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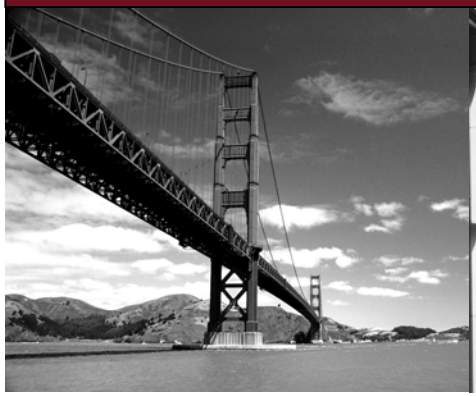
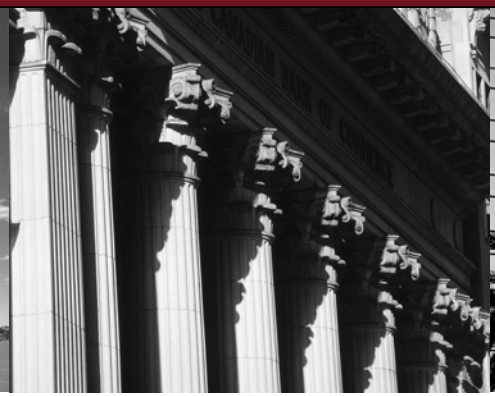
“There are no facts, only interpretations.”

- **Claims presented to the wrong (marine) insurers.**

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- **“If you can’t be with the one you love, love the one you’re with.”**

(Crosby Stills Nash & Young, 1971)

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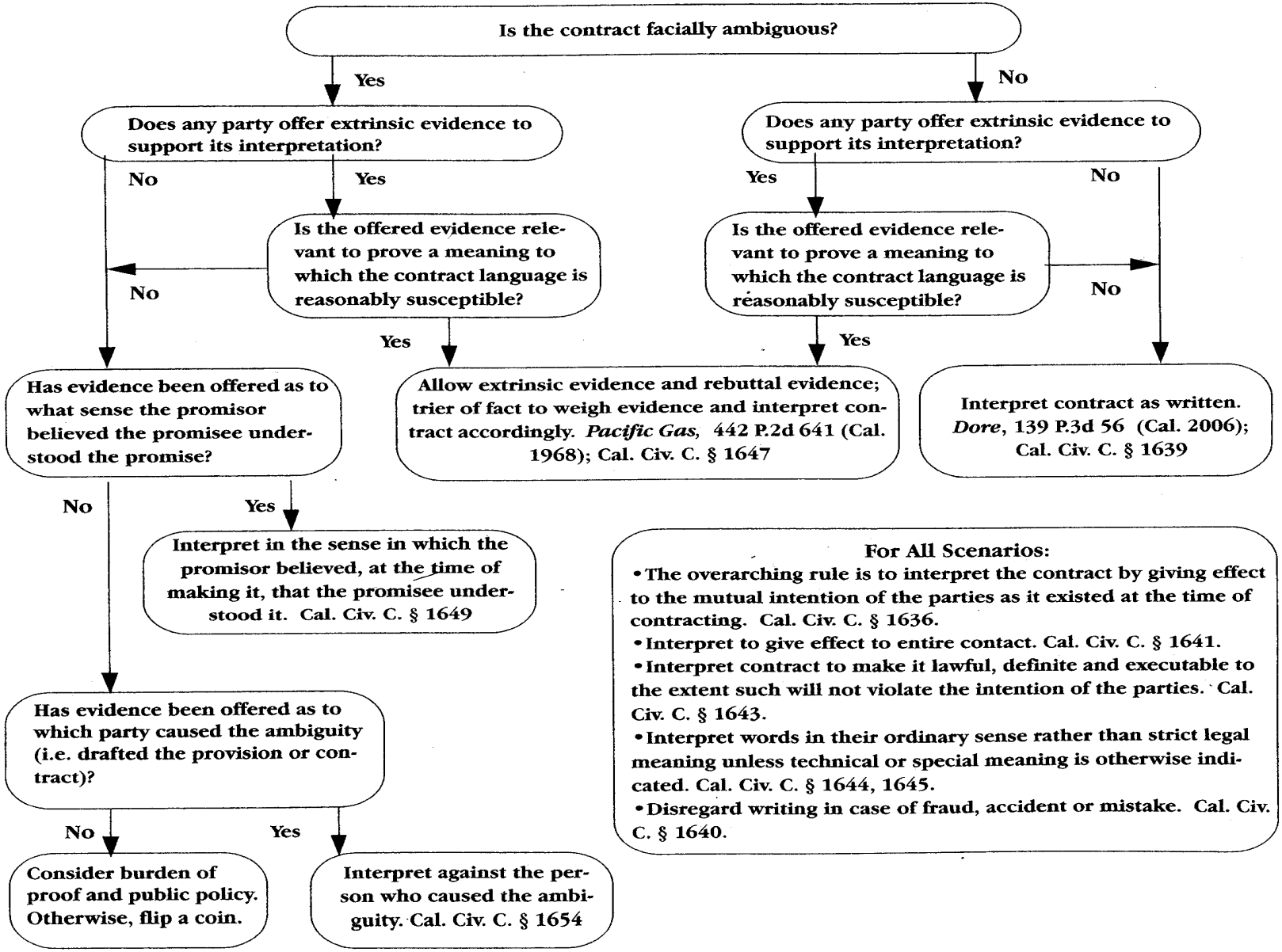
A Flow Chart for Contract Interpretation under California Law



