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THE MLA REPORT

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EDITORIAL COMMENT

This Report includes the first newsletter issued by the recently constituted Marine Ecology and Maritime Criminal Law Committee. The Committee, headed by Chair Jim Moseley, Jr. of Jacksonville and Vice Chair Dennis Minichello of Chicago, monitors a wide range of domestic and international environmental topics, including legal decisions, legislation, and trends that impact the shipping and insurance industries. Jim and Dennis are to be commended for overseeing this new committee's fine work, which is reflected in the newsletter they have produced for the MLA membership, and we look forward to updates in coming months.

This report also includes updates on recent case law by the Recreational Boating Committee, Carriage of Goods by Sea Committee, and Marine Insurance and General Average Committee, Additionally, the latter committee has included in its newsletter an excellent article regarding rescission of insurance policies for misrepresentation of material facts by John Woods of New York, and a timely update concerning the 2004 York-Antwerp Rules by Jonathan Spencer.

The MLA Report was founded 22 years ago by past President, David Owen, of Baltimore, to help maintain a permanent record of the various written work of the MLA. LeRoy Lambert and I urge all MLA members to remain active in the Association's committee structure and to make their work available through their committees, so we can share their expertise with the membership of this Association.

Matthew A. Marion,
Editor

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MARINE ECOLOGY AND MARITIME CRIMINAL LAW COMMITTEE NEWSLETTER, FALL 2004

Chairman: James F. Moseley, Jr., Jacksonville, Florida
Vice-Chair: Dennis Minichello, Chicago, Illinois
Secretary: Alexander M. Giles, Baltimore, Maryland

The Marine Ecology & Maritime Criminal Law Committee is a new committee of the Maritime Law Association which has combined the former Marine Ecology Committee and Maritime Criminal Law Committee. The Committee appreciates the hard work of the previous chairs of these two separate committees, Matt Marion of the Marine Ecology Committee and Tom Russo of the Criminal Procedure Committee. Both individuals have played an integral role in the successful creation of this new committee. The first meeting was held on November 11, 2004 in New Orleans, Louisiana at the law offices of Jones Walker Waechter Poitevent Carrere & Denegre.

Our first committee meeting consisted of a very thorough program addressing many issues by six well-qualified speakers. The committee greatly appreciates the hard work of the speakers as well as the work of Dennis Minichello and Matt Marion in assisting in putting the program together.

The speakers at this meeting were as follows:

Thomas M. Russo, Freehill Hogan & Mahar
New York, New York

Nathalie Soisson, Total Fina Elf/DCI
Paris La Defense, France

Graham Walker, Borden Ladner Gervais
Vancouver, B.C., Canada

Lawrence I. Kiern, Winston & Strawn
Washington, D.C.

Joe Walsh, Keesal Young & Logan
Long Beach, California

David Dickman
Washington, D.C.

I. OBSTRUCTION OF JUSTICE

Thomas Russo provided us a well-informed talk on issues relating to obstruction of justice charges in criminal marine investigations. There has been a concern of criminal prosecution by members of the committee when handling marine investigations.

Mr. Russo told the committee that advising clients that they have a right to counsel is not an act of obstruction of justice. Many cases against shipowners are based upon incriminating statements made to Coast Guard officials by officers and crew members. In the United States, shipowners and operators have vicarious liability based upon the actions of their employees acting within the scope of their employment. It was pointed out that officers and crew members can be told that they have the right to speak to their own attorney before they decided to provide statements which might be incriminatory to the Coast Guard. It was also pointed out that lying to the Coast Guard in past cases has resulted in crew members suffering felony liability in what had previously been a misdemeanor charge. Advising of the right to counsel, however, is different from advising officers and crew members not to speak to the Coast Guard or advising a client to take evasive action. For example, during a grand jury investigation, it is important to produce everything called for in a subpoena that is not privileged. Privileged matters should be listed in a separate privilege log. In order to protect oneself from the suspicion of holding back subpoenaed materials, an attorney should obtain an affidavit from a client affirming that they have produced everything requested to him.

Another issue discussed was conflicts in representation. Usually an attorney represents the vessel owner and not the crew members. In a criminal case, the crew member should have individual counsel. Because vessel owners and crew members generally have joint interests, they may enter into a joint defense agreement whereby their counsel can share information without waiving attorney work product or attorney-client privileges.

II. OILY WATER SEPARATORS

Joe Walsh of Keesal Young & Logan of Long Beach, California gave a report on the recent trend involving the prosecution of oily water separator (OWS) cases. Mr. Walsh reported that there is a need to properly maintain log books and immediately log all movements of waste, oil, transfers

and discharges, etc. There is a recent trend of the government to investigate what it describes as systematic efforts to lie to the Coast Guard and keep inaccurate log books. It was pointed out by Mr. Walsh that Department of Justice prosecutions are up over the last three years (123 total cases as of 2003, an increase of 83 cases since 2000). Of these cases, 25% involve OWS. This has resulted in $61.5 million in corporate fines. Prior to 2001 almost all of the fines were against cruise lines. This changed in 2001. In 2001, non-cruise ship fines were approximately $3 million whereas they were virtually non-existent prior thereto. In the year 2002, these fines doubled to a total of $6 million. For 2004, the amount of these fines has been projected to exceed $15 million dollars.

The Coast Guard has become more knowledgeable concerning OWS violations. During investigations the Coast Guard will look for red flags such as flexible hoses with oil remnants and oil book irregularities such as the same number for each discharge, discharges in excess of OWS capacity, and the same handwriting throughout the log book. The Coast Guard has also taken to seizing original documents and logs and aggressively interrogating crew members. The Coast Guard has also immediately notified and involved the Department of Justice in their investigations.

The Committee will continue to update the membership on these trends relating to OWS cases and will monitor very carefully.

III. MISCELLANEOUS

Nathalie Soisson provided the Committee with a European law update. Larry Kiern provided us a congressional update and Dave Dickman provided us a criminal procedure case law update.

Although he could not join us at the committee meeting, member Kent Roberts of Schwab, Williamson & Wyatt, Portland, Oregon provided us advises on recent amendments to the Oil Pollution Act of 1990 in the memo below:

The Coast Guard and Maritime Transportation Act of 2004 passed Congress in July and was signed into law by President Bush on August 9, 2004. The Act covers a number of disparate topics but includes some amendments to the Oil Pollution Act of 1990. Section 701 of the Act requires Vessel Response Plans (VRP) for self-propelled, non-tank vessels over 400 gross tons, carrying oil as fuel for main propulsion. The require-

ment was previously limited under the OPA to tankers and tank barges. The Act also calls for submission of non-tank vessel VRPs within a year from enactment of the Act, though the exact timeline for the VRP process will be determined by the Coast Guard in its rulemaking. The Coast Guard is charged with developing regulations for implementation of this new non-tank vessel VRP requirement over the next year.

A number of coastal states already have VRP requirements for non-tank vessels on their books. Some require or permit VRPs on an individual vessel basis, others allow non-tank vessels to meet the state's requirements by enrolling under a regional VRP that covers vessels calling in the local area. Section 701 of the Act states that in developing the Federal regulations, the Coast Guard is to consider any applicable state mandated response plan and ensure consistency to the extent practicable.

Section 703 of the Act includes some amendments to the definitions of "owner or operator" under the OPA (33 USC § 2701(26)) to more clearly address the liability position of lenders, lease finance owners and governmental entities who have an interest in vessels through financing arrangements, or who acquire interest in vessels through law enforcement activity, bankruptcy, tax delinquency, abandonment or similar governmental activities. Amendments to 33 USC § 2703 also include further clarification of what is a "contractual relationship" in relation to real property in the hands of an innocent purchaser. Criteria definitions are also added as to what steps must be taken to be an innocent purchaser for purposes of liability and cost recovery.

THE ENFORCEMENT OF MARINE ECOLOGY LAWS IN CANADA

by Graham Walker, Vancouver, British Columbia

1. LEGISLATIVE FRAMEWORK

Canada is a federal state with a relatively strict division between federal and provincial jurisdiction in most areas. Legislative authority over maritime matters is exercised mainly by the federal Parliament.[1] While the Supreme Court of Canada has held that protection of the environment is not a head of jurisdiction belonging either to Parliament or the provincial legislatures,[2] it has also held that marine pollution is a matter of "national concern" which cannot effectively be dealt with by the provinces acting independently and therefore falls within the federal Parliament's residual power to make laws for the "peace, order and good government of Canada".[3] The result is that marine ecology lawmaking and enforcement in Canada is mostly a federal responsibility.

The main statutes—all federal—governing marine ecology and related matters are as follows:

a. Canada Shipping Act[4]

Parts 15 and 16 of this Act empowers the federal cabinet and the ministry of transport (Transport Canada) to take a variety of measures to prevent and respond to marine pollution. Among Part 15's provisions are those empowering cabinet to implement by regulation Canadian obligations under the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL)[5] and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990.[6] Other provisions of this part define pollution offences, create pollution prevention personnel, and establish standards to reduce and minimize pollution. Part 16 of the Act empowers Transport Canada to take necessary measures to repair, remedy, minimize or prevent pollution damage from ships it believes have discharged, are discharging or are likely to discharge a pollutant.

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[1]Constitution Act 1867 ss 91(10) (navigation and shipping) and 91(12) (fisheries).
[2]Friends of Oldman River Society v Canada [1992] 1 SCR 3 at 63, 64, 70.
[3]R v Crown Zellerbach [1988] 1 SCR 401; Constitution Act 1867 s 91.
[4]RSC 1985 c S-9 as amended.
[5]1340 UNTS 184.
[6]30 ILM 733.

Part 15 defines several pollution-related criminal offences, punishable either on summary conviction or by way of indictment. Among the criminalized activities are discharging pollutants contrary to regulation (s 664) and disobeying a pollution prevention officer (s 666). Ships suspected of committing offences may be detained and, in some circumstances, sold (s 672). Convicted offenders under Part 15 may be subjected, in addition to any other punishment imposed by the court, to a variety of remedial orders such as prohibitions of activity that may result in further offences, directions to publish facts relating to the conviction, and directions to pay for research into the ecological use and disposal of the pollutant in question (s 664). These are strict liability offences with fines ranging from $250,000 (6 months) to $1,000,000 (3 years).

b. Canada Shipping Act 2001[7]

This Act (the relevant parts of which are not yet in force) creates a variety of offences for contravention of its provisions or regulations. Unlike its predecessor, offences under the Canada Shipping Act 2001 are summary only, the outdated process by indictment having been abolished. Fines have been increased on summary conviction to a maximum of $1,000,000 (18 months). What is most notable about this Act for our purposes is that its enforcement falls not only to Transport Canada, as in the past, but also to the Department of Fisheries and Oceans (DFO). The expansion of enforcement authority will be discussed further in a moment.

c. Marine Liability Act[8]

This relatively new Act serves to implement a variety of maritime law treaties to which Canada is a party or may become a party,[9] notably the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992). Part 6 of the Act governs civil liability and compensation for marine pollution. Shipowners are strictly liable for ship-source oil pollution damage and reasonable costs incurred to prevent, repair, remedy or minimize it. The Act also provides for additional compensation for pollution (above limitation amounts) by means of two funds, the International Oil Pollution Compensation Fund and the Ship-source Oil Pollution Fund. The Act creates only a few criminal offences, punishable on summary conviction.

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[7]SC 2001 c 26 (not yet fully in force).
[8]SC 2001 c 6.
[9]See A Chircop, E Gold and H Kindred, Maritime Law (Toronto: Irwin Law, 2003) at 116.

d. Canadian Environmental Protection Act, 1999

CEPA is the primary enforcement statute used by Environment Canada. As its name implies, it was enacted in 1999 in an effort to enhance Environment Canada's enforcement arsenal. CEPA provides for both civil and criminal liability.

In general, CEPA prohibits the disposal of substances at sea without a permit except in "emergency" situations. An emergency is defined as an uncontrolled, unplanned or accidental release of a substance into the environment. Under CEPA, every owner or person with charge, management or control of a regulated substance is required to have in place an emergency response plan (ERP) and is liable to restore the environment and pay costs incurred to repair damage to the environment. Civil liability is strict, meaning proof of fault or negligence is not required and defences are limited, however, rights against third parties are preserved.

CEPA also contains various "whistle blower" provisions intended to encourage public participation in the enforcement of the Act. CEPA permits the confidential reporting of offences under the Act, allows an individual to apply for an investigation into impugned conduct and to bring an environmental protection action including relief by way of injunction. Unlike the US, CEPA does not provide monetary rewards for assistance or information resulting in a conviction.

It is an offence to contravene CEPA. On summary conviction, the maximum fine is $300,000 and/or 6 months incarceration. If indicted, the maximum fine is $1 million and/or 3 years imprisonment. Directors and officers of corporations who offend CEPA also face criminal liability if they direct, authorize, assent to, acquiesce in or participate in the commission of the offence. Liability is strict and the defence of due diligence is available.

e. Fisheries Act

The Fisheries Act has long been an important part of the Canadian marine ecology enforcement regime. It is widely used as an enforcement tool in western Canada. Under the Act it is an offence to deposit a deleterious substance into waters frequented by fish. Proof of actual harm or impact to the receiving environment is not required. The Fisheries Act also prohibits the disruption, destruction or harmful alteration of fish habitat. There is a positive duty to report discharges of substances to DFO. Liability is strict under the Act and fines range from $300,000 and/or 6 months

imprisonment for a summary conviction offence to $1 million and/or 3 years incarceration for an indictable offence.

The Fisheries Act also provides for civil liability. The Act creates a cause of action in favour of the Crown to recover its reasonable costs incurred to abate or mitigate adverse effects of pollution. Further, the Act creates a cause of action in favour of fishermen for loss of income attributable to contraventions of the legislative provisions. Civil liability is absolute and joint and several, but the provisions of the Fisheries Act do not apply to ships within the meaning of Part 15 of the Canada Shipping Act.

f. Arctic Waters Pollution Prevention Act[10]

The Act establishes a marine pollution protection regime similar to that found in the Canada Shipping Act but for Arctic waters, *i.e.*, Canadian waters above the sixtieth parallel of north latitude. The Act also prohibits all waste disposal into Arctic waters, imposes special vessel equipment and crew requirements, creates additional offences, and establishes other environmental protection measures. The regime is enforced by pollution prevention officers and other officials of Transport Canada.

