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| **MLA REPORT, FALL 2003** |
| **Editor:** Matthew A. Marion**Source:** MLA**Doc. No.:** 774**Date:** November 1, 2003Document No. 774November 1, 2003 THE MARITIME LAW ASSOCIATIONOF THE UNITED STATES **THE MLA REPORT**  *Editor* Matthew A. Marion of South Norwalk, Ct. *Associate Editor* LeRoy Lambert of New York**TABLE OF CONTENTS**

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**EDITORIAL COMMENT** Not even the mischief of Hurricane Fabian will prevent the fall 2003 meeting of the Maritime Law Association from taking place as scheduled. Great credit is due to Association president, Ray Hayden, and to Bob Parrish and the members of the Planning and Arrangements Committee, for relocating and reassembling the biannual meeting in Boca Raton, Florida on such short notice. For those fortunate enough to attend in Florida, the fall 2003 edition of the *MLA Report* will be distributed by hand to MLA members and guests at the general meeting of the Association on November 1st, and, subsequently, will be mailed to the entire membership. This Report includes newsletters by the Recreational Boating Committee, Marine Insurance and General Average Committee, Carriage of Goods by Sea committee, as well as the Committee on Uniformity of U.S. Law and Carrier Security Committee. The reports are timely and well written, and offer an important guide to the work currently being done by these committees. The Report was founded in 1983 by past MLA President, David Owen, of Baltimore, in order to help maintain a permanent record of the various written work of the MLA, in a form in which that work could be retrieved without difficulty. LeRoy Lambert and I strive to ensure that goal is fulfilled, and, in that vein, welcome suggestions as to how the *MLA Report* can be improved. Likewise, we encourage committees to make their work available in written form so we can share their efforts with the membership of this Association, both now and in the future. Matthew A. Marion,*Editor***COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE****NEWSLETTER, FALL 2003** *Editors:*George N. ProiosGene B. GeorgeJoshua S. Force **I.  NEWS AND INFORMATION** **The York Antwerp Rules Revisited — By Jonathan Spencer** In Issue 8 of the *Maritime Advocate* I reviewed what was at that time an incipient effort by the International Union of Marine Insurance (IUMI) to curb the scope of the York-Antwerp Rules. The Comité Maritime International (CMI), which is loosely rendered in English as the International Maritime Law Association, is custodian of the York-Antwerp Rules, the current version of which was adopted at the CMI’s plenary session in 1994 in Sydney. Despite efforts to involve the marine insurance community fully in the 1994 revision, they came late to the table then decided they did not like the bill of fare. IUMI has now prevailed on the CMI to conduct an extensive review of the rules. ‘IUMI’, in the context of this debate, in fact describes four individuals who apparently have been empowered to drive IUMI’s agenda — two company men based respectively in Dublin and London, a London solicitor and a London-market statistician. We face the prospect of a much-reduced version of General Average that would exclude salvage settlements under most circumstances and substantially eliminate common-benefit GAs, temporary repairs, wages allowances, substituted expenses and costs of handling cargo under York-Antwerp Rules X (b) & (c). The argument for excluding salvage settlements arises from situations where one owner of property salvaged in a given situation is able to make a more favourable settlement with the salvors than his fellows in a so-called ‘differential salvage settlement’.Currently, unless the parties agree otherwise, this expenditure becomes part of the GA pool and is contributed for rateably by all the parties at interest.The party which has made the favourable settlement loses much of the advantage it has thus gained, hence the argument that salvage settlements should be allowed to lie where they fall. Such an argument undermines a fundamental principle of General Average, that of community of interest, and it does away with the equitythat can be achieved in more complex cases involving, for example, sacrifice of property and a subsequent accident on the voyage during which the General Average occurs. Posit a salvage operation where one parcel of cargo is sacrificed for the common safety, and another parcel is saved. The sacrificed cargo would pay nothing to the salvors, having no salved value. It would have its sacrifice made good in full under the General Average adjustment. The cargo that is saved would pay the salvors, possibly at a higher rate than the ship if the cargo owners have less bargaining power than the shipowners, and it would contribute under the General average adjustment, as would the shipowners, to make good the value of the parcel that was sacrificed. If the cargo that was saved remained in good condition on completion of the salvage services but suffered some subsequent damage, perhaps by heavy weather or in consequence of an accident during discharge, it would nevertheless have to pay for the salvage on the basis of the sound value it had at the place where the salvors’ services were terminated. Under the current York-Antwerp Rules, the salved parcel would then bear proportionately less of the salvage under the final adjustment if it were in damaged condition at the end of the voyage. The sacrificed cargo would contribute to the General Average on the amount that it receives as made good, and the General Average would include the sums paid to the salvors by the ship and the salved cargo. Proportionately, all interests suffer the same degree of monetary loss. Were salvage to be settled outside of General Average, the sacrificed cargo would contribute nothing towards the salvage expenses and would have its sacrifice made good in General Average. The salved interests would contribute towards that cargo sacrifice and bear all of the salvage. A state of affairs would come about where it is actually financially advantageous to have your cargo chucked over the side rather than having it delivered at destination. The Phoenicians apparently had the nous to work out, more than two thousand years ago, that this is plain daft. Turning now to the other areas of General Average expenditure that IUMI has in its sights, the objective has been described as confining General Average to common safety, and eliminating expenditure incurred for the common benefit. A typical instance might be a fire in the cargo at sea where the ship comes into a port of refuge, the fire is successfullyextinguished, the cargo is discharged into shore warehouses, the ship makes repairs necessary for the safe prosecution of the voyage, the cargo is reloaded and the voyage is resumed. The current York-Antwerp Rules provide for the costs incurred in respect of the cargo in this circumstance to be allowed as General Average, together with the expenses incurred by reason of the prolongation of the voyage, including wages and fuel putting into the port of refuge and while detained there, port charges and so on. Under the IUMI proposals, allowances in General Average would cease once safety is attained. But when is safety attained? When no more smoke can be seen? When the cargo closest to the seat of the fire has been discharged? Does all the property attain safety at the same time or is the cargo in the hold most distant from the fire safe some time before the cargo in the hold where the fire has broken out? Once safety is attained, what incentive are the shipowners going to have to continue the voyage, given that the expenses that IUMI seeks to exclude from GA — often quite substantial — now presumably fall on the shipowners? The type of expenditure described would not necessarily be recoverable under standard forms of hull insurance policy, and the P&I clubs are unlikely to go in to bat for first party losses. The inevitable outcome of the IUMI initiative is more circumstances under which shipowners will argue successfully that voyages are commercially frustrated. Indeed, IUMI’s own General Average Working Group noted in its report to IUMI’s 1998 Lisbon conference that the proposed regime would “present some problems to the cargo owner in respect of forwarding cargo to destination in case the shipowner abandons the voyage”. One would have hoped that the insurance community would seek to avoid that result rather than mounting an effort to bring it about. Mention should also be made of the great loss of uniformity. At the moment, faced with fire on the voyage, any shipowner carrying cargo under contracts subject to the York-Antwerp Rules can ring up any qualified average adjuster anywhere in the world and say, “This is what I am faced with. Where are the expenses going to fall?” and he will get substantially the same advice from all of us. If General Average is to end with the attainment of safety, what happens thereafter becomes a matter for interpretation under the law and practice, presumably, of the place where the voyage ends.   Historically, the law of the United Kingdom did not allow the wages and maintenance of the crew during deviation to a port of refuge. American law did not allow them during the deviation and up to the time the vessel regained the high seas, and most Continental European law allowed them until the point of deviation was regained. What happens if the ship has cargo for the UK and the Netherlands? Is an adjustment to be made in accordance with two different codes? The York-Antwerp Rules are a commercial regimen to be agreed between carriers and shippers of cargo. Average adjusters should provide counsel, if asked. We do not advocate any particular position. To those who say we have a vested interest in the status quo, we say that someone ultimately will insure these exposures, once the hull, cargo and freight policies have been rewritten, and the claims will still have to be adjusted. But do the carriers and shippers understand and embrace the change that their insurers are trying to bring about? Why on earth would they? *Newsletter Editors’ comment: Reprinted by permission of The Maritime**Advocate, Issue 23.* ***Revising The York-Antwerp Rules, 1994*** By Jonathan Spencer, Chair, Sub-committee on General Average The York Antwerp Rules have been subject to periodic change since their inception, every twenty to twenty-five years — 1924, 1950, 1974 and, most recently, 1994. Change was largely evolutionary and in 1994 the main change was the introduction of a Rule Paramount to ensure that all allowances to be made in GA were subject to a test of reasonableness. Beyond that the effort largely was a tidying up of the existing language. Almost as soon as the ink was dry on the York Antwerp Rules 1994, IUMI, or really a handful of individuals within IUMI (International Union of Marine Insurance) started lobbying for much more fundamental change. They have pressed ahead largely unopposed and the possibility exists that a new version of the York Antwerp Rules could be adopted by the CMI, which is the custodian of the York Antwerp rules, as early as the Vancouver conference scheduled for early June next year. Some of the proposed changes are procedural. One proposal is to eliminate advancing commission on General Average expenditure. Another is to replace the rate of interest on GA expenditure and sacrifices, currently  fixed in the York Antwerp Rules at 7%, with a variable rate based on LIBOR, to be revised every three months during the period of the outlay; when I sat on a recent committee of the Association of Average Adjusters of the United States that looked into rates of interest, we found LIBOR quite cumbersome to research when compared with U.S. prime rates and we also considered that a variable rate would be unwieldy, favoring a fixed rate based on the rate prevailing at the time the adventure ended. IUMI is also lobbying for a time bar on GA adjustments, which might or might not be useful in those jurisdictions where such a provision would not be inimical to national law. This is all relatively unexceptionable, even if largely unnecessary. More substantive change is found in the proposal to eliminate salvage from General Average. Under the current York Antwerp Rules salvage settlements are reintroduced under the General Average adjustment. This has the effect of preserving the equitable distribution of expenditure made for the common safety that General Average seeks to achieve, rather than letting salvage lie where it falls, on the value of the property at the termination of the salvage services. Those who would do away with salvage in General Average favor a sort of commercial free-for-all where those interests with the most commercial leverage over the salvors make the best possible deal that they can for themselves and leave everyone else to fend for themselves. To understand the effect of this approach, it is necessary to grasp the concept of ‘made good’. The value of property that has been sacrificed for the common safety is ‘made good’ as General Average and receives the contribution of other parties to the adventure but also itself takes on some tangible form, the amount made good contributing to the rest of the GA. This means that property that ends the voyage undamaged contributes on its sound value; property that is damaged by sacrifice contributes, in effect, on its sound value but receives under the GA the value of the sacrifice; and property that is damaged by accident contributes on the basis of its damaged value. This spreads the salvage equitably among all the interests. If salvage were taken out of General Average, one of the results would be that sacrificed property would receive the value of the sacrifice made good as General Average but would contribute to the GA only on its damaged value, if the sacrifice is not one of the entire property. The result of this is that it would be of positive benefit to have your cargo jettisoned in a salvage situation — you would receive the whole value of it back in GA but not have to contribute anything, under the proposed revisions, to the salvage services.The more wide sweeping change altogether is in the elimination of the concept  of  common  benefit,  restricting salvage solely to  attainment  of        safety. A typical General Average involves saving the property from the grip of the peril and bringing it to a port of refuge, effecting repairs at the port of refuge that are necessary for the safe prosecution of the voyage, then resuming and completing the voyage. The proposal is to eliminate all that expenditure incurred during the prolongation of the voyage at the port of refuge while making repairs necessary for the safe prosecution of the voyage. Specifically targeted are GA allowances for crew wages and maintenance and fuel and stores and the limiting of allowances for temporary repairs. The IUMI reformers ignore the fact that the type of expenditure allowed in GA, as currently constituted, assists in getting cargo to destination. Actually, they don’t completely ignore it — IUMI’s own General Average Working Group noted in its report to IUMI’s 1998 Lisbon conference that the proposed regime would “present some problems to the cargo owner in respect of forwarding cargo to destination in case the shipowner abandons the voyage” but they seem unfazed by this particular result of their proposals. As a practising adjuster, I see attempting to cut off General Average allowances on ‘attainment of safety’ as an adjusting nightmare. Going back to our typical example, say there is a fire in the cargo at sea. The ship comes into a port of refuge, where the fire is successfully extinguished. The cargo is discharged into shore warehouses. The ship makes repairs necessary for the safe prosecution of the voyage. The cargo is reloaded and the voyage is resumed. The current York Antwerp Rules provide for the costs incurred in respect of the cargo in this circumstance to be allowed as General Average together with the expenses incurred by reason of the prolongation of the voyage — wages and fuel putting into the port of refuge and while detained there, port charges and so on. Under the IUMI proposals, allowances in General Average would cease once safety is attained. But when is safety attained? When no more smoke can be seen? When the cargo closest to the seat of the fire has been discharged? Does all the property attain safety at the same time or is the cargo in the hold most distant from the fire safe some time before the cargo in the hold where the fire has broken out? Most importantly, if GA no longer pays, who does? The orphan expenditure would not be paid under standard forms of hull and machinery policy. It is probably not a special charge on cargo if the cargo is undamaged and the voyage continues under the contract of affreightment; and if it were, to get it paid would require an adjustment as complex as a GA adjustment. The P&I Club isn’t going to be interested in what is essentially a first-party problem. Who is going to pay if the Shipowner walks away?This is the issue that the insurance community has not grasped and surrounding which we have been unable to engage their attention. Past-President Howard McCormack is the U.S. delegate to the CMI’s international subcommittee on General Average and is coordinating his efforts through a committee made up of members of the MLA and of the Association of Average Adjusters of the United States. The international subcommittee will meet in London next November 17th and there might or might not be a further meeting prior to the Vancouver meeting. The conference website declares that “[i]t is the intention of the CMI to lay before its 38th Conference in Vancouver in June 2004 a revised text of the York-Antwerp Rules for consideration. Amongst the proposals likely to be made would be the restriction of port of refuge expenses, elimination from general average of costs of temporary repairs and a possible revision of the rule relating to substituted expenses”. These proposals at best seem likely to be ill considered and half baked but, as I have said, insurers, shippers and carriers in our community seem quite indifferent, leaving the MLA in the dark as to what point of view it should properly represent in the CMI sessions. I addressed the two principal issues at greater length in an article published in the July 2003 issue of The Maritime Advocate. If the Editors are not sufficiently indulgent to attach it to this newsletter please request a copy by email tojss@jss.us Further background material can be found at *www.theGApage.com*. *Newsletter Editors’ note: Our sincere thanks to Jonathan Spencer for the**two foregoing articles.* **Have Another Hurricane And Pass The Policy Limits** In the wake of Hurricane Fabian, the official web site of Fairmont Hotels and Resorts carried a notice that the company’s two Bermuda properties, the Fairmont Southampton and Fairmont Hamilton Princess, had “suffered considerable damage” but that all guests and staff were safe. Fabian was described as “the most powerful storm to hit Bermuda in almost 80 years.” The site went on to report that the “Fairmont Southampton was the more seriously affected of the two properties and will be closed until November 1, 2003.” An update was promised after a fuller assessment of the damage. [www.fairmont.com, September 8, 2003]. Return visits to the site have not revealed any further status reports. Fairmont does not face the prospect of paying for all repairs out of its own pocket. On September 9, 2003, *The Royal Gazette*of Hamilton, Bermuda, reported: Businesses seriously affected by Friday’s hurricane were yesterday assessing insurance coverage for damage sustained in the storm, including what they might received for loss of business. The Fairmont Group of hotels said its two Bermuda properties were “extensively” insured for both property and business interruption which would reduce their total bill to, by estimates, between $5 million and $10 million. Head of investor relations Emma Thompson could not, however, put a price tag on the gross cost of the devastating storm. Ms. Thompson said that information would not be available until a complete assessment of damage was completed in coming weeks. The group is having to close down their Fairmont Southampton property for between two and six months. The Hamilton Princess remains open although one quarter of its rooms will need repairs after suffering water damage in the weekend storm. Not long after, Fabian passed into the ranks of the oldies as Hurricane Isabel struck the East Coast of the United States, with insured losses initially estimated at about $1 billion, mainly to homes and cars from winds and falling tree limbs. By comparison, Hurricane Floyd caused $2 billion in insured loses to the same general area in 1999; and the Great Mississippi Flood of 1927 took over 1,000 lives and caused $1 billion in damages. The costliest natural disaster in U. S. history remains Hurricane Andrew, which caused $15 billion in insured losses in 1992. [*USA Today*, Sept. 22, 2003; *The New Yorker*, Aug. 4, 2003].Fortunately for policy-holders, it appears that Isabel will not result in wide-ranging premium increases, because insured losses were well below estimated levels for which underwriters had already set aside reserves. Before the hurricane reached the mainland a risk-modeling agency, AIR Worldwide, had predicted that insured losses could reach $2 billion. According to the Insurance Information Institute, if the estimates of insured losses prove accurate they will be in the range of what underwriters anticipated and built into insurance premiums for homeowners and businesses along the East Coast. [*USA Today*, Sept. 22, 2003; *The Wall Street Journal*, Sept. 22, 2003].  Even so, insurers will undoubtedly review individual claims with care, to avoid overpaying in what is already a very costly year. Isabel may bring insurance industry casualty loses for 2003 to $8.6 billion, compared to $5.8 billion in 2002 and $7.1 billion in 2001 (excluding the September 11 terrorist attacks). Much of the total for 2003 resulted from $3.13 billion in insured losses caused by a series of spring tornadoes in the Midwest. [*The Wall Street Journal*, Sept. 22, 2003]. Any claim overpayment or misdirection of funds will only add to the industry’s losses.  The claim adjustment with respect to another windblown hotel presents a cautionary tale. In May of 1989 a windstorm severely damaged the roof of a hotel in Euless County, Texas, owned by Hotel Management Corp. The property had been purchased and renovated with a loan from Master Mortgage Investment Fund, Inc., secured by a mortgage on the hotel.  American National Fire Insurance Company issued a policy insuring the hotel against various hazards including windstorms and hail, and designating Master Mortgage as loss payee. American National knew of Master Mortgage’s status as mortgagee as well, but settled the repair claim for $45,000.00, by issuing a check in that amount to Hotel Management Corp. without notifying Master Mortgage, all in violation of the insurance policy’s loss payee clause.Master Mortgage subsequently filed for bankruptcy protection and commenced an adversarial proceeding against American National for negligence, fraud, breach of duty of good faith and fair dealing, intentional interference with business relationship, conversion and breach of fiduciary duty. Although the bankruptcy court concluded that Master Mortgage’s claims either sounded in contract and were time barred, or were otherwise defectively pleaded and supported, it recognized that the facts would have supported a timely claim for breach of the insurance contract: American National failed to list Master Mortgage as a payee on a check which it was required to do. This failure breached the insurance contract. American National withheld funds from Master Mortgage…[T]his Court concludes that the contractual relationship created a debtor/creditor relationship between the parties. *In re Master Mortgage Invest. Fund, Inc.,*161 B. R. 228, 237 (Bkrtcy. W.D.Mo. 1993). In the wake of Fabian and Isabel, we can be assured that insurance professionals will adjust all claims seasonably and with utmost care, mindful of the needs of the insured and of the insurance industry’s bottom line, for as the *Master Mortgage*court artfully summarized, “[a]n insurance company seeks to minimize *its own liability* and still provide fair and reasonable compensation for the insured’s loss.” *Id.* at 239. Rest easy by the pool in Boca, check the weather back home occasionally, contemplate another Hurricane[\*](http://www.mlaus.org/article.ihtml?id=728&issue=53&folder=0" \l "_ftn1" \o ") and keep your insurance agent’s number handy. Gene B. George**II.    RECENT CASES OF INTEREST** **Full Damages For Grounding Recoverable From Defendant By Shipowner That Received Payments From Underwriters And General Average Contributor** *Tetuan Shipping Corp. v. M/V Tug Ann Moran,*No. 02-15237 (11th Cir. March 31, 2003)  Affirms award of damages to Tetuan for full amount of loss resulting from grounding of container ship, the COLUMBUS OLINDA, which ran aground during a turning maneuver at the port of Miami while being assisted by defendant’s tug. Liability was affirmed on earlier appeal. *Tetuan Shipping Corp. v. M/V Tug Ann Moran*, No. 00-16021 (11th Cir. Oct. 26, 2001).  Prior to bringing suit, Tetuan was paid $619,150.18 by its hull underwriters; $79,000.00 by its loss-of-hire underwriters; and $131,843.41 pursuant to a general average agreement. Though underwriters did not intervene in action and were not joined by Moran defendants, Moran argued at conclusion of trial that Tetuan’s recovery should be limited to the amount of unreimbursed losses.  