the *SPEEDER*. The *Restatement of Torts* expressly limits liability to a select group of individuals who the misinformer actually knows will receive the information, and the fact that it was merely possible or foreseeable that a person would rely on the information is insufficient.

The court went on to hold that the first prong of the test was met when NKK supplied false information by issuing a class certificate free of deficien-

cies when expert witnesses for both parties testified that the various items of damage and deterioration found by the ABS surveyor would affect the *SPEEDER*'s NKK classification. The second prong was satisfied when the court found that NKK failed to exercise reasonable care in its survey because many of the deficiencies were open and obvious to the ABS surveyor. The court held that Otto Candies met the third prong because the CEO testified that, but for NKK's certification of the *SPEEDER*, Otto Candies would not have purchased the vessel. Lastly, the court stated that Otto Candies met the fourth prong by suffering pecuniary damages in the amount of the cost of the repairs.

Becker v. Tidewater, Inc.,
335 F.3d 376 (5th Cir. 2003)
Digest by Kevin McGlone of
New Orleans

Plaintiff, a college engineering student, secured a summer internship with Baker Hughes, Inc., an oilfield services company. Plaintiff began his internship performing primarily land-based work. Baker Hughes planned to expose plaintiff to the various areas of its business, and it planned to "try to get plaintiff out on a boat" at some point during the summer. After doing various land-based tasks, plaintiff had the opportunity to observe an operation on an offshore platform. At the conclusion of the trip, Baker Hughes assigned plaintiff to work aboard its technology vessel because one of the vessel's regular crew members needed time off. Plaintiff immediately began working on the vessel, which was sent to assist in an operation to be performed at an offshore rig. While performing work aboard the rig and vessel, an accident occurred which severely injured plaintiff, who lost both of his legs.

Plaintiff brought suit against Baker Hughes, among others, alleging that he was a seaman entitled to the negligence cause of action provided by the Jones Act and warranty of seaworthiness under the general maritime law. Alternatively, he alleged a claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The matter proceeded to trial, and the district court allowed the issue of seaman status to go to the jury despite a motion for summary judgment and for directed verdict by Baker Hughes. The jury found plaintiff was a seaman then adjudged the defendants liable for the plaintiff's injuries and awarded $29 million in general damages.

Various appeals followed, but the Fifth Circuit focused exclusively on the threshold issue of the plaintiff's seaman status. Applying the two-part test for seaman status articulated by the Supreme Court in *Chandris, Inc. v.*

Latsis, 515 U.S. 347 (1995), the Fifth Circuit found the critical issue for review was whether the plaintiff had a substantial connection to the vessel in terms of its nature and duration. Plaintiff could not satisfy the court's "rule of thumb" that a seaman is one who spends at least 30% of his time in service of the vessel. However, the *Chandris* Court had created two exceptions to this rule. First, a land-based employee reassigned to classic seaman's work qualifies for seaman status even if he is hurt shortly after he begins working. Second, a worker reassigned to land-based work cannot claim seaman status based on his previous work. It was this first exception that plaintiff sought to utilize. As the court framed the issue, the plaintiff would be a seaman if "over the course of his employment, [he] has worked in the service of a vessel in navigation well under thirty percent of his time [and] may still qualify for seaman status if he has been reassigned to a new position that meets this temporal requirement."

In resolving this issue, the court rejected plaintiff's invocation voyage test, which would have conferred seaman status solely on the basis of the one voyage plaintiff was on at the time of the accident. The Fifth Circuit concluded that one cannot simply move in and out of seaman status. Rather, he would have to show the permanence of the reassignment from land-based work to a position that would eventually lead him to work in service of the vessel at least 30% of the time. The Fifth Circuit concluded that the evidence in the record was insufficient to support the jury's verdict in this case. Plaintiff was not permanently assigned to the vessel, and the evidence surrounding his summer internship indicated he would likely have returned to land-based work had he not been injured. The court found no evidence that plaintiff would have become a regularly sea-based employee. Considering this lack of evidence, the court found that, as a matter of law, plaintiff was not a seaman. Accordingly, his only remedies were under the LHWCA. The Fifth Circuit reversed the district court's judgment and remanded the matter to the district court for further proceedings as to the plaintiff's remedies under the LHWCA.

Moore v. ANGELA MV
353 F.3d 376 (5th Cir. 2003)
Digest by Brett Mason of Baton Rouge

Plaintiff, a surviving spouse of a deceased longshoreman, filed a §905(b) action against the M/V ANGELA *in rem* following the death of her husband who was struck by falling cargo and killed while working for Stevedores, Inc. in the M/V ANGELA. The vessel was seized and upon the posting of a letter of undertaking in the amount of $500,000.00 it was released.

Following a bench trial the district court found vessel liability under §905(b) and *Scindia Steam Navigation Co. v. De Los Santos*. The district court concluded that a defective crane caused the longshoreman's death and assessed comparative fault 65% to Angela, 30% Stevedores, and 5% to the decedent. The total damage award was $907,469.11, including $750,000.00 in non-pecuniary damages for loss of society. The court entered a judgment for $862,095.66 and granted plaintiff a post-trial increase in security sufficient to cover the judgment. An appeal followed.