Offences under the Act are addressed to contraventions of its waste disposal and pollution prevention provisions. They are summary in nature and fines on conviction range from $5,000 to $100,000. We are not aware of any enforcement actions under this Act.

g. Criminal Code[11]

Though not specifically addressed to marine ecology matters, the recently enacted provisions of ss 22.1-22.2 of the Criminal Code are of interest. These provide for the liability of corporations, partnerships and other "organizations" for criminal negligence and intentional acts. For criminal negligence, the central inquiry is whether the senior officer or officers responsible for the relevant aspect of the organization's activities markedly departed from the standard of care that, in the circumstances, could reasonably be expected. For intentional criminal acts, the main question is whether an organization's senior officer acted with the intent at least in part

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[10]RSC 1985 c A-12 as amended.
[11]RSC 1985 c 46 as amended.

to benefit the organization. These amendments were brought about principally to address health and safety concerns arising from the Westray Mine disaster. However, the scope is wide enough to encompass environmental matters and shipping operations.

2. ENFORCEMENT AUTHORITY

In the past, primary responsibility for the enforcement of marine ecology laws has rested with the federal minister of transport and his ministry, Transport Canada, acting under the Canada Shipping Act, the Arctic Waters Pollution Protection Act and other laws and regulations. Recently, however, Parliament has passed marine ecology laws that rely on other federal ministries. The result is an increasingly complex regulatory enforcement system. The new entrants into the enforcement area are the DFO and Environment Canada.

Under Part 8 of the Canada Shipping Act 2001 (not yet fully in force), DFO will share some of Transport Canada's enforcement responsibilities with respect to the discharge of oil, the creation of pollution response organizations, the appointment of pollution prevention officers, and other matters. The Act also confers regulatory authority on both Transport Canada and DFO to implement Canadian obligations under the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 and other treaties. Apart from its new responsibilities under the Canada Shipping Act 2001, DFO has enforcement responsibility over marine pollution under such laws as the Oceans Act,[12] the Fisheries Act,[13] and the Coastal Fisheries Protection Act.[14]

Environment Canada has overlapping enforcement jurisdiction with Transport Canada and DFO through a variety of laws,[15] most notably the Canadian Environmental Protection Act 1999.[16] As we will see later, the federal government is currently considering legislation that would further expand Environment Canada's enforcement role in marine ecology matters.

What follows are summaries of recent Canadian marine pollution enforcement cases.[17]

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[12]SC 1996 c 31.
[13]RSC 1985 c F-14 as amended.
[14]RSC 1985 c C-33 as amended.
[15]E.g. Canada Water Act RSC 1985 c C-11 as amended; Canada Wildlife Act RSC 1985 c W-9 as amended; Migratory Birds Convention Act 1994 SC 1994 c 22.
[16]SC 1999 c 33.
[17]Most of these summaries are taken from http://www.admiraltylaw.com.

R v Glenshiel Towing Co. Ltd. (June 21, 2001) No. CA027681 (B.C.C.A.)

On December 16, 1997, the tug "Glenshiel" was found heeled over and submerged at her mooring in False Creek, Vancouver. As a result of the sinking a considerable amount of diesel fuel escaped from the vessel into the water and the owner was charged pursuant to s. 668 of the Canada Shipping Act with discharging a pollutant. At trial, the accused was acquitted on the grounds that the Crown had failed to prove sufficient evidence to support a conviction. On appeal, the Crown argued that all it needed to prove to support a conviction was that the pollutant emanated from the ship. The accused argued that it was incumbent on the Crown to prove that the accused caused the discharge. The judge on appeal agreed with the accused, holding that the Crown must prove some causal link between the accused and the discharge of the oil before liability will arise, at which point the onus shifts to the accused to prove due diligence. On further appeal, the Court of Appeal held that the offence was a strict liability offence which carries a conviction upon mere proof of the prescribed act. The Crown was not required to prove that an act or omission of the master or some other person on board the ship caused the discharge. All that is required is proof beyond a reasonable doubt that the discharge occurred. Thereafter, the onus shifts to the accused to prove that all due care was taken to avoid the discharge.

R v The "Tahkuna" [2002] N.J. No. 62

This was an appeal of sentence imposed by a provincial court judge. The defendant ship was charged under the Oil Pollution Prevention Regulations of the Canada Shipping Act. The charges stemmed from a spill of approximately 1,000 litres of fuel during refuelling operations. The cause of the spill was that a valve in the overflow line had been inadvertently left open. The spill affected 1,500 feet of shoreline and the clean up costs, which were paid by the shipowner, amounted to $65,000.00. Under these circumstances, the trial judge imposed a fine of $20,000.00. The shipowner appealed the fine to the Newfoundland Court of Appeal, arguing that the fine far exceed the range customarily imposed for similar offences. The Court of Appeal noted that it could only intervene to vary a sentence imposed at trial if the trial judge committed "an error in principle" leading to a sentence that was "demonstrably unfit." Upon reviewing the circumstances, the Court of Appeal found no such error in principle and dismissed the appeal.

R v The "Point Vibert" [2000] N.S.J No. 147 (N.S. Prov. Ct.)

This is a rare case in which a ship was found not guilty for discharging a pollutant. The Court found that although the pollutant emanated

from the ship, the cause of the pollution was the failure of shore-based personnel to stay at their posts. Specifically, the procedure set up for the fuelling operation was for the shore-based personnel to operate the control valve as instructed by the crew. During the course of the fuelling operation it was apparent that the rate of flow was too great and the crew shouted to the person operating the valve to restrict the flow. However, that person had inexplicably left the valve unattended with the result that the fuel overflowed. Under the circumstances, the Court held that the discharge occurred as a result of events outside the control of the vessel or the crew.

Canada v J.D. Irving Ltd. (December 21, 1998) No.T-1625-97 (F.C.T.D.)

This decision disposes of motions for summary judgment brought by the various defendants. The matter arose out of the sinking of the "Irving Whale", a tank barge, on September 7, 1970, while under tow of the tug "Irving Maple" from Halifax, Nova Scotia to Bathurst, New Brunswick. At the time of the sinking she was loaded with 4,297 long tons of Bunker C fuel oil. Immediately after the sinking a quantity of oil was discharged from the barge and 32 kilometres of coast line was contaminated. Clean up operations continued until November, 1970. Thereafter, small quantities of oil intermittently leaked from the barge. The barge was kept under surveillance until 1994 when the Minister of Transport decided that the sunken barge should be raised to avoid an inevitable catastrophe. The barge was successfully raised on 30 July 1996 at a cost of $42,000,000.00. The Government of Canada later commenced this action to recover the costs of raising the barge. The action was commenced against the owners and charterers of the "Irving Whale" and "Irving Maple" and against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971. The action against the owners and charterers was based on the statutory liability of an "owner" imposed by 677(1) of the Canada Shipping Act and on the torts of negligence and nuisance. The actions against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971 were pursuant to Part XVI of the Canada Shipping Act.

The various defendants brought motions for summary judgment. The significant issues were: whether the action against the defendants was time barred by the terms of subsection 677(10) of the Canada Shipping Act; whether the action against the "owner" in tort was time barred; whether Part XVI of the Canada Shipping Act had retroactive effect; whether the claim against the Ship Source Oil Pollution Fund was time barred by subsection 710(1) of the Canada Shipping Act; and whether the claim against the International Oil Pollution Compensation Fund was time barred.

On the first issue the Court held that the plaintiff's statutory cause of action against the "owner" was time barred by subsection 677(10). Subsection 677(10) provides for a limitation period of 3 years from the date of the damage and 6 years from the date of the "occurrence" that caused the damage. The plaintiff argued that these limitation periods did not apply because the claim was for "preventative measures" rather than pollution damage. In the alternative, the plaintiff argued that since the claim was for "preventative measures" the word "occurrence" as used in subsection 677(10) should be interpreted as meaning the taking of "preventative measures" or the time when the plaintiff first had reasonable grounds for believing such measures were necessary. The Court rejected the plaintiff's arguments and held that the word "occurrence" could only mean the sinking of the barge. In result the plaintiff's statutory action against the "owner" was time barred.

On the issue of whether the action in tort against the "owner" was time barred, the owner relied on section 681 of the Canada Shipping Act (which provides that the owner of a "Convention ship" is not liable for the matters referred to in subsection 677(1). The Court, however, noted that there was doubt as to whether the "Irving Whale" continued to be a "Convention ship" as the owner had abandoned ownership after the sinking. The Court further noted that the torts of negligence and nuisance may be of a continuing nature and that there was an absence of evidence on the motion as to the nature of the torts and when they may have been committed. The Court therefore allowed the plaintiff's actions in negligence and nuisance to continue.

The third issue, whether Part XVI had retroactive effect, arose because Part XVI was not enacted until well after the sinking. The enacting legislation provided that it should apply to claims for expenses "regardless of the time of the occurrence that gave rise to the damage, loss, cost or expenses. The Court held that these words indicated a clear intent that the legislation should be applied retroactively.

The two remaining issues of whether the statutory claims against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971 were time barred were resolved against the Plaintiff. The Court held that these claims were time barred.

R. v The "Elm" (May 5, 1998) (Nfld. Prov. Ct.)

In this matter the "Elm," a lumber carrier, and her Master, Chief Engineer and Second Engineer were charged with various pollution

offences. The charges arose when a Fisheries Surveillance aircraft observed an oil slick off the south coast of Newfoundland on 23 November 1996. The slick was approximately 20 metres in width and 59 nautical miles long. The Fisheries aircraft followed the slick to the stern of the "Elm". The observers on the aircraft concluded that the oil was being discharged from the "Elm" even though they did not actually observe the discharge of pollutants from the ship. The ship vehemently denied the charges. The theory of the defence was that the slick had come from another vessel transiting the same shipping highway to Europe. Expert evidence was led indicating the course of the slick was slightly different from the course of the ship. Evidence was also led that the ship was well run and well equipped. The trial judge acknowledged that the facts raised a suspicion but acquitted the accused. In doing so the trial judge noted the absence of oil sample analysis that would have conclusively proven the oil slick had emanated from the "Elm".

Newfoundland Processing Ltd. v The "South Angela" (September 23, 1996) Nos. T-457-88, T-584-90, T-620-90 (F.C.T.D.).

The issue in this case was who was responsible for an oil spill that occurred at the Come By Chance oil refinery. The spill resulted after the defendant vessel had discharged its cargo of crude and was involved in a line draining process. The Court held that both the plaintiff and defendant were equally at fault. The plaintiff was at fault in that the cause of the spill was a backflow from the refinery and there were no check valves in place which, although not required by law, would have made the Plaintiff aware of the backflow. The defendant was at fault in that it had failed to close a valve which, if closed, would have prevented the backflow from entering the slop tank and overflowing into the sea. The Court further held that the contributory negligence of the plaintiff was not a bar to recovery. In doing so the Court relied upon and adopted the reasoning of the Newfoundland Court of Appeal in *Bow Valley (Husky) Bermuda v Saint John Shipbuilding Limited* (1995) 130 Nfld. & PEIR 92.

R. v The "Front Climber" [1995] N.B.J. No. 249 (N.B. Prov. Ct.).

The "Front Climber" pleaded guilty to a charge of pollution under the Canada Shipping Act. Approximately 25 to 30 litres of oil had been discharged in St. John harbour. The cause of the discharge was a failure to fully close a valve. The ship was fined $2,000. An interesting point in the case was whether the ship could be given an absolute or conditional discharge, in lieu of a fine. The Court held that the discharge provisions of

the Criminal Code applied only to natural persons and were therefore not available to ships.

R v The "Argus" [1995] N.B.J. No. 507 (N.B. Prov. Ct.).

The ship "Argus" pleaded guilty to an accidental discharge of 3 to 5 barrels of oil into the waters of St. John harbour. The cause of the discharge was a crew member opening the wrong valve. The Court analyzed the various factors that should be taken into account in sentencing and ultimately ordered a fine of $23,000. An interesting issue in the case was whether the Crown could introduce evidence of prior convictions against ships in the same ownership as the "Argus". The Court held that the "offender" was the ship and not its owner and, therefore, prior convictions against sister ships were not admissible.

Cook v. Canada (Minister of Justice) 2002 BCCA 535

Cook sought judicial review of the Minister's decision ordering his surrender to the United States. Cook was a Canadian citizen who was wanted in Washington, D.C. to face pollution and related conspiracy charges. The American authorities alleged that Cook directed the dumping of demolition waste from a ferry boat into the Gulf of Mexico. Cook could not be prosecuted in Canada for the offences. Cook argued that the Minister's decision was contrary to s. 6 of the Charter (protecting mobility rights). He denied being involved in the dumping although he admitted being on the boat. Other evidence suggested he directed the dumping. Held: application dismissed. The Minister's discretionary decision was political in nature and was entitled to deference. There was a real and substantial link between the crimes alleged and the interests of the United States. The Minister could not be expected to embark on an enquiry intended to resolve the credibility issues that arose from the evidence. Cook had demonstrated no basis on which to interfere with the Minister's conclusion that his surrender would be neither unjust nor oppressive.

3. FUTURE DEVELOPMENTS: BILL C-34

The enforcement of marine ecology laws in Canada may be on the brink of important, and, to some, worrisome, change. Shortly before the last federal election (June 2004), the Liberal government introduced in the House of Commons bill C-34, *An Act to amend the Migratory Birds Convention Act, 1994 and the Canadian Environmental Protection Act,*

1999. In the Commons, the government described the bill as being largely for the protection of birds from the effects of oil spills. On this basis, it seems, the opposition rallied behind it and it was passed by the Commons in one week (a very speedy passage). Before C-34 could move to the Senate, however, Parliament was dissolved for the federal general election. That election returned the Liberals to power (though with only a minority government). There is now a real chance that C-34 may be revived and become law in the near future.

The bill would affect the enforcement of marine ecology laws in Canada both administratively and jurisdictionally. Administratively, C-34 gives Environment Canada a greater role in marine pollution enforcement than it currently enjoys. The bill was drafted by Environment Canada officials and is sponsored by the environment minister. By amending the Migratory Birds Convention Act 1994 (MBCA)[18] and the Canadian Environmental Protection Act 1999[19]—both statutes administered principally by Environment Canada—to increase marine pollution powers under those Acts, bill C-34 would make Environment Canada a much more significant enforcement authority in marine pollution matters.