Court of appeals affirms district court’s rejection of Moran’s argument and award of full damages totaling $1,121,681.11, subject to subrogation rights of underwriters and rights of the general average contributor. As to underwriters, the appellate court notes that admiralty law has long recognized equitable subrogation rights of a marine insurer that pays a claim. However, if an insurer has paid only part of the loss, both the insured and insurer have substantive rights against the tortfeasor. The insured, Tetuan, may sue for the entire loss, and the insured’s recovery is then impressed with a trust in favor of the insurer in the amount to which it is entitled by subrogation. The insurer’s right to recover its subrogation interest is limited to the excess which an insured recovers from a wrongdoer remaining after the insured is fully compensated for a loss.District court’s ruling is consistent with the collateral source rule, originally adopted by the Supreme Court in *The Propeller Monticello v. Mollison*, 58 U. S. (17 How.) 152 (1854) (rejecting defendant’s argument, where steamboat collided with and sank a schooner, that plaintiff had already been compensated by its insurer): The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty. *Id.* at 155. A similar principle applies to general average contributions. A shipowner’s right to recover general average expenses as part of its damages is not extinguished by payment of general average contributions, but is kept alive and enforced for the benefit of the contributors. Contributors may recover from the tortfeasor in a direct action or by the shipowner suing for their benefit. **Following Underwriters Must Fully Follow Coverage And Claims Payment Decisions Of Lead Underwriter Under Hull Cover Note’s Full Following Clause** *LCI Shipholdings, Inc., v. If P & C Ins., Ltd.,*2003 U. S. Dist. LEXIS 8805 (E.D.La. May 22, 2003) Court grants motion for summary judgment by plaintiffs, owner and manager of a ship, in action against following underwriters seeking money damages and declaratory judgment for coverage and payment under a marine insurance policy. Owner, manager and vessels were insured under multi-peril marine insurance package evidenced by a cover note, on which defendants were two of the “following underwriters.” Pursuant to Full Following Clause in the cover note, adjuster prepared adjustment for damages to insured vessel arising from a lash barge crane incident, and lead underwriter paid owner and manager its percent participation interest, as did all “following underwriters” except defendants.Court finds language of Following Clause clear and unambiguous, obligating following underwriters to follow the lead underwriter’s decisions on payments and settlements of claims. Summary judgment is appropriate where following underwriters failed to show existence of an issue of fact as to the meaning of the Following Clause. Defendants claim the adjustment called for payment of losses falling outside the policy conditions; the lead underwriter is not authorized to alter those conditions; and they are not obligated to follow the lead underwriter with regard to payment of such losses. In underlying incident, ship’s lash barge crane collapsed during loading at New Orleans, damaging both crane and ship’s deck. Plaintiffs removed crane from another vessel and had it shipped to New Orleans and installed on damaged vessel pending completion of permanent repairs. Survey report established that collapse of crane because of failure of starboard braking system was due to a “covered peril,” and that plaintiffs’ actions in mitigating damages were fair and reasonable. Adjuster prepared adjustment allocating damages, less deductibles, among the underwriters in accordance with their respective proportions, which the lead underwriter and seven of the nine following underwriters paid. Court finds there is no controlling federal rule and New York law governs interpretation of cover note, which was issued there. Under New York law, insurance policies are to be construed so as to give effect to the intent of the parties as expressed by their words and purposes. Words must be given their plain meaning and clear and unambiguous terms must be enforced as written. Extrinsic evidence is not admissible if the language of the policy is unambiguous. Court rejects defendants’ argument that Following Clause only bound them to follow lead underwriter on administrative matters, not coverage issues. Defendants did not present a reasonable interpretation showing the clause is ambiguous. Underwriters agreed to follow decisions of the lead “with regard to all aspects of coverage,” and on “payments and settlements of claims.” Language was unambiguous and consistent with the traditional commercial purpose of following clauses — simplifying administration and claims settlement.**Insurance Contract Not “Executory” In Bankruptcy** *In re Wisconsin Barge Line, Inc.,*76 B.R. 695 (E.D.Mo. Bkrtcy. Aug. 4, 1987) On motion of insurer (INA) to compel debtors to assume or reject insurance contracts, bankruptcy court holds that insurance contracts are not “executory” and need not be assumed or rejected where debtors’ only duty to insurer under the contracts was payment of money owed for retrospective premiums. Debtors are engaged in inland river transportation business, operating barges, a marine equipment repair yard, a liquid bulk storage facility, a midstream fuel service and barge repair terminal. INA insured debtors against marine losses, liabilities and defense costs in 1983, 1984 and 1985. Policies called for minimum premium payable during policy year, plus retrospective premiums due in later years, calculated on loss experience and a maximum total premium stated in the policy. Debtors filed for protection under Chapter 11 of bankruptcy code in 1986, owing in excess of $800,000 for 1983-85, with more to be calculated as loss experience accumulates. Bankruptcy court agrees that contracts need not be assumed or rejected by debtors, because they are not deemed “executory,” as defined in Countryman, “*Executory Contracts in Bankruptcy, Part I,*” 57 Minn. L. Rev. 439, 460 (1973): “a contract under which the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” This definition, adopted by the Eighth Circuit, binds Missouri bankruptcy court. Other courts have held insurance contracts requiring retrospective premiums not to be executory, where debtor “had no duty of future performance under the contract, other than the payment of money.” **Bill Of Lading Forum Selection Clause Valid** *Baosteel America, Inc. v. M/V Ocean Lord,*257 F. Supp.2d 687 (S.D.N.Y. 2003) Suit by shipper and subrogated cargo insurer for damage to cargo shipped from China to U. S. Court holds forum selection clause in bills oflading is mandatory and requires shipper to sue in Korea, flag-state of the vessel. Forum selection clause is *prima facie*valid and should be enforced unless enforcement is shown to be reasonable under the circumstances. Forum selection clause will be deemed unreasonable if party resisting it shows:  1 .     clause is the product of fraud or overreaching;  2.   complaining party would be for all practical purposes deprived of his day in court, due to grave inconvenience or unfairness of selected forum;  3.   fundamental unfairness of the chosen law may deprive plaintiff of a remedy; or  4.          clause contravenes strong public policy of the forum state. A “mandatory” forum selection clause grants exclusive jurisdiction to selected forum, whereas a “permissive” clause reflects contracting parties’ consent to a certain forum, but does not require that disputes be resolved there. Clause providing: all disputes arising under and in connection with this Bill of Lading shall be settled in the flag-state of the ship, or otherwise in the place mutually agreed between the carrier and the Merchant.... is held to be mandatory and required action to be brought in Korea. Enforcement of clause did not contravene public policy embodied in section of Shipping Act requiring common carriers to publish samples of bills of lading. Even if carrier published a slightly reworded clause, sample clause and actual clause used were substantively the same. **Arbitration Award Affirmed** *Banco De Seguros Del Estado v. Mutual Marine Offices, Inc.,*257 F. Supp.2d 681 (S.D.N.Y. 2003) Domestic U.S. insurer sought arbitration of breach of contract claims against Uruguayan reinsurer pursuant to umbrella agreement requiring reinsurer to post prejudgment security. Following confirmation of final award for domestic insurer, foreign reinsurer moved to vacate award or to stay its effect pending appeal, and domestic insurer moved for confirmation of award. Court confirms final award, holding that Inter-American Convention on International Commercial Arbitration does not permit vacating award on basis of motion solely driven by reinsurer’s legal strategy, nor altering award to delay enforcement pending reinsurer’s appeal. Convention applies when arbitration arises from a commercial relationship between citizens of signatory nations, including the U. S. and Uruguay. 9 U.S.C. §301. The Convention incorporates the terms of the Federal Arbitration Act unless they are in conflict with the Convention’s terms. A court applying the Convention can vacate an arbitration award on grounds recognized under the FAA, including: 1.         award was procured by corruption, fraud or undue means; 2.         evident partiality or corruption of the arbitrators; 3.         arbitrator misconduct in refusing to postpone the hearing for sufficient cause, refusing to hear material evidence, or any other misbehavior which prejudices the rights of any party; or 4.         where arbitrators exceed their powers, or execute them so imperfectly that a mutual, definite, final award was not made. 9 U.S.C. §10 (a). An award may also be vacated if rendered in manifest disregard of the law. Under the Convention, district court’s role is strictly limited to confirming award unless it finds one of the specific grounds for refusal or deferral of recognition or enforcement to exist. 9 U.S.C. §§207, 302. This is a summary proceeding that makes a final arbitration award a judgment of the court. Here, Convention did not permit vacatur of award rendered after full and fair hearing, where reinsurer had every opportunity to contest its liability under reinsurance agreement. Nor did Convention permit postponing enforcement of award pending appeal, especially where reinsurer failed to show that it would suffer substantial injury if award was enforced pending appeal.**Loss Of Market Value Recoverable Under Rejection Coverage In Ocean Marine Transportation And Rejection Policy** *American National Fire Ins. Co. v. Mirasco, Inc.,*249 F. Supp.2d 303 (S.D.N.Y. March 10, 2003), on rehearing, 265 F. Supp.2d 240 (S.D.N.Y. May 26, 2003) Action by insurers against insured exporter of beef liver, seeking declaration that they are not obligated to pay insured’s losses pursuant to “rejection” coverage in ocean marine policy. Insured counter-claimed and filed state court action for breach of policy and bad-faith denial of claim. After removal of state court action, parties cross-moved for summary judgment. District court grants insured’s motion in part, holding that alleged misstatements by insured regarding its settlements with other parties were not willful or made with intent to defraud insurers under New York law, where insured had revealed extent of settlements in its counterclaim, and had not revealed them prior to litigation because the insurers had already denied the claim in its entirety. Under New York law, insured only needed to prove that government authorities refused to grant cargo entry into country in order to recover under “rejection” coverage in ocean marine transportation policy that did not define “rejection.” Insured did not have a duty under policy’s sue and labor clause to unload cargo and segregate mislabeled goods from correctly labeled goods so that correctly labeled goods could be sold. It appeared that even if cargo had been unloaded and segregated, Egyptian authorities would have found other grounds for rejection. Rejection insurance by its nature insures against arbitrary acts of government, including arbitrary rejection or detention, or miscarriage of administrative determination. “Loss of market” exclusion in policy did not bar claim, where insured’s customers in Egypt had previously agreed to buy the cargo, and would have done so but for denial of importation by Egyptian government. Insured resold goods in U.S. for lower prices, and thus lost market value, not market. On cross-motions for rehearing, court reaffirms original rulings, finding that the parties essentially attempted to reargue issues and re-present evidence already considered. Court notes that evidence on motions did notconclusively establish whether policy’s “embargo” exclusion applied to some portion of the cargo. The Supreme Court’s definition of “embargo,” not opinion evidence of expert witnesses, is controlling on whether the foreign rejection decree is encompassed within the meaning of the term “embargo” as used in the policy. **Insurer Bound To Pay Agreed Value Of Salvage Services** *Southernmost Marine Services, Inc. v. One (1) 2000 Fifty Four Foot (54’) Sea Ray M/V “Potential,”,*250 F. Supp.2d 1367 (S.D. Fla. 2003) Action by professional salvors against vessel, her owner and insurer for refusal to pay agreed salvage award after vessel and passengers were successfully rescued from position impaled on rock jetty outside Key West Harbor. Insurer paid boat owner’s total claim in the amount of $750,000, and, with advice of experienced marine surveyor, negotiated a $150,000 settlement of salvors’ claims. After mailing payment to salvors, insurer consulted attorney, stopped payment on settlement check, removed vessel from Key West and refused to pay salvors the agreed amount. In amended answer and stipulation of facts, insurer conceded that salvors responded and successfully saved the stranded vessel. Insurer contended that a lower salvage award was warranted because: (a) salvors failed to protect and preserve the vessel; (b) risk to salvors and vessel was insubstantial; and (c) there was no pollution. Following nonjury trial, court concludes that when vessel was found hard aground on rock jetty it had suffered severe hull damage and was in danger of sinking and of further damage from wave action and tides moving it against the jetty. Boat owner read and signed a salvage agreement, owner and passengers were removed, a containment boom was deployed, salvors’ divers patched underwater holes in hull, and vessel was ultimately towed to a boatyard in Key West, where it was hauled and secured on blocks. Mechanics hired by salvors cleaned and preserved the engines, which had been submerged in saltwater while vessel was aground. Insurer’s surveyor negotiated salvors’ original demand of $200,000 down to $150,000, which court finds insurer approved. After preparing and mailing check, insurer decided to back out of the deal and informed salvors the check was not negotiable.Court concludes that all elements of a salvage claim were proved: 1.         that a marine peril exists; 2.         that the service was voluntarily rendered; and 3.         that the effort was successful in whole or in part. Under 11th Circuit standard, a marine peril exists: Where a vessel is in danger of being partially or totally lost through the action of the elements and where it is not being successfully salved when the plaintiff voluntarily undertakes its salvage operation. Court finds salvors entitled to “a full reasonable salvage award” in light of elements to be considered by admiralty court in determining award: 1.         labor expended by salvors in rendering service; 2.         promptitude, skill and energy displayed in rendering service; 3.         value of property employed by salvors and danger to which such property was exposed; 4.         risk incurred by salvors in securing salved property from peril; 5.         value of property salved; and 6.         degree of danger from which property was rescued. Court finds agreed settlement for $150,000 to be a valid, binding contract, and adopts that amount as the fair value of the salvage award. In reaching this result, the court rejects all three reasons advanced by defendant insurer for lower award, based on facts before it. Court finds defendants had no factual basis for disputing salvage award they had agreed to, contracted for, and paid. Award of attorney’s fees and costs is within court’s discretion in admiralty cases, and specifically permitted in salvage cases. Award is appropriate here because salvors were forced to litigate to recover salvage award. Court also awards prejudgmentinterest at the rate of 11% from date of stranding until paid to compensate salvors for loss of use of the funds. Interest rate and period are set on basis of Florida law (“admiralty courts will generally look to appropriate state law in determining questions involving a marine insurance contract.”) *See Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985). **P & I Policy Arbitration Clause Enforced Under Federal Arbitration Act** *Assuranceforeningen Skuld v. Apollo Ship Chandlers, Inc.,*Nos. 3D02-2385 and 3D02-2245 (Florida 3d. Dist. App. Ct., March 19, 2003) P & I club appeals trial court orders staying arbitration and denying its motion to compel arbitration. Court of Appeals reverses, finding arbitration agreement enforceable under Federal Arbitration Act, 9 U.S.C. §1 *et seq.* Insureds sought coverage for a maritime claim filed by a former employee. Club denied coverage and referred resulting coverage dispute to arbitration in Norway pursuant to clauses in P & I policies. Trial court granted Apollo’s motion to stay arbitration and denied Skuld’s motion to compel arbitration. Apollo claims dispute is subject to Florida law, which does not allow arbitration of coverage disputes, asserting that its argument is supported by the McCarran–Ferguson Act, 15 U.S.C. §1011, *et seq. (“*the Act”).Under the Act, a federal provision that regulates insurance is superceded by any conflicting state provision regulating the business of insurance. The Act does not apply here because the parties’ dispute involves foreign commerce. The Act is “intended to apply only to interstate commerce, and not foreign commerce.” Thus it does not provide the basis for applying Florida law to preclude arbitration. Court concludes that all four criteria for enforcement of the arbitration agreement under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards have been satisfied: 1.         there is an agreement in writing to arbitrate the subject dispute; 2.         the agreement provides for arbitration in Norway, a signatory of the convention;3.         the agreement arises out of a legal, commercial relationship; and 4.         one of the parties to the agreement, Skuld, is not an American citizen. Florida courts must enforce arbitration agreements that are valid and enforceable under the Federal Arbitration Act, even where the agreement would not enforceable under Florida law. **Equitable Distribution Of Policy Proceeds Deposited With Court In Interpleader Action** *Agricultural Ins. Co. v. Matthews,*749 N.Y.S.2d 533 (N.Y. Sup. Ct., App. Div., 1st Div., Nov. 26, 2002) Interpleader action by insurer against lessor and lessee of deceased gelding, seeking to deposit livestock insurance proceeds arising from horse’s death into court and to be discharged from further liability. Appellate division reverses lower court’s grant of summary judgment in favor of lessee, holding that he failed to establish timely exercise of purchase option necessary to acquire ownership interest in gelding and entitle him to insurance proceeds. Policy contained “general endorsement” listing lessor as gelding’s owner. Lessee failed to establish extent of his loss under the policy by proving timely exercise of his purchase option under lease, and, therefore, was not entitled to livestock insurance proceeds upon death of gelding in a barn fire. Affidavits submitted in support of lessee’s motion for summary judgment contained conclusory statements of lessee’s intention to purchase gelding, not evidence that purchase option was actually exercised. Letter purporting to exercise option to purchase 21/2 months after death of gelding is a nullity. “Clearly, the lease ended with the death of the horse; that document did not contemplate the purchase of a carcass.” Once an order of interpleader is entered, distribution of proceeds and determination of other relief is equitable in nature. Here, plaintiff insurer is entitled to full interpleader relief on its motion to deposit insurance proceeds into court and receive discharge from further liability. Lessee should receive proportionate refund of lease payments for unexpired portion of lease following gelding’s death, together with insurance premium he paid, which was not contractually required. Lessor/owner of horse is entitled to balance of stake deposited with court by plaintiff insurer.**World Trade Center Decision Affirmed On Appeal** *World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.,*(2d Cir. Sept. 26, 2003) Several weeks after the second anniversary of September 11, the Second Circuit Court of Appeals dealt a severe blow to efforts by the leaseholder of the WTC complex to recover double his $3.5 billion policy limits for the destruction of that day. Chief Judge Walker wrote the opinion affirming summary judgment for three insurers on the “occurrence” definition, and affirming the district court’s holding that fact issues existed concerning the meaning of the word “occurrence” in the policy issued by Travelers. As the insurance policies had not been issued before September 11, the coverage dispute centers on the meaning of the word “occurrence” in binders that the various insurers issued before the tragedy. The insurers contend that the event was one “occurrence” based on binders which incorporate the terms of a “WilProp form” whicih defines “occurrence” as “…all losses or damage…attributable directly or indirectly to one cause or to a series of similar causes....” The lessee of the property, a consortium led by Larry Silverstein, maintains that the excess insurers agreed to follow the form of a Travelers policy issued on September 14. As the Travelers policy does not define occurrence, the meaning that New York courts have given the term over the years should result in a finding that the limits apply separately to each of the towers. Judge Martin of the Southern District rejected Silverstein’s argument and held that as the only terms presented to the St. Paul, Hartford, and Royal underwriters were on the “Wilprop form”, the coverage they subsequently bound necessarily incorporated those terms, including the “occurrence” definition. The court further found that the events of September 11 were one occurrence and granted summary judgment to those insurers. On appeal Silverstein argued that it was error for Judge Martin to reject evidence that each of the underwriters actually intended to “follow the [Travelers] form.” The opinion offers an instructive recap of the placing history and a framework for analyzing the law of policy formation. Significantly, the Second Circuit ruled that St. Paul, Hartford and Royal could not be bound to the terms of a policy of another insurer that had not been issued when they agreed to coverage, and that they had therefore never reviewed. Any evidence that those insurers may in fact have agreed tothe Travelers form was irrelevant, according to the court, and the only issue was the terms of the particular binder that each issued before September 11. After recounting the negotiations for each policy, the court found that there was no genuine dispute that all three insurers bound coverage on the basis of the Wilprop form. Having determined that the Wilprop form controls, the court went on to hold that “no finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes sixteen minutes apart as a result of a single, coordinated plan of attack was, at the least, a ‘series of similar causes.’” Summary judgment for St. Paul, Royal and Hartford was affirmed. Silverstein had also appealed the district court’s decision denying summary judgment under the Travelers policy on the grounds that there were disputed issues of fact with respect to the undefined word “occurrence” in that policy. While Travelers had also not issued a policy as of September 11, the policy that they issued on September 14 specified a policy period reaching back to July 19, 2001. On this basis Silverstein argued that “occurrence” was not defined and that it should be given the plain meaning New York courts have universally ascribed to it. The court briefly recounted the placing history for the Travelers policy, noting that that coverage was bound subject to negotiations over the final terms of the policy, including the occurrence definition. Thus, the question was whether a binder issued before the loss trumps the terms of a policy issued after the loss. After finding that New York law clearly favors the binder as the controlling agreement when it is the only writing in existence before the loss, the court ruled that the terms of the Travelers binder, rather than the September 14 policy, governed the parties’ obligations. The court then discussed settled rules of policy construction to the facts. If the terms of an insurance policy or binder are unambiguous, the meaning can be resolved as a matter of law. If the terms are ambiguous, then the parties may introduce parol or extrinsic evidence of their intentions as to the meaning of the word. In determining whether a term is ambiguous, courts should “consider the ‘customs, practices, usages and terminology as generally understood in the particular trade or business.’”Silverstein argued that “occurrence” is unambiguous and that it means the direct physical cause of loss. As there were two direct impacts from two different airplanes, there must be two separate occurrences. Most of the cases that Silverstein cited for this proposition were rejected by the court, however, because they involved third party liability policies and therefore “…involve different interests, both public and private, than first-party property insurance cases such as the instant case”. After digesting its only prior decision involving the word “occurrence” in a first party property insurance policy, the Court held that “*Newmont Mines [Newmont Mines v. Hanover Ins. Co.,*784 F2d 127 (2d Cir 1986)] confirms our belief that…the meaning of the undefined term ‘occurrence’ is an open question as to which reasonable finders of fact could reach different conclusions” (“To be sure, a jury could find two occurrences in this case, as it did in *Newmont Mines*, or it could find that the terrorist attack, although manifested in two separate airplane crashes, was a single, continuous, planned event causing a continuum of damage that resulted in the total destruction of the WTC, and thus, was a single occurrence”). As the term is ambiguous, its meaning is to be decided at trial and the parties may introduce extrinsic evidence to the jury regarding their intentions. ***Multiple Yacht Policies And Homeowner’s Policy:* Non-Operating Passenger Not Covered Under Yacht Policies, But Covered By Homeowner’s Personal Umbrella Liability Endorsement.