The Fifth Circuit did not find clear error in the district court's finding that the vessel owner violated the turnover duty, that the breach of this duty was a substantial factor in causing the accident, or that the decedent was five percent at fault.

The Fifth Circuit further concluded that non-pecuniary damages are recoverable, but that the amount of the district court's non-pecuniary damage award was not sustainable. The plaintiff and decedent had been married six months, after living together for seven years and had a truly loving relationship. They married when they were about 50 years old and had no children together. Applying the "maximum recovery rule" the court found that the maximum non-pecuniary award that could be made was $399,000.00.

The Fifth Circuit found no legal basis for the district court to have required additional security. The court limited the security and amount of the damage award to $500,000.00 and remanded the case for further proceedings in accordance with the opinion. Judge Garza concurred in part and dissented in part.

YLC Projects

Indexing Project

The YLC, under the leadership of past YLC Chair Doug Muller, was asked by past MLA President Bill Dorsey to assist in creating an index of MLA Proceedings, Board Minutes, and MLA Reports. The YLC has been tasked with preparing an index for these materials from 1986–present. This project is currently being led by Katharine Newman. The YLC still needs volunteers for the indexing project. The YLC also still needs the following source material for this project: MLA Reports: Spring and Fall 1987, Spring and Fall 1988, Spring and Fall 1990, Spring 1991. If you can spare approximately 10 hours or if you can share any of the above-listed missing sources, please contact Katharine: katharine.f.newman@conocophillips.com. Thanks to the volun-

teers who have given so generously of their time to this project, including: Katharina Brekke, Claurisse Camapanale-Orozco, George Chalos, Michael Marks Cohen, Mike Eaves, Alex Giles, Bryant Gardner, Jason Harris, Lynn Hubbard, David James, Mike Leahy, Marc Marling, Doug Muller, Sean O'Neil, Colin McRae, Dave Neblett, Katharine Newman, Scott Scherban.

State-By-State CLE Project

As noted above, the YLC is assisting the MLA's Special Committee and the CLE Committee to improve and expand the MLA's ability to provide CLE for its members. The YLC's role in this connection has been to investigate the costs, fees, paperwork and other requirements associated with accrediting CLE activities either per program or on a permanent basis, in each individual US jurisdiction with mandatory CLE obligations. Dana Henderson, who is leading this project, reports that only some finishing touches need to be completed before the report is ready for submission to the CLE and Special Committees. Thanks to all the assistance provided by volunteers: Jonathan Thames, Mike Eaves, Craig Brewer, Jim Koelzer, Katharine Newman, Marc Marling, Geoff Losee, David Marvel, John Holloway, Chuck Diorio, Fred Goldsmith, Brent Skolnick, Bryant Gardner, Robert Berger, Ian Carvajal and Dana Henderson.

Fisheries/Marine Finance Project

Pamela (Whipple) Palmer completed her assignment researching several different issues in connection with the Sustainable Fisheries Act, 16 U.S.C. §1855(h) concerning the extension *vel non* of maritime liens to cover commercial fishing permits issued by the National Marine Fisheries Service. Thanks in part to Pamela's research, the Fisheries and Marine Finance Committees at the 2004 Fall Meeting put to a vote, which was approved by the membership, the issue of the MLA's involvement in proposing an amendment to the Sustainable Fisheries Act to Congress.

Model Admiralty Jury Instructions

Volunteers are still needed to draft and compile pattern jury instructions for various maritime claims. Though some jurisdictions already have a complete set of appropriate jury instructions, other jurisdictions have only partial instructions while still others have none at all. Interested volunteers should contact me at: kahn@freehill.com.

Other On-Going Projects

Many of you are working on numerous other projects assigned to the YLC, and your time and efforts on behalf of our Association and Committee are greatly appreciated. Many thanks to those who have been working on these important projects.

Proctor Status

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor Status with the MLA. The advantages of Proctor Status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair or director unless s/he is already a Proctor (Non-Lawyer members may so serve, however). Proctor applications may be obtained from the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus.org) in the "Membership Forms" section.

One of the requirements to obtain Proctor Status is to obtain two letters in support from Proctor members who are not associated with the applicant in the practice of law. Your active involvement in this committee aids your officers in drafting such letters on your behalf and you should consider us as resources for that purpose.

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Larry Kahn
Chair, Young Lawyers Committee
Freehill Hogan & Mahar, LLP
New York, NY 10005

AMC "RETROS" INDEXED FOR CONVENIENCE OF COUNSEL

From time to time since 1996, AMC has reprinted under the heading "RETROSPECT" important opinions antedating AMC and still being cited. There have been 50 of these "RETROS" as of summer 2005. Most are from the Supreme Court and are copied from original reports with star pagination so that a user of AMC need not go to another reporter for an official page citation. The editors have thought that likely users may be interested to see the present extent of the RETROS and to have at hand the following lists in alphabetical order and by principal topics.

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