Jurisdictionally, bill C-34 would amend the MBCA so as to apply both in Canada and in Canada's exclusive economic zone.[20] In particular, the bill deems acts or omissions committed in Canada's EEZ that are criminal offences under the MBCA to have been committed in Canada.[21] C-34 similarly extends the reach of the Canadian Environmental Protection Act 1999 into Canada's EEZ.[22] Unlike the UN Convention on the Law of the Sea 1982,[23] which enshrines the right of innocent passage and has as its goal enforcement rather than detention, C-34 provides for detention, arrest, and search and seizure of Canadian and foreign-flagged vessels by Environment Canada game wardens. Such extensions of Canadian regulatory and criminal jurisdiction are arguably contrary to Canadian obligations under UNCLOS other Canadian treaties and possibly even customary international law.

A further point about bill C-34 is that it would re-introduce indictable offences into Canadian marine pollution law. Recall that while the Canada Shipping Act provides for both summary and indictment processes, the

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[18]SC 1994 c 22.
[19]SC 1999 c 33.
[20]Bill C-34 cl 2.
[21]Bill C-34 cl 15.
[22]Bill C-34 cl 35.
[23]1833 UNTS 3.

Canada Shipping Act 2001 all but abolishes indictable offences. C-34 would amend the MBCA to create new indictable offences for persons, ships and specific individuals, including the master and chief engineer of a polluting vessel, whether Canadian-flagged or not. The fines are raised from $100,000 to $1,000,000 but can go beyond in cases where the offender has received monetary benefit from the pollution.

Critics of the bill, including ship owners, carriers and many others in the maritime community, have serious reservations with regard to the proposed legislation. Arguments counter suggest bill C-34 may infringe Canada's international obligations under UNCLOS; may infringe Canada's international obligations under MARPOL; may infringe Canada's international obligations under CLC 1992; and may create another layer of civil liability for pollution. A dedicated lobby effort is underway.

Bill C-34 is not yet law in Canada and may never become so. The government has not yet reintroduced it in Parliament. Nevertheless, the bill suggests a determination on the part of Environment Canada to take a bigger and more aggressive part in the enforcement of marine ecology laws in the future.

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COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, FALL 2004

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I. NEWS AND INFORMATION

Rescission of an Insurance Policy for Misrepresentation or Concealment of Material Facts. Is the test objective or subjective?

By John M. Woods

An insurer faces an uphill battle in attempting to rescind an insurance contract based upon an alleged misrepresentation. There are several elements that an insurer must prove. Although these elements vary from state to state, generally speaking, an insurer will have to demonstrate, among other things, that the misrepresentation was material. (Since there is no uniform federal maritime law on this subject, applicable state law will govern.) As discussed in this article, the issue of materiality is judged from the perspective of the individual insurer at issue. Therefore, a material fact to one insurer may be irrelevant to another. This is what the law refers to as a subjective test. The law frequently struggles with subjective tests, however, because there must always be some mechanism independently to judge whether the subjective test would have been met. As a result, the issue arises whether a court should be analyzing whether the underwriter at issue would find the fact to be material, or whether a reasonable underwriter would consider the fact to be material. Some courts take what appears on their face to be inconsistent positions in this regard. The permutations of the rules and their application are discussed briefly in this article.

The insurance application is the way that an insurer learns about the party it is insuring. Given that insurance is a creature of contract, it is essential, and indeed required, that the applicant provide truthful answers to the questions posed by the insurer. When the applicant fails to do so

and the insurer is faced with a risk that it did not intend to cover, an insurer can seek to rescind the policy *ab initio*, rendering the policy void, as if it never existed.

Under the law in most United States jurisdictions, rescission of an insurance contract is considered to be a drastic and harsh remedy because it leaves the insured without coverage for claims that may have already occurred. Rescission also leaves the insured without coverage for future claims that the insured might have anticipated when bargaining or contracting for the scope and limits of coverage provided under the contract. Accordingly, as a general matter, a misrepresentation is sufficient to void a reinsurance policy only, *inter alia,* if the misrepresentation is a material one.

A misrepresentation is material if the insurer would not have issued the insurance policy had it known the truth concerning the facts misrepresented. The question then becomes what is the standard for a trier of fact to assess whether the insurer would not have issued the insurance policy. Is it what that particular insurer testifies are the facts that it would have considered material, or is it what a reasonable insurer would have considered material?

Rescission Is A Harsh Remedy Disfavored In The Law

As a general matter of U.S. law, rescission of an insurance contract is considered to be a drastic and harsh remedy, and therefore one which courts are generally very reluctant to grant. *See, e.g., Knights of Pythias v. Kalinski*, 163 U.S. 289, 298 (1896) (extreme remedy of rescission inappropriate where the insurer had sufficient facts to require it to make a further investigation into the insured); *Union Ins. Exch., Inc. v. Gaul*, 393 F.2d 151, 154 (7th Cir. 1968) (applying Indiana law, reversing judgment for rescission and noting the drastic nature of rescission relief) *citing Knights of Pythias*, 163 U.S. at 298; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 72 F. 413, 418 (6th Cir. 1896) (stating that rescission is inappropriate where misrepresentation was not material, as rescission is a harsh remedy); *Pacific Mut. Life Ins. Co. v. Cunningham*, 54 F.2d 927 (D.C. Fla. 1932), *rev'd on other grounds*, 65 F.2d 909 (5th Cir. 1933); *Aetna Cas. & Sur. Co. v. O'Connor*, 8 N.Y.2d 359, 363, 170 N.E. 2d 681 (N.Y. 1960); *Rushing v. Commercial Cas. Ins. Co.*, 251 N.Y. 302, 305, 167 N.E. 450 (N.Y. 1929); *Ingrassia v. Med. Malpractice Ins. Ass'n*, 555 N.Y.S.2d 876, 161 A.D.2d 685, 686 (2d Dep't 1990) ("Courts have disfavored rescission of insurance policies upon a recognition that there is a public interest at stake that exceeds the interests of the parties."); *Medical Malpractice Ins. Ass'n v. Brooklyn*

Hosp., 416 N.Y.S.2d 614, 70 A.D.2d 552, 553 (1st Dep't 1979); *see also* COUCH ON INSURANCE 3d, § 31.70 (2000) ("Rescission is a drastic remedy and the courts are ordinarily reluctant to grant it."); JOHN APPLEMAN, INSURANCE LAW AND PRACTICE 3A, § 1831 (1967).

Courts in the U.S. are generally reluctant to grant the extreme remedy of rescission because the remedy voids the insurance contract *ab initio*. *See* Joseph P. Monteleone, *Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues*, 51 BUS. LAW. 573, 585 (1996) ("In return for the granting of a rescission, the insurer will usually be required to return the premium…these amounts usually…are insignificant when compared to the insurer's potential exposure if the policy limits remained effective."). Moreover, when an insurer rescinds an insurance contract, there is no coverage for past or future claims that the assured might have anticipated when bargaining or contracting for the scope and limits of coverage provided under the contract. *Id.*; *see also* APPLEMAN ON INSURANCE 2D, § 4.15 ("Members of public who purchase insurance policies are entitled to full measures of protection to meet their reasonable expectations."); DAN DOBBS, LAW OF REMEDIES 2D, § 4.3(6) (rescission is a remedy which unmakes a contract as if it had never existed); Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 136 (1993) (noting the harsh nature of the rescission remedy).

As a further reflection of the public policy concerns underlying judicial reluctance to rescind, some states have enacted statutes to protect the expectations of the assured with regard to certain types of insurance contracts. *See, e.g., United Services Auto. Assoc. v. Joiner*, CIV. A. No. 89-2610, 1989 WL 86726, *2 (E.D.Pa. July 26, 1989) ("Allowing insurers the right to rescind unilaterally undermines Act 78's purpose, which is to control the insurer-insured contractual relationship, particularly the bargaining positions of the parties."); *Harkrider v. Posey*, 24 P.3d 821, 831-32 (Okla. 2000) ("Although the rationale varies from state, it is generally agreed that rescission of a non-void contract is inconsistent with the public policy that underlies compulsory automobile liability insurance."); *Glockel v. State Farm Mut. Auto. Ins. Co.*, 361 N.W.2d 559, 563 (Neb. 1985); *see also* Palmieri, at 136 (noting that many states have codified the common law rule prohibiting rescission of some insurance contracts).

Materiality

Generally speaking, for a misrepresentation to allow an insurer to rescind an insurance contract, the misrepresentation must be material. The

threshold issue in determining materiality is whether the insurer can assert that it would not have accepted the application had the truth been known in lieu of the misrepresentation — a subjective standard. *See* N.Y. INS. LAW § 3105(b); *Process Plants Corp. v. Beneficial Nat'l Life Ins. Co.,* 42 N.Y.2d 928, 929 (1977); *see also Christiania Gen. Ins. Corp. of New York v. Great Am. Ins. Co.*, 979 F.2d 268, 278 (2d Cir. 1992). If so, the insurer may have grounds to bring a rescission action.

The first question that arises with respect to the issue of rescission is a procedural one — how and at what stage of the proceeding is the insurer able to prove to the court that the misrepresentation was material. On this question, many jurisdictions issue a similar refrain: "Whether a misrepresentation in an application for insurance constitutes a material misrepresentation that would allow an insurer to avoid the resulting insurance contract is generally a question of fact. If the evidence is 'clear and substantially uncontradicted,' however, a court may determine the question as a matter of law." *Iacovangelo v. Allstate Life Ins. Co. of New York, Inc.*, 750 N.Y.S.2d 920 (N.Y. App. Div. 2002) (citations omitted).

Of course, when courts declare a matter can be resolved as a matter of law it means that the court can resolve the issue without the need for a trial, whereas matters that cannot be decided as a matter of law and are actually issues of fact require a trial to be resolved. A court can decide as a matter of law that a "departure in a representation from an accurate statement of the truth may be so slight that . . . the difference could not affect [the] decision of any reasonable person." *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 266 (1937). Similarly, when a misrepresentation is so obviously essential to the insurance offered, a court can allow for rescission as a matter of law (*e.g.* where an insured represents that he has never had a heart attack knowing that he had ten in the prior month). *See id.* ("[W]here an applicant for insurance has notice that before the insurance company will act upon the application, it demands that specified information shall be furnished for the purpose of enabling it to determine whether the risk should be accepted, any untrue representation, however innocent, which either by affirmation of an untruth or suppression of the truth, substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken, is material as a matter of law."). "In order to prove that a misrepresentation is material as a matter of law, an insurer must submit evidence concerning its underwriting practices with respect to applicants with similar histories, establishing that it would have denied the application had it contained accurate information." *Iacovangelo*, 750 N.Y.S.2d at 920 (cita-

tions omitted). It is in the scenarios in between the two ends of the spectrum where the issue of materiality becomes an issue for the trier of fact.

In short, the courts are looking for a way to determine whether to believe the underwriter. Otherwise, the insurer could win every such case, with the underwriter's testimony alone making the underwriter judge and jury. The concept of reasonableness is not meant to turn the test from a subjective one to an objective one, but is actually a necessary device to allow the court to dispose of the obvious cases while injecting a manner of truth-telling control.

Newsletter Editors' Note: Our sincere thanks to John Woods for the foregoing article.

YORK-ANTWERP RULES 2004 – Recent Developments

By Jonathan S. Spencer, Chairman, General Average Subcommittee

I attended the CMI Conference in Vancouver at the request of the Association of Average Adjusters of the United States, as an observer. My thanks go to that Association for having met the great bulk of the expenses of the enterprise and thanks, too, to the MLA, particularly Chris Davis of the old CMI Committee, for welcoming me to the daily breakfast meetings of those MLA members in attendance at the conference. Not only was I allowed to sit at the same table and break bread but those assembled were gracious enough to hear my increasingly ineffectual cries against the proposed changes. As average adjusters, it was not our place to oppose changes (or, for that matter, militate in their favor) but we attempted to call attention to the numerous pitfalls we perceived in the way the changes were implemented.

Readers with more than a passing interest in the topic are likely to have read my brief commentary on the 2004 Rules, previously circulated to members and friends of the Marine Insurance Committee. If anyone regrets having missed it, an updated version can be found at *http://www.TheGApage.com*.

Subsequently, Richard Cornah, a director of Richards Hogg Lindley, the average adjusting arm of the Charles Taylor group, and a member of the CMI's International Working Group involved in laying the groundwork for the York Antwerp Rules 2004, also published a commentary. It is somewhat more detailed than mine though does not differ materially

in any conclusion – and can be accessed at *http://www.richards.co.uk/pdfs/CommentaryYAR2004080704.pdf*.

I have seen relatively little debate or comment since then though the recent IUMI meeting in Singapore revisited the 2004 revisions. Papers are posted at *http://www.iumi.com/ conferences/2004_Singapore/2004_Singapore.htm*. Disappointingly, some speakers confined themselves to PowerPoint presentations but there is a useful paper, written from the IUMI perspective, on the background to the 2004 changes, by Ben Browne of Shaw & Croft, who has been one of the more energetic of the IUMI camp, working, we are given to understand, on a pro bono basis.

(IUMI, incidentally, has revamped its entire website and it is now a quite useful resource in many respects.)

Ben's paper is followed by an enlightening paper from Bent Nielsen, a Danish lawyer, who chaired the International Subcommittee in Vancouver and the Working Group before that, which drafted the 2004 changes, and had been rapporteur of the International Subcommittee that ushered in the 1994 York-Antwerp Rules in Sydney. In other words, he has a long and deep involvement in the topic. He preserved careful neutrality during the Vancouver sessions but has allowed himself to be quite candid in retrospect, saying:

> The changes [brought about by the 2004 Rules] were not supported by the representatives of shipowners' interests. Speaking also on behalf of BIMCO, Intertanko and Intercargo, the International Chamber of Shipping (ICS) resisted the approval of the new rules, mainly on the grounds that it would be premature to produce a new set of rules only ten years after the 1994 rules.
>
> This is extraordinary. It is the first time that new York-Antwerp Rules have been agreed upon without the approval of the shipowners' interests. These interests are very influential with respect to the use of the rules, as they mainly come into use via clauses in the charterparties and bills of lading.
>
> One has to realise, therefore, that the application of the YAR 2004 will not be wide-spread unless and until owners in general, and their organizations, have been convinced that they should be applied.