** *National Ben Franklin v. Levernier,*2003 AMC 1461 (E.D.Wisc. 2003). A collision occurred while the owner and operator of 37 foot Sea Ray, Hoffman, left the wheel of the vessel to go down below. A passenger, Levernier, was seated alongside the seat before the helm. Hoffman had been navigating the vessel, including setting waypoints in the vessel’s automatic pilot system during the voyage. The vessel was on automatic pilot at the time of the collision. On motions for summary judgment in a declaratory judgment action, the court declared that Hoffman’s yacht policy on the 37 foot Sea Ray did not provide coverage for Levernier because he was not operating the vessel. Similarly, Levernier’s yacht policy on his 24 foot Sea Ray (not involved in the collision) did not provide coverage, because he was not “operating” another’s vessel with the permission of the owner. Finally, the court found coverage under Levernier’s homeowner’s personal umbrella liability endorsement which did not exclude coverage with respect to vessels exceeding 50 horsepower. (Hoffman’s vessel’s engines exceeded 50 horsepower).***Yacht Policy:* Exclusionary Clause Prohibiting Permissive Operators Deemed Void Under N.Y. Ins. § 3420(E)** *Jefferson Ins. Co. v. Cassella,*261 F. Supp.2d 160 (E.D.N.Y. 2003) *(vacated in part)*. Yacht policy insured a Donzi 382X boat with trading limits of Long Island Sound and Great Southern Bay. While the boat was being operated by Thomas Cassella, with permission of the owner and assured, it collided with another vessel. The insurer brought a declaratory judgment action seeking to void coverage on the basis of: 1) an endorsement issued after the commencement of the policy, and unsigned by the insured, declaring the insurance null and void unless the assured, Michael Cassella, was the sole operator; and 2) breach of the doctrine of utmost good faith for failure to disclose permissive operators. Court held that the endorsement was an exclusion, not a warranty, and was void under N.Y. Ins. §3420(e) which prohibits such exclusions from coverage. New York Insurance Law 3420(i) exempting “ocean going vessels” from regulation, was held not applicable because the policy trading limits restricted trade to the Sound and the Bay. The alleged breach of utmost good faith was held not material. ***General Average:* Cargo Need Not Contribute In General Average And Entitled To Indemnification For Salvage Payment And Attorney’s Fees.** *Birmingham Southeast, LLC v. M/V MERCHANT PATRIOT,*2003 AMC 1559 (S.D.Ga. 2000). Shipowner filed a petition for exoneration from or limitation of liability. The court found that the MERCHANT PATRIOT was unseaworthy at the commencement of the voyage, the vessel owner had failed to exercise due diligence, and the unseaworthy condition caused loss of or damage to cargo. Cargo interests sought declaratory relief and the court issued an order stating that the shipowner was not entitled to general average contributions based on the court’s findings in the limitation action. Cargo also received reimbursement for salvage payments made directly to the salvor and for attorneys’ fees expended while defending the salvage action. Cargo’s claim for reimbursement of salvage payments was treated as general average and, therefore, was not precluded by the one year COGSA limitation on actions.***Yacht Policy:* Utmost Good Faith; Breach Of Cooperation Clause; Breach Of Fraud And Concealment Clause; Credibility Established By A Penchant For Chocolate Martinis** *Rocco v. Continental Ins. Co.,*2003 AMC 1237 (Conn. Super. Ct. 2003) Rocco owned a 1987 34 foot Wellcraft which he purchased for $65,000. On his application for insurance, Rocco stated that he purchased the vessel for $125,000, and requested U.S. Inland Lakes and Rivers navigation limits, although he intended to cruise in the coastal waters off Long Island Sound. A month after obtaining coverage, Rocco discovered his vessel missing from the marina. The court determined that Rocco lied to the police about numerous material facts including his whereabouts on the alleged date the vessel was found missing. The bartender at the marina testified that Rocco and his new wife passed by the bar and went down to the dock to board the boat on the date that Rocco reported to the Police that the vessel was missing. The bartender’s testimony was deemed credible due to Rocco’s wife’s penchant for chocolate martinis. The bartender specifically recalled the event because he had already commenced preparing a chocolate martini in anticipation of the wife’s usual order. In this state court action, the court applied federal admiralty law finding a breach of the obligation of utmost good faith, the Cooperation Clause and the Fraud and Concealment Clause. The assured failed to disclose the true purchase price of the vessel and the actual intended trading area. The assured failed to cooperate with the insurer during the investigation and concealed or otherwise defrauded the insurer concerning certain material facts after the event of the loss. ***Yacht Policy:* Assured Had A Good Faith Obligation To Disclose Motor Vehicle Violations; Damages Not Allowed For Loss Of Use Of Pleasure Vessel** *Continental v. Muradyan,*2003 AMC 1536 (C.D. Cal. 2003). Continental Insurance, through America Yachts, Ltd., issued a policy for insurance on a 33 foot Wellcraft speedboat. The boat was damaged while being towed behind a motor vehicle on the Los Angeles freeway. The application for insurance inquired regarding Motor Vehicle Violations. Theassured replied that he had none. After the loss occurred, the insurer’s investigation revealed that the assured had five prior violations; and that the assured had concealed the fact that another insurance company, aware of the driving record, had provided a premium quote six times higher. The insurer commenced an action for: 1) rescission, 2) voiding of the insurance policy, and 3) declaratory relief based on non-disclosure and misrepresentation. Defendant alleged bad faith, negligence on the part of the insurer in failing to investigate the motor vehicle record at the time of application, and sought loss of use damages. The court refused to rule on the “utmost good faith” issues on a motion to dismiss, stating that the issue should await summary judgment. The claim for loss of use of a pleasure vessel, however, was dismissed. The court also held that an insurer need not investigate the accuracy of the information on an insurance application until a loss occurs. ***P & I Insurance:* Choice Of Law Provision In P&I Club Rules Will Be Enforced In Spite Of “Greatest Interest Rule.”** *Millennium Seacarriers,*2003 AMC 1185 (S.D.N.Y. 2003) Millennium Seacarriers filed for Chapter 11 bankruptcy as operator of nineteen ocean-going merchant vessels. The Skuld P&I Club filed a Notice of Preferred Maritime Lien for Necessaries pursuant to the U.S. Federal Maritime Lien Act for unpaid insurance premiums. The court held that the Norway choice of forum and law clause, contained in the P&I Club Rules must be upheld, although the United States had a “greater interest” in the dispute. Under Norwegian law, Skuld was not entitled to a priority for its unpaid insurance premiums claim. ***All Risk Insurance:* Fortuity And Latent Defect** *City of Burlington v. Indemnity Ins. Co. of N.A.*(2d Cir. June 27, 2003) The City of Burlington, between 1996 and 2000, held two all-risk policies that insured a power generator with defendant insurer. During the coverage period, approximately 33 welds on the generator’s boiler developed leaks as a result of intrinsic defects. Defendant disclaimed coverage for the defective and failed welds and plaintiff sued. The U.S.District Court for the District of Vermont held that the defective and failed welds were not covered because plaintiff’s policies excluded losses caused by a “latent defect.” The Court of Appeals for the Second Circuit certified questions to the Vermont Supreme Court, holding that the correct disposition of the case depends on two undecided issues of Vermont law. The issues are whether under Vermont law all-risk policies cover only losses that are externally caused (*i.e.,*fortuitous events) and, if not, whether under Vermont law, a paragraph of plaintiff’s policies that excluded from coverage losses due to “latent defect” and various other listed internal causes applied to the failed welds. The Court of Appeals noted that “latent defect” was not defined in the policy and that Vermont courts have yet to consider the definition of “latent defect” in the context of an “all-risk” policy. Vermont courts have also not ruled on how the term “direct physical loss or damage” should be interpreted in an insurance contract. The court of appeals did decide that coverage under the policies extended only to the 33 leaks that occurred during the policies’ coverage period and not to the cost of repairing defective welds that had not yet failed.   *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 MLA Carrier Security Committee ReportbyBruce G. Paulsen, Chairman The Carrier Security Committee continues to monitor the rapid developments in the security area as they impact carriers and crew. As of the date of this printing, the Office of Management and Budget had cleared the U.S. Coast Guard final regulations on maritime security. These regulations are intended to replace the interim regulations published on July 1, 2003 and are expected to be published before the end of October, 2003. Committee Vice Chair Douglas B. Stevenson reports that on 20 June 2003, at the United States’ initiative, the International Labor Organization adopted the Seafarers’ Identity Documents Convention (Revised) (ILO-185). ILO-185 will set international standards for seafarer identification documents (“SID”) that will provide reliable, positively verifiable and internationally acceptable identification. ILO-185 also codifies mariners’ rights to shore leave and requires member countries to accept SIDs as substitutes for visas for the purposes of shore leave. The standards for SIDs enumerated in ILO-185 satisfy the technical requirements of the U.S. Enhanced Border Security and Visa Reform Entry Act of 2002 (e.g. machine-readable, tamper-proof, digital photograph, biometric indicator) and should therefore be acceptable by American immigration authorities as a substitute for a visa or the basis for a visa waiver. Crewmembers not in possession of a SID would have to obtain a visa to apply for shore leave in the United States.**COMMITTEE ON CARRIAGE OF GOODS BY SEA****CARGO NEWSLETTER NO. 42, FALL 2003** *Editor*:  Michael J. Ryan*Associate Editors*:    Edward C. RadzikDavid L. Mazaroli **IS THAT ALL IT TAKES?.....** *Continental Ins. Co. v. The Polish Steamship Co.*,No. 02-9002; (2d Cir. Oct. 8, 2003) Subrogated underwriters sued for loss or damage to a cargo of steel coils. Suit was brought against the vessel owner, who filed a third-party complaint against the charterer. The charterer moved to dismiss the third-party complaint as time-barred and to stay the claims against it pursuant to an arbitration clause in the charter party. The owner cross-moved to dismiss the action based on the arbitration clause or, alternatively, to stay the proceeding pending arbitration. The district court dismissed the action in its entirety, finding that the bills of lading incorporated the charter party arbitration clause and that the arbitration clause applied as between the subrogated underwriter and the defendant owner and charterer. The subrogated cargo underwriter appealed and challenged only the portion of the ruling that found the bills of lading incorporated the charter party. On appeal, the circuit court noted the general rule that where terms of the charter party are expressly incorporated into bills of lading, they are part of the contract of carriage and are binding upon those making claims for damages for breach of that contract. To incorporate a charter party effectively, the bill of lading must specifically refer to a charter party and use unmistakable language indicating that the charter has been incorporated. The bills in question on their face referred to conditions of carriage on the overleaf, the first of which provided all terms and conditions, etc., of the charter party, “dated as overleaf, are herewith incorporated.” The court referred to previous decisions where similar language effectively demonstrated  intent  to  incorporate  the  arbitration  clause of  the charterparty. As to whether the bills of lading specifically identified the charter party, they were issued on a standard CONGENBILL form. The face of each bill contained a line reading “freight payable as per charter party dated             ” and “06.01.2000.” was typed in the blank. In each instance, the word payable was crossed out and replaced with the word “PREPAID.” While the court stated it would have been preferable if the charter party had been identified in more detail, it found the specification of the date of the charter party, along with the reference to charter parties on the bill’s face and overleaf, sufficed to identify the charter party so as to give effect to incorporation (citing cases). The plaintiff argued that the reference was inadequate because the charterer was not named on the bills. The court rejected this argument, stating “the charter party was specifically identified by date, which is all that is required.” As to the plaintiff’s argument that the date of the charter party on the bill should be ignored because it was included in a line specifying the terms for payment of freight and, thus, was a nullity because freight was prepaid, the court stated the provisions certainly served to identify the charter party, “which is all that we are supposing it to do.” The court thus affirmed the dismissal, finding that the charter party was effectively incorporated in the bills of lading and that it was appropriate to dismiss the case in favor of London arbitration. **BUT “RELEVANT” NOT ENOUGH.....** *MacSteel Intl. U.S.A. v. M/V JAG RANI* (S.D.N.Y. Oct. 7, 2003) (Koeltl, J.) Plaintiff sued the vessel and its registered owner for alleged damage to a shipment of steel. The owner moved to compel arbitration and to stay or, alternatively, dismiss the complaint. The charter party contained an arbitration clause which provided for arbitration in London. A bill of lading was issued on behalf of the master, which listed the plaintiff as consignee. The bill was on a CONGENBILL form and on the face of the bill, the pre-printed freight clause the words “AS PER RELEVANT” were typed in the blank provided for the charter date. The court considered the primary question to be whether the bill of lading, specifically the phrase “AS PER RELEVANT” incorporated thecharter party and its arbitration provision. The court noted prior decisions where courts had held that a bill of lading incorporated a charter party where the bill specifically referred to a charter party of a particular date or to the signatories to a charter party. Conversely, the court noted cases where the charter party was not deemed incorporated if the space provided in the bill of lading for insertion of the name and date of the charter party had been left blank. In the case before it, the court noted the situation did not fall into either of these well defined categories. The space was not left blank because the words “AS PER RELEVANT” were inserted. At the same time, the words did not provide the date or place of making of the charter party or its signatories. The court found the insertion was not sufficiently specific and the term “AS PER RELEVANT” was no more specific or unmistakably an attempt at incorporation than the phrase “AS AGREED,” which had been found insufficient in a previous case. As there was no specific reference to a charter party in the bill and the bill failed to incorporate the charter party in unmistakable language, the owner had the burden of showing that the plaintiff had either actual or constructive notice of the incorporation of the charter party. Thus, the defendants’ motion to compel, dismiss or stay was denied without prejudice, pending discovery as to the consignee’s actual or constructive notice of the incorporation of the charter party. **AND NOTHING SURELY DOESN’T CUT IT.....** *Hawkspere Shipping Co. Ltd. v. Intamex, S.A.,*330 F.3d 225 (4th Cir. May 27, 2003) The ocean carrier filed a claim *in rem*against the cargo and *in personam* against the shippers, seeking to recover unpaid freight. The shippers filed a counter claim contesting the lien and seeking damages, and alleged they had sent payment to the cargo consolidator who apparently had failed to forward the payments to the carrier. The district court granted summary judgment in favor of the carrier and the shippers appealed. The Fourth Circuit noted that the shipment involved two distinct contracts: (1) the charter party and (2) the bills of lading. As the dispute was between the carrier/shipowner and the shippers, the court focused on thebills of lading. The court noted the charter played no roll in the preparation of the bills of lading and the shippers were in no way involved in the charter party. The shippers never saw a copy of the charter party nor were they otherwise aware of its terms. Neither shipper had any communication with the owner prior to the arrival of the cargo at the discharge port. The shippers argued that English law governed and that under English law, there was no right to assert a maritime lien against the cargo *in rem* for unpaid freight. The argument was based on the law and arbitration clause in the charter. The owner countered that the shippers were not parties to the charter party and the charter terms had not been successfully incorporated into the bills of lading. The court of appeals noted courts consistently hold that attempts to incorporate a charter party into a bill of lading are ineffective where the spaces in the bill that would have identified the charter party are left blank. In this case, the date of the charter party was not included and the bills contained no reference whatsoever to the specific charter party. The court also found the shippers were not provided with any effective notice of the charter party’s terms and, thus, concluded that the terms of the charter had not been successfully incorporated. [The court also considered arguments as to choice of law, agency, estoppel and assumption of risk, etc.] The court affirmed the district court’s decision that the owner could proceed *in rem* or alternatively *in personam*against the shippers for payment of freight. (One judge concurred in the judgment but dissented on the ground that the charter party terms were properly incorporated into the bills of lading as there was only one charter party for the vessel and the bills of lading specifically referred to that vessel.) **PROFIT ON PANTS PRECLUDED, PAUCITY OF PROOF.....** *Levi Strauss & Co. v. Sea Land,*2003WL 21108311 (S.D.N.Y. May 15, 2003) (Martin, J.) A container of mens pants was shipped from Honduras and discharged at Port Everglades, Florida for on-carriage to Little Rock, Arkansas. A trucker, retained by the ocean carrier, took possession of the goods; however, the container was stolen from the trucker’s yard in Florida. The carrier did not dispute its liability, but disputed the measure of damages.The court noted that the general measure of damages under COGSA is the difference between the fair market value of the goods at destination in the condition in which they should have arrived and their fair market value in the condition in which they actually arrived. The court also noted that lost profits are available under COGSA upon a showing of actual losses: [T]o recover market value, plaintiff ‘must show that it in fact suffered lost profits and that it could not mitigate damages by substitution of comparable goods from the market.’ The plaintiff did not show it was unable to fill customers’ orders from existing inventory or that it could have made additional sales had the goods been delivered. The court stated that a damage award for lost profits would result in a recovery greater then the loss suffered and thus limited plaintiff’s damages to the costs incurred in the manufacture of the goods. As to the carrier’s argument that plaintiff had not adequately proved the specific goods were loaded in the container, the court noted that documentary evidence was presented showing that as the goods were loaded into cartons, the bar codes were scanned and electronically became part of plaintiff’s database and the invoices received from the manufacturer indicated which goods were contained in the stolen shipment. The court, thus, found the evidence sufficient. In the ocean carrier’s cross-claim against the trucker, the trucker alleged its tariff provided for a maximum liability of $100,000 (against a loss of $243,651.81). The court found there was no agreement between the carrier and trucker incorporating the trucker’s tariff or referring to it. Therefore, there was no basis for holding that the carrier was offered an opportunity to declare a higher value or had agreed to the trucker’s limited liability. The only agreements between the trucker and the carrier were the Intermodal Interchange Agreements, none of which referred to the trucker’s tariff. The court granted summary judgment against the carrier and judgment in favor of the carrier against the trucker for the full amount. **CELL PHONES, CARMACK and CONTAINERS.....** *AIG Uruguay Compania de Seguros, S.A. v. AAA Cooper Transp.,*No. 02-11570 (11th Cir. June 19, 2003)A shipment of cellular telephones shrink wrapped on pallets was trucked from Illinois to Miami where it was to be forwarded to Uruguay. At Miami, the shipment went missing. The subrogated underwriter sued the trucker and the district court entered judgment in favor of the subrogated underwriter for the full value of the lost shipment. The trucker appealed, arguing that the district court had erred by allowing the subrogated underwriter to prove its *prima facia* case with circumstantial evidence and, second, by holding that the trucker had not properly limited its liability on the shipment. As to the subrogated underwriter’s *prima facia* case under the Carmack Amendment, the court noted the difference between goods received by a carrier not in a sealed container and those received in a sealed container. With respect to the former, the carrier has the ability before and during the shipment to ascertain the nature and condition of the shipment and a recitation of good condition in the bill of lading may suffice as proof that the goods were delivered to the carrier in good condition. With respect to sealed containers, the carrier has no independent ability to ascertain the contents of the shipment. Thus, the shipper will be held to a higher standard of proof. Here, the court noted the shipment was on three pallets, shrink wrapped in clear material. Each pallet contained either 16 or 34 cartons, each of which in turn contained 5 smaller boxes, each allegedly containing a cellular phone. The court noting a shipment is considered to be a “sealed container” if its contents are not visible and open to inspection and that the pallet could not have been opened by the carrier for inspection in a significant way. The transparency of the outer layer of tape or wrapping did not negate the fact that the actual phones were inside two more layers of boxes. In effect, the court equated the shrink wrapped pallets to a “sealed container.” Therefore, the subrogated underwriter was required to present direct evidence of the contents and the district court erred in concluding otherwise. At the same time, the court found the evidence presented was sufficiently direct as to the contents. When the phones were packed their serial numbers were scanned into the manufacturer’s system and that record followed the order from station to station as it proceeded toward shipment. The serial numbers appeared automatically on the invoice generated before the shipment left the facility. The record was made contemporaneously withthe sealing of the phones inside the cartons and identified the contents of the carton, even though there was no testimony about the individual responsibility for scanning the phones. The court made reference to the practicalities of largely automated modern industry. While the circuit court found the district court had erred in its analysis, the appellate court concluded that the lower court did not err in its result. As to the limitation of liability, a non-negotiable bill of lading was issued which contained no space for a declaration of released value. Thus, the trucker was liable for the “actual loss or injury to the property.” The trucker argued that its liability should be limited on the basis of a mis-description in the bill of lading and urged the court to “reform” the bill of lading to identify the type of phones now claimed to have been lost. The court did not accept this argument, noting that the federal courts were not in existence to protect sophisticated business actors from each other, and in the absence of fraud or other sufficient cause for doing so, would not reform a contract between two such parties. There was no evidence of fraud. Even if the goods had been correctly described, a higher rate might have been charged; however, the goods would still have disappeared, the subrogated underwriter would have paid the claim, and a subrogee would still have sued the trucker for the full value of the shipment. Accordingly, the court affirmed the judgment against the trucker. **CONTRACTS AND CARMACK.....