CONTRA PROFERENTEM

- *Gray v. Zurich Ins. Co., 65 Cal.2d 263 (1966)*

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- **Unequal bargaining position; contract of adhesion.**

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Plain meaning

- *AIU Ins. Co. v. Superior Court, 51 Cal.3d 807 (1990).*

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- **Rose Bird**

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- **California Department of Agriculture.**
- **Never been a judge**
- **Chief Justice, California Supreme Court. 1977 to 1987**

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- **Turned out of office by the voters.**
- **Overturned 58 of 58 death penalty convictions.**

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New California Governor

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JORGE FISHING CLAIM

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Tuna seiner.

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Spotter helicopter.

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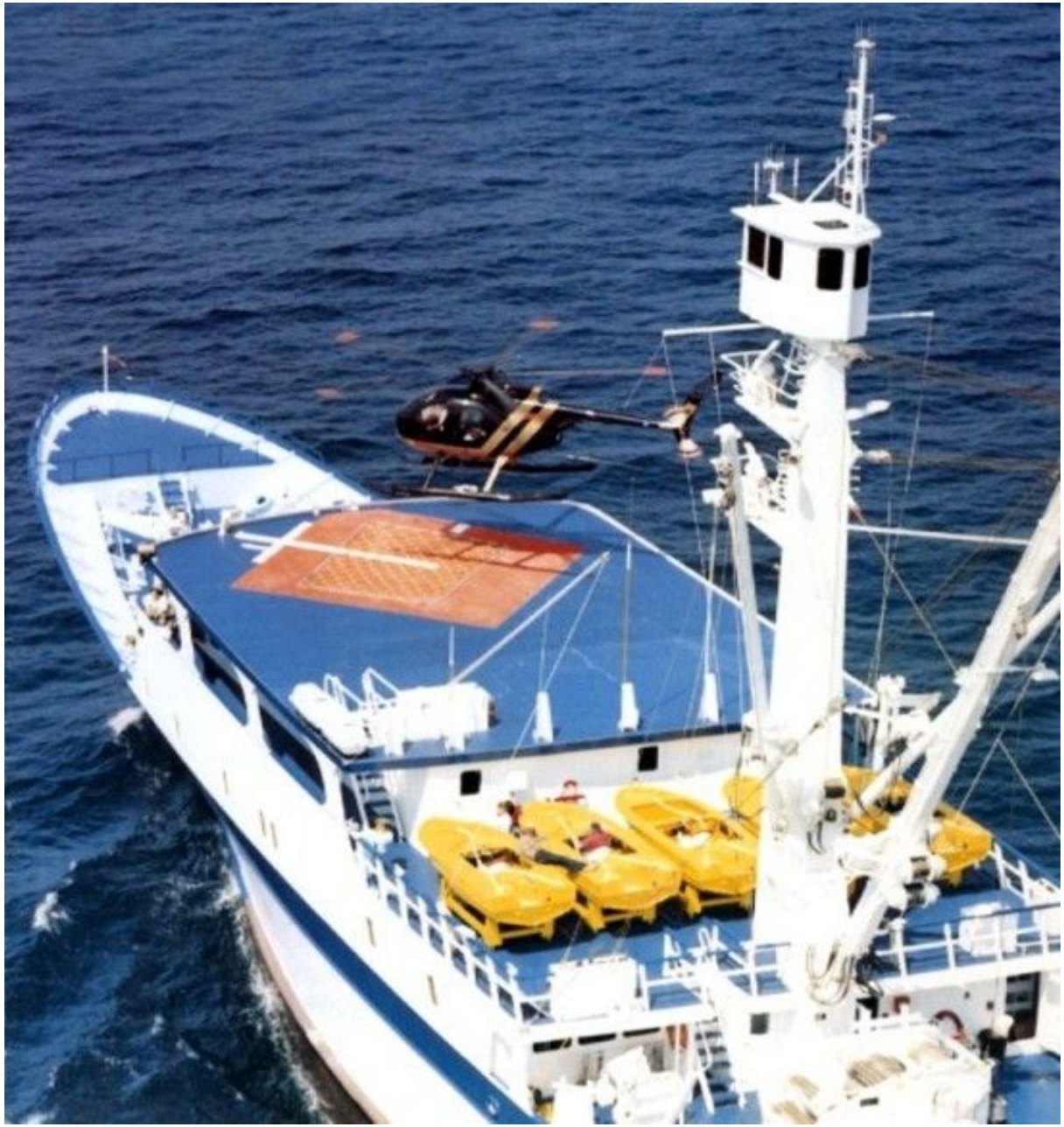

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Tuna boats need insurance for:

A. Hull and machinery.
B. Increased value on hull.
C. P&I.
D. Excess P&I.
E. Net and catch.
F. Oil pollution and COFR (U.S. waters).
G. USL&H
H. Aviation liability.

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Jorge fleet
Receivership in Puerto Rico

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Receiver appointed.

- **Dour Scot.**

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Hired a new insurance broker.

- Wanted to look good to his client.
- Wanted to reduce total cost of insurance.

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- **Gambled; did not renew aviation liability policy.**

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Primary P&I insurance had an exclusion:

“Excluding claims regarding helicopters whilst rotors are in motion.”

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U.S. broker issued cover note to assured.

- No exclusion attached.
- Did broker fail to attach it?
- Did assured or his lawyers tear it off?

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Helicopter crashed.

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Pilot and fish captain badly hurt; permanently disabled.

- **Sued the vessel and the company.**

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- **P&I Underwriters declined claim.**

- **U.S. Broker funded settlement.**

- **Assured and U.S. broker sued P&I underwriters.**

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U.S. Broker and assured argued:

- **Helicopter is an appurtenance of vessel.**
- **Helicopter contributes to mission of vessel.**
- **Therefore helicopter liabilities are covered by P&I policy.**

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“All such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay ….”

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- **No exclusion applies.**
- **Contra proferentem.**

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Underwriters' argument:

- Helicopter not an appurtenance of vessel.
- Requires a license and considerable training to fly a helicopter.
- Neither is required to drive an uninspected fishing vessel.