It remains to be seen whether the 2004 Rules are still-born. Meanwhile, an unintended consequence emerged from the redrafting of Rule VI, which deals with salvage. A major sop was thrown to IUMI in the 2004 Rules, namely, the removal of salvage settlements in most instances from the ambit of General Average, except where one party to the adventure pays salvage on behalf of another party to the adventure. The new Rule VI states that salvage payments are not allowed in General Average but that where they are paid by one party to the adventure on behalf of other parties, the General Average adjuster must provide an apportionment in the adjustment – no longer over contributory values but now over salved values.

Meanwhile, Rule XXI of the York-Antwerp Rules provides for the allowance of interest to the paying party on "expenditure, sacrifices and allowances in general average." The new Rule VI requires a credit in favor of the paying party but there is no corresponding debit to the general average, only to the party on whose behalf the payment was made. Rule VI clearly still provides for an "allowance," but it is not an allowance "in general average." On a strict construction, therefore, the provisions of Rule XXI do not apply and General Average interest can no longer be allowed on salvage settlements dealt with under the new Rule.

The potential for inequity was taken up by the Executive Committee of the Association of Average Adjusters of the United States and, in a remarkably timely response to the Sydney development, those full members present at the annual business meeting of the Association, held in New York on October 6th 2004, adopted the following proposed Rule of Practice:

SALVAGE SETTLEMENTS UNDER
YORK ANTWERP RULES 2004 – ALLOWANCE FOR INTEREST

> When the adjustment is subject to the York Antwerp Rules 2004 and includes, applying the provisions of Rule VI (a) of those Rules, contributions to salvage paid by one party to the adventure on behalf of another party to the adventure as well as on its own behalf, the provisions of Rule XXI of the Rules will apply to the paying party's salvage payments, including interest thereon and legal fees associated with such payments, as if they were General Average expenditure.

In accordance with the By-Laws of the Association, the new Rule is a Probationary Rule and in the normal course of events will be confirmed as a Rule of Practice at the next annual business meeting.

Attentive readers will recall that General Average advancing commission was eliminated entirely from the 2004 York-Antwerp Rules and, in my opinion, will now be allowable only where those Rules are supplemented by New York adjusting practice so that if the 2004 Rules are to be suffered at all, New York at least would seem to be the place to have the adjustment prepared.

So much for the substantive. Turning to the anecdotal, in Bent Nielsen's Singapore paper he describes the evolution of the changes to Rule VI, changes that he characterizes as 'by far the most important amendment of the YAR': "In Vancouver the matter was first debated in the subcommittee, where the voting, however, ended in a tie of 12 for and 12 against (3 abstentions). The matter was brought up again in the plenary session of the Vancouver conference, and there - no doubt due to diligent footwork by IUMI's representatives in the corridors - the vote was 21 for and 9 against (1 abstention)."

Newsletter Editor's Note: Our sincere thanks to Jonathan Spencer for the foregoing article.

II. RECENT CASES OF INTEREST

COGSA Limit on Liability Applies Until Discharge at Final Port of Destination

Schramm, Inc. v. Shipco Transport, Inc., 364 F.3d 560 (4th Cir. 2004)

This is a breach of contract action by a shipper and its cargo insurer against a non-vessel-operating common carrier (NVOCC), with which the shipper had contracted for ocean transport of a mobile drilling rig from the U.S. to Chile, for damage to the rig while it was dockside during restowage operations at an intermediate port.

The Court of Appeals affirmed the District Court's holding that the carrier was liable but that its liability was limited to $500.00 under the Carriage of Goods by Sea Act, 46 U.S.C. §1300 *et seq.*, because: (1) goods are not "discharged" from vessel under COGSA until they are released from the ship at their final port of destination; (2) the rig had not been "discharged" from the vessel under COGSA at the time that it was damaged, so COGSA applied to limit the NVOCC's liability; and (3) the bill of lading extended COGSA's protection to the NVOCC.

Although damage occurred while the rig was on land during restowage for security reasons at the intermediate port, goods are not considered to be "discharged" under COGSA until they are released from the ship at their final port of destination. 46 U.S.C., §§1301(e), 1302, 1303(2) and 1304(5). Ordinarily, during the common carriage of goods by sea, the Harter Act applies to cargo prior to its loading aboard a vessel and from the point of discharge until delivery of the cargo to the consignee, unless the parties have contractually agreed to extend COGSA. In this case, the bill of lading provision stating that COGSA would govern before the goods were loaded, after they were discharged from vessel, and throughout the time period that they were in the custody of the NVOCC, extended COGSA beyond its normal application to include the period of restowage at the intermediate port, where the cargo remained in the NVOCC's legal custody, even though the rig was being handled by an entity other than the NVOCC when it was damaged.

The Court of Appeals reviewed the language of the statute as follows:

> By its terms, COGSA covers "the period from the time when the goods are loaded on to the time when they are discharged from the ship." *Id.* §1301(e). This period has been referred to as "tackle to tackle." *See, e.g., Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 589 (5th Cir. 2000); *B. Elliott (Can.) Ltd. v. John T. Clark & Son of Md., Inc.*, 542 F.Supp. 1367, 1372 (D.Md. 1982)…. The statutory text does not permit the view that restowage of the rig constituted a "discharge" under COGSA. COGSA does not itself define the term "discharge." When viewing the statute as a whole, however, it is clear that goods are not "discharged" from a vessel under COGSA until they are released from the ship at the final port of destination, and thus that the restowage of goods at an intermediate port does not constitute a discharge. *Id.* at 564.

However, the court made clear that its ruling was not intended to extend COGSA's limit on liability to every instance of damage to cargo removed from a vessel at an intermediate port:

> In sum, we hold that the term "discharge" under COGSA "means the removal of the goods at their final port of destination, and hence COGSA also cover(s) the tem-

porary unloading" of goods at an intermediate port. *Ming Moon*, 965 F.2d at 1300. However, our holding is by no means open-ended. COGSA can apply to goods transported by sea but damaged on land, but there must be a sufficient nexus between the activity which caused damage to the goods and the carriage of goods by sea. This would be an altogether different case if the cargo was damaged in circumstances far removed from customary maritime activities. On the facts of this case, we find that appellants' drilling rig had not been "discharged" from the vessel under COGSA when it was damaged during restowage at the intermediate Charleston port, and therefore that Shipco's liability was properly limited to $500. *Id.* at 566.

Absent Additional Insured Clause Prevailing Defendant Recovers Defense Costs Under Repair Contract's Indemnity Provision

Marquette Transp. Co. v. Louisiana Machinery Co., 367 F.3d 398 (5th Cir. 2004)

This was an action by the owners, operators and insurers of a vessel destroyed by an engine room fire against shipyard defendants that performed repairs. Plaintiffs alleged negligence and breach of express and implied warranties of workmanlike performance. Defendants counterclaimed for attorneys' fees and costs. On appeal from the District Court's denial of the claims and counterclaims, the Court of Appeals affirmed in part and reversed in part, holding: (1) that the vessel's owners and operators had failed to present sufficient circumstantial evidence of negligence and causation, but (2) the indemnity provisions in repair agreement required the vessel's owners and operators to indemnify the shipyard for its expenses incurred in defending their unsuccessful negligence claim.

The trial court did not err in finding insufficient evidence of negligence and causation where a fire had occurred more than five weeks after the engines were overhauled and other extensive renovations had been performed by the defendants, there was credible expert evidence on both sides, the vessel had been out of the defendants' control for more than a month before the fire and the extent of destruction resulting from the fire made it difficult to determine the cause.

The counterclaim for attorneys' fees and costs was based on a repair agreement's indemnification clause, which provided in part:

> Each party agrees to defend, indemnify and hold harmless the other party's indemnitees free and harmless from and against any and all suits, claims, or liabilities (including, without limitations, the cost of defending any suit and reasonable attorney's fees).

The District Court found that the shipyard was not negligent and the clause was unambiguous, but must be construed in conjunction with other provisions of the repair contract that required each party to obtain specified insurance policies, the proceeds of which the court found were "intended to be the 'primary payer' of the subject damages, ahead of the contract's indemnity obligations." *Id.* at 401. Since those policies were not exhausted, the District Court concluded the shipyard was not entitled to indemnification for fees and expenses, even though the contract did not require that the vessel interests be named as additional insureds under the shipyard's policy.

Reviewing precedent in the circuit, the Court of Appeals disagreed, concluding that the absence of an "additional insured" requirement does make a difference, and that in the absence of such language, the reconciling of provisions in the repair contract does not require giving the vessel interests the benefits of the non-negligent shipyard's insurance:

> We disagree with the district court's conclusion that there is "no logical way" to reconcile the indemnity and insurance provisions without finding that the parties intended that the insurance limits be exhausted prior to attachment of the indemnity obligations. This line of thinking is appropriate in cases…where the contracts contained "additional insured" requirements or dictated the primacy of insurance coverage over indemnification obligations, or both…In the absence of similar contractual language, however, this reasoning is inapposite. In the instant case, the insurance requirement appears to be designed to provide a solvent, deep pocket for any indemnity obligations that may eventuate between the parties and to cover any third-party claims that may arise. It simply is not true that there is only one way to integrate the repair agreement's indemnity and insurance obligations.

> In this absence of language supporting the district court's interpretation of those provisions, we cannot accept it. *Id.* at 407.

The shipyard, thus, could look first to the unsuccessful plaintiffs rather than its insurers for reimbursement of its defense costs.

Agent Lacked Authority to Bind Reinsurer, Which Timely Repudiated Retrocession Agreement

Sphere Drake Ins. v. American General Life Ins., 376 F.3d 664 (7th Cir. 2004)

A reinsurer sought a declaratory judgment that its retrocession agreement with a ceding insurer was void. The District Court, applying Illinois law, entered summary judgment for the reinsurer. The Court of Appeals affirmed, holding: (1) the reinsurer's broker lacked both actual and apparent authority to accept the retrocession; (2) the ceding insurer was chargeable with its intermediary's lack of due diligence in failing to determine that the broker had exceeded its binding authority; (3) the reinsurer did not ratify broker's unauthorized actions either through delay in rescinding the policy or through a lack of due diligence; and (4) the reinsurer was not estopped from repudiating the retrocession and did not waive that right.

The plaintiff had argued in the lower court for the application of English law because the United Kingdom had the most significant relationship to the transaction, even though the retrocession agreement called for the application of Illinois law. The Court of Appeals agreed with the District Court that no difference between Illinois law and English law had been shown, noting that where the parties have not identified a conflict between two bodies of law that might apply to a dispute, courts will apply the law of the forum state, in this case Illinois.

An agent's authority may be either actual or apparent, but only the alleged principal's words and conduct, not those of the alleged agent, establish that authority. The party alleging an agency relationship bears the burden of proof on the issue.

Here, the alleged agent had authority to bind the reinsurer at the time it signed the retrocession agreement, but the binding authority capped the amount of estimated gross premium the agent was permitted to write with respect to each year, and increases were only accomplished by a written

endorsement. The ceding insurer had no proof that the premium limit was ever raised above $12 million, which had already been exceeded before the agent entered into the retrocession in question. The agent's business plan, written before the binding agreement as a forecast of gross premium increases from year to year, was not evidence of the agent's actual authority, nor was proof of correspondence and meetings to discuss possible future increases in the premium limit.

Illinois law recognizes apparent authority, which is the authority that a principal knowingly allows an agent to assume, or the authority which the principal holds an agent out as possessing. The party asserting apparent agency under Illinois law must prove: (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) based on actions of the principal and agent, a third person could reasonably conclude that the party was an agent of the principal; and (3) the third person justifiably and detrimentally relied on the agent's apparent authority.

The evidence showed that the reinsurer did not knowingly acquiesce, because it did not know until after the agent booked the retrocession in question that the premium limit had already been exceeded. Reliance in this instance on cases allowing an innocent third party to rely on an agent's apparent authority, in the court's view: "is misplaced, however. EIU's authority was not constrained by "undisclosed" or "secret" limitations. To the contrary, Stirling Cook knew that EIU was bound by a premium cap, it just did not know what the exact limit was." *Id.* at 674.

A reinsurance broker is considered an agent, not a neutral intermediary, and the general rule is that the broker is the cedent's agent, which the Court of Appeals agreed it was in this case. Thus, its lack of due diligence in determining the premium limit precluded a finding of apparent authority, because the burden is on one who deals with an agent to ascertain the scope of his powers.

The reinsurer did not ratify the unauthorized transaction by long-term acquiescence, after notice and acceptance of its benefits. The report from its agent incorrectly indicated that it was still within premium limits. After an audit and further investigation triggered by problems with an unrelated policy, during which it kept the cedent's agent apprised of its concerns and issued a reservation of rights pending review of the binding authority, the reinsurer issued a timely repudiation of the retrocession and offered to return the premium. Hence, it did not waive the right to rescind and was not estopped from raising that defense. Under Illinois law, waiv-

er requires proof that the party "'clearly, unequivocally, and decisively' took action waiving the right." *Id.* at 679.

Federal Admiralty Law Trumps the Connecticut Unfair Trade Practices Act

John DeRossi v. National Loss Management, No. 3-02-247 (D. Conn. 2004)

The federal district court considered a plaintiff's claim for hull repairs incurred as a result of vessel damage sustained when the vessel submerged in the waters of Lake George as a result of Hurricane Floyd. Certain engine repairs were contested by the insurer as being unrelated to the sinking. The parties agreed to resolve the dispute by submitting it to an appraiser. However, the claim was time-barred under the time limits found in the policy due to the inactivity of the insured. The insured commenced an action for breach of the insurance contract; breach of the implied duty of good faith; bad faith; and violations of the Connecticut Unfair Trade Practices Act (CUTPA), Section 42a *et. seq.* and the Connecticut Unfair Insurance Practices Act (CUIPA), Section 38a-815.

The court enforced the one year time bar in the policy and denied the plaintiff's claims of estoppel and/or waiver. The court held that no private right of action existed under CUIPA. The court also held the CUTPA was preempted by judicially established admiralty law. According to decisions by the Second Circuit Court of Appeals, admiralty law applies the "American Rule" as to attorney's fees. Thus, attorney's fees are not recoverable. Also, admiralty law allows punitive damages only where the defendant's actions are intentional, deliberate, grossly negligent, or so wanton and reckless as to demonstrate a conscious disregard for the right of others. Thus, CUTPA does not meet the standards established by admiralty law for an award of punitive damages.