** *The Tokyo Marine & Fire Ins. Co., Ltd. v. Mitsui O.S.K. Lines, Ltd.,*No. 02-3617 (C.D. Cal. June 27, 2003) (Rafeedie, J.) The court considered whether two defendants, an ocean carrier and rail carrier, could assert a $500 package limitation. The court found that the rail transportation at issue was undertaken under a contract entered into pursuant to §10709(a) of the Carmack Amendment, an exempt rail transportation agreement. Thus, the Carmack amendment was inapplicable, including its restriction on the availability of the $500 per package limitation on the liability of ocean carriers. The court further found the extension of the COGSA $500 limitation in a through bill of lading was valid and that the railroad was a beneficiary of the limitation under the Himalaya clause contained in the ocean carrier’s bill of lading.**LEERY AT OWNER’S STATUS IN JAPAN, COURT LEANS TO LOUISIANA LITIGATION.....** *Kanematsu USA Inc. v. M/V OCEAN SUNRISE*, 2003 WL 21241790 (E.D. La. May 23, 2003) Plaintiffs, cargo owners of a shipment of steel tubing which moved from Japan to New Orleans and Houston, filed suit for damage to the shipment and depreciation against the vessel owner in the Eastern District of Louisiana. The vessel owner moved to dismiss the complaint on the basis of a forum selection clause in the ocean carrier’s bill of lading, which mandated jurisdiction in Tokyo’s district court. The district court considered three prior cases in the Fifth Circuit which had addressed the issue of whether enforcement of a Japanese forum selection clause is enforceable or void as a violation of public policy. In particular, the court focused on the issue of whether the plaintiff could adequately demonstrate that enforcement of the Japanese forum selection clause would lessen the liability of the carrier in contravention of 46 U.S.C. §1303(8) of the U.S. COGSA. Plaintiffs asserted that the Japanese courts would not recognize their claims against the vessel owner as a “carrier” under the bill of lading. Plaintiff’s Japanese attorney’s affidavit stated that under Japanese law, “[no] claim” would “lie” based on the bill of lading against the vessel owner, and that the only claim in Japan would lie in tort. Defendant’s Japanese legal expert contended that this was a distinction without a difference because Japanese COGSA would be applicable to a tort claim. The district court held that if the only claim in Japan would lie in tort, the motion to dismiss on the basis of the forum selection clause should be denied, since it was clear that the Plaintiffs’ rights under U.S. COGSA to proceed against the owner as a carrier would be diminished under Japanese law in violation of § 3(8). **COURT DECLINES BID FOR TEXAS TWO STEP.....** *Ferrosteel Inc. v. M/V EAGLE,*No. 02-1887(S.D.N.Y. June 30, 2003) (Berman, J.) Plaintiff alleged loss and damage to a shipment of steel beams and pipes which moved under a charter party for carriage from Shanghai, Chinato Houston, Texas. Plaintiff sued in the Southern District of New York but later moved to transfer the case to the Southern District of Texas after discovery had disclosed that liability might lie with the stevedore who was not subject to jurisdiction in New York. The court denied plaintiff’s motion to transfer primarily on the ground that the contract of carriage had specified a forum in the Southern District of New York, a fact that initially had not been revealed by the plaintiff. While plaintiff argued that the convenience and fairness factors set forth in 28 U.S.C. §1404 dictated a transfer to the Southern District of Texas, the court held that these factors were insufficient to override the contractual forum chosen by the parties. The court cited precedent holding that a plaintiff seeking to move for a change of venue from its initially chosen forum must show a change of circumstances since the filing of suit in order to prevail:  A plaintiff moving to transfer venue has already had an opportunity to choose the venue when filing the action. Therefore, a plaintiff moving to transfer must demonstrate, *inter alia*, that after the action was filed there was a change of circumstances that warrants transferring the action to the transferee forum. The court found the plaintiff’s argument for change of circumstances to be unpersuasive, notwithstanding that the entire action could proceed in Texas against both the vessel owner and the stevedore. The court found that the relevance of the claim against plaintiff’s stevedore “was known or should have been known to plaintiff long before the filing of this law suit.” The court held that the plaintiff could continue to prosecute its claim in New York against the vessel owner and file an independent action against the stevedore in Texas if it saw fit to do so. **“AGREED STOPPING PLACE” NO BIG DEAL THIS TIME.....** *Royal & Sun Alliance v. American Airlines, Inc.,*No. 02-6541 (S.D.N.Y. July 23, 2003) (Sweet, J.) Plaintiff commenced a subrogation action to recover for the non-delivery of four crates of aircraft parts shipped by air from Brussels,Belgium to Tulsa, Oklahoma. The cargo was originally scheduled to be transported from Brussels to Chicago and then trans-shipped from Chicago to Tulsa. The cargo was initially booked as weighing 75 kilograms. However, the booking was changed to reflect the actual weight of 374 kilograms. Because the actual cargo was heavier than originally expected, the shipment was re-scheduled for delivery one day later and was re-routed through Dallas instead of Chicago. Sometime during the transit, four of the five crates shipped were lost or stolen. Plaintiff moved for partial summary judgment for a declaration that the shipment was governed by the original Warsaw Convention and that the air carrier’s limitation of liability defense under the Hague Protocol should be dismissed. The air carrier argued that the original Warsaw Convention did not apply because of the United States’ adherence to the Hague Protocol. The air carrier submitted that the Hague Protocol “removed most of the exceptions to limited liability,” including the “agreed stopping places” requirement. The full value of the missing crates was $122,730. Under the Hague Protocol, the air carrier’s liability would be limited to $7,480. The court held that the shipment was governed by the Hague Protocol and that the air carrier was entitled to limit its liability. The court found that when the United States ratified the Montreal Protocol (which amended the Warsaw Convention), the United States acceded to the Hague Protocol. The court distinguished the case law relied upon by the plaintiff, namely, *Chubb v. Asiana Airlines* and *Fujitsu Ltd. v. Federal Express Corp.* In *Chubb*, the shipment took place prior to the Hague Protocol. In *Fujitsu*, the Second Circuit expressly recognized the “entry into force of the Hague Protocol in March 1999.” **PLAINTIFF SINGS MARIACHI BLUES.....** *George Weintraub & Sons v. ETA Transp.,*No. 01-6417(S.D.N.Y. Aug. 28, 2003) (McKenna, J.) Plaintiff, a men’s clothing importer and wholesaler, purchased a shipment of men’s suits from its vendor in Mexico and arranged to have them sent directly by truck from the vendor’s factory to plaintiff’s customer in Houston, Texas. Shortly after the truck carrying the shipment left the vendor’s facility in Mexico, armed thieves hijacked the truck and stole the shipment.Plaintiff brought an action against a transportation broker who was also a licensed motor carrier in the United States. The defendant broker did not itself take possession of the goods, but rather arranged for a Mexican trucking company to pick up the shipment and deliver it to the broker’s terminal in Laredo, Texas, just across the United States/Mexican border. On cross motions for summary judgment on the issue of liability, the court ruled against the plaintiff and in favor of the defendant. The court found that the defendant was not a common carrier or baillee *vis a vis* the plaintiff, but merely a freight forwarder. The defendant did not issue a bill of lading nor did it physically take possession or transport the goods: . . . The facts here clearly show that E.T.A. contracted as a freight forwarder and not a common carrier, to arrange for the transportation of Plaintiff’s goods. E.T.A. “was hired to act as a ‘travel agent’ for [Plaintiff]: it set things up and made reservations but did not engage in any hands-on heavy lifting” (quoting from *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F3d. 126 (2d Cir. 2000). *Newsletter Editors’ Note:    Acknowledgment and thanks are extended to Messrs. Michael Marks Cohen and David M. Mazaroli for their contributions.***COMMITTEE ON RECREATIONAL BOATING****NEWSLETTER, FALL 2003** *Editor:*Frank P. DeGiulio **Army Corps of Engineers Liable for Failure to Conspicuously Mark Dam on Ohio River** *McMellon v. United States,*338 F.3d 287 (4th Cir. 2003). On an August afternoon in 1999, the operators of four jet skis heading downstream on the Ohio River in West Virginia mistook the Robert C. Byrd Lock and Dam for a bridge. When they finally realized they were not encountering a bridge, it was too late. The vessels and their operators plunged over the gates of the dam into the water below, a vertical distance of about 25 feet. Although there were several warning signs posted above the dam, the jet skiers did not see them. Local boaters testified that the warning signs were either obscured by vegetation or difficult to read. The operators of the jet skis brought suit against the United States for personal injuries pursuant to the Suits in Admiralty Act, 46 U.S.C. § 741 et seq. (“SAA”) in the U.S. District Court for the Southern District of West Virginia. The district court entered summary judgment in favor of the United States, finding that although the government was not immune from suit, in this particular case the Corps of Engineers had no duty to warn the jet skiers of the dam. *McMellon v. United States*, 194 F. Supp. 2d 478 (S.D.W.Va. 2002). The plaintiffs appealed. Over a strong dissent, a panel of the U.S. Court of Appeals for the Fourth Circuit reversed the district court’s decision in *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003). The panel agreed with the district court’s finding that under the SAA the United States cannot avail itself of the “discretionary function exception” to the federal government’s waiver of sovereign immunity and affirmed this part of the district court’s decision. However, the panel also held that the Corps of Engineers had both a regulatory and a legal duty to provide adequate warning to vessels approaching a dam on the Ohio River and, therefore, remanded the case to the district court for a determination of the government’s liability. The SAA permits an injured party to bring an admiralty action against the U.S. government “in cases where if ... a private person or property were involved, a proceeding in admiralty could be maintained.” 46 U.S.C. § 742. The Federal Tort Claims Act, the SAA’s non-maritime counterpart, also waives the federal government’s immunity from suit, but includes a so-called “discretionary function exception,” which continues to immunize the government from claims that are based on the performance or non-performance of a federal agency’s “discretionary function or duty.” Although the SAA does not contain an explicit discretionary function exception, nearly all federal courts have held that the exception is to be implied in cases falling under the SAA, in part to avoid judicial second-guessing of discretionary agency activity. In fact, the Federal Courts of Appeal in the First, Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have all held that the SAA incorporates the discretionary function exception to liability contained in the Federal Tort Claims Act. Notwithstanding the decisions of virtually every other federal circuit, in 1975 the Fourth Circuit Court of Appeals considered the argument and refused to imply a discretionary function exception in the SAA. *Lane v. United States,*529 F.2d 175 (4th Cir. 1975). Two of the three Fourth Circuit judges in *McMellon* refused to accept the government’s arguments that the *Lane*decision should be overruled and, therefore, declined to read a discretionary function exception into the SAA. Thus, the Fourth Circuit continues to stand alone in its position that the federal government may not rely on the discretionary function exception to sovereign immunity in cases under the SAA. Citing 33 C.F.R. § 207.300(s), the majority found that the Corps had a regulatory duty to “conspicuously and appropriately mark the limits of the restricted area around the dam.” The applicable regulation, which governs Corps of Engineer activity on the Ohio River, states as follows: “*Restricted areas at locks and dams*. All waters immediately above and below each dam, as posted by the respective District Engineers, are hereby designated as restricted areas. No vessel or other floating craft shall enter any such restricted area at any time. The limits of the restricted areas at each dam will be determined by the responsible District Engineer and marked by signs and/or flashing red lights installed in conspicuous and appropriate places.” The majority broadly read the last sentence to impose a duty on the Corps to “conspicuously mark the boundaries of any area surrounding each dam it decides to restrict.” The majority concluded that jet skiers werewithin the class of persons that the regulation was meant to protect, and that the injury suffered by the plaintiffs was the kind of harm that the regulation sought to avoid. Thus, having chosen to designate the approach to the Robert C. Byrd Lock and Dam as a “restricted area,” the Corps was required to adequately warn oncoming jet skiers of the restriction. In addition to its regulatory obligations, the Corps also had, according to the court, a duty under general maritime law to warn the public of the dam’s presence. The court analogized the Corps’ duty to that owed by a private property owner, namely the duty to warn others if one’s property constitutes an obstruction to navigation. The court did acknowledge, however, that the federal government is not bound to ensure the safety of every inch of the nation’s waterways. Rather, the Corps’ legal duty in this case was derived from its status as an “owner” of a navigational hazard. The Corps defended on the grounds that the plaintiffs were mere trespassers at the time of the accident and were thus owed no legal duty at all. The majority rejected this position. Citing the Supreme Court’s decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the majority noted that in the case of a tort committed against a visitor lawfully aboard a vessel, general maritime law does not distinguish between invitees, licensees, and trespassers; Every visitor is owed a duty of reasonable care under the circumstances. The panel imposed this same duty of care on the Corps, even though the alleged negligence in this case did not occur aboard a vessel. Finally, the court rejected the government’s argument that the plaintiffs’ failure to see the dam earlier was, as a matter of law, a failure to avoid an “open and obvious” danger. The court considered this to be a factual issue, properly decided by the trial court. It explained that not all dams are to be deemed open and obvious hazards, and that even if the plaintiffs were negligent in not seeing the dam in time to react, this would not necessarily preclude recovery but would simply reduce their damage award in proportion to their relative fault. *Newsletter Editor’s Note: As this edition went to print the judges of the Fourth Circuit Court of Appeals agreed to reconsider the panel’s decision en banc.***Eighth Circuit Enforces Exculpatory Clause in Marina’s Slip-Rental Agreement** *Sander v. Alexander Richardson Investments,*334 F.3d 712, 2003 AMC 1817 (8th Cir. 2003). A houseboat moored at the St. Louis Yacht Club caught fire as a result of an improperly installed fuel pump. The pump installation had been negligently performed a few days earlier by a Yacht Club employee. As the fire spread, three other vessels docked at the marina were destroyed. The owners of these boats brought negligence claims against the Yacht Club, which defended on the basis of a red letter clause in its slip-rental agreement. This clause purported to relieve the Yacht Club from “any and all liability for loss...including fire.” The district court refused to enforce the clause on the grounds that it was ambiguous and was the result of unequal bargaining power between the parties. Furthermore, the district court concluded that exculpatory clauses which completely absolve a party from any liability are unenforceable as a matter of law. The district court entered judgment in favor of the boat owners against the marina. The marina owner appealed. The Court of Appeals for the Eighth Circuit reversed the district court’s decision in*Sander v. Alexander Richardson Investments*, 334 F.3d 712, 2003 AMC 1817 (8th Cir. 2003). The exculpatory clause in question stated in its entirety: “INSURANCE: TENANT AGREES that he will keep the boat fully insured with complete marine insurance, including hull coverage and indemnity and/or liability insurance. THE LANDLORD DOES NOT CARRY INSURANCE covering the property of the TENANT. THE LANDLORD WILL NOT BE RESPONSIBLE for any injuries or property damage resulting, caused by or growing out of the use of the dock or harbor facilities; that the TENANT RELEASES AND DISCHARGES THE LANDLORD from any and all liability for loss, injury (including death), or damages to person or property sustained while in or on the facilities of LANDLORD, including fire, theft, vandalism, wind storm, high or low waters, hail, rain, ice, collision or accident, or any other Act of God, whether said boat is being parked or hauled by an Agent of LANDLORD or not.” The Eighth Circuit first considered the issue of whether the clause was ambiguous. According to the Eighth Circuit, the clause clearly reflected an intent to absolve the Yacht Club from the consequences of its own fault.Even though the clause did not explicitly refer to negligence, “[t]he term ‘any and all’ used in the exculpatory clause is all-encompassing and leaves little doubt as to the liability from which the boat owners released the Yacht Club.” Thus, under general maritime law, the clause would be deemed to encompass all losses, even those arising from the Yacht Club’s negligence. Next, the court determined whether the clause was enforceable under admiralty law. The Eighth Circuit reviewed what it described as a split of authority between the Federal Circuits regarding the enforceability of exculpatory clauses under admiralty law, specifically citing and contrasting the decisions in *Diesel “Repower,” Inc. v. Islander Investments Ltd.,*271 F.3d 1318 (11th Cir. 2001) and *La Esperanza de P.R. Inc. v. Perez y Cia de P.R. Inc.*, 124 F.3d 10 (1st Cir. 1997) (exculpatory clause unenforceable if it purports to absolve the party of all liability) with the decisions in *Royal Ins. Co. v. S.W. Marine*, 194 F.3d 1009 (9th Cir. 1999) and *Theriot v. Bay Drilling Corp.*783 F.2d 527 (5th Cir. 1986) (except in towing contracts exculpatory clauses may absolve a party of all liability for negligence). The Eighth Circuit in *Sanders* held that in its opinion the courts’ historic hostility to exculpatory clauses in admiralty cases should be limited to towage contracts and other similar arrangements, such as “bailment, employment, or public service relationships,” where one side enjoyed a monopoly or grossly uneven bargaining power. In the absence of such circumstances, the court preferred to “uphold the strong public policies of recognizing parties’ liberty to contract and enforcing contracts as written.” Accordingly, the Eighth Circuit sought to align itself with the decisions of the First and Fifth Circuit Courts of Appeal in *La Esperanza* and *Royal Insurance*. Finally, the Eighth Circuit considered and concluded that there was no evidence of fraud or overreaching, nor was there any extreme imbalance in bargaining power between the parties which might serve as a basis to void the exculpatory clause. Reviewing the evidence the court observed that the boat owners remained free to take their business to one of the other marinas in the vicinity and that none had voiced any objection to the clause when they entered into their rental agreements with the Yacht Club. In these circumstances the Eight Circuit held that public policy “demands” that the written contract of the parties be enforced as agreed. Accordingly, the court vacated the district court’s judgment against the marina, holding that the boat owners (or their insurers) must bear their own losses.**Loss of Society Damages Are Not Available under General Maritime Law to the Parent of a Child Killed in State Waters** *Tucker v. Fearn,*333 F.3d 1216, 2003 AMC 1705 (11th Cir. 2003). The Court of Appeals for the Eleventh Circuit has held that a non-dependant father may not recover loss of society damages under general maritime law for the death of a child in state waters. The plaintiff’s minor son suffered fatal injuries when the 19-foot Wellcraft in which he was riding collided with a 36-foot Pearson sailboat. The collision occurred on the Intracoastal Waterway near Orange Beach, Alabama. The decedent’s father brought a wrongful death action in admiralty against the operators of the sailboat. He sought, among other things, nonpecuniary damages for his grief and loss of affection. The trial court struck the father’s claim for non-pecuniary damages. On interlocutory appeal from the district court’s decision, the Eleventh Circuit affirmed in *Tucker v. Fearn*, 333 F.3d 1216, 2003 AMC 1705 (11th Cir. 2003). The court negotiated the array of Supreme Court precedent, beginning with *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne*recognized for the first time a cause of action for wrongful death under general maritime law for deaths occurring in territorial waters. Subsequently, the Supreme Court held in *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), that a dependent relative of a longshoreman killed in territorial waters could recover non-pecuniary damages for loss of society. Four years later, in *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978), the Supreme Court declined to allow recovery of non-pecuniary damages for wrongful deaths on the high seas because Congress, in passing the Death on the High Seas Act (DOHSA), had explicitly decided to allow recovery of “pecuniary loss” only, and it was not the judiciary’s place to “supplement” the Congressional scheme. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court ruled that the mother and administratrix of a seaman killed in territorial waters could not recover damages for loss of society under either the Jones Act or under general maritime law. Finally, in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), the Court decided that, in the absence of a federal statute, the survivors of a “nonseafarer” killed in territorial waters are not limited to a *Moragne*wrongful death action; rather, they may seek damages under the applicable state wrongful death statute. With this framework in mind, the Eleventh Circuit concluded that the wrongful death of a child in state waters did not entitle a non-dependent father to loss of society damages under maritime law. The court was reluctant to afford the plaintiff a remedy more generous than that available under DOHSA for deaths on the highs seas. The Eleventh Circuit also observed that “[a] strange anomaly would result if we were to permit the survivors of non-seaman the right to recover loss of society damages while the survivors of seaman — the traditional wards of admiralty law — are barred from such recovery under the Jones Act and general maritime law.” The plaintiff pointed to the Supreme Court’s *Gaudet*and *Calhoun*decisions as support for his position. But the Eleventh Circuit was unconvinced, noting that the *Miles*Court had limited *Gaudet*to cases involving a longshoreman killed on territorial waters. The court also held that the *Yamaha*decision was not controlling because, according to the court, it merely “preserve[d] the application of state statutes to deaths within territorial waters” and did not establish a survivor’s right to seek non-pecuniary losses in admiralty. Moreover, the Second, Fifth, and Sixth Circuits had already held that nondependent survivors of non-seamen may not recover loss of society damages under general maritime law. This latest decision from the Eleventh Circuit further isolates the Ninth Circuit on this issue. *See Sutton v. Earles*, 26 F.3d 903, 915-17 (9th Cir. 1994) (interpreting *Gaudet*to allow loss of society damages for deaths of non-seamen in state waters).  **Sixth Circuit Affirms Coast Guard’s Liability for Damages Caused by Negligent Rescue***Sagan v. United States,*342 F.3d 493 (6th Cir. 2003). On an August night in 1997, after several hours of drinking, a man dove headfirst from a pleasure boat into the shallows of Little Muscamoot Bay, near Algonac, Michigan. The man’s spine was severed upon impact and water entered his lungs. His wife brought him to the surface alongside the boat and, while a friend resuscitated him, she summoned the sheriff’s department over the boat’s radio. Local firefighters proceeded to the scene by boat. They put the victim on a backboard and prepared to transport him by boat to an ambulance waiting on shore. A Coast Guard patrol boat then arrived and advised the firefighters to await a Coast Guard helicopter that was en route to affect the rescue. However, the helicopter did not appearon the scene for at least 40 minutes. When it did arrive, its lifting apparatus could not be connected to the back board, and rather than risk moving the victim again, the rescuers took him ashore by boat as originally planned. Within a month of the accident, the victim began suffering from pneumonia, which doctors linked in part to the one-hour delay in transporting him to the emergency room. The victim and his wife brought suit against the United States under the Suits in Admiralty Act, alleging that the Coast Guard was negligent in its response to the emergency and thereby exacerbated the victim’s injuries. Shortly after the suit was filed, the victim died of complications from quadriplegia and pneumonia. The trial court granted the government’s motion for summary judgment, finding that the plaintiffs had failed to show that the Coast Guard’s negligence caused or contributed to the victim’s injuries. On appeal the Court of Appeals for the Sixth Circuit reversed. *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003). The Sixth Circuit observed that while the Coast Guard does not have a statutory duty to mount a rescue for every maritime emergency, once a rescue is undertaken the Coast Guard is bound to act with reasonable care. This duty of care arises under general maritime law rather than statute. If a rescue operation is negligently carried out, the government may be liable in tort for the resulting harm. In this case, the Coast Guard apparently conceded that it was negligent in hampering the victim’s transport to the hospital. To establish that this negligence contributed to the victim’s injuries, the plaintiffs had presented expert testimony that the one-hour delay in evacuating him left the victim more susceptible to pneumonia and respiratory problems. Even the government’s expert had tacitly admitted that the delay contributed to at least some of the victim’s ailments. Thus, the Appellate Court held that the plaintiffs had presented sufficient evidence of causation to survive summary judgment, and remanded the case to the district court for a determination of the government’s liability on the merits. **Unrecorded Bill of Sale Does Not Protect a Federally Documented Vessel from Attachment by Seller’s Creditors** *Mullane v. Chambers,*333 F.3d 322, 2003 AMC 1740 (1st Cir. 2003). Dr. David Mullane purchased the yacht LADY B GONE from David and Angela Murphy pursuant to a bill of sale dated July 2, 1998. OnAugust 28, 1998, the local sheriff’s department seized the yacht to enforce two state court writs of execution held by the Murphys’ judgment creditors. Five days after the yacht was seized, Mullane recorded his bill of sale with the National Vessel Documentation Center. Mullane filed suit in the U.S. District Court for Massachusetts against the yacht, *in rem*, pursuant to Rule D of the Supplemental Admiralty Rules, seeking possession of the yacht and a determination that the creditors’ claims against the vessel were invalid. Mullane also sued the judgment creditors and the sheriff’s department, alleging that the seizure was improper and that the yacht had been damaged in the course of the seizure. The district court held that the seizure of a federally documented yacht to execute on state law judgments held by the creditors of the former owners was invalid, even though the new owner had not recorded the bill of sale at the time of the seizure. According to the district court, Mullane was a bona fide purchaser for value without notice of claims and, therefore, took the vessel free and clear of all encumbrances. The district court also awarded $100,000 in punitive damages to Mullane and against the Murphys’ judgment creditors on the grounds that the creditors had intentionally disregarded Mullane’s rights to the vessel. Finally, the district court awarded $43,720 in attorneys’ fees to sheriff’s department. The judgment creditors appealed the district court’s decision to the U.S. Court of Appeals for the First Circuit. The First Circuit reversed and remanded. *Mullane v. Chambers,*333 F.3d 322, 2003 AMC 1740 (1st Cir. 2003). On appeal, the judgment creditors argued that their seizure of the yacht was proper because Mullane’s unrecorded bill of sale was invalid as to them under 46 U.S.C. § 31321 of the Federal Maritime Lien Act. 46 U.S.C. § 31321(a)(1) provides in relevant part as follows: “A bill of sale... whenever made, that includes any part of a documented vessel... must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, *against any person*except: (A) the grantor, mortgagor, or assignor; (B) the heir or devisee of the grantor, mortgagor, or assignor; and (C) *a person*having actual notice of the sale ....”(emphasis added). Construing the language and intention of § 31321, the First Circuit held that judgment creditors are included among the “persons” protected by the statute and that Mullane’s unrecorded bill of sale could not preclude thejudgment creditors’ seizure unless Mullane could prove that the creditors had actual notice of the sale at the time of the seizure. Noting that the district court did not make any findings regarding the creditors’ notice, the circuit court reversed and remanded the case for further proceedings on the issue. Furthermore, observing that the district court had improperly applied federal law to determine the validity of the transfer from the Murphy’s to Mullane, the Court Of Appeals also instructed the district court on remand to reconsider whether Mullane was a bona fide purchaser for value under Massachusetts law and to determine whether the sale was a fraudulent conveyance. In reaching its decision on the applicability and effect of § 31321, the Court of Appeals noted that two state supreme courts had reached an opposite conclusion regarding the scope and effect of the statute, originally enacted in 1850. In those decisions, both dating from the 1800s, the courts held that the statute was only intended to protect subsequent purchasers and mortgagees and not judgment creditors. These courts reasoned that creditors’ rights are entirely contingent upon the debtor possessing legal title to the vessel at the time of execution, whether or not a sale has been recorded. The First Circuit rejected this reasoning, concluding that nothing in the legislative history indicated that Congress intended to limit the scope of the statute and that judgment creditors were within the meaning of “any person” under the plain language of the section. The Court of Appeals also reversed the district court’s award of punitive damages against the judgment creditors. The award of punitive damages was premised on the district court’s conclusion that the judgment creditors improperly continued to press their claims after Mullane produced his bill of sale for the vessel in the litigation. The First Circuit held that the creditors’ conduct amounted to nothing more than the presentation of legal arguments. There was no finding of any abuse of process or malicious prosecution. Finally, the Court of Appeals vacated and reversed the district court’s award of attorneys’ fees to the sheriff’s department and against Mullane. The Court observed that attorneys fees are available only where a party has acted “in bad faith, vexatiously, wantonly or for oppressive reasons.” In this case, the district court had failed to specify and describe the conduct upon which the award was based. Moreover, after reviewing the sheriff department’s motion for attorneys fees, the Court of Appeals held that the facts as alleged did not amount to conduct that was sufficiently egregious to support an award of attorneys’ fees.**Texas Court of Appeal Rejects Proposed Class Action Against Manufacturer and Seller of Jet Skis** *Polaris Industries, Inc. v. McDonald,*No. 12-01-00372, 2003 Tex. App. Lexis 6985 (Tex. App. Aug. 13, 2003). The purchaser of two Polaris jet skis attempted to bring a class action against Polaris and a Polaris dealer, claiming that the lack of off-throttle maneuvering capability rendered the jet skis unmerchantable and defective. A Texas court of appeal found class certification improper and dismissed the case. *Polaris Indus., Inc. v. McDonald*, No. 12-01-00372, 2003 Tex. App. Lexis 6985 (Tex. App. Aug. 13, 2003). The plaintiff alleged that the jet skis were unreasonably dangerous because they had no steering or collision avoidance capability while the engine was idling or shut off. He brought his claims in the form of a class action on behalf of thousands of Polaris jet ski purchasers and owners in Texas. The trial judge agreed to certify a class that consisted of “[a]ll persons and entities who purchased new Polaris personal watercraft from dealers in the State of Texas after May 4, 1995 and who still own their Polaris personal watercraft.” On interlocutory appeal, the Court of Appeal for the Twelfth District reversed, holding that the plaintiff had no standing to bring the class action. Neither the plaintiff nor anyone he knew had actually been injured as a result of the jet skis’ design. The plaintiff and his children had used their jet skis for six years, apparently without incident. Numerous warning labels had informed the plaintiff at the time of purchase that the jet skis could not be steered without using the throttle. In the court’s words, the plaintiff “got exactly what he paid for — a water vehicle fit for recreational use.” Class certification was also improper according to the court because there was insufficient commonality of factual and legal issues: each jet ski purchaser or user would have likely had different a experience. The court was also concerned that a ruling in the class action in favor of the defendants might preclude a subsequently injured class member from bringing a claim for defective design. Finally, the court noted that the U.S. Coast Guard, under the authority of the Federal Boat Safety Act, continues to assess the feasibility of requiring off-throttle steering systems in personal watercraft. For these reasons, the court concluded, class action certification was inappropriate.**California Court of Appeal Applies Primary Assumption of Risk Doctrine to Personal Watercraft.** *Whelihan v. Espinoza,*2 Cal. Rptr. 3d 883 (Cal. App. 2003). Under California common law, a sports participant ordinarily will not face tort liability if he injures another participant through simple negligence. The purpose of the doctrine is to encourage healthy competition. A California court of appeal has concluded that a jet skier may qualify for immunity under this doctrine because jet skiing is a challenging activity with significant risk of injury and, according to the court, a refusal to apply the doctrine “would chill vigorous participation in jet skiing, thereby having a ‘deleterious effect’ on the nature of the sport as a whole.”*Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883 (Cal. App. 2003). The plaintiff and her male companion were operating their jet skis on Lake Engelbright in Nevada County, California. The two were maneuvering their jet skis in close proximity when the plaintiff apparently swerved in front of her friend. The two jet skis collided, and the plaintiff sued her companion for negligence and negligent infliction of emotional distress. The defendant raised the primary assumption of risk doctrine as a defense, and the trial court rendered a judgment in the defendant’s favor. The Court of Appeal for the Third Appellate District affirmed. It observed that “[a]s a matter of common knowledge, jet skiing is an active sport involving physical skill and challenges that pose a significant risk of injury, particularly when it is done — as it often is — together with other jet skiers in order to add to the exhilaration of the sport by racing, jumping the wakes of the other jet skis or nearby boats.” According to the court, even if this plaintiff was a novice and was not in actual competition with the defendant, the general nature of jet skiing made the sport subject to the primary assumption of risk doctrine. The plaintiff argued that two recently-enacted California statutes compelled a different conclusion. One statute made it a misdemeanor to operate a watercraft “in a reckless or negligent manner so as to endanger the life, limb, or property of any person.” The other statute required that personal watercraft “be operated in a reasonable and prudent manner.” The court concluded, however, that these statutes did not trump the common law doctrine of assumption of the risk because the statutes did not reflect a clear legislative intent to do so.Furthermore, the court held that the plaintiff could not show that the defendant’s conduct was so reckless as to fall outside the range of activity permitted by the primary assumption of risk doctrine, noting that the plaintiff had failed to include any claims of recklessness in her original or amended complaints. Accordingly, the decision of the trial court entering judgment for the defendant on the plaintiff’s negligence claim was affirmed. **Connecticut Court Holds Insured to *Uberrimae Fidei* Standard** *Rocco v. Continental Ins. Co.,*No. 99-CV-0171669-S (X05), 2003 Conn. Super. Lexis 1514 (Conn. Super. May 13, 2003). An insured brought breach of contact, breach of covenant of good faith, and fraud claims against an insurer who declined to pay a claim after the apparent disappearance of the insured’s 34-foot Wellcraft. Relying on the doctrine of*uberrimae fidei*, a judge of the Stamford-Norwalk District Court had no difficulty dismissing the insured’s claims.*Rocco v. Continental Insurance Co.*, No. 99-CV-0171669-S (X05), 2003 Conn. Super. Lexis 1514 (Conn. Super. May 13, 2003). Twice when he applied for insurance, the insured had overstated the vessel’s purchase price by about one-half. He again misstated the purchase price when he filed a claim for the vessel’s disappearance. He had also elected coverage for only “Inland Lakes and Rivers” when he knew he would be operating his vessel in “coastal waters.” The court was not impressed. Such facts were material to the risk, the court wrote, and, if made known as they should have been, these facts would have affected a prudent underwriter’s decision to issue a policy. Such facts also would have affected the premium charged. Thus, the insured had violated his obligation to act with the utmost good faith, and the policy was void from the start. As if that were not enough, the insured also breached the policy’s cooperation clause and fraud and concealment provisions. He delayed informing the insurer about the claimed disappearance. He gave inconsistent statements to the insurer, the adjuster, and the local police, and failed to supply the requested documentation. The court held that the insured’s lack of cooperation, taken with his prior misrepresentations, voided all coverage under Connecticut law.*The Newsletter Editors wish to thank Frederick A. Lovejoy, of Lovejoy and Associates, Easton, Connecticut, for calling our attention to the Rocco decision.* **“Non-Contact” Vessel Owes a Duty of Care to Prevent Other Vessels from Colliding** *Kuczynski v. McLaughlin,*No. 08-175-JRS, 2003 Del. Super. Lexis 300 (Del. Super. Aug. 27, 2003). After an outing together on the Chesapeake & Delaware Canal, two families were returning home in their respective power boats. As night fell, the vessels proceeded eastbound on the C & D Canal, each at a speed of about 40 miles per hour. The lead vessel traveled approximately 100 yards ahead of the following vessel, and about 30 feet to starboard. The operator of the lead vessel overtook the plaintiffs’ 22-foot Cutty Cabin (which was traveling at only 15-20 miles per hour), leaving it to port. Although visibility was good, he did not see the Cutty Cabin until he was alongside or past it. Apparently, the operator of the following vessel likewise failed to see the Cutty Cabin. Within seconds, the following vessel “in essence, ran over” the plaintiffs’ Cutty Cabin. The plaintiffs suffered serious injuries and brought negligence claims against the operators of both the lead vessel and following vessel in Delaware state court. The operator of the lead vessel filed a motion for summary judgment to dismiss the claims against him, arguing that since his vessel safely overtook and never came into physical collision with the plaintiffs’ vessel, he owed the plaintiff no duty of care and could not be held liable for any negligence on the part of the following vessel. The trial court rejected the argument in *Kuczynski v. McLaughlin*, No. 08-175-JRS, 2003 Del. Super. Lexis 300 (Del. Super. Aug. 27, 2003). The court observed that anyone who operates a vessel on navigable waters can expect to encounter other vessels and should know that carelessness may result in a collision. According to the court the mere fact that the lead boat happened to avoid a collision with the slower boat did not necessarily discharge the lead boat’s duty of care “to the plaintiffs and to all other vessels operating on the C & D Canal” that evening. The court held that even assuming that the lead vessel had not violated any Rules of the Road, it still owed a general duty of care to other boaters “traveling in close proximity.” Consequently, the court denied the motion for summary judgment and found that the plaintiffs were entitled to present their arguments against the lead vessel to a jury for a determination of liability.**COMMITTEE ON RECREATIONAL BOATING****NEWSLETTER, SPRING/SUMMER 2003** *Editor:*Frank P. DeGiulio ***Sprietsma v. Mercury Marine:*U.S. Supreme Court Finds No Federal Preemption of State Law Propeller Guard Claims** The issue of whether state common law claims based on the alleged failure to equip pleasure boat engines with propeller guards are preempted by federal law has been the subject of a number of reported lower court decisions over the past decade. In 2001, the Supreme Court of Illinois joined the ranks of the majority of other state and federal courts which had considered the issue in holding that state law personal injury claims based on the alleged failure to equip a recreational boat with a propeller guard are preempted by Coast Guard regulatory action taken under the authority of the Federal Boat Safety Act, 46 U.S.C. ‘ ‘4301-4311 (“FBSA”). *Sprietsma v. Mercury Marine,*197 Ill.2d 112, 757 N.E.2d 75 (Ill. Sup.Ct. 2001). Jeanne Sprietsma died in 1995 from injuries suffered when she fell from a power boat and was struck by the propeller blades of a 115 horsepower outboard motor manufactured by Mercury Marine. A wrongful death action was commenced against the manufacturer under Illinois state law alleging that Ms. Spreitsma’s death was caused by the failure to design and equip the boat with a propeller guard. In response to a motion to dismiss filed by Mercury Marine the trial court found that the plaintiffs’ common law claims were expressly and impliedly preempted by federal law. On appeal the intermediate appellate court affirmed the result below on the grounds that the FBSA expressly preempted the plaintiffs’ claims. *Sprietsma v. Mercury Marine,*312 Ill.App.3d 1040, 729 N.E.2d 45 (Ill. App. Ct. 2000). The plaintiffs then appealed to the Illinois Supreme Court. On appeal to the Illinois Supreme Court, Mercury Marine argued that state law claims based on the alleged failure to equip the motor with a propeller guard were expressly preempted by language in the FBSA itself and impliedly preempted because the U.S. Coast Guard had considered and rejected the imposition of regulations requiring propeller guards pursuant to its authority under the Act. Although some state and federal courts had held that the FBSA expressly preempted such state law claims, the IllinoisSupreme Court adopted the approach taken by the Fifth and Eleventh Circuit Courts of Appeal and held that the common law claims were impliedly preempted in light of the Coast Guard’s prior consideration of the issue and its determination that regulations requiring propeller guards were not warranted. *See Lady v. Neal Glazer Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000) and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), previously reported at 6 Boating Briefs No. 1 (1996); 7 Boating Briefs No. 1 (1998); 9 Boating Briefs No. 2 (2000). In reaching its decision in *Sprietsma*, the Illinois Supreme Court placed great emphasis on the need for uniformity of the law: “Uniformity is particularly important where, as here, the federal statute relates to a product that is inherently mobile and thus likely to move from state to state....Boats also frequently navigate in lakes or rivers that mark the boundary between two states. Thus it is essential that a uniform body of law be developed.” (*See* 11 Boating Briefs No. 1 for detailed discussion of Illinois Supreme Court decision.) The plaintiffs in *Sprietsma* petitioned the U.S. Supreme Court for certiorari and the Supreme Court granted the petition in January, 2002. *Sprietsma v. Mercury Marine,*122 S.Ct. 917, 151 L.Ed.2d 883 (2002). The question on appeal to the Supreme Court was whether state common law tort claims against the manufacturer based on a failure to install a propeller guard were either expressly preempted by the FBSA or impliedly preempted by Coast Guard regulatory action under the Act. In December, 2002, the U.S. Supreme Court issued its opinion, holding that state common law tort claims based on an alleged failure to install a propeller guard on a pleasure craft are not preempted by federal law. *Sprietsma v. Mercury Marine,*123 S.Ct. 518, 154 L.Ed.2d 466, 2003 AMC 1 (2002). In writing for the Supreme Court, Justice Stevens addressed and then rejected three theories advanced by Mercury Marine as to why state common law propeller guard claims are preempted by federal law: (1) that by its own language the FBSA expressly preempts state common law claims; (2) that such claims are impliedly preempted either because in exercising its authority under the FBSA the Coast Guard had previously decided that a requirement for propeller guards on pleasure craft was not warranted or because in enacting the FBSA Congress intended to preempt the entire field of pleasure boat safety regulation, and;  (3) that  the FBSA’s  stated  goal ofproviding national uniformity in regulations governing the pleasure boat manufacturing industry justified a finding that state common law claims were impliedly preempted by the Act. In addressing the implied preemption issue, the Supreme Court rejected Mercury Marine’s argument, and the basis of the Illinois Supreme Court’s decision, that the Sprietsma’s state law claims are preempted by the Coast Guard’s decision not to impose a regulation requiring propeller guards for pleasure boats based on a study undertaken from 1988 to 1990. To the contrary, the Court held that “[i]t is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation,” and that “...a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards.” 123 S.Ct. at 527-528. In connection with this aspect of the Court’s holding, it is of some significance that both the Coast Guard and the Solicitor General of the United States filed briefs in support of the *Sprietsma*plaintiffs in which they maintained that the Coast Guard had no intention of preempting state law when it decided not to impose any federal requirement for propeller guards. The Supreme Court summarily rejected Mercury’s argument concerning the need for national uniformity in regulations governing the pleasure boat industry and held that “...the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the more prominent objective [of the FBSA], emphasized by its title, of promoting boating safety.” 123 S.Ct. at 530. In the Supreme Court, Mercury Marine also argued that the Sprietsma’s claims were subject to federal maritime law, thereby precluding the application of state law based claims. The Supreme Court did not address the merits of this argument in its decision, holding that the argument had not been raised in the Illinois Supreme Court and had, therefore, been waived. 123 S.Ct. at 523, n. 4. The decision of the U.S. Supreme Court in *Sprietsma* abrogates a host of lower court decisions which held that state common law claims for failing to  equip  a  pleasure  craft  with  a  propeller  guard  were  preempted   byfederal  law,   including  the   decisions  of   the   federal   circuit   courts  in*Carstensen v. Brunswick Corp.,* 49 F.3d 430 (8th Cir. 1995)(express preemption); *Lady v. Neal Glazer Marine, Inc.*, 228 F3d 598 (5th Cir. 2000) (implied preemption), and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997)(implied preemption). The implications of the Supreme Court’s decision may be far reaching. Following the decision it is clear that parties sustaining injuries from pleasure craft propellers are free to pursue state law product liability claims against marine manufacturers alleging negligent design for failing to equip marine engines with propeller guards. It remains to be seen whether plaintiffs can succeed on such a theory. Moreover, in the absence of affirmative regulatory action by the Coast Guard under the FBSA, it appears that states are free to enact statutes and regulations requiring marine engines to be equipped with propeller guards if they choose to do so. This opens the possibility of inconsistent requirements among the states, subjecting manufacturers and perhaps boat owners to differing requirements depending on the waters in which a boat is operated. **Salvor Permitted to Pursue*Quantum Meruit*Claim in State Court** In *Phillips v. Sea Tow/Sea Spill of Savannah*,      S.E.2d     , 2003 WL 1442121 (Ga. 2003), the Supreme Court of Georgia held that although a salvor may only pursue a marine salvage claim in a federal court, the salvor may pursue a claim against a vessel owner for its services in a state court based on a theory of *quantum meruit.