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- **Aviation risks previously insured separately.**

- **Separate market for aviation insurance.**

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Assureds did not have the right insurance.

- **No aviation liability.**

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- **Their solution: Present the claim to the insurance they did have:**
  - **-Primary P&I**
  - **-Excess P&I**

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Result:

Settled after almost three months of jury trial in federal court in San Diego, California.

- **Extremely expensive.**
- **Very liberal, anti-insurer judge.**

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Lesson:

P&I should have a warranty that if vessels operate helicopters, aviation liability insurance will be kept in force at all times, and P&I will not cover claims which would have been covered had aviation liability insurance been in place.

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- **In the open cover agreement.**

- **In each cover note.**

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KILCHIS

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- **Large crane barge.**

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- **Barge anchored during a storm; broke free.**
- **Tug anchored away from barge to avoid ranging damage.**
- **Tractor tug tried to capture it.**

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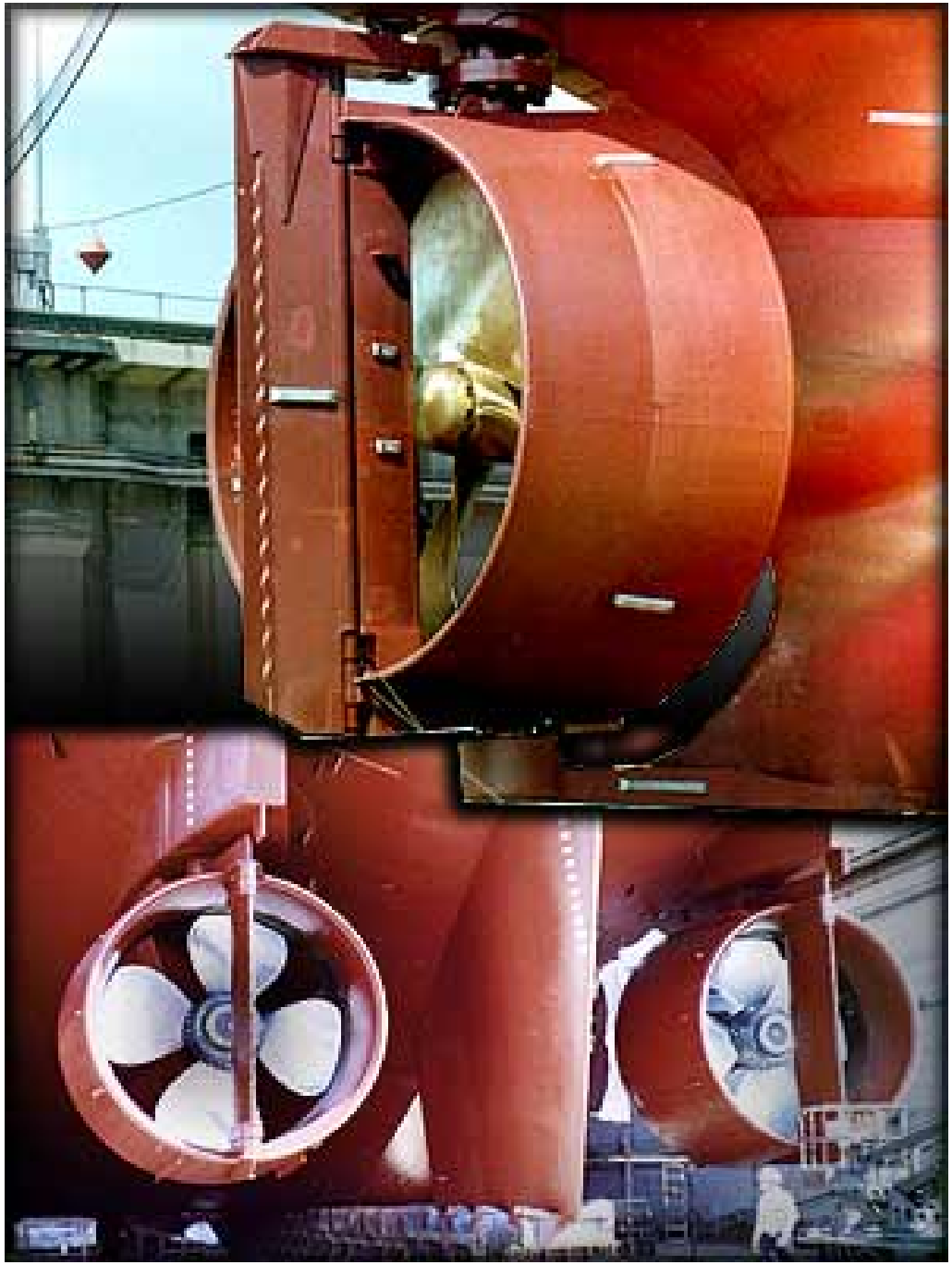