"Pay To Be Paid" Clause Validated Under Canadian Law

Walter A. Conohan v. The Cooperators, 2004 AMC 1661 (Fed. Ct. Canada, Ct. App. Feb. 11, 2002)

The Canadian Court of Appeals affirmed the federal trial court's holding that a "pay to be paid" clause requires an insured to first pay before he could claim indemnification from the protection and indemnity insurer. On September 28, 2000, two vessels, the Lady Brittany and the Cape Light II,

collided in the offshore waters of Prince Edward Island. The Cape Light II was owned by appellant Conohan and the Lady Brittany was owned by Gaudet. Gaudet and the Lady Brittany were insured by The Cooperators.

Gaudet admitted that he had no defense. He executed an admission of liability, a confession of judgment and an assignment of rights to Conahan's underwriters. Conahan's underwriters sued Guadet's underwriters under the assignment. The Cooperators argued that it was not obligated to indemnify Gaudet under the policy in respect of liability arising out of the collision because Gaudet had failed to comply with the "pay to be paid" requirement in the Fishing Vessel rider. The court, therefore, dismissed the action.

State Insurance Law Governs Misrepresentation Claims Under Policies Written For Recreational Vessels

Progressive Northern Ins. Co. v. Bachman, 2004 AMC 1745 (N.D. Wis. 2004)

Declaratory judgment action brought by an insurer contending a policy was void because the defendant had misrepresented the insured vessel's maximum speed and horsepower. The defendant claimed that the insurer could not avoid the policy on the basis of the alleged misrepresentation because the plaintiff had failed to comply with the Wisconsin Insurance Code, with requires the insurer to provide notice within 60 days after acquiring the knowledge upon which rescission is based.

The plaintiff sought rescission based on the federal common law doctrine of *uberrimae fidei*, which imposes the highest degree of good faith among parties to a marine insurance contract. Under this doctrine, a failure by the insured to disclose any material fact which could have controlled the insurer's decision to accept the risk voids the policy at issue, regardless of whether the nondisclosure arises from mistake, accident or forgetfulness. The insured is bound to make these disclosures even if the insurer makes no inquiry concerning the subject. Furthermore, failure to make such disclosure renders the policy void *ab initio* under the doctrine, precluding the insured from asserting an estoppel defense grounded in state law.

Under Wisconsin's law of misrepresentation, an insurer may rescind a policy only if: (1) the insured knew or should have known that the statement was false; (2) the insurer relies on the material misrepresentation; and (3) the fact misrepresented contributes to the loss. In addition, under the

Wisconsin Insurance Code, an insurer is estopped from rescinding a policy or defending a suit against a claim unless the insurer notifies the policyholder of its intent to do so within 60 days of acquiring the knowledge which serves as the grounds for rescission or general defense to all claims.

The court held that Wisconsin law controlled the case because the case did not involve facts of commercial or international scope, but rather, a policy covering a recreational boat that was damaged while being operated on an inland lake and that was available for inspection before the policy was issued. *See St. Paul Ins. Co. v. Great Lakes Turnings, Ltd.,* 829 F. Supp. 982, 1993 A.M.C. 2539 (N.D. Ill. 1993). The court determined that Wisconsin has not exempted recreational boat insurance from its laws regulating insurers doing business in Wisconsin.

Factfinder To Determine Issues In Action Alleging Misrepresentation To Underwriters As To Size Of Fleet

American Home Assurance Co. v. Masters' Ships Management S.A., New York Law Journal, June 3, 2004, 2004 U.S. Dist. LEXIS 9364 (S.D.N.Y. 2004)

This maritime insurance action was brought by a group of underwriters seeking a declaratory judgment that hull and machinery insurance contracts they entered into with the defendants should be deemed void *ab initio* and that the underwriters are not liable for any claims under those contracts. In addition, both sides moved for summary judgment. The court denied both motions for summary judgment because factual issues remained for the trier of fact.

Defendants entered into various hull and machinery insurance agreements with plaintiffs covering defendants' fleet. On June 25, 2002, the SATURN II grounded off the west coast of India. Defendants claimed the ship was a constructive total loss and sought payment from plaintiffs under the policy.

The underwriters claimed the policy should be ruled void *ab initio* under the doctrine of *uberrimae fidei* because the defendants had failed to disclose a material fact when negotiating the placement of the policy. According to the underwriters, they had entered into the contracts under the belief that they were covering a fleet of ships, when in fact the coverage was for only one ship. The underwriters claimed this fact was material because if they had known the fleet consisted of one ship, they would

have declined to provide coverage, or at a minimum, demanded a significantly higher premium.

Defendants disputed that any misrepresentation was made or that they had failed to disclose a fact they were obligated to disclose. In the alternative, defendants argued that such misrepresentation was not a fact relied upon by the underwriters in providing coverage or deciding on a premium.

The court determined that there were a handful of material facts in dispute. Furthermore, the court recognized that issues of materiality are typically reserved for the trier of fact unless the materiality of a fact is so obvious that a court can make a ruling on its own. This was not one of those obvious cases. As such, the court denied both parties' motions for summary judgment and declared the case ready for trial.

Failure To File Notice Of Claim Against Bankrupt Entity Does Not Bar Suit Upon That Entity's Insurance Coverage

Minafri v. United Artists Theaters, Inc., New York Law Journal, July 22, 2004, 2004 N.Y. Misc. LEXIS 1449, (Supreme Court, Westchester County 2004)

An action for personal injuries arising from an alleged slip and fall while plaintiff was attending a movie on February 4, 2000. The defendants are three corporate entities: United Artists Theaters, inc., United Artists Theatre Circuit, Inc. and Movie Center, Inc. On the date plaintiff's claim arose, defendants had an insurance policy in effect with Kemper Insurance Company which provided ample coverage for plaintiff's claim. Kemper neither declined coverage nor threatened to do so.

At or near the time of plaintiff's accident, various corporate entities, including defendant United Artists Theatre Circuit, Inc., were in bankruptcy, and eventually underwent a reorganization in which an injunction was granted barring any claims for incidents that happened prior to September 5, 2000.

Defendants move to dismiss the complaint on the ground that plaintiff's claim was barred by the injunction issued by the bankruptcy court in Delaware. The court denied defendants' motion and allow plaintiff's claim to proceed against the bankrupt defendants. In general, after the filing of

a bankruptcy petition, a creditor must file a notice of claim in the bankruptcy proceedings to maintain its claim against the debtor. If the creditor fails to file this notice, any rights against the bankrupt are waived. However, the discharge will not act to enjoin a creditor from taking action against another who also might be liable to the creditor.

The court found that New York Insurance Code § 3420 explicitly condoned direct recovery from a liability insurer in the event of its insured's bankruptcy. As such, defendant's insurer would be liable for plaintiff's injuries, regardless of whether plaintiff filed a notice of claim in the bankruptcy proceedings. The court reasoned that this result does not frustrate the purpose of § 524 of the Bankruptcy Code, and since neither the debtor nor his property is in jeopardy, an insurer cannot escape liability simply based on the financial misfortunes of its insured.

N.Y. Ins. Law § 3420(e) Which Voids Permissive User Exclusions Applies Only To Coverage For Third Party Liability

Jefferson Ins. Co. of New York v. Cassella,, 2004 A.M.C. 1443 (E.D.N.Y. 2003)

Plaintiff issued a marine policy for a Donzi 382X to Michael Cassella, the owner of the vessel. After Mr. Cassella signed the declarations page, plaintiff issued an endorsement stating the policy was null and void unless the assured, Michael Cassella, was the sole operator. Michael's brother, Thomas Cassella, was operating the vessel with Michael's permission and was involved in a collision with another boat.

On May 8, 2003, the court granted summary judgment for Michael Cassella holding that N.Y. Ins. Law § 3420(e) prevented plaintiff from refusing coverage in circumstances where an individual other than the named insured operates this type of boat (non-ocean going vessel) with permission. Thereafter, on July 23, 2003, the court vacated its May 8, 2003 Order to the extent that it granted summary judgment to Michael Cassella for first party coverage (*i.e.,* damage to the insured boat). The court determined that the permissive operator's exclusion is valid to shield an insurer from first party coverage for damage to the insured boat, but not to shield the insurer from claims of third parties.

Michael Cassella argued that the exclusion contained in an endorsement to the policy was nevertheless invalid because he did not sign it nor did he possess actual knowledge of the endorsement. The court deter-

mined that Mr. Cassella's insurance broker was directly informed of the endorsement, and that because the broker acts as the agent for the insured, the broker's knowledge would be imputed to the insured.

Apportionment Of Loss Between Insurers Is Based Upon The Policy Limits Rather Than The Value Of The Insured Cargo

Adams, v. Unione Mediterranea Di Sicurta, 2004 A.M.C. 1170 (5th Cir. 2004)

This action was brought by two insurers in June 1994 seeking a declaration, *inter alia*, that each plaintiff was obligated to pay only its proportional share of the loss. The district court determined that each insurer was obligated to contribute *pro rata* for the loss according to their respective policy limits.

While en route from New Orleans to Cincinnati, two barges carrying 158 slabs of steel cargo broke away from their flotilla and sank in the Mississippi River. The owner of the steel was Duferco SA, a Swiss Company, which had agreed to ship the steel cargo to AK Steel, an Ohio company. Plaintiff underwriters Steen Henry Adams and UMS, an Italian insurer, concurrently insured the steel cargo under separate marine cargo policies.

UMS argued that the apportionment of the loss should be based upon the value of the insured cargo under the individual certificates of insurance rather than under the general open cargo policy limits. The court specifically rejected this argument under Italian law and affirmed the lower court's decision to divide the loss based on the open cargo policy limits. The district court based its decision on the UMS policy and article 1910 of the Italian Insurance Code.

Watercraft Exclusion In Marine Liability Policy Precludes Coverage For Liability Arising From The Death Of A Vessel Operator Who Struck Insured's Moored Barges

Blair v. Suard Barge Services, Inc., 2004 A.M.C. 1144 (E.D. La. 2004)

Defendant, Federal Insurance Company, moved for summary judgment. Federal asked the court to rule that the policy issued to the defen-

dant, Suard Barge Service, did not provide coverage for plaintiff's claims against Suard due to the policy's watercraft exclusion. Plaintiff opposed the summary judgment motion on the grounds that the watercraft exclusion was inapplicable or that an endorsement to the watercraft exclusion provided coverage for plaintiff's claims.

On August 31, 2002 plaintiff's decedent was operating a mud boat in a geographic and political subdivision of the State of Louisiana. Decedent's mud boat struck two moored barges; Suard Barge 24, which was approximately 123 feet from the bank, and Suard Barge 76, which was approximately 93 feet from the bank. As a result, decedent suffered critical injuries and died soon thereafter.

Section I of Federal's policy excluded from coverage incidents that normally would fall within the general scope of the policy's coverage. It provided that "the insurance afforded is subject to the following exclusions ... (E) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of: (1) any water craft owned or operated by or rented or loaned to any insured, or (2) any other water craft operated by any person in the course of his employment by any insured." Immediately thereafter, Section I provided that "this exclusion does not apply to water craft while ashore on premises owned by, rented to or controlled by the named insured."

Endorsement VIII of the policy provided that the watercraft exclusion "does not apply to any water craft provided such water craft is neither owned by the named insured nor being used to carry person or property for a charge." It further provided that "where the insured is, irrespective of this coverage, covered or protected against any loss or claim which would otherwise have been paid by Federal under this endorsement, there shall be no contribution or participation by this company on the basis of excess, contributing, deficiency, concurrent, or double insurance or otherwise."

The court determined that the risk encompassed by the accident was not covered by Federal's policy because the above watercraft exclusion barred plaintiff's claims against Federal.

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

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COMMITTEE ON RECREATIONAL BOATING
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Editor:
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Federal Court Applies State Law to Insurer's Misrepresentation Claims

A federal district court has refused to apply the federal maritime law doctrine of utmost good faith or *uberrimae fidei,* finding that state law should govern a marine insurer's claim for rescission of a yacht policy based on alleged misrepresentations by the insured. *Progressive Northern Insurance Co. v. Bachmann*, No. 03-0566, 2004 U.S. Dist. LEXIS 6823 (W.D. Wis. April 19, 2004).

Fred Bachmann purchased a 1998 34-foot Wellcraft Scarab in 2000 and obtained hull and machinery coverage through an insurance broker. The declaration page of the policy indicated that the boat was equipped with two 415-horsepower engines.

Several years later, acting through the same broker, Mr. Bachmann applied to Progressive Northern Insurance Company for a replacement policy. The broker filled out an application for the replacement policy, inserting the same 415-horsepower figure from the previous policy. Mr. Bachmann signed the application, which represented that the boat was not capable of obtaining a speed over 75 m.p.h. and, that to the best of his knowledge, every statement in the application was true.

Shortly after the new policy was issued, the boat's drive units suffered damage while the boat was being operated on an inland lake in Wisconsin. Mr. Bachmann took the boat to a mechanic, who concluded that the boat had likely struck a submerged object. A Progressive Northern claims representative also inspected the damage and discussed the required repairs with the mechanic. During his inspection the claims representative noted that the vessel was equipped with two "HP 500" Mercruiser engines.

When the repairs to the outdrives were nearly complete, a second claims representative inspected the vessel. Based on his examination he concluded that the damage was caused by a mechanical failure rather than by a collision with a submerged object.

Two weeks later, Progressive Northern notified Mr. Bachmann that the policy was being rescinded because he had allegedly misrepresented the vessel's top speed in his insurance application. In addition and in the alternative, the insurer took the position that the loss was in any event not covered because the policy excluded coverage for damage resulting from mechanical breakdowns or internal defects, which, Progressive Northern contended, was the cause of the damage to the drive units.

Progressive Northern filed a declaratory judgment action in the U.S. District Court for the Western District of Wisconsin, seeking a declaration that it was entitled to rescission of the policy based on alleged misrepresentations by the insured. In addition to alleging that the insured misrepresented the vessel's top speed, the insurer also alleged that the vessel's horsepower was misrepresented on the insurance application. In the alternative, the insurer sought a declaration that the loss in question was the result of mechanical failure and was, therefore, not covered under the terms of the policy in any event.

