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Maritime Recovery

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News Concerning Recent Maritime Recovery Issues

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# Non-traditional Theories of Recovery for Losses Arising Out of Maritime Casualties

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When significant cargo losses result from sinking, fire or some other casualty, the usual targets against which subrogation efforts are focused are the vessel, its owner and possibly the vessel's charterer. Unfortunately, this narrow approach can leave marine insurers with a bleak recovery prospect.

Certain countries, such as the United States and Great Britain, have limitation of liability statutes in place which permit the vessel owner to limit its liability to the value of the vessel after the casualty, plus freight. In addition, many countries have ratified the Hague Rules and subsequent conventions. Known in the United States as the Carriage of Goods By Sea Act, 46 U.S.C. 1300, et. seq., this statute codifies the rights and obligations of vessel owners and common carriers by water, thereby providing substantive defenses which are unheard of in land-based torts and which enable the carrier to avoid liability; see, e.g., Peril of the Sea, Error in Navigation/Management and the "Due Diligence" defense. Further, vessel owners and ocean carriers, even if found liable, can frequently limit their liability under COGSA to $500 per package or per customary freight unit. So, even if found liable, a common carrier can effectively skirt liability by paying a limitation that can be a small fraction of the actual loss.

Another potential victim of these types of losses is the vessel owner's hull insurer. Hull insurer typically reimburse its insured, the vessel owner, for the value of its lost ship, a figure which amount to millions of dollars; yet, this insurer is typically left with no viable means of recovery.

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However, during the past ten years, cargo and hull insurers, relying upon the creativity of seasoned maritime attorneys, have been increasingly pursuing alternate, and far less traditional, avenues of recovery.

One theory of recovery has entailed prosecution of a cargo shipper, when a catastrophic loss can be traced to some dangerous propensity of its cargo which was not known to the ocean carrier. In two recent decisions, insurers for the vessel and cargo owners filed claims against the shippers of containerized calcium hypochlorite hydrated ("cal-hypo") which ignited during transit. Cal-hypo was not considered a hazardous cargo, i.e., it was not usually flammable or explosive, so there was no limitation on where it could be stowed aboard a ship; however, unbeknownst to the ocean carrier, the chemical had a tendency to become unstable when it was heated. In both cases, the cal-hypo was stowed below deck where heat from the engine room and bunker tanks caused it to spontaneously combust. Asserting that this characteristic was known only to the shipper at the time of the casualties, the plaintiffs sought to impose liability on the shipper for the losses that followed. The outcomes were mixed: the judge who tried the Contship France case, in a decision rendered from the bench, ruled in favor of the shipper; whereas the judge in MV DG Harmony, 2005 AMC 2528 (S.D.N.Y. 2005), ruled in favor of the plaintiffs. Ironically, both decisions were issued by judges in the U.S. District Court for the Southern District of New York; and, not surprisingly, both decisions are being appealed.

Another novel approach was demonstrated by the insurers of the MSC CARLA and the containerized cargo she carried when the vessel broke in half during rough weather in the North Atlantic in November, 1997. After it was discovered that the ship had been "elongated" approximately twelve years before the casualty, and that the fracture had occurred at a point in the structure where the welding was alleged to be sub-standard, the Korean shipyard which performed the work was named in the proceeding. The trial judge held the shipyard liable for the damage, In Re Rationis, Inc., 2004 AMC 2211 (S.D.N.Y., 2004). But, eight months later, the Second Circuit reversed, holding that the claims were subject to Korean law and time-barred under that country's law. Rationis Enterprises Inc. of Panama, v. Hyundai Mio Dockyard Co., Inc, 426 F.3d 580 (2d Cir. 2005). Cargo interests and the owner of the MSC CARLA filed a Petition for a Writ of Certeriorari before the U.S. Supreme Court, but the Petition was denied..

Another category of defendants which has been targeted by hull and cargo insurers is the classification society, an entity which conducts inspections of ships in accordance with schedules and criteria set forth in the society's rules. The role of the classification society is crucial in the maritime community, since it is virtually impossible for an owner to obtain hull or P&I insurance, or to charter its ship, if the vessel is not in class with a recognized classification society. Recently, hull and cargo insurers have been advancing the

argument that, if an unseaworthy condition caused or contributed to a casualty, the classification society should be held liable if the defect is one which should have been discovered during a scheduled inspection.

Internationally, the viability of claims against classification societies is not uniform. In the UK, the House of Lords held a classification society does not owe any duty to a cargo owner and dismissed the suit. Marc Rich & Co. v. Bishop Rock Marine Co., Ltd. (The Nicholas H), (1995) 2 Lloyd's Rep. 299. In contrast, Greece appears to recognize suits against classification societies Sealord Marine v. American Bureau Of Shipping, 2002 AMC 2817 (S.D.N.Y. 2002) (Greek law recognizes cause of action against classification society by vessel purchaser who relied upon negligently prepared report); Carbotrade v. Bureau Veritas, 1997 AMC 98 (2d Cir. 1996) (Greek law recognizes cause of action by cargo owner against classification society).

In the U.S., the results of suits against classification societies have also been mixed since the outcomes are fact sensitive and the law applicable to the loss can vary. See, e.g., Sundance Cruises Corp. v. The American Bureau Of Shipping, 1992 AMC 2946 (S.D.N.Y. 1992) aff'd 7 F.3d 1077 (2d Cir., 1993); 511 U.S. 1018 (1994), in which a suit against the classification society was barred because the court found that the claim was governed by Bahamian law. In Cargill Incorporated v. Bureau Veritas, 1996 AMC 577 (S.D.N.Y. 1996), a suit by the cargo owner was dismissed because there was no reliance upon the certificate issued by the defendant classification society. In contrast, the Court in Otto Candies, LLC v. NKK, 2003 AMC 2409 (5th Cir. 2003) affirmed a judgment against the classification society which involved negligent misrepresentation of the condition of the vessel.

All of the above examples involved cases in which liability was hard fought, in many instances through trial and appeals. Accordingly, the high expert and legal costs have to be weighed against the potential recovery and the possibility of success. However, when the loss involves a container vessel and all of her cargo, the costs of litigating the dispute, although significant, may pale in comparison to the substantial losses borne by the marine insurers.