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Barge ran aground; significant hull damage.

- Reinsured Underwriter wrote hull and machinery insurance on barge.

- Paid loss of $1.8 million.

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Treaty:

50% reinsurance of losses to vessels “whilst under tow”.

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- **No facultative reinsurance of this hull policy.**

- **Claim presented to the reinsurance they did have.**

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- **Leader declined claim.**

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- **Broker was insistent.**

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- **Leader referred claim to LCO.**

- **LCO agreed; no coverage.**

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Reinsured sued in federal court in San Francisco.

Mediation.

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Their claims:

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- **Barge was under tow (only temporarily broken free).**

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- **We are a very large American insurance company that does a lot of business in the London market.**

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- **Underwriters will want to do business with us again, so should pay our claim.**

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Motion for summary judgment filed.

Settled at mediation.

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Did not have proper reinsurance.

- **Presented claims to the reinsurance they had.**

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SAN PEDRO BOAT WORKS

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San Pedro, California.

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Repaired boats over a 40 year period.

Sandblasted hulls.

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- **Failed to properly wrap/shroud vessels to contain waste.**

- **Failed to properly handle, store and dispose of hazardous waste.**

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Criminal conviction of president of SPBW.

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Former SP Boatyard Owner is Sentenced

Posted on: Tuesday, 28 March 2006, 12:00 CST

By Matt Krasnowski COPLEY NEWS SERVICE

The former owner of a San Pedro boatyard was sentenced Monday to one year and a day in prison for illegally storing hazardous waste, and was ordered to pay $490,000 in restitution to the city of Los Angeles for cleanup at the port.

San Pedro Boat Works owner Andrew Wall, 61, of Hawaii was also fined $5,000. He pleaded guilty in 2004 to a single federal count of unlawfully storing drums of flammable and toxic wastes at Berths 44 and 57 of the outer Los Angeles Harbor.

The year-and-a-day prison term could allow Wall to qualify for "good time" credits toward his sentence and be released after roughly 10 months in custody. He was ordered to report to prison in May.

The restitution is to be paid to the Los Angeles Harbor Department to reimburse it for cleaning up and removing waste generated by the company.

Court papers in the case state that Los Angeles County Fire Department officials found at least 128 55-gallon drums filled with flammable waste paint, solvent, waste oil and contaminated water, as well as a cargo container filled with paints and solvents at the berths.

Wall "neglected his stewardship of the environment," said U.S. District Judge Dickran Tevrizian, who ordered the sentence.

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Suit by City of Los Angeles for Cleanup costs.

- No pollution insurance for on land occurrences.
- CGL policies had APE.