* In May, 1998, Robert Phillips abandoned his twenty-five foot sports fisherman after it capsized in the Atlantic Ocean off the coast of Georgia. Sea Tow, a professional rescue and salvage company, located the vessel several days later and brought it to safety. Sea Tow filed suit against Phillips in the state court for Wayne County, Georgia, to recover $15,000 for salvage services. The county trial court dismissed the case for lack of jurisdiction based on a finding that a pure salvage claim is subject to exclusive federal jurisdiction and may only be pursued in a federal court. The decision was appealed to the intermediate Court of Appeals, which reversed the trial court’s decision and held that Sea Tow was entitled to pursue a salvage claim in state court. *Sea Tow/Sea Spill of Savannah v. Phillips,*253 Ga.App. 842, 561 S.E.2d 827 (2002). The decision was appealed to the Georgia Supreme Court. Both sides agreed that federal courts have exclusive jurisdiction over a salvage lienagainst a vessel *in rem* and that such a claim cannot under any circumstances be pursued in a state court. However, Sea Tow argued that state courts have concurrent jurisdiction with the federal courts to hear salvage claims brought personally against the owner of a salved vessel. Sea Tow based its argument on the “Savings to Suitors” clause of the Judiciary Act of 1789. The Judiciary Act provides that the federal courts have jurisdiction over “all civil causes of admiralty and maritime jurisdiction...saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.” *See* 28 U.S.C. §1333. Phillips argued that federal courts have exclusive jurisdiction over all salvage claims, whether brought against the vessel*, in rem*, or against the owner personally, because the concept of salvage is unique to admiralty law and therefore is not “a common law remedy” within the meaning of the Savings to Suitors clause of the Judiciary Act. The Georgia Supreme Court reviewed prior case law and the opinions of legal commentators offered by both Phillips and Sea Tow. The court concluded that the decisions and scholarly opinions reflected a disagreement among the courts and scholars as to whether it is permissible for a state court to hear and decide salvage claims brought against a vessel owner personally. After finding that the authorities were in conflict on the general issue of whether a state court may decide a marine salvage claim, the Georgia Supreme Court turned to a specific consideration of Georgia state law. The Supreme Court held that salvage is not a remedy which exists under Georgia state law because no court had recognized such a remedy and the legislature had not created such a right. Accordingly, the Supreme Court concluded that it is impermissible for a salvor to pursue a salvage claim against a vessel owner in the courts of Georgia because marine salvage is not a recognized “common law remedy” within the meaning of the Judiciary Act. However, the Supreme Court then held that although there is no remedy available for salvage under Georgia law, claims based on the theory of *quantum meruit* are recognized. A Georgia statute provides for a claim based on *quantum meruit* as follows: “...[W]hen one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.” OCGA §9-2-7. The court held that a salvor may sue an owner of a vessel personally in a Georgia state court under a theory of*quantum meruit* based on eventsidentical to those which would support a marine salvage claim in a federal court. Moreover, the court held that although Sea Tow could not recover a “salvage award,” the jury would be entitled to consider the peril of the service rendered by the company and the value of the service that the boat owner received in considering the appropriate amount of any judgment in favor of Sea Tow. **Court Holds Marine Policy Voided by Insured’s Failure to Disclose Defects in Yacht** We previously reported the decision of the U.S. District Court for the District of Massachusetts in *Reliance National Ins. Co. (Europe) Ltd. v. Hanover*, 222 F. Supp. 2d 110 (D. Mass. 2002). In the 2002 decision the court denied Reliance National’s motion for summary judgment to void a yacht policy based on alleged misrepresentations regarding the purchase price and the condition of the vessel by the insured. (*See* 11 Boating Briefs No. 2 (2002)). Following a bench trial in admiralty in February, 2003, the court entered judgment in favor of Reliance National, finding that the yacht policy was void and that no insurance coverage was owed due to the owner’s breach of the policy’s warranty of seaworthiness and his failure to disclose known defects in the yacht to the insurer. *Reliance National Insurance Company (Europe) Ltd. v. Hanover*,      F. Supp. 2d     , 2003 WL 716533 (D.Mass. 2003). In 1999, “lain Hanover saw an advertisement for *Stiarna*, a 1937 Camper & Nicholson yacht, on the website of Authentic Yacht Brokerage. The advertisement specified an “asking price” of $250,000. According to the website, $800,000 had been spent on refurbishment since the 1980s and she had been “carefully maintained” and was “85% of excellent.” The yacht broker provided Hanover with a 1999 survey of the vessel which identified certain deficiencies in the hull, rigging and engine but concluded that most of the systems were in “very good” or “excellent” condition, including the mast and boom, engine, transmission, sails and electrical system.  The yacht was located in Trinidad and Hanover traveled there to personally inspect the yacht and to conduct sea trials in January, 2000. He also spoke to the boatwright who had maintained the yacht in Trinidad.Hanover admitted at trial that after his inspection he thought that the broker’s representation that the yacht had been “carefully maintained” was an exaggeration. Hanover observed a number of problems with the engine during the sea trials and admitted that he thought the engine was not in acceptable condition. Based on his inspection, review of the 1999 survey and discussions with the boatwright, Hanover offered to pay $130,000 for *Stiarna* and the offer was accepted. At that time Hanover estimated that an expenditure of $250,000 would be required for initial refitting to replace the engine and to renew various steel structural members and hull timbers. He also estimated that an additional $450,000 would be required to refurbish the yacht’s interior accommodations. Hanover made arrangements for the initial refitting work to be done at a shipyard on the neighboring island of Grenada. Hanover submitted a copy of the 1999 survey and an application for insurance to a Canadian marine insurance broker to obtain insurance on *Stiarna*. The application form contained a notice advising the applicant that the information provided therein would be relied on by the insurer and that any misrepresentations could void coverage. This initial application, prepared by the broker, listed the purchase price as $130,000. The Canadian broker forwarded the application, together with the 1999 survey and a copy of the yacht broker’s website listing, to underwriters acting for Reliance National in London. In a covering letter the Canadian broker also informed the underwriters of Hanover’s intention to refit the vessel at a yard in Grenada and suggested that no additional survey should be required by the underwriter until after the contemplated work at Grenada had been completed. Based on the 1999 survey, the insurance application, the Canadian broker’s cover letter and the brokerage listing, the Reliance National underwriter testified that he was persuaded that the yacht was seaworthy. However, he noted that the insurance application had not been completely filled out and conditioned placement of coverage on submission of a complete application. The underwriter accepted the Canadian broker’s suggestion that no additional survey be required until after the completion of the work at Grenada. On February 4, 2000, Reliance National issued a binder and cover note for hull and crew liability coverage for*Stiarna* for an agreed annual premium of $4,250 conditioned upon the requirement that an out-of-water survey beconducted after the refitting work in Grenada was completed. The underwriter forwarded the documents to the Canadian broker with a letter noting that the coverage was subject to the terms and conditions of the actual policy wording and submission of a complete insurance application by the insured. The Canadian broker immediately forwarded the binder and cover note to Hanover together with a second blank insurance application. The actual policy wording was not yet available and the broker advised Hanover that the policy would be forwarded at a later date. On February 12, 2000, Hanover received photographs from the Trinidad boatwright, Fred Thomas, which depicted a rotted area in the yacht’s main mast. An accompanying report from Thomas indicated that he had found three rotted spots and two open scarfs in the mast and suggested that the planned movement of the yacht from Trinidad to Grenada might be unwise. On February 14, 2000, Hanover completed the second insurance application and mailed it to the Canadian broker. In the second application Hanover listed the purchase price as $150,000, $20,000 in excess of the actual price. Hanover did not mention the rotting discovered in the mast or his own observations of problems with the engine in the second application. The Hanovers hired a professional captain for the intended voyage from Trindad to Grenada. The captain recommended that the sails not be used during the voyage due to the problems with the mast and that the yacht should be motored to Grenada. The captain also recommended hiring a commercial power boat to accompany the yacht on the voyage so that *Stiarna*could be towed if the engine failed. When he hired the captain Hanover told him to make sure that the engine was in good working condition before the voyage. Following a sea trial the captain decided that the engine performed satisfactorily but gave no opinion to Hanover other than to inform him that the engine had successfully started. *Stirana* departed Trinidad on February 23, 2003. An hour after departure a fire broke out in the engine compartment. *Stirana* was abandoned and sank on the same date. Following the loss Reliance hired a surveyor to investigate the sinking. In April, 2000, the surveyor advised Reliance of his opinion that the sinking was wholly fortuitous and not due to any fault of Hanover, that the onlyknown unseaworthy condition, the rot in the mast, had no relationship to the cause of the loss and that Hanover’s plans to refit the vessel had been fully disclosed. Hanover did not receive a copy of the insurance policy wording until March 1, 2000, a week after the loss of the vessel. Despite its investigator’s report, Reliance rescinded the policy and filed the declaratory judgment suit in the Massachusetts District Court seeking a declaration that no coverage was owed in connection with the loss due to the alleged unseaworthiness of *Stiarna* and Hanover’s alleged misrepresentation of the purchase price. In its opinion the district court concluded that the fire and sinking of *Stiarna* was clearly an accident, attributing the loss to a “perfect storm of bad judgment” by Hanover and all others involved. The court reviewed various case decisions and concluded that the doctrine of *uberrimae fidei* or utmost good faith requires an insured to “fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk...including those facts not directly inquired into by the insurer.” Furthermore, the court found that after coverage has commenced, the doctrine of utmost good faith “imposes a continuing obligation on the vessel owner to insure that the vessel will not, through either bad faith or neglect, knowingly be permitted to break ground in an unseaworthy condition.” Applying the legal principles to the evidence produced at trial, the court found that the Reliance policy was void and that no coverage was owed to Hanover because: (a) the *Stiarna* was by definition unseaworthy at the inception of the policy because the sails could not be safely used and the operators could not rely on its engine; (b) Hanover knew or should have know that the engine was unfit for service prior to submitting the first application but failed to disclose the defect; (c) Hanover knew of the rot in the mast before submitting the second application but failed to disclose the defect;(d) Hanover’s failure to repair the defects in the engine and mast before departing from Trinidad constituted a breach of the policy’s warranty of seaworthiness; (e) Hanover’s failure to disclose the defects in the mast and the engine to the underwriters was a breach of his duty of utmost good faith, and; (f) the evidence established that Reliance would not have issued the policy if its underwriter had been aware of the defects.**Wrongful Death Claim Arising From Jet Ski Accident on Wabash River Subject to Admiralty Jurisdiction** Tyler Ellsworth, a minor, was struck and killed by a jet ski on the Wabash River between Tippecanoe and Fountain Counties in the State of Indiana. A wrongful death action was filed against the owner and operator of the jet ski in Indiana state court. Lisa Strahle, the owner of the jet ski, subsequently filed a petition for exoneration from or limitation of liability in the U.S. District Court for the Northern District of Indiana pursuant to the Shipowners’ Limitation of Liability Act, 46 U.S.C. § 181, *et seq*. Tyler’s guardian appeared in the Limitation of Liability action and filed a motion to dismiss for lack of admiralty jurisdiction on the grounds that the accident did not occur on navigable waters of the United States and that the nature of incident was not of the type which satisfies the requisites for admiralty tort jurisdiction under U.S. Supreme Court precedent. In denying the claimant’s motion to dismiss, the court concluded that the waters of the Wabash River where the accident occurred are navigable waters of the United States and that the nature of the incident was of the type which falls within the admiralty jurisdiction of the federal courts. *In re Petition of Strahle*,      F.Supp.2d     , 2003 WL 1130258 (N.D. Ind. 2003). The court began its jurisdictional analysis by referring to the 1993 decision of the Seventh Circuit Court of Appeals in *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993) as setting forth the necessary prerequisites for admiralty tort jurisdiction: (1) the incident occurred on the navigable waters of the United States; (2) the incident posed a potential hazard to maritime commerce, and; (3) the activity engaged in was substantially related to traditional maritime activity. In its opinion the District Court discussed the legal principles governing the determination of “navigability” for purposes of admiralty jurisdiction and considered factual evidence submitted by the parties on the point. The parties submitted extensive factual evidence relevant to the issue of whether the waters of the Wabash River where the accident occurred are navigable waters for the purposes of admiralty jurisdiction. The evidence included a detailed guide book to the river which declared the Wabash to be “the largest non-navigable river in the United States.” Navigability studies by the Indiana Natural Resources Commission, the U.S. Army Corp ofEngineers and the U.S. Division of Hydropower Administration and Compliance were also admitted into evidence and considered by the court. In its opinion the court found that navigability for purposes of admiralty jurisdiction depends on whether the waters in question are presently capable of supporting interstate commercial maritime activity. In considering the evidence submitted by the parties the court noted that there are no dams or artificial obstructions on the Wabash between the location of the accident and the river’s confluence with the Ohio River, thereby permitting vessels to traverse the river system downstream from the accident location to Illinois and beyond. None of the evidence submitted by the parties demonstrated the existence of any current interstate commercial activity on the Wabash. However, a study by the Hydropower Administration in 2000 showed active recreational boating on the river system comprised of the Tippecanoe, Wabash and Ohio Rivers. The court found that this evidence demonstrated that the river system is “suitable for the simpler forms of trade in interstate commerce.” Based on the foregoing evidence the court concluded that the accident occurred on navigable waters of the United States. The court then turned its attention to the remaining elements of the test for admiralty tort jurisdiction: (a) whether the type of incident giving rise to the claim posed a potential hazard to maritime commerce, and; (b) whether the activity which gave rise to the claim was substantially related to traditional maritime activity. The deceased’s estate argued that the accident could not have posed a potential hazard to maritime commerce as required by the jurisdictional test because there is no evidence of present commercial activity on the waters where the incident occurred. In response, the vessel owner argued that the accident had the potential to disrupt maritime commerce because numerous canoe rental establishments and beaches were located in the area. In considering the owner’s argument the court observed that “[c]ertainly the news of such an accident would cause worry and concern amongst potential customers.” The court concluded that the incident in question, the striking of a person by a jet ski on navigable waters, has sufficient potential to disrupt commercial maritime activity as required by the test.Finally, the court found that the alleged negligent operation of a personal watercraft on a navigable waterway is an activity which bears a sufficient relationship to traditional maritime activity so as to satisfy the final prong of the test for admiralty tort jurisdiction. Finding that all prerequisites for admiralty tort jurisdiction were satisfied, the court denied the estate’s motion to dismiss the owner’s Limitation of Liability action. **Salvage Awarded for Dewatering of Pleasure Boat at its Berth** In *New Bedford Marine Rescue, Inc. v. Cape Jeweler’s Inc.*, 240 F. Supp.2d 101 (D. Mass 2003), the U.S. District Court of the District of Massachusetts concluded that the assistance rendered by individuals associated with the plaintiff salvage company to a recreational boat sinking at the dock constituted pure salvage and awarded the plaintiff $11,000.00 plus pre-judgment interest. The award constituted 18.3% of the salved value. The plaintiff, New Bedford Marine Rescue, Inc. (“plaintiff”), sued the corporate owner of a custom Canyon 30 power boat known as *Memories*after the defendant owner of the vessel refused to pay a $13,000 salvage bill. *The Cast*.    Ralph Joseph is the owner of the plaintiff, New Bedford Marine, a commercial rescue and salvage operation with multiple boats, specialized equipment, and professional captains. George Gray is a certified dive master who worked part time for the plaintiff on an “on-call” basis. Gray lived aboard a houseboat at the same marina where the*Memories* was docked. Martin Niemiec owns Niemeic Marine and Boat in New Bedford and was a mechanic who regularly worked on *Memories*. Shawn Keegan owns Cape Jewelers and was the principal operator of *Memories*. *The Event*.    Late in the afternoon of October 25, 2000, George Gray was informed by another boat owner at the marina that *Memories,*tied up at its usual berth, was low in the water. Gray found *Memories* with its stern down to the point that water was starting to lap at the scuppers. Gray returned to his boat and brought back an electric pump and absorbent pads. When Gray returned to *Memories*, he unplugged the shore power and began to pump out the boat. At this time, the base of the engine was submerged but the water had not reached the starters. Neither the forward nor aft bilge pumps were working. He placed absorbent pads around the engine compartment to soak up the oil.After Gray began pumping out the boat, he telephoned Ralph Joseph for assistance because Gray knew that he could not salvage the boat by himself in the event that something went wrong. Gray then telephoned the marina’s manager to obtain the owner’s contact information. Joseph arrived on the scene in about 15 minutes and decided that Gray’s pump was adequate for the job. Joseph plugged the scuppers with rags. Joseph assisted Gray in pumping out the bilge and placing absorbents to soak up excessive oil. The pump out took about an hour once Joseph arrived on scene. During the pump out, the marina manager approached Joseph with contact information for Shawn Keegan, the owner of *Memories*. Joseph contacted Keegan and according to Joseph informed him that his boat was taking on water, that it was a salvage situation, that they were pumping out the water, and that the boat was about to be stabilized. Keegan claimed that he told Joseph to get off the boat, that he would call his own mechanic and that he did not want the boat hauled out. Joseph testified that he told Keegan that he would be happy to take the plugs out of the scuppers and remove the bilge pump and personnel, but that Keegan needed to call someone to repair the leak as the boat was in peril. According to Joseph, Keegan’s last comment was not to let the boat sink. Keegan called his mechanic Niemiec who arrived at the boat in about 15 minutes. Niemiec brought only tools and no pumps or absorbents. Niemiec tightened the shaft stuffing boxes which were the source of the leak and phoned Keegan to let him know the problem had been fixed and the boat was not in danger of sinking. Joseph also spoke with Keegan, agreeing that the boat was no longer in peril. Joseph asked Keegan for insurance information. Keegan testified that Joseph never gave him an exact price but that Joseph explained to him how much it cost per foot to pump out. Joseph testified that he never spoke to Keegan about the cost of his services. Niemeic made a temporary fix to the forward bilge pump by propping open the float switch with a plastic spoon. He asked Gray or Joseph to remove the spoon when the forward bilge was completely pumped out. Niemiec was aboard the boat for approximately 21 minutes and billed Keegan $41.25 for his services. Gray was on the boat for another hour. *Damages.*    Following the incident, Joseph sent Keegan a bill for $13,750.00. His justification for this salvage bill was that it represented a fair percentage of the post casualty value of *Memories* plus a bonus for prevention of an oil spill. Keegan refused to pay.*Pure Salvage*.    The court analyzed the three elements of a pure salvage claim as follows: *Marine Peril.*    The Court found that the *Memories* was in peril because it was taking on water and was in danger of being submerged. *Memories* has an aft freeboard of 3 feet. Based on evidence presented at the trial the court found that the water level in the berth at low tide was approximately 6 feet. Accordingly, further submersion would have resulted in total submersion of the engine compartment and below deck spaces. *Service Voluntarily Rendered*.    The court found that Gray and Joseph had voluntarily rendered salvage services, that Keegan did not refuse Joseph’s services, and that there was no contract between Joseph and Keegan because the conversations between Joseph and Keegan were insufficient to show that a contract existed. *Success in Whole or In Part.*The boat was no longer in danger of sinking once it had been dewatered to the point that the mechanic could tighten the leaking stuffing boxes. After the salvage was complete, the boat did not need any significant repairs other than cleaning. Keegan testified that the value of the boat was the same before and after the incident. The court found that the salvors were successful and that plaintiff had established a pure salvage claim. *Calculating the Salvage Award*.    The court used the *Blackwall* factors to determine the amount of the salvage award as follows: *Degree of Danger From Which the Ship Was Rescued*. The court considered Gray’s testimony that the vessel would have sank within a day to be credible. Had it sank, there would have been significant damage to the vessel. The court found that the boat was in serious peril. *Post Casualty Value of the Property Saved*.    The court found the fair market value of the boat to be $60,000.00 based on the testimony of Joseph and Keegan regarding the trade-in value of the boat. It was also the amount for which the boat was insured. It was undisputed that the boat only required cleaning after the salvage. *Risk Incurred in Saving the Property From Impending Peril*.    Because the only risks were unplugging the shore power, coming into contact with petroleum products, and boarding an unstable boat, the court found that the risks were minimal.*Promptitude, Skill and Energy Displayed in Rendering Salvage*.    The plaintiff is a professional salvage company ready at all times to render competent services. Gray arrived on scene as soon as he was informed that *Memories* was taking on water. He immediately returned with a pump and commenced to dewater the boat. Joseph arrived on scene within 15 minutes of being contacted by Gray. Joseph contacted the owner as soon as the marina manager provided the contact information. The skill involved included knowledge of boat construction, pumps and dewatering a vessel, knowledge of power and wiring systems and awareness of an oil spill and its consequences. The court noted that the plaintiff’s captains are all certified and that the plaintiff has equipment available at the marina and employs Gray to respond to distress calls when needed. The court found that these factors weighed in favor of a liberal salvage award because the Plaintiff was exceptionally prompt and skillful. *Value of the Property Employed by the Salvors and Danger to Which They are Exposed*.    The Plaintiff arrived on the scene in one of his boats, but that boat was not used in the salvage efforts nor were any additional pumps. The equipment used in the salvage consisted of Gray’s pump and absorbent pads. The court found the value of the property employed by Plaintiff and the danger to which it was exposed to be minimal. *Labor and Materials Expended By the Salvors*.    The materials used in the salvage consisted of 33 absorbent pads at one dollar each. The labor expended consisted of Gray’s labor for 2-3 hours and Joseph’s labor for 11/2-2 hours. While on scene, their only labor consisted of setting up one pump and moving it around to remove water. They also continuously placed absorbent pads to soak up oil. The court found the labor and materials expended to be minimal. The court also addressed an additional factor of “preventing or minimizing environmental damage.” The court held that although prevention of environmental damage cannot be used to justify a salvage award, if the elements of a salvage claim have already been established, prevention of environmental damage may be considered in calculating the award. The court found that Joseph and Gray averted some environmental damage because they soaked up oil with absorbents. The court found that the environmental damage was minimal and did not have a significant impact on the salvage award. The court also agreed with the plaintiff’s argument that professional salvors are entitled to an incentive bonus or additional compensationbecause it induces them to maintain a professional salvaging business. Joseph maintained equipment in three places to accommodate the need to respond quickly to distress calls. He employed nine captains who are trained in salvage services. The court found that plaintiff was a professional salvage service and therefore entitled to a more liberal salvage award. The court found in favor of the plaintiff salvor and awarded $11,000.00 for the salvage or the equivalent of 18.3% of the fair market value of $60,000. *(The Newsletter Editor wishes to thank Lyn Kagey, Esq. for contributing this article.)