Progressive Northern moved for summary judgment. In considering the insurer's motion, the district court held that Wisconsin state law, rather than general maritime law, would apply to determine Progressive Northern's right to rescind the policy based on Mr. Bachmann's alleged misrepresentations regarding the engine horsepower and top speed. The court recognized the existence of the established marine insurance rule of *uberrimae fidei* (utmost good faith), which requires an insured seeking coverage to disclose all facts which, if revealed to the insurer, would affect the insurer's decision to issue the policy or would affect the premium. However, in the district court's view, the maritime law doctrine of utmost good faith should be limited to the commercial or international insurance setting, where the insurance market still depends on a uniform rule of complete disclosure.

According to the district court a recreational craft insurance policy is not all that different from an automobile or homeowner's policy. The court observed that although the Wisconsin insurance code contains provisions expressly applicable to "ocean marine insurance," it does not contain any provisions which specifically address insurance on recreational boats.

The district court found that the language of the policy supported its conclusion that state law should govern the insurer's misrepresentation claims. The policy provided that the insurer would be entitled to void the policy if the insured "knowingly concealed or misrepresented any material

fact." The court noted that the reference to a "knowing" misrepresentation was more consistent with the applicable standard of misrepresentation under Wisconsin law than the traditional marine insurance rule of utmost good faith, which may permit rescission even if the insured's misrepresentation was unintentional.

Wisconsin law requires an insurer seeking to rescind a policy to notify the insured of its intention to rescind within sixty days after the insurer learns of facts that would support rescission. In this case Progressive Northern did not raise the alleged misrepresentation of the vessel's horsepower until it filed its declaratory judgment action against Mr. Bachmann, some four months after its claims representative had noted the "HP 500" printed on the vessel's engines. The court accepted Mr. Bachmann's contention that the insurer's pre-suit notification letter, referencing the alleged misrepresentation of the vessel's top speed, was insufficient to provide notice of any alleged misrepresentation regarding horsepower.

Having concluded that Wisconsin law rather than the doctrine of *uberrimae fidei* governed Progressive Northern's claim for rescission, the court found that the insurer had failed to give notice to Mr. Bachmann of its intention to rely on the alleged misrepresentation of the vessel's horsepower within the time required by Wisconsin statutory law and was, therefore, barred from relying on this alleged basis of misrepresentation as a basis for rescission.

In addition, the district court concluded that Progressive Northern was not entitled to rescind the policy based on an alleged misrepresentation of the vessel's top speed. Mr. Bachmann presented several affidavits which stated that neither he nor any of his passengers had ever witnessed the boat exceeding the 75 m.p.h. top speed listed on the insurance application. The insurer countered with an affidavit from its claims adjuster, who stated that several boat dealers and the manufacturer had told him that a boat like Mr. Bachmann's could be expected to have a top speed exceeding 75 m.p.h. The court rejected the affidavit as hearsay.

Finally, the district court considered the insurer's alternative argument that the loss resulted from a mechanical failure or defect and was therefore not covered under the policy. While questioning the credibility of the claims adjuster's opinion regarding causation (in light of the fact that the opinion was based on an inspection conducted after repairs were nearly completed), the court concluded that resolution of the factual dispute over the cause of damage was a task best left to a jury.

Lack of Notice of Judicial Sale No Bar to Deficiency Judgment Against Guarantor

In *Knauss v. Dwek,* 2004 A.M.C. 479 (D.N.J. 2003), the district court held that a foreclosing mortgagee's failure to provide notice of a pending judicial sale to a mortgage guarantor does not bar the mortgagee's claim for a deficiency judgment against the guarantor.

Plaintiff Winston Knauss was the holder of a First Preferred Ship's Mortgage on a casino vessel securing a $950,000 promissory note. Defendant Solomon Dwek executed the mortgage both as vice president of the registered owner, Camelot Casino Cruises, and as "personal guarantor." Camelot subsequently declared bankruptcy and the vessel was sold to Bernie Weintraub, with the permission of the bankruptcy court. Weintraub assumed Camelot's obligations under the First Preferred Ship's Mortgage. Following the sale, Knauss refused to release Dwek from his personal liability as guarantor of the mortgage. Weintraub then defaulted on the mortgage and Knauss filed an *in rem* foreclosure action in the United States District Court for the Southern District of Florida. The vessel was sold to a third party by the U.S. Marshal at public auction for $645,000. Dwek maintained that he was never notified of the pending Marshal's sale. Dwek filed a post-sale motion objecting to the sale on the grounds that the sale price was grossly inadequate. The Florida district court denied Dwek's motion and confirmed the sale.

Knauss then commenced the action in the New Jersey district court against Dwek personally, as guarantor of the mortgage, to recover the difference between the sale price and the original loan amount. Knauss moved for summary judgment on his claim. Dwek opposed the motion and filed a cross-motion for summary judgment in his favor on the grounds that Knauss' failure to notify him of the pending Florida judicial sale barred Knauss' claim.

The mortgage contained a "Redemption" clause which required the mortgagee Knauss to provide written notice to Dwek of any "repossession sale." Dwek argued that the term "repossession sale" required Knauss to give him notice of any proposed sale of the vessel, regardless of whether the sale was related to self-help repossession or was a court-ordered sale in a formal foreclosure action. After reviewing the terms of the mortgage and case law, the district court found that the mortgage clearly differentiated between a private sale associated with self-help repossession and a judicial sale in a foreclosure action, requiring notice only in the case of a pri-

vate sale. In these circumstances the court found that the mortgage did not require Knauss to give notice of the pending judicial sale to Dwek.

The district court then considered whether notice to Dwek was required by the Ship's Mortgage Act, 46 U.S.C. § 31303 *et seq.* The court noted that although the Act expressly requires that lien claimants and mortgagees be given notice of the filing of a foreclosure action, there is no requirement that a mortgage guarantor be notified. The court therefore found that Dwek was not entitled to notice of the judicial sale under the Ship's Mortgage Act.

Notwithstanding the district court's conclusion that lack of notice to Dwek did not bar Knauss' claim for a deficiency judgment, the court found that there were genuine issues of material fact which prevented the entry of summary judgment in Knauss' favor. Dwek alleged in the alternative that Knauss expressly agreed to keep him informed of developments in the foreclosure action and to notify him in advance of any scheduled judicial sale. Based on these allegations Dwek argued that Knauss should be equitably estopped from recovering a deficiency judgment against Dwek as guarantor. The district court found that issues of material fact precluded summary judgment because a reasonable fact-finder could conclude that Dwek reasonably relied to his detriment on Knauss' alleged promise to inform him of any judicial sale.

Third Circuit Affirms Trial Court's Decision to Exclude Certain Expert Testimony in *Calhoun* Case

The final chapter in the fourteen-year legal saga arising from the 1989 death of twelve year-old Natalie Calhoun may finally have been written. In late 2003 the U.S. Court of Appeals for the Third Circuit affirmed a judgment and jury verdict entered in favor of defendants Yamaha Motor Company and Yamaha Motor Corp., U.S.A. following a trial on liability. *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 2003 AMC 2895 (3d Cir. 2003).

Twelve-year-old Natalie Calhoun was killed in 1989 while operating a Yamaha Wavejammer jet ski in the territorial waters of Puerto Rico. She suffered massive head and neck trauma when the Wavejammer crashed into an anchored boat at the Palmas del Mar resort.

Her parents brought negligence, strict liability, and breach of warranty claims against the Yamaha companies in the U.S. District Court for the

Eastern District of Pennsylvania. They alleged, among other things, that the jet ski had an improperly designed throttle control and inadequate warning labels.

As previously reported in 4 Boating Briefs No. 2 (Mar.L.Ass'n 1995), 5 Boating Briefs No. 1 (Mar.L.Ass'n 1996), 8 Boating Briefs No. 2 (Mar.L.Ass'n 1999), and 10 Boating Briefs No. 1 (Mar.L.Ass'n 2001), the case became the subject of several notable appeals, including a 1996 decision of the U.S. Supreme Court, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

Eventually, the Calhouns' negligence and strict liability claims were tried to a jury. At the close of evidence, the judge entered judgment for the defendants on the Calhouns' negligence claims. The jury later returned a defense verdict on the strict liability claims.

On appeal to the Third Circuit, the Calhouns argued that the district court erred by limiting the testimony of three of their expert witnesses. The first expert, an experimental psychologist, had been permitted to testify that the Wavejammer's throttle controls resembled a bicycle's brake handle, and that a child operator trying to stop the jet ski in an emergency would instinctively tend to squeeze the throttle control rather than letting go. However, he was not permitted to testify that an operator would tend to clench her hands as a "stress reaction," as the expert was unable to point to any existing tests or literature that would support such an opinion. The expert was also precluded from testifying that the Wavejammer's warning label should have restricted operators to individuals 16 years of age or older. (Yamaha's label designated a "minimum recommended operator age" of 14 years.) In excluding this testimony, the trial court noted that the expert could not articulate a scientific basis for the proposed age restriction.

Agreeing that the precluded aspects of the psychologist's proposed testimony lacked sufficient reliability, the Third Circuit held that the trial court had not abused its discretion by limiting the expert's testimony.

The district court also limited the testimony of a metropolitan marine safety department officer. The expert was permitted to testify in general terms about the various types of jet ski throttles and the layout of warning labels. However, given the expert's lack of design experience, the trial court did not permit him to opine on the relative suitability of the various types of throttle controllers. Also, he was precluded from offering his opinion on the appropriate minimum age for a jet ski operator or the adequacy of the Wavejammer's warning label because the trial court concluded

that he lacked any scientific or statistical basis for his opinions. Again, the Third Circuit found no abuse of discretion with the trial court's determinations in this regard.

The Calhouns' third expert was a naval architect, who was permitted to offer testimony regarding the mechanical design of the Wavejammer throttle, but was prevented from stating that the design was unsafe. This expert had little firsthand experience with the design or operation of jet ski throttles, and he had not conducted any tests to assess the relative safety of one throttle design over another. This, the Third Circuit stated, was a sufficient basis for precluding opinion testimony regarding the safety of the Wavejammer throttle.

In addition to their evidentiary objections, the Calhouns also argued that the trial court erred by dismissing their negligence claims at the close of the evidence. However, given that the Calhouns' trial presentation had focused almost exclusively on the strict liability claims, the Third Circuit found no error in the trial court's decision to dismiss their negligence claims.

Finally, the Calhouns argued that the trial court erred by instructing the jury to consider the comparative negligence of the individual who rented the Wavejammer to their daughter and the Palmas del Mar resort (neither of which were parties in the Calhouns' suit against the Yamaha defendants).

The Third Circuit found that even if the trial court's instruction regarding these non-parties was erroneous (which was a doubtful proposition), any such error was harmless. The trial court's instruction to the jury made it clear that the jury should first decide whether the Wavejammer was defective, and only if they found that the Wavejammer was defective were they to consider the comparative negligence of the two non-parties. Because the jury found that the Wavejammer was not defective in the first instance, they would not have been swayed by the court's instructions on the comparative negligence issue.

Mississippi Supreme Court Holds that Boat Owner and Operator Were Not Entitled to a Jury Instruction on the Doctrine of "Inevitable Accident"

A motorboat approaching a congested bend on the Tchoutacabouffa River encountered the wake of another vessel. The motorboat's operator, who had a knee ailment, was standing up at the time so as to get a better

view of the bend. The action of the other vessel's wake caused the operator's knee to buckle, and he fell away from the helm. The wake also caused the motorboat's owner, who was seated on the passenger side, to be thrown against the outboard side of the cabin. As a result, the boat's helm was unattended for a period of about fifteen seconds, during which time the motorboat entered a swimming area and struck a twelve-year-old child.

The injured child and her guardian filed suit against the motorboat's owner and operator in Mississippi state court. The complaint alleged negligence against both defendants and included a negligent entrustment claim against the boat owner alleging that the owner negligently permitted the passenger to operate the boat in a congested area of the river. The complaint sought compensatory and punitive damages.

The trial judge entered a directed verdict against the plaintiffs on their negligent entrustment and punitive damage claims. The court refused the plaintiffs' request for a jury instruction on the state law concept of negligent supervision, under which a person may be held liable for injuries resulting from his improper supervision of a subordinate. The court did permit the jury to receive an instruction on the doctrine of "unavoidable accident," which provides that a party cannot be held liable for an accident that was not intended and that could not have been foreseen or prevented by the exercise of reasonable care. The jury returned defense verdicts in favor of both defendants.

On appeal, the Supreme Court of Mississippi affirmed the trial court's entry of directed verdicts in favor of the defendants on the plaintiffs' negligent entrustment and punitive damage claims, but held that it was error for the jury to have received an instruction on the doctrine of unavoidable accident. The court, therefore, reversed the judgment and remanded the case for a new trial. *Tillman v. Singletary*, 865 So.2d 350 (Miss. 2003).

According to the majority opinion the accident could not reasonably be viewed as unavoidable. The court noted that the motorboat's speed (10 to 12 knots, according to the operator) was excessive, given the boat's proximity to the bend in the river and the presence of other boaters. In addition, the evidence demonstrated that the operator was not using a kill switch, which would have stopped the engine in the event that he fell away from the helm.

The Supreme Court also held that the trial court erred by refusing to instruct the jury on the plaintiffs' theory of negligent supervision. There was evidence that the boat's owner was the more experienced of the two

defendants and that just prior to the accident he had been instructing the operator on how to maneuver the vessel. This evidence was sufficient to present the jury with an instruction on the issue of negligent supervision.

In affirming the trial court's entry of a directed verdict in favor of the defendants on the plaintiffs' negligent entrustment claim, the court noted that the passenger had previous experience operating other boats, and that although the owner was aware of his friend's knee ailment, the owner was not aware that it might buckle as a result of the movement of the boat. Thus, there was insufficient evidence to support the plaintiffs' negligent entrustment theory.

Finally, the court affirmed the trial court's decision to grant a defense verdict on the plaintiffs' punitive damages claims. The sole basis for these claims was the testimony of one witness who stated that the boat owner appeared to be drunk after the accident. However, this witness's observation was made at a distance of at least 35 feet. Other testimony established that the boat owner and operator had consumed only a minimal amount of alcohol. Therefore, the trial judge had not abused his discretion in keeping the plaintiffs' claims for punitive damages from the jury.

New York Federal Court Refuses to Enforce Exculpatory Provision in Boat Storage Contract

In August, 2001, motorboats owned by Michael Cantamessa and Charles Durso were destroyed by fire while in storage at Blue Water Yacht Club ("Yacht Club") in Merrick, New York. Commercial Union Insurance Company and Employers' Fire Insurance Company insured the boats, paid their respective insured's claims and became subrogated to the insureds' interests. The insurers filed suit against the Yacht Club in the U.S. District Court for the Eastern District of New York, alleging breach of contract, negligence and breach of bailment.

The Yacht Club moved to dismiss the insurers' complaint based on lack of admiralty subject matter jurisdiction and on the basis of an exculpatory provision of the Yacht Club's storage contract. The Yacht Club's contract included the following clause:

> "[Yacht Club] does not maintain insurance for the benefit of any [owner] to protect against loss or damage to [owner's] boat from fire, theft, vandalism, collision, acts of God, or other casualty, or for personal injury thereon. [Owner] is required to maintain

> independent insurance for such purposes. [Owner] expressly acknowledges that [Yacht Club] shall not be liable to [Owner]... for any loss, injury or damage to [Owner's] boat...irrespective of how the same is caused, unless the same results from [Yacht Club's] willful misconduct or gross negligence..."

In a January, 2003, decision, *Commercial Union Insurance Co. v. Blue Water Yacht Club Ass'n*, 239 F. Supp. 2d 316, 2003 AMC 289 (E.D.N.Y. Jan. 17, 2003), the district court found that the insurer's contract claims were clearly within admiralty subject matter jurisdiction and that it was proper to exercise supplemental jurisdiction over the tort-based claims.

In the same January, 2003, decision, after noting that neither party had briefed the issue of applicable law, the district court also determined that the enforceability of the exculpatory provisions in the Yacht Club's contract was governed by New York state law rather than federal maritime law. The court found that the exculpatory clause was not sufficiently clear to relieve the Yacht Club from the consequences of its own negligence under New York law, which requires that any agreement to disclaim liability for one's own negligence must be clear and unequivocal. The court noted that although a disclaimer can be effective without explicitly using the word "negligence," it must at least "convey a similar import." The court observed that the Yacht Club's contract did not specifically mention "negligence," nor did it explicitly disclaim responsibility for damage caused by the Yacht Club's own fault or lack of reasonable care. In addition, the court observed that the boat owners were probably unsophisticated customers who might not have recognized the Yacht Club's attempt to disclaim liability. The district court denied the Yacht Club's motion for summary judgment based on the contract provisions.

Following the district court's January, 2003, decision, three separate New York trial courts in Nassau County ruled that the identical exculpatory provisions of the Yacht's Club's contract were enforceable under New York law and entitled the Yacht Club to summary judgment in its favor in connection with claims for fire damage resulting from the same incident brought by other boat owners.

The Yacht Club filed a motion for reconsideration of the federal district court's January, 2003, decision on the basis of the intervening New York state court decisions. The federal court, however, was not persuaded that the related state court decisions were correct. After restating the rationale for its original decision, the district court stated that it simply disagreed with the conclusions reached by the three trial courts. The district

court also noted that the Yacht Club's motion for reconsideration was untimely under local civil rules and that, in any event, the decisions of state trial courts do not bind a federal district court. Accordingly, the Yacht Club's motion for reconsideration was denied. *Commercial Union Ins. Co. v. Blue Water Yacht Club*, 289 F. Supp.2d 337 (E.D.N.Y. Nov. 5, 2003).

Florida Court of Appeal Enforces Exculpatory Language in Boat Club Membership Agreement

Applying federal maritime law, the Florida Court of Appeal held that exculpatory provisions in releases signed by boat club members were enforceable as a matter of law and affirmed the trial court's entry of summary judgment against the members on their personal injury claims against the Club and its employee. *Hopkins v. The Boat Club, Inc.*, 866 So.2d 108 (Fla. 1st Dist. Ct. App. 2004).

Ronald Hopkins entered into a written contract with The Boat Club, Inc. for the right to use recreational watercraft owned and maintained by the Club. Thereafter, as required by the Club's conditions of membership, he and his wife each executed documents entitled "Assumption and Acknowledgment of Risks and Release of Liability Agreement." The releases contained provisions by which the Hopkins acknowledged and assumed the risk of personal injury and released the Club and its employees from liability for any injury arising from their participation in watersport activities.

After signing the releases the Hopkins participated in a "checkout cruise" with a Club employee, William Brawner. The purpose of the outing was to allow Mr. Hopkins to become familiar with the operation of the Club's vessels. While operating a power boat under the direction and supervision of the Club's employee, Mr. Hopkins crossed the wake of a larger vessel at a high rate of speed. Mr. Hopkins' wife was thrown from her seat and suffered severe injuries.

The Hopkins filed suit against the Club and its employee Brawner alleging negligence on the part of the Club's employee. The defendants filed a motion for summary judgment based on the exculpatory provisions in the releases signed by the plaintiffs. The trial court dismissed the Hopkins' negligence suit against the Club and the Club's employee based on the release language. The Hopkins appealed.

On appeal, the Hopkins argued that the language of the release was insufficient to relive the Club and its employee of liability for their own

negligence under Florida law. Relying on reported decisions of a number of Florida courts, the Hopkins argued that a release is ineffective to relieve a releasee of liability for its own negligence unless the release contains specific language to that effect. The releases signed by the Hopkins contained no specific reference to negligence by the Club or its employees.

The Court of Appeals declined to apply Florida law, holding that the construction and enforceability of the release were governed exclusively by federal maritime law. The court concluded that federal maritime law does not require specific reference to a releasee's own negligence and that state law requirements to the contrary are therefore preempted. In support of its holding the court noted that the releases explicitly required the Hopkins to acknowledge the risk of encountering "changing water flows, tides, currents, wave action and ships' wakes," and broadly provided that the Club and all its employees and agents would be relieved of all liability arising out of the customer's participation in boating activities. In addition, the court held that there was no evidence of unequal bargaining positions between the parties. Thus, the court concluded, the contract was sufficient to inform an ordinary customer that he or she was agreeing to release the Club from liability arising from the Club's own negligence. The trial court's entry of summary judgment in favor of the Club and its employee was affirmed.

REGULATORY DEVELOPMENTS AND OTHER CASES OF INTEREST

Proposed Regulations - State Boating Registration

The Coast Guard's Office of Boating Safety has proposed regulatory amendments to permit states to require proof of liability insurance as a condition for obtaining a state-issued vessel registration. 33 CFR Part 174.31 currently permits states to impose only two conditions – proof of tax payment and proof of title. Under the current regulations any state which imposes additional conditions on registration risks withdrawal of the Coast Guard's approval of the state's registration program. The amendment would allow, but not require, a state to impose the additional condition. The comment period closed on 13 April, 2004. Information regarding the proposed amendment may be obtained from the Office of Boating Safety, Program Operations Division, at telephone 202-267-1077 or email, apickup@comdt.uscg.mil.

Professional Marine Corp. v. Underwriters at Lloyd's, 77 P.3d 658 (Wash. Ct. App. 2003)

On appeal by underwriters, the Washington State Court of Appeals affirmed the trial court's entry of a default judgment and award of attorneys fees against "Underwriters at Lloyd's" in a declaratory judgment action filed by an assured, a Seattle boat yard. The state trial court entered judgment against the underwriters on the assured's marine insurance coverage claims and supported the judgment by specific findings of fact and conclusions of law. The trial court also awarded attorneys' fees to the boat yard under a state Consumer Protection Act. The underlying loss arose from wind damage to two vessels docked at the assured's facility. After filing the declaratory judgment action the boat yard assigned its policy claims to the hull insurers of the two damaged vessels (Fireman's Fund and Albany Insurance) in exchange for a covenant not to execute judgment.

On appeal the underwriters argued that the default judgment was unenforceable because it was entered against a non-juridical entity ("Underwriters at Lloyd's") which is neither capable of suing or being sued. The Court of Appeals rejected this argument, noting that the policy identified the insurer as "Underwriters at Lloyd's of London," referred to the insurer as "the company" and included no information about the identity of individual underwriters. The underwriters also challenged service of process based on an affidavit from an employee of Mendes & Mount denying that she accepted service of the summons and complaint. The Court of Appeals rejected the argument, holding that service of process was properly effected as provided in the policy.

Finally, the underwriters argued that they had appeared "informally" in the declaratory judgment action and that it was therefore error for the trial court to enter a default judgment without notice and an opportunity to defend. Although the Court of Appeals recognized that an "informal" appearance by a party may require that the party be given notice of an application for entry of a default judgment under Washington law, the court held that the underwriters' actions in this case did not amount to an informal appearance.

Jury Awards BUC International $2 million For Copyright Infringement

A federal jury in Fort Lauderdale reportedly awarded more than $2 million in damages to BUC International Corp. in a suit filed by BUC against MLS Solutions, Inc. and the International Yacht Council alleging that the defendants misappropriated and published BUC's copyrighted yacht sale

listings. BUC alleged that the defendants routinely copied its exclusive and copyrighted website sale listings to their own internet listing service.

Turner v. Pleasant, 2004 U.S. Dist. LEXIS 1061 (E.D.La., Jan. 27, 2004)

Passenger on a bass boat filed suit alleging that she sustained injuries to her lumbar spine when she was thrown in the air due to an excessive wake caused by the defendant's vessel. The incident occurred in the Intercoastal Waterway in Terrebonnne Parish, Louisiana. Following a bench trial the court entered a defense verdict in favor of the defendants supported by findings of fact and conclusions of law. The district court judge concluded that every vessel has an obligation to use reasonable care to avoid excessive wake but that there is no actionable claim unless the wake is "unusual" and cannot be reasonably anticipated by others. The court found that the plaintiff had failed to prove that the defendant's vessel caused the alleged wake, that the defendant's vessel was operating at an unsafe speed or that any "unusual" wake impacted the plaintiff's boat. The court also found that the plaintiff's liability expert lacked credibility and that, in any event, the plaintiff had failed to prove that the incident caused her alleged back injury.

Carney Family Investment Trust v. Ins. Co. of North America, 296 F.Supp.2d 629 (D. Md. 2004)

Plaintiff insured brought declaratory judgment action against insurer on yacht policy seeking a judgment of $1.1 million for fire damage to the insured vessel. In addition, the plaintiff sought recovery of treble damages and attorneys fees for alleged unfair claims settlement practices by the insurer under Massachusetts' law. The insurer moved to dismiss the plaintiff's claims for punitive damages and attorneys' fees on the grounds that federal maritime law preempted application of Massachusetts state law. The district court found that state law governs claims by an insured for attorneys' fees and punitive damages against an insurer under a marine insurance policy in light of the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). Accordingly, the district court denied the insurer's motion to dismiss the plaintiff's state law claims for punitive damages and attorneys' fees.

Dominguez v. United States, 2004 U.S. Dist. LEXIS 5345 (S.D.N.Y., March 31, 2004)

Suit alleging negligence by the U.S. Coast Guard in connection with attempted rescue of boaters dismissed upon motion of the United States where the plaintiffs' complaint was filed more than two years after the inci-

dent. Plaintiffs' complaint alleged jurisdiction and a right of recovery under the Federal Tort Claims Act, 28 U.S.C. § 1346. The district court found that the plaintiffs' claims were admiralty claims governed exclusively by the Suits in Admiralty Act, 46 App. U.S.C. § 741 *et seq.*, ("SIAA") and were subject to the SIAA's two-year statute of limitations. Accordingly, the district court dismissed the complaint as time-barred.

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THE OLD FASHIONED WAY; YOU HAVE TO EARN IT…

Americas Ins. Co. and Sterling Chemicals, Inc. v. Stolt-Nielsen, Inc., W.L. 202 9377 (S.D.N.Y. Sept. 10, 2004.) (Casey, J.)

A shipment of acrylonitrile was loaded aboard a vessel for transportation from Texas to Korea. Freight was paid to the charterer, who issued a bill of lading providing that the shipment was to be carried pursuant to the terms and conditions of a contract of affreightment ("COA"). The bill of lading provided that freight was to be earned "concurrent with loading." However, it also stated that freight "was payable as per Charter Party," which the court construed to be a COA. The COA contained no provision as to when freight was earned.

After loading, it became apparent that the vessel's tanks were contaminated and had damaged the shipment. The shipment was off loaded; the vessel was placed off hire and the vessel's owner fully reimbursed the charterer for the cost of the charter.

As to the cargo damage, the reconditioning costs were reimbursed by an open policy of marine insurance issued to the charterer. After the cargo was reconditioned, the shipper wished to forward it to its original destination. The charterer informed the shipper that a second freight payment would be required to deliver the cargo to its destination and the second freight was paid under protest.

The shipper sought to recover the cost of the initial freight from the cargo underwriter, who took the position that the shipper had not suffered a loss because the charterer was obliged to return the freight, therefore, it was not "lost." Ultimately, an accommodation payment of 50% was made to the shipper, after which the cargo underwriter and shipper jointly sued the charterer, seeking return of the initial freight paid for the voyage that

was never made. Plaintiffs and defendants then moved for summary judgment.

The court found the freight at issue was never earned under the COA. The basic rule is that an ocean carrier's freight charges are not earned unless and until the goods are delivered to their destination. Parties may alter this general rule by contract. However, in the absence of an express contractual modification, the general rule governs.

Looking to the COA, the court found that it did not contain language providing that the freight was earned upon loading. The court noted that the bill of lading provided that freight would be earned upon loading, but disregarded that provision as contrary to the COA and inconsistent with the bill of lading format set forth therein. The court found the charter party, not the bill of lading, governed the relationship between the parties and thus trumped any conflicting provisions in the bill of lading. Since the charterer did not deliver the shipment, it was not legally entitled to retain the initial freight paid for that shipment and was, therefore, obliged to return the freight as not having been earned.

Addressing an argument by the charterer that, despite the unearned nature of the freight, the underwriter and shipper, as insurer and co-insured, were barred from recovery under the so-called "Anti Subrogation Rule," the court allowed the underwriter to recover its portion of the freight because the recovery was for a risk that was not covered by the insurance policy. The case involved "reimbursement, not subrogation" and the underwriter did not waive its right to recovery by reimbursing the shipper for half the freight.