* **Owner’s Petition for Exoneration or Limitation of Liability Granted by Summary Judgment in Swimming Accident Case** Matthew Ginop suffered serious spinal injuries which rendered him a paraplegic when he dove from the bow of a 27 foot Bayliner into shallow waters in the Anchor Bay area of Lake St. Clair, Michigan. The boat was registered in name of James Jacobs but had been jointly purchased by Jacobs, Brian Hervey and Michael Hemby, all three of whom were aboard at the time of the accident. Both Ginop and Jacobs were generally familiar with the lake and were aware of water safety issues. The boat had a swim platform and a depth finder. None of the men had been out on the boat prior to that day. They all decided before launching that they would take the boat to the Anchor Bay area of Lake St. Clair where they could swim. Jacobs had never boated in the Anchor Bay area. Before departing the dock and while on the boat, Hemby told the men that the water in that area was quite shallow and approximately 4 feet deep in places. When they arrived at Anchor Bay, Jacobs put the boat in neutral about 200 yards from shore and handed the controls to Hemby. There were a number of other boats in the area, the closest of which was approximately 50 yards away, and there were swimmers who were standing in chest deep water. Ginop did not inquire about the depth of the water nor did he inform any of the other occupants of his intention to dive off the boat. While Jacobs was lowering the anchor, Ginop dived head first from the bow of the boat. Matthew Ginop filed suit against Jacobs in the U.S. District Court for the Eastern District of Michigan, alleging that Jacobs was negligent in failing to warn him of the shallow water and the risk of injury. It appears that Jacobs, with leave of court, answered the Complaint by filing a Petition for Exoneration from or Limitation of Liability pursuant to the Shipowners’ Limitation of Liability Act, 46 U.S.C. §181, *et seq*. In *Ginop v. 1984 Bayliner 27’ Cabin Cruiser*, 242 F.Supp.2d 482 (E.D. Mich. 2003), the district court granted Jacob’s Petition for Exoneration from or Limitation of Liability. The decision is somewhat unusual in that it appears from the opinion that the court treated Jacob’s Petition as a motion for summary judgment and rendered a decision based on a hearing and oral argument rather than conducting a full bench trial. The court began its opinion by correctly noting that a determination of Jacob’s right to limitation of liability required a two-step analysis; initially the court must determine if the owner was negligent or the vessel was unseaworthy and then determine if the negligence or unseaworthiness was within the “privity and knowledge” of the owner within the meaning of the Limitation Act. The court stated that the plaintiff Ginop had the initial burden of proof on the issue of negligence or unseaworthiness. According to the court’s opinion, Ginop’s counsel conceded that the boat was seaworthy. In considering Ginop’s allegations that Jacobs was negligent by failing to warn him of the shallow water and the risk of injury the court found that Jacobs did not breach any duty of care owed to Ginop based on the evidence presented at oral argument. The court found that both Ginop and Jacobs were equally unfamiliar with the specific waters in question but that as an owner Jacobs provided Ginop with sufficient information to apprize Ginop of the shallowness of the water. The court noted that there was an operational depthfinder on the boat and that Ginop was present during the conversations wherein Hemby informed everyone aboard that the water in the area was shallow. The court also noted that Ginop dove into the water without warning while Jacobs was lowering the anchor, and before Jacobs had any opportunity to warn Ginop. In considering proximate cause, the court found that Ginop’s injuries were not proximately caused by any negligence of Jacobs but were solely attributable to Ginop’s own negligent conduct. The court noted that Ginop dove from the bow of the boat instead of using the swim platform. In addition, Ginop dove into the water without warning and without inquiring about its depth despite the fact that other swimmers in the immediate vicinity were visible to all, standing in chest deep water. The court found that Ginop’s failure to heed Hemby’s warnings, his failure to consult the depth finder and his disregard of the significance of the appearance of nearby swimmers were the cause of Ginop’s injury, not Jacob’s behavior. Having concluded that the vessel was seaworthy and that no negligence on the part of the owner Jacobs caused or contributed to Ginop’s injuries,one would expect the court to have simply ended its analysis with a finding that Jacobs was entitled to complete exoneration from liability. However, in another somewhat unusual aspect of the case, the court stated that it was required to also determine whether Jacobs was “in privity” within the meaning of the Limitation Act before ruling on Jacobs’ Petition. Ginop argued that Jacobs’ mere presence aboard the vessel as owner automatically established his “privity” and precluded him limiting his liability to the value of the vessel for his own negligence (although none had been found) under the Limitation Act, citing the subsequently discredited case of *Fecht v. Makowski*, 406 F.2d 721 (5th Cir. 1969). The court rejected Ginop’s argument, noting that the holding of the *Fecht* court had been rejected by the Sixth Circuit Court of Appeals in *Estate of Muer v. Karbel*, 146 F.3d 410 (6th Cir. 1998) in which it was held that the owner’s mere presence aboard the vessel does not preclude limitation of liability in an appropriate case. The court found that Jacobs had acted prudently in all respects and that the accident resulted solely from Ginop’s imprudent behavior. Having concluded that neither negligence nor privity on the part of Jacobs had been established, the court held that Jacobs was entitled to summary judgment in his favor on the Limitation of Liability Petition. *(The Editor wishes to thank Lyn Kagey, Esq. for contributing this article.)***OTHER RECENT CASES OF INTEREST** *Solar v. Kawasaki Motor Corp. USA,* 221 F.Supp.2d 967 (E.D.Wis 2002). District court granted summary judgment in favor of defendant Kawasaki in wrongful death/product liability action filed on behalf of minor who drowned in Lake Michigan while using his family’s Jet Ski. There were no witnesses to the incident. The Jet Ski was found several weeks after the minor’s body was recovered. When recovered, a bolt which secured the steering cable to the steering nozzle was detached and the evidence indicated that the bolt had failed. Plaintiffs alleged that the PWC was defectively designed or manufactured and that the failure of the steering system caused or contributed to the minor’s death. Expert reports and testimony were submitted by the plaintiff and the defendant. The plaintiff’s experts were unable to conclusively determine whether the bolt failure occurred before or after the incident. Although causation in a product liability case is ordinarily an issue for determination by a jury, the court concluded that the plaintiff’s theory of causation against the product distributor was purely speculative. The court held that evidence of a “mere possibility” of causation was insufficient to allow the issue to go to the jury. *Lewis v. Sea Ray Boats, Inc.,*65 P.3d 245 (Sup. Ct. Nev. 2003). The Supreme Court of Nevada reversed a defense verdict and judgment in favor of the manufacturer following a jury trial. The claim arose from one death and several personal injuries to individuals while sleeping aboard a Sea Ray power boat allegedly as a result of exposure to carbon monoxide from the vessel’s generator. The incident occurred on Lake Mead. The plaintiffs alleged that the manufacturer failed to provide adequate warnings concerning the risks of carbon monoxide exposure. At the trial the judge rejected the plaintiffs’ proposed jury instruction on the issue of the adequacy of warnings, adopting a more general instruction based on reasonableness. The judge refused to amend or supplement the warnings instruction despite two specific requests for clarification by the jury during their deliberations. In vacating the judgment the Supreme Court held that the jury instruction was improper because it failed to give adequate guidance to the jury on the standards governing the adequacy of product warnings. Inaddition, the plaintiffs challenged the trial court’s application of maritime law rather than Nevada state law. The Supreme Court held that although the waters of Lake Mead are “navigable waters” for the purposes of admiralty jurisdiction, the nature of the incident in question (injuries & death from carbon monoxide on a moored pleasure craft) did not in its view have a potential to disrupt maritime commerce as required to satisfy the test for admiralty tort jurisdiction. *National Ben-Franklin Ins. Co. v. Levernier,*No. 01-1166 (E.D.Wis., March 28, 2003). Declaratory judgment action relating to the availability of insurance coverage for claims made against a passenger on a 37 foot Sea Ray power boat (Edward Levernier) alleging that the passenger was operating the Sea Ray at the time it collided with another boat resulting in one death and several injuries to the occupants. The Sea Ray was owed by Lawrence Hoffman. Although the evidence showed that Levernier was seated near the helm next to the operator’s chair prior to the collision, the court found that the owner and primary operator Hoffman did not delegate any duties to Levernier. Levernier maintained a marine policy on his own boat which provided liability coverage to the named insured when operating other boats. Levernier’s insurer, National Ben-Franklin, argued that there was no coverage under its policy because the evidence showed that Levernier was not operating the Sea Ray at the time of the collision. Based on the evidence submitted by the parties the district court agreed that Levernier was not operating the Sea Ray and that therefore National Ben-Franklin did not owe a duty to defend or indemnify Levernier in connection with the claims. Hoffman, the owner of the Sea Ray, was insured by Northern Insurance which argued that the claims against Levernier were not covered under its policy on identical grounds, i.e., that Levernier was not operating the Sea Ray within the meaning of the policy. The district court agreed and held that the claims against Levernier were not covered under Northern’s policy. Finally, Levernier maintained a homeowner’s policy with General Casualty of Illinois which excluded coverage for liabilities arising from the ownership, maintenance or use of certain water craft as defined in the General Casualty policy. The district court found that the General Casualty policy did not exclude liability coverage for bodily injury claims involving a vessel with engines exceeding 50 horsepower if the vessel was not owned or rented by the insured. As a result, the district court found that General Casualty owed a duty to defend and indemnify Levernier under the homeowner’s policy.*Swords v. Bucher,*57 Pa. D. & C.4th 258 (2002). Trial court granted defendant boat owner’s motion for summary judgment on plaintiff’s claim for personal injuries sustained in “tube riding” accident based on the doctrine of assumption of the risk under Pennsylvania law. *Raskin v. Allison,*57 P.3d 30 (Kan. Ct. App. 2002). Suit was filed in Kansas state court on behalf of two minors for personal injuries sustained in collision between their watercraft and a watercraft operated by the defendant in the Pacific Ocean off Cabo San Lucas, Mexico. The plaintiffs and the defendants were all Kansas residents. On appeal the Kansas Court of Appeals affirmed the trial court’s finding that Mexican substantive law governed the plaintiffs’ claims under the doctrine of *lex loci delicti*notwithstanding the fact that all of the parties were Kansas residents, the fact that contributory negligence is a complete bar to recovery under Mexican law and the fact that Mexican limitations on recoverable damages would substantially reduce any potential recovery by the plaintiffs.**COMMITTEE ON MARITIME ARBITRATION AND MEDIATION****Newsletter No. 21, April 29, 2003** *Editors*:     Armand M. Paré, Jr.Keith W. Heard **I.    Cases Involving Pre-arbitration Issues** **A.    Failure** **to Lift Third-Party “Subject” Prevents Contract Formation** The parties in *Phoenix Bulk Carriers, Ltd. v. Oldendorff Carriers Gmbh & Co., KG,* 2003 A.M.C. 51 (S.D.N.Y 2002), disagreed over whether a “subject” found in a charter party fixture recap had been lifted B determining, in this case, whether the parties had entered into a binding contract. Defendant Oldendorff negotiated with plaintiff Phoenix, a shipowner, to obtain a vessel for AIMCOR, a seller of petroleum coke, to transport coke to CSN, a receiver in Brazil. During their negotiations, Oldendorff and Phoenix agreed to incorporate a pro forma charter party already in existence between Oldendorff and AIMCOR that included an arbitration clause. The PhoenixB Oldendorff agreement was then memorialized in a fixture recap, which was made “subject” to AIMCOR’s approval by a stated deadline. Phoenix contended the “subject” was lifted because AIMCOR expressed satisfaction with Oldendorff’s nomination of the vessel and presented it to CSN for approval. Oldendorff maintained that the “subject” had not been lifted on a timely basis because AIMCOR had not given its final approval to Phoenix or Oldendorff. Phoenix sought an order compelling arbitration and Oldendorff denied the existence of a contract. In articulating the standard of review, the District Court noted that “if an offer to enter into a charter party is accepted subject to a condition or reservation, ‘neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied.’” *Id*. at 55, quoting *Andolina Shipping Ltd. v. TBS Eurolines Ltd.,* 84 F. Supp.2d 527,530 (S.D.N.Y. 2000). The court agreed with Phoenix that AIMCOR expressed satisfaction with Oldendorff’s recommendation and proceeded to nominate the vessel to CSN but, on the evidence, disagreed with the assertion that this nomination was sufficient to lift the “subject.” The court was particularly troubled by Phoenix’s argument that AIMCOR’s unilateral act of nominating the vessel to CSN had an immediatelybinding effect on Oldendorff and Phoenix, even though neither was aware of it at the time. The district court concluded instead that “the more logical interpretation of this ‘subject’ is that AIMCOR was required in some fashion to communicate its approval to at least one of the two *contracting parties* in order to make the charter party binding on these parties.” 1993 A.M.C. at 57. The court also rejected Phoenix’s argument that Oldendorff was estopped under the implied covenant of good faith and fair dealing from claiming that the vessel was no longer open for trade after the deadline for AIMCOR’s approval because Oldendorff continued to represent to CSN after said deadline that the vessel remained “on the table.” *Id*. at 58. **B.     “Subject Details” Not Revisited** In an Order filed on November 13, 2002, the Second Circuit denied a petition for rehearing filed by the appellant with respect to the decision reported in *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.,* 241 F.3d 135 (2d Cir. 2001). As a result, the law in the Second Circuit with respect to contract formation, insofar as it relates to charter parties, remains as stated in *Great Circle Lines, Ltd. v. Matheson & Co.,* 681 F.2d 121 (2d Cir. 1982). **C.    Agreement to Arbitrate: Charter Party Incorporated in Bills****of Lading** In *Cargill Ferrous Int’l v. M/V SEA PHOENIX,* 2003 U.S. App. LEXIS 6714 (5th Cir. April 9, 2003), the Court of Appeals, in a 2-1 ruling, reversed the District Court’s denial of the defendant shipowner’s motion to stay litigation and compel arbitration, even though plaintiff shipper and voyage charterer had prevailed at trial and its cargo claim was now time-barred in arbitration. The vessel had been time chartered to an intermediate party and then voyage chartered to the shipper. The bills of lading for the cargo had an incorporation clause that was blank as to the names of the signatories, and the date and place of the making of the charter. Relying on *State Trading Corp. of India v. Grundstad Shipping,* 582 F.Supp. 1524, 1525 (S.D.N.Y.), *aff’d without opinion,* 751 F.2d 371 (2d Cir. 1984), the Fifth Circuit concluded that “such language is enough to effect incorporation where the bills of lading are in the hands of the charterer and where there is no confusion concerning who wasthe charterer or which charter party the bills of lading sought to incorporate.” 2003 U.S. App. LEXIS 6714 at 7. The court said there could be no confusion in the instant case because the shipper received and continued to hold the bills, the agent who signed them received its authority solely from a term in the voyage charter, the bills indicated freight was to be paid pursuant to that charter and the voyage charter required all bills issued thereunder to incorporate its arbitration clause, which was arguably done. The court ascribed particular significance to the voyage charter’s “requirement that bills of lading incorporate its arbitration clause” but this seems misplaced since there were two charters (one time, one voyage) and the bills did not indicate which one’s arbitration clause was being incorporated. The court rejected plaintiff’s argument that the shipowner had waived its right to seek arbitration, pointing out that the “only” prejudice to plaintiff had been “the expenses it incurred pursuing the litigation. . . and participating in a two-day bench trial,” *id*. at 14, which were expenses the shipowner also had to bear. A vigorous dissent argued that, on the basis of Fifth Circuit precedent, the failure of the bills of lading to specify either the name, date or parties to the charter was fatal to the incorporation argument, especially where, as here, there was more than one charter party. **D.    Agreement to Arbitrate: Subsidiary Bound to Parent’s****Contract Under Agency Principles** In *Keytrade USA, Inc. v. M/V AIN TEMOUCHENT,* 2003 U.S. Dist. LEXIS 597 (E.D. La. Jan. 10, 2003), the district court granted a motion requiring plaintiff cargo purchaser to arbitrate its late delivery claim against the defendant vessel’s time-chartered owner and stayed all other claims in the action, pending completion of the arbitration. Progress Bulk, the time-chartered owner, had voyage chartered the ship to plaintiff’s parent, a Swiss corporation. Progress argued that plaintiff was bound by the terms of the voyage charter, including its London arbitration clause, because: (1) the charter was incorporated by reference in the bill of lading, and (2) the parent was acting on behalf of plaintiff when it entered into the charter, binding plaintiff to the charter’s terms under agency principles. The court rejected the first argument, noting that “under Fifth Circuit case law, the bill of lading for the shipment did not incorporate the terms ofthe charter party.” *Id.* at 4. However, it granted the motion on the basis of the second argument, finding that plaintiffs’ entire board consisted of the parent’s officers and directors, plaintiff bought all of its imports through its parent, contractual decisions were based on considerations of group profitability, the parent handled all of plaintiff’s chartering arrangements, plaintiff knew of the standard terms of these charters and received copies of the recaps and, in the instant case, plaintiff “even requested that certain terms be included in the charter party.” *Id.* at 12. The defendant shipowner also made a motion to stay plaintiff’s claims against it, pending arbitration, based on the theory of equitable estoppel. While noting it was unclear whether the facts gave rise to an estoppel, the court nevertheless ruled that “a stay of all claims in this matter is essential” since allowing a trial against the shipowner beforehand “would almost certainly undermine Progress Bulk’s right to arbitration.” *Id.* at 18. **E.    Agreement to Arbitrate: Non-signatory to Charter Not****Entitled to Arbitrate** In *Astra* *Oil Co., Inc. v. Rover Navigation Ltd.,* 2002 U.S. Dist. Lexis 21210 (S.D.N.Y. Nov. 2, 2002), the court denied an attempt by petitioner Astra Oil to compel the respondent shipowner to arbitrate Astra’s claim for delayed delivery of a cargo of gasoil. Astra’s affiliate AOT Trading AG chartered respondent’s vessel and, while the voyage was being performed, sold the cargo to Astra, who was not a signatory to the voyage charter between AOT and Rover. An order bill of lading was issued for the cargo but its provisions concerning the date of the charter and names of the parties to the charter were left blank. When the vessel was delayed due to Coast Guard detention at the first discharge port, Rover provided a letter of undertaking addressed to both AOT and Astra, agreeing to appear in court or proceed “in accordance with the arbitration clause” in the charter to arbitrate any dispute in New York. Astra demanded arbitration of the late delivery claim and submitted supporting documents to the Panel but Rover denied that it had any duty to arbitrate Astra’s claim under the charter since the latter was not a signatory to that contract. In deciding the motion to compel, the court considered whether Astra was bound to the arbitration clause by principles of contract and agency law, including incorporation by reference, assumption, agency, veil-piercing/alterego and estoppel. The court found no basis to grant Astra’s motion under any of these principles. With respect to agency, the court ruled the evidence was insufficient to establish that AOT had acted as Astra’s agent in executing the charter. With respect to estoppel, the court investigated whether “the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.” *Id.* at 15, quoting *ThomsonBCSF, S.A. v. American Arbtrn. Assn.,* 64 F.3d 773, 779 (2d Cir. 1995). Noting that the charter was silent concerning damages for late delivery of cargo, the court concluded that relief was not available through estoppel since the issues Astra sought to resolve appeared to arise out of its dealings with a customer under a sales contract, rather than under the charter. Astra has appealed the District Court’s decision. *MLA Report Editors’ Comment: The district court’s decision in Astra was reversed by the U.S. Court of Appeals for the Second Circuit in 344 F3d 276 (2d Cir. 2003)* **F.    No Hearing Needed to Appoint an Arbitrator** The primary issue in *ACEquip Ltd., v American Engineering Corp.,* 315 F.3d 151 (2d Cir. 2003), was whether the District Court could appoint an arbitrator without first holding a hearing to test the validity of the arbitration clause. Plaintiff ACEquip was the assignee of a military construction contract that the assignor, Transact International, Inc., the original general contractor, had entered into with defendant American Engineering Corp. (“AEC”), a subcontractor. Sometime after the assignment, a dispute arose between ACEquip and AEC. ACEquip and Transact together commenced an action in Connecticut to have an arbitrator appointed. Although AEC challenged the validity of the assignment, the District Court misunderstood AEC’s position and dismissed Transact from the action. AEC then requested discovery and a hearing to show the assignment was invalid but the District Court found that an agreement to arbitrate existed, ordered appointment of an arbitrator and stated that the issue of the assignment’s validity was for the arbitrator to decide. The Court of Appeals reversed the dismissal of plaintiff Transact since the District Court based its decision on a clear misunderstanding of defendant’s position. Turning to the primary issue before it, the Court ofAppeals observed that nothing in the Federal Arbitration Act (“FAA”) or Connecticut law supported defendant’s argument that it was entitled to a hearing on the existence of an agreement to arbitrate before an arbitrator was appointed in response to plaintiffs’ motion. The court wrote that “a somewhat less stringent standard governs the [district] court’s decision to appoint an arbitrator as opposed to its decision to compel arbitration.” *Id.* at 156. For the latter, the District Court would need to determine whether the agreement to arbitrate was valid but, for the former, the FAA and the Connecticut arbitration statute required only that a district court determine the existence of such an agreement. The Court of Appeals noted that this result was especially appropriate in the instant case where defendant was clearly required to arbitrate with one of the plaintiffs and the only real issue at this stage was which one. The court remarked that “the appointment of an arbitrator is not the same as ordering arbitration,” offering that “the opposing party need not participate in arbitration after such an appointment” or may move for declaratory judgment “to challenge the arbitration clause after the appointment of an arbitrator but before arbitration begins.” *Id.* at 157. **G.    Time Bar for the Arbitrator to Decide** In *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S.     , 123 S.Ct. 588, 154 L.Ed. 2d 491 (2002), the Supreme Court ruled that a National Association of Securities Dealers (“NASD”) arbitrator, rather than the District Court, should determine whether the NASD’s time-limit rule for submitting controversies to arbitration applied to plaintiff’s claim. Plaintiff agreed to be bound by the NASD’s Code of Arbitration Procedure which stated that no dispute “shall be eligible for submission. . . where six (6) years have elapsed from the occurrence or event giving rise to the dispute.” Dean Witter filed suit, asking the District Court to declare the dispute ineligible for arbitration because it was more than six years old and seeking an injunction to prohibit Howsam from proceeding in arbitration. The District Court dismissed the action, stating that the NASD arbitrator should interpret and apply the NASD rule. However, the Tenth Circuit reversed, concluding that the rule’s application presented a question of the underlying dispute’s “arbitrability” and noting that a court will ordinarily decide an arbitrability question. The Supreme Court agreed with the District Court. Reviewing its precedents, the Supreme Court observed that the phrase “question ofarbitrability” has a limited scope and that, under those prior decisions as well as under the Revised Uniform Arbitration Act of 2000, questions as to time limits and laches are “presumptively for the arbitrator, not for the judge.” 154 L.Ed.2d at 498. The Court also observed that it was preferable for an NASD arbitrator to interpret and apply one of the NASD’s rules than for a judge to do so. **H.    Court Cannot Prevent Arbitrator from Considering Treble****Damages** In *Pacificare Health Systems, Inc. v. Book,* 123 S.Ct. 1531, 2003 U.S. LEXIS 2714 (2003), the Supreme Court ruled that it was premature for the District Court to decide whether contractual provisions barring an arbitrator from awarding punitive damages required the court to consider respondent’s claims for treble damages under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §1961 *et seq.* The District Court had refused to compel arbitration of respondents’ RICO claims, concluding that since an arbitrator lacked authority to award treble damages under the statute because of the proscriptive language in the contracts, the arbitration agreements were unenforceable with respect to those claims. The Eleventh Circuit affirmed. However, relying on its decision in *Vimar Seguros y Reasguros, S.A. v. M/V SKY REEFER,* 515 U.S. 528 (1995), the Supreme Court concluded that it was “premature” to address the issue “at this time.” 2003 U.S. LEXIS 2714 at 6. The Court pointed out that, in *SKY REEFER,* it had ruled that the cargo plaintiffs’ concerns about the law to be applied in a Tokyo arbitration were “premature” since it was possible the arbitrators would actually apply U.S. COGSA in deciding plaintiffs’ claims. As for the instant case, the Court wrote that “neither our precedents nor the ambiguous terms of the contracts” made it clear that an arbitrator would be precluded from awarding treble damages under RICO. 2003 U.S. LEXIS 2714 at 8. The Court noted that while the treble damages provisions in some federal statutes have been characterized as “punitive in nature,” such provisions in other statutes, including RICO, have been described as “remedial in nature.” *Id.* at 9-10. The Court concluded that “since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties’ agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration.” *Id.* at 11.**II.    Cases Involving Post-award Issues** **I.    Award Vacated Due to Lack of Fundamental Fairness,****Violations of Rights Under State Arbitration Law** In *Matter of Coty, Inc. v. Anchor Constr., Inc.,* 2003 N.Y. Misc. LEXIS 13 (Sup. Ct., N.Y. Cty. 2003), the court vacated a $2.4 million construction arbitration award on the basis that the arbitrators wrongfully denied respondent the right to participate in the proceedings and the right to a fundamentally fair hearing. When a dispute arose under a contract to remodel and repair office space in lower Manhattan, the prospective tenant filed for arbitration with the American Arbitration Association (“AAA”). The arbitrators scheduled over ten days of hearings and asked the parties to pay, in advance, certain fees, expenses and anticipated compensation for the Panel, totaling more than $80,000. Initial hearings were held in which each party was present and represented by counsel, although Anchor, the construction manager, had failed to pay its half of the requested fees and expenses. Petitioner Coty then made the Panel aware of the situation, in violation of the AAA rules, through a motion for default due to Anchor’s non-payment, which the Panel granted by denying Anchor any further active participation in the proceedings, despite its contention that the non-payment was due to “financial difficulties.” A total of twelve witnesses testified for Coty without being cross-examined by Anchor’s attorneys, who could not present evidence on behalf of their client and were even barred from speaking to the Panel. The court vacated the resulting award, ruling that the proceedings violated applicable New York statutes, due process and the AAA’s own rules. With respect to New York arbitration law, Anchor was denied its statutory right to participate under CPLR § 7506(c) and its unwaivable right to counsel under CPLR § 7506(d). In addition, the award was tainted by arbitrator misconduct due to a “bad faith” refusal to hear pertinent and material evidence after becoming directly involved in discussions with the parties about the Panel’s fees before the proceedings had concluded. With respect to due process, the court ruled that Anchor was denied a “fundamentally fair” hearing because it was denied the opportunity to be heard and to present evidence, and the right to be heard by an unbiased decision maker. Finally, the proceedings were marred by a violation of the AAA’s Rules, which provided that the Panel should not have been advised of the status of the fee dispute and which did not allow the Panel “to use the arbitration proceeding itself as a way of enforcing collection of their compensation.” *Id.* at 32.**J.    Excessive Award of Punitive Damages Vacated** In *Sawtelle v. Waddell & Reed, Inc.,* 754 N.Y.S.2d 264 (1st Dept. 2003), the New York Appellate Division, First Department vacated an award of $25 million in punitive damages against the former employer of a mutual fund broker that allegedly conducted a smear campaign after terminating him. Perhaps in retaliation for the broker’s testimony before the Securities and Exchange Commission regarding the activities of another Waddell & Reed broker, the employer terminated petitioner Sawtelle and then, according to the court’s summary of the arbitrator’s award, orchestrated “a campaign of deception that included giving the impression that Sawtelle had mishandled his clients’ investments, was untrustworthy, was not authorized to do business and, in some way, had been involved in the embezzlement of clients’ funds.” *Id.* at 268. The Panel awarded over $1.8 million in compensatory damages, attorneys’ fees and B on the basis that the employer had interfered with the broker’s prospective business relations in violation of the Connecticut Unfair Trade Practices Act — $25 million in punitives. When the employer moved to vacate or modify, the motion court modified the award to correct the panel’s double award of attorneys’ fees but declined to disturb the punitive damages award, noting the limited scope of review under the FAA. On appeal, the First Department vacated the punitive damages award and remanded for the arbitrators to reconsider the issue. The appellate court determined that the Supreme Court’s decision in *BMW of North America v. Gore,* 517 U.S. 559 (1996), although not an arbitration case, “provides the appropriate standard in determining the excessiveness of an arbitration award of punitive damages under FAA review.” 754 N.Y.S. 2d at 271. In analyzing the instant case under*Gore,* the First Department determined that the former employer’s misconduct did not evince the requisite “degree of reprehensibility,” the punitives awarded were substantially disproportionate to the harm inflicted on petitioner (who retained “the lion’s share” of his customers) and were “vastly out of proportion to the ‘civil or criminal penalties that could be imposed for comparable misconduct.’” *Id.* at 272-73. While the court was not convinced the award violated public policy, it did conclude that, in issuing an award where the punitive damages were “grossly disproportionate to the compensatory damages awarded,” the panel “completely ignored applicable law,” such that manifest disregard provided “a separate basis for vacating the award.” *Id.* at 273-74.**K.    Award Reinstated on Appeal: No Manifest Disregard** In *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.,* 304 F.3d 200 (2d Cir. 2002), the Court of Appeals reversed a decision in which Judge Marrero of the Southern District vacated an award concerning breach of a sales agreement on the basis that, by awarding expectancy damages for breach of a preliminary agreement, the sole arbitrator acted in manifest disregard of New York law. (We summarized the District Court’s decision in Newsletter No. 20 of April 30, 2002.) The Second Circuit held that Daihatsu, the losing party at arbitration, had not met its burden of demonstrating either the existence of a clearly governing legal principle or the arbitrator’s manifest disregard of such a principle. Although the motion to vacate ostensibly challenged the arbitrator’s manifest disregard of New York’s law of damages, the court noted that Daihatsu was actually contesting the tribunal’s reading of the sales agreement as a contract with condition precedent. The Second Circuit concluded that, instead of accepting the facts as determined by the arbitrator, the District Court embarked upon an (impermissible) independent examination of the contractual language to provide a basis for disagreeing with the arbitrator’s characterization of a key contractual provision. As stated by the Court of Appeals, “the arbitrator’s factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law.” *Id.* at 214. Interestingly, the Court of Appeals observed that “were we confronted with the task of construing the [contract] in the first instance, we might well be inclined to adopt the reading proposed by the district court, for we have serious reservations about the soundness of the arbitrator’s reading of this contract.” *Id.* at 216, n. 10. Reviewing relevant New York cases that allegedly foreclosed an award of expectancy damages in the instant case, the court determined that they were “factually distinguishable in a material respect,” thereby preventing the particular legal principle for which they stood from being “well defined, explicit, and clearly applicable,” as required by the manifest disregard standard. *Id.* at 216. The court also noted that, even if Daihatsu could prove the existence of a controlling rule of law, it could not prove that the arbitrator knowingly refused to apply or intentionally disregarded it. Finally, the court rejected Daihatsu’s alternative arguments that vacatur was required because the arbitrator had violated the “law of the case” doctrine, or exceeded or imperfectly executed his powers under section 10(a)(4) of the Federal Arbitration Act.**L.    Partnership Ruling Binds Corporate Parent to Award** In *Sarhank Group v. Oracle Corp.,* 2002 U.S. Dist. LEXIS 19229 (S.D.N.Y. Oct. 9, 2002), the court denied respondent Oracle’s petition to vacate a Cairo arbitration award and granted petitioner’s motion to confirm pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Petitioner, an Egyptian corporation, entered into a contract with Oracle Systems, a Cyprus corporation and a wholly owned subsidiary of the respondent, whereby petitioner was to sell Oracle products and provide services within Egypt. When a dispute arose, Oracle Systems terminated the agreement and petitioner responded by demanding arbitration of both Oracle Systems and the respondent. At the proceedings in Cairo, respondent objected to arbitration on the grounds it was not a party to the contract and had never agreed to arbitration or subjected itself to liability under the contract. The arbitrators rejected respondent’s defense that it was not a party to the arbitration and issued a unanimous award for petitioner. Respondent appealed the award to the Cairo Court of Appeals, where the decision was upheld, and then to the Egyptian Supreme Court, which had not yet ruled on the merits but had upheld a lower court’s Execution Order. When petitioner sought to confirm and enforce the award in New York, respondent opposed and sought vacatur on the grounds that: (a) the arbitrators lacked authority to impose liability since respondent was not a party to the contract, (b) the case was not ripe, and (c) enforcement of the award was contrary to U.S. public policy. The court ruled that the arbitrators’ conclusion that a partnership existed between respondent and its subsidiary was one of “construction of the parties’ agreement” which could not be reviewed by the court absent extraordinary circumstances, which were not present in the case. *Id.* at 14. The ripeness issue required the court to “use its discretion to balance the often competing interests of international comity and the goals of arbitration” which, in this case, “decisively” favored reaching the merits of enforcing the award, in part because the judicial proceedings in Egypt sought to set aside, not enforce, the award. *Id.* at 16. Finally, the court rejected the public policy argument because respondent received due process through notice and an opportunity to argue its defense to the arbitrators, which it utilized, and because “the imposition of joint and several liability against Oracle conforms to United States public policy,” as expressed in Second Circuit case law.*Id.* at 21.**M.    Dual Awards Withstand Multiple Attacks.** The district court in *In the Matter of the Arbitration between Back-Haul Bulk Carriers, Inc. v. Falcon Offshore Inc.*, No. 02-1209 (S.D.N.Y. April 16, 2003) denied petitioner bareboat charterer’s motion to modify or vacate a Partial Final Award and Final Award on the basis of sections 10(a)(4) and 11(b) of the FAA, manifest disregard and misconduct, bias or partiality on the part of the arbitrators. The arbitration dealt with claims between the respondent shipowner and the petitioner arising out of vessel mechanical problems that resulted in the ship’s redelivery in the Far East. Each party asserted several claims against the other, some of which were addressed in the Partial Final Award while others were dealt with in the Final Award. Respondent contended that Petitioner’s attack on the Partial Final Award was untimely since it was allegedly “final as to the issues determined therein.” Op. at 6. The court rejected Respondent’s argument, however, noting that the Partial Final Award was not final because some claims addressed therein were considered again in the Final Award. With respect to the motion to vacate, the court ruled that Petitioner failed to establish that the arbitrators exceeded their powers under section 10(a)(4) or made an award upon a matter not submitted to them under section 11(b). With respect to manifest disregard in interpreting a contractual provision concerning payment for fuel and stores at redelivery, the court observed that “charterer has put forth no cognizable evidence to show that the arbitrators were aware of a controlling doctrine and ignored or refused to apply it.” Op. at 14. With respect to Petitioner’s argument that the arbitrators were guilty of misconduct in refusing to hear additional oral evidence and argument, the court concluded “that the Panel offered both parties ample opportunity to present their cases.” Op. at 15. Finally, Petitioner argued that the panel’s conduct indicated “a pattern of partiality” in violation of FAA section 10(a)(2) but the court noted that the arbitrators made decisions in both awards “that went in favor and against both parties.” Op. at 17. **N.    Award of Attorneys’ Fees Upheld Basis SMA Rules** In *AT&T Corp. v. Tyco Telecommunications (U.S.) Inc.,* 2003 U.S. Dist. LEXIS 5565 (S.D.N.Y. April 4, 2003), the district court denied respondent’scross-motion to vacate an arbitration award on the grounds that various items of damages awarded due to the rupture of an underwater fiber optics cable were not in manifest disregard of the law. Liability for severing the cable was admitted and the purpose of the arbitration was to determine petitioner’s damages. Respondent argued that the Panel improperly interpreted the International Convention for the Protection of Submarine Cables as authorizing a private cause of action and allowing the recovery of restoration damages, disregarded the co-ownership doctrine expressed by the Supreme Court in *Brooklyn* *E. Dist. Terminal v. United States*, 287 U.S. 170 (1932), and misconstrued the law of proximate causation in compensating the cable owners for prorated annual restoration costs. In each case, the court determined either that the law was not “well defined, explicit, and clearly applicable” or that, where it was, the Panel’s application of the law was not grounds for vacatur. Respondent also argued that the Panel “improperly concluded that the parties implicitly agreed to be governed by the Rules of the Society of Maritime Arbitrators,” 2003 U.S. Dist. LEXIS at 29, which was then used as a basis for awarding attorneys’ fees. However, the court noted that, in determining applicability of the Rules, the Panel pointed to correspondence between the parties mentioning SMA Rules, written exchanges between counsel regarding the application of specific points covered by SMA Rules and, finally, reliance by respondent on SMA Rule 31 in opposing petitioner’s application for a partial final award. Thus, as stated by Judge Marrero, “the Court cannot conclude that the Panel’s decision to apply the SMA Rules is so lacking a basis in the record as to deprive Tyco of fundamental fairness.”*Id*. at 31-32. **O.    Award of Attorneys’ Fees Upheld Basis English Statute** In *Aasma v. American Steamship Owners Mut. Prot. & Indemn.,* 238 F. Supp.2d 918 (N.D. Ohio 2003), the court granted a motion by defendant P&I Clubs to confirm a London arbitration award that rejected plaintiffs’ attempts to collect from the Clubs default judgments against a bankrupt shipowner and assessed substantial costs and attorneys’ fees against plaintiffs. Plaintiffs, merchant seaman claiming injury from exposure to asbestos, obtained default judgments against States Steamship Co., whose bankruptcy case was officially closed in 1991. When plaintiffs sought a declaratoryjudgment to allow the judgments to be collected from two West of England entities, the latter obtained a stay requiring that plaintiffs, deemed to be standing in the shoes of the bankrupt shipowner, had to proceed in arbitration in England. The arbitrator in England concluded that, under the “pay to be paid” clause in the policies, “payment must first be made by States to Plaintiffs before West [of England] could be held liable under the States-West contract.” *Id.* at 920. The arbitrator ruled for the Clubs on all claims and assessed plaintiffs with costs and fees totaling over $500,000. In this proceeding, the Clubs moved for an order to confirm the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to enter judgment. The court determined it was without authority to hear plaintiffs’ “numerous substantive attacks against the arbitrator’s decision” since the parties’ arbitration agreement specifically provided that such disputes were to be submitted to an English court, which plaintiffs had failed to do. *Id.* at 921. Plaintiffs also argued that the award of costs was improper because, in their agreement, the parties had failed specifically to authorize the arbitrator to award same. The court rejected this argument, noting the parties had agreed that the proceedings were to be conducted in accordance with the Arbitration Act 1996, an English statute that specifically provided for the awarding of costs. Finally, the court rejected the argument that it should refuse to recognize the award under Article V, § 2 (b) of the Convention on the grounds the award of costs and fees was contrary to public policy. The court stated that this argument was based “largely on the grounds that the award is contrary to the American Rule regarding attorney’s fees.” *Id.* at 922. The court pointed out, however, that, even under the American Rule, parties are free to contract regarding the apportionment of fees, which is what the parties here did when agreeing to application of the Arbitration Act 1996. Finally, the court noted that “the arbitrator actually reduced the requested amount [of fees] by a considerable sum.” *Id.* at 923. **P.    Forum Non Conveniens Dismissal Under New York****Convention.** The Second Circuit in *In the Matter of the Arbitration between Monegasque de Reassurances S.A.M. and Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) affirmed a *forum non conveniens* dismissal of a foreign reinsurer’s petition seeking confirmation of a Russian arbitration award against Ukrainian respondentspursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the Convention”), 9 U.S.C. §201 *et seq.* The reinsurer, incorporated in Monaco, paid a claim originally held by Gazprom, a Russian company, and then pursued the claim against Naftogaz, a Ukrainian entity, at arbitration in Moscow. A substantial award in favor of the reinsurer was upheld by the Russian courts. In a confirmation action filed in the Southern District of New York, the reinsurer added the State of Ukraine as a respondent, contending that the political entity controlled Naftogaz or acted with it as a joint venturer. The District Court dismissed the petition on the basis of *forum non conveniens*. On appeal, the reinsurer argued that confirmation under the Convention can only be denied for seven reasons articulated therein, which did not include *forum non conveniens*. In essence, wrote the Court of Appeals, the reinsurer argued “that a United States Court must recognize and enforce any foreign arbitral award as a treaty obligation of the United States, without any consideration given to whether the court is a convenient forum for the enforcement proceeding.” *Id.* at 495. The court affirmed the District Court’s rejection of this argument, noting that the Convention required signatories to recognize arbitral awards “and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” Convention art. III. The doctrine of *forum non conveniens* is procedural, not substantive. The Court of Appeals found no abuse of discretion in the District Court’s dismissal, noting that “it is clear that the jurisdiction provided by the Convention is the only link between the parties and the United States.” 311 F.3d at 499.  *The Newsletter Editors gratefully acknowledge the contributions of Michael Marks Cohen, Christopher H. Dillon and Donald Kennedy in providing recent cases.***COMMITTEE ON UNIFORMITY OF U.S. MARITIME LAW****SPRING 2003 REPORT** In *Sprietsma v. Mercury Marine,*    U.S.        , 123 S.Ct. 518, 2003 AMC1 (2002), the United States Supreme Court held that the Federal Boat Safety Act, 46 U.S.C. §4301 *et. seq.,* does not preempt state common law tort claims. Plaintiff’s wife died in 1995 after falling from a speedboat and being hit by the motor’s propeller blades. Plaintiff sued the engine designer in Illinois state court for common law negligence. Plaintiff alleged that the engine should have been equipped with a propeller guard. The trial court dismissed the action and the appellate court affirmed, finding that the Federal Boat Safety Act (“FBSA”) expressly preempted the action. The Illinois Supreme Court affirmed dismissal, but on grounds of implied preemption. The FBSA, passed in 1971, was enacted to promote greater uniformity of boating laws and regulations and to promulgate national minimum safety standards for recreational vessels. The Department of Transportation vested the Coast Guard with authority to issue the regulations to be included in the Act. In 1990, the Coast Guard decided not to regulate propeller guards based on its conclusion that, among other things, propeller guards might increase potential for blunt trauma injuries. The United States Supreme Court granted *certiorari*and reversed and remanded. In a unanimous opinion, the Court ruled that the FBSA did not preempt plaintiff’s cause of action. The Court found that common law tort claims were not encompassed by the Act’s express preemption clause, which applies to “a [state or local] law or regulation.” That conclusion was reinforced by the Act’s savings clause, which states that compliance with the Act’s requirements does not relieve a person from common law liability. *Sprietsma,* 123 S. Ct. at 526. The Court also relied on the fact that the Coast Guard does not require the use of propeller guards. The Court reasoned that decision not to regulate that aspect of boating safety is consistent with intent to preserve state regulatory authority. *Id.* at 527-28. Further, the Coast Guard’s decision did not convey an “authoritative” message of a federal policy against propeller guards. *Id.* at 528.The Court rejected the Illinois Supreme Court’s holding that the FBSA impliedly preempted plaintiff’s claim. The Act does not require the Coast Guard to promulgate comprehensive regulations covering every aspect of boating safety, or to certify every vessel subject to its jurisdiction. Further, the Court determined that the FBSA does not convey a clear and manifest intent to completely occupy the field of boat safety regulation so as to foreclose state common law remedies. *Id.* at 529. The Court rejected the engine designer’s argument that preemption was required in order to preserve federal uniformity. In the opinion of the Court, that goal did not justify displacement of state common law remedies that compensate accident victims and their families and promote boating safety. *Id*. at 530. The Maritime Law Association submitted an *amicus curiae* brief on behalf of respondent, Mercury Marine. MLA President, Raymond P. Hayden, Joshua S. Force of New Orleans, J. Patrick Cooney of Houston and Donald C. Greenman of Baltimore prepared the *amicus curiae* brief.[\*](http://www.mlaus.org/article.ihtml?id=728&issue=53&folder=0" \l "_ftnref1" \o ")       1 oz. White rum; 1 oz. Dark rum; 1 oz. Bacardi 151 proof rum; 1 oz. Southern Comfort; 3 oz. Orange juice with pulp; 3 oz. unsweetened pineapple juice; 1/2 oz. Grenadine; crushed ice. Mix. Drink. Repeat as needed. |