The charterer argued that because the insurance policy contained a provision including advance freight as part of the valuation of lost cargo, the insurance policy covered the freight advanced by the shipper. The court rejected this argument, stating the freight was never earned and was, therefore, not recoverable as a "loss" under the policy "because freight can only be lost or damaged if it is first earned, the freight at issue here was not covered by the policy."

Dealing with the Anti Subrogation Rule, the court found it applied only to recoveries by an insurer "against its own assured for a claim arising from the very risk for which the insured was covered" and not to recoveries for losses not covered by the insurance policy between the parties. The court distinguished between subrogation and reimbursement and found the

cargo underwriter was seeking to recover from the charterer for an obligation not insured by the underwriter.

The court also allowed the shipper's action for half the freight as the Anti Subrogation Rule did not bar an indemnification action where the insurance policy was inapplicable to the loss. Because the court found the freight at issue to be outside the scope of the insurance policy, the shipper could recover its portion of the unearned freight from the charterer. Accordingly, the court granted plaintiffs' motion for summary judgment and denied defendants' motion.

PUFFED RICE…..

Allied Maritime, Inc. v. The Rice Corp., No. 04-7029 (S.D.N.Y. Oct. 12, 2004) (Scheindlin, J.)

The defendant chartered a vessel from plaintiff to carry cargo to Chile. On the vessel's arrival, the consignee claimed the rice was damaged and brought suit in that country, causing the vessel to be arrested. A bank guarantee was posted to release the vessel. The defendant then initiated London arbitration proceedings against the plaintiff, seeking indemnity for the claims asserted against it in Chile on the basis that the rice was damaged as a result of improper stowage and for alleged detention damages.

Defendant obtained an Order of Attachment from the Chilean court for the rice still on the vessel, which remained in Chile. The plaintiff charterer offered to sell the rice and escrow the proceedings; however, this proposal was rejected by the defendant, who argued both that the rice would not be sold at a fair price and that it would be prejudiced by having the proceeds held in Chile.

The charterer offered alternative security in the form of a Letter of Undertaking ("LOU") from its insurer; however, defendant refused to accept this LOU, arguing that the insurer lacked reinsurance and was not a member of the International Group of P&I Clubs. It did offer to accept the LOU provided that it was granted a direct claim against the insurer's owner. However, this condition was not agreed upon before the attachment hearing.

The court conducted a "prompt post-attachment hearing" to determine why the attachment should not be vacated or other relief granted. Noting the purpose of Supplemental Rule B was to enable the plaintiff both to

acquire jurisdiction over the defendant and obtain security for any resulting judgments, the court stated that the plaintiff could justify the attachment by demonstrating either that the attachment was necessary for jurisdiction or that security was required.

Under the facts, however, the court concluded that the attachment was not necessary to obtain jurisdiction as the dispute between the parties was governed by an arbitration clause, and arbitration had already begun in London. The court then looked to justification for the attachment for purposes of security and found the defendant had failed to make this showing.

The court noted that the charterer was one of the largest rice trading companies in the world and had maintained offices in California since 1993. Against this, the plaintiff's only response to the "demonstration of size and stability" was to raise a hypothetical possibility that the charterer might not be solvent in three years when the arbitration was expected to conclude. The court noted that plaintiff offered no reason to suppose that the charterer would be at any greater risk of insolvency than any other defendant and further that the charterer had not resisted arbitration and had also alerted the plaintiff to the presence of substantial assets in California, more than enough to satisfy the alleged claims. The court also noted that the plaintiff had taken no steps to investigate such assets or to find some alternative source of security or to demonstrate the charterer would be incapable of satisfying a judgment against it. The court found that the plaintiff "does not need security for its claim any more than the typical plaintiff might" and vacated the attachment.

[Newsletter Editor's Note: Although the decision speaks to arbitration having been commenced and proceeding in London, no reference is made to the possible application of 9 U.S.C. §8]

ZERO X ZERO X ZERO + ZERO = ZERO

Sampo Japan Ins. Co. of America v. M/V Commander, No. 03-C7770 (N.D.Ill. Aug. 4, 2004) (Shadur, J.)

A subrogated cargo underwriter brought action against the vessel, the vessel owner and the charterer to recover for damage to cargo. The vessel owner moved to dismiss on the basis that it was not subject to personal jurisdiction in Illinois.

The shipment involved steel carried from Gemlik, Turkey to Chicago. The court noted the vessel was under a time charter under which the charterer was responsible for the vessel's direction and control, including decisions to undertake the voyage and to direct the vessel to Chicago. As it was not disputed that the vessel owner played no direct role regarding the cargo or the vessel's voyage that would support personal jurisdiction, the plaintiff underwriter had to "stake its jurisdictional bet" on the fact that the bills of lading referred to the owner as the carrier. The bills were prepared by the charterer's loadport agent, who had signed them "as agent on behalf of the carrier."

Under the terms of the charter party (adapted from the New York Produce Exchange form), the master was required to sign bills of lading as presented in conformity with the mates' or tally clerk's receipts, and the charterers and/or their agents were authorized to sign on the master's and/or owner's behalf "without prejudice" to the charter party.

Against this background, the court considered various decisions concerning bills of lading signed "for the Master." It noted generally that a bill of lading signed by the charterer or its agent, "for the Master" with the authority of the shipowner will bind the shipowner. On a bill signed "for the Master" without the authority of the shipowner, the shipowner is not personally bound and does not, by virtue of the charterer's signature, become a COGSA carrier.

As regards authority to sign unconditional bills of lading, the court found it lacked sufficient information to decide whether there was actual authority or apparent authority. However, it noted this issue would bear on the owner's possible *liability* and not the issue of personal jurisdiction. Noting that the owner did not "purposefully direct" the cargo to Chicago and lacked any other connections with Chicago or the state of Illinois, the court dismissed the complaint against the owner for lack of *in personam* jurisdiction.

Finally, the court dealt with the plaintiff's request for discovery to enable it to pursue the "possibility that general jurisdiction rather than special jurisdiction might be available." The court rejected this request, noting that even if it were demonstrated that one or more charter parties involved voyages having Illinois destinations chosen by the charterer, the result would be the same: "After all, the addition or even multiplication of zeros produces the same zero result."

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COURT FINDS CHARTER PARTY MEANS WHAT IT SAYS....

Ferrostaal, Inc. v. M/V Tupungato, 2004 WL 2211658 (S.D.N.Y. Oct. 1, 2003) (Cedarbaum, J.)

Suit was brought against the vessel owners and charterers for alleged damage to a cargo of steel transported to New Orleans. A third party complaint was filed against the time charterer of the vessel and the time charterer, in turn, impleaded the vessel's disponent owner.

The disponent owner moved to stay the action against it on the grounds that the charter party executed between it and the time charterer required London arbitration. The time charterer opposed the motion, arguing that the arbitration clause was "permissive" rather than mandatory. In its decision, the court stated not only did the parties use the word "shall," which in common usage and understanding "signifies command," but they also used language ("shall be referred to and *finally resolved* by arbitration in London") which indicated that London arbitration would be the *sole* means of resolving disputes.

The time charterer also argued that it might be deprived of a remedy against the disponent owner if it were forced to arbitrate in London because English courts have applied COGSA in ways which might bar its claims. The court noted that COGSA does not apply to claims for contribution or indemnity; however, the governing charter included a clause which provided that COGSA should apply to all bills of lading for cargo shipped to or from the United States. While American courts have refused to apply COGSA's one year limitation to indemnity claims, one English court interpreted COGSA as identical to the Hague-Visby Rules and barred an indemnity claim brought more than one year after discharge of the cargo. (The time charterer referred to the English case, *The Strathnewton*, 2 Lloyd's Rep. 296 Q.B. 1982). The time charterer argued that the arbitration panel might apply that case on the basis of the incorporation of COGSA into the charter and bar its indemnity claim, even though that claim would not ripen until the claims against the time charterer had been adjudicated or settled.

The court considered the argument to be essentially an objection to the choice of location for the airing of disputes, rather than the choice of arbitration as a means of settling them. The court further noted that the charter party was based on a standard New York Produce Exchange form with numerous changes to the preprinted form and a provision specifical-

ly providing for arbitration in London. Noting that *The Strathnewton* was reversed on appeal (1 Lloyd's Rep. 219 (C.A. 1982)), the court held the time charterer to be bound by the "specifically negotiated provision."

The court also rejected the time charterer's argument that London arbitrators might decline to view the disponent owner as subject to liability, noting also that the charter party contained specific allocations of liability between the charterer and owner for cargo damage resulting from problems such as unseaworthiness, improper stowage, and cargo handling. The court granted the motion to stay the third party claims pending arbitration as called for in the charter party.

CARRIER GETS GORED BY ITS BILL OF LADING…..

Foster Wheeler Energy Corp. v. M/V An Nig Jiang, 2004 WL 1905297 (5th Cir. Sept. 13, 2004)

In a suit for cargo damage sustained on a voyage from Spain to China, the district court held the ocean carrier was entitled to a $500 per package limitation under COGSA. The shipper appealed.

The court of appeals affirmed the district court's judgment on liability and looked to the provisions of the bill of lading with respect to the limitation issue. The bill of lading contained a general paramount clause providing that the Hague Rules as enacted in the country of shipment shall apply to the contract. Spain, the country of shipment, had ratified the Hague-Visby Rules. The bill of lading also contained a jurisdictional clause providing for suit to be brought in federal court in New Orleans and that "U.S. Law shall apply." The district court specifically noted the jurisdictional clause's reference to "U.S. Law" and held that it called for the application of U.S. COGSA, notwithstanding the general references in the paramount clause to the Hague-Visby Rules.

The Fifth Circuit Court of Appeals, following the axiom that a contract should be interpreted to give meaning to all of its terms, found it was undisputed that the Hague-Visby Rules as enacted in Spain applied *ex proprio vigore* and that U.S. COGSA did not, since the shipment was not to or from a U.S. Port. At the same time, the court noted that COGSA's application could be extended to pre-loading and post discharge periods or to carriage between two non-U.S. ports. However, the appellate court concluded that the most reasonable interpretation of the contract of carriage, giv-

ing effect to all of its provisions, would be that the jurisdiction clause (providing for the application of U.S. Law) applied only during the periods of responsibility and to the types of claims to which the Spanish Hague-Visby Rules reference in the General Clause paramount did not apply as compulsory law.

Accordingly, the court of appeals reversed the district court as to the application of the $500 package limitation under COGSA and remanded for a further determination as to the extent of damages pursuant to the Spanish Hague-Visby Rules.

IN AID OF ATTACHMENT.....

Yayasan Sabah Dua Shipping v. Scandinavian Liquid Carriers Ltd., 2004 WL 2059514 (S.D.N.Y. Sept.13, 2004) (Kaplan, J.)

A dispute arose out of the termination of a charter party. Arbitration in New York was demanded pursuant to the arbitration clause in the charter. Local counsel were appointed by the respective parties and preliminary correspondence exchanged regarding the pending arbitration.

The "owner" filed a maritime attachment pursuant to Rule B(1) of the Supplementary Admiralty Rules, alleging that the "Charterer" could not be found within the district but had accounts and credits within the district. The court granted the attachment, after which restraining orders were served upon a New York Bank and funds were frozen.

A motion was made on behalf of the "charterer" to vacate the attachment on the ground that the charterer could be found within the district because it had authorized its counsel to accept service of process. The Charterer also argued that the situs of its bank account was not New York, but rather the Cayman Islands.

As to the first argument, the court found that appointed counsel was not the charterer's agent for service of process merely because it was the charterer's counsel in the arbitration. Authorization for counsel to accept process in the action did not occur until subsequent to the institution of the attachment proceedings.

In addition, the court rejected a proposed rule requiring inquiry into whether counsel was authorized to accept service and then proposing a

reasonable waiting period to determine whether authority to accept service would be granted. The court considered this proposed rule would undermine maritime attachments by affording a potential party time to move its assets out of the district in order to evade process, liability and judgments. The court interpreted Rule B to mean that in order to be "found in the district" a defendant had to be present in the district when the attachment is sought.

As to the location of the bank holding the attached funds, the court examined the operations of the New York bank and its Cayman Islands branch and found that the Cayman Islands was essentially a "paper" or electronic branch with no physical office, employees or tangible bank assets or liabilities in the Caymans. For all practical purposes, it found the Cayman Islands branch to be part of the New York branch and concluded that the account and funds were in New York at the time of the attachment. The motion to vacate was denied.

POSTERS AND PRINTS GET PIECED OFF….

El Greco (Australia) PTY Ltd. v. Mediterranean Shipping Co. SA, (2004) FCAFC 202 (decided Aug. 10, 2004)

Down under, suit was brought for seawater damage to a containerized shipment of posters and prints. The bill of lading described the goods as "1 x 20 foot FCL/FCL general purpose container said to contain 200,945 pieces, posters and prints."

The primary court held that the damages should be measured by the wholesale price in Australia rather than in Greece, the final destination of the shipment. As to the application of Article IV, Rule 5 of the Hague-Visby Rules (relating to limitation), the court found that the enumeration of the 200,945 units, being the individual unpackaged posters and prints, meant that the container was not to be regarded as the package or unit for the purposes of limitation. [It was agreed that the pieces were placed into "approximately" 2,000 packages although there was no references to those 2,000 or so packages in the bill of lading.]

On appeal, the full court of the Federal Court of Australia reversed on the place where damages should be determined, holding damages should be determined by the value of the goods at the discharge port.

Additionally, on the question of the package limitation, a majority of the appellate court overturned the lower court's holding that the reference to 200,945 individual pieces was not an enumeration called for by article IV rule 5 (c) of the Hague-Visby Rules. Accordingly, since there was no enumeration, the container was considered to be the package and the carrier was entitled to limit its liability to the greater of two units per package or two per kilogram. The dissenting opinion would have treated the 2,000 packages as the number of packages or units to be considered although such was not referred to in the bill of lading.

The decision is 82 pages in length and includes an extensive treatment by the majority of various case law, including United States law, involving the issue of what constitutes a "package". (The opinion is published at www.austlii.edu.au/ au/cases/cth/FCAFC/2004/202.html

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