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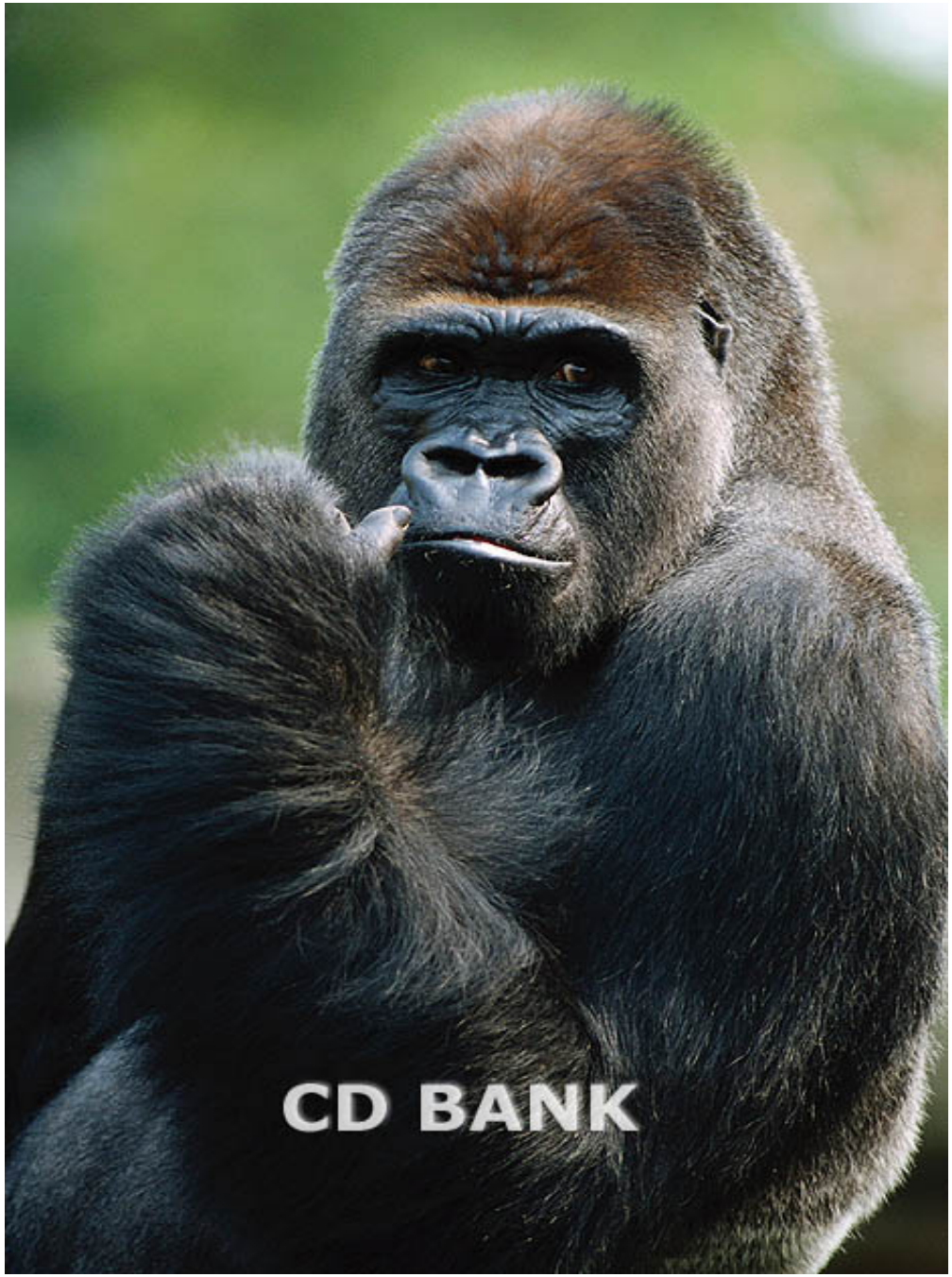

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- **Absolute Pollution Exclusion**

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Presented claim to Vessel pollution insurers.

- **Declined**
- **Sued Underwriters.**

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Facts showed:

- **Sandblasting vessels in drydock.**
- **Pollution falls or blows into water and mud.**

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- **Ordinary course of assured's business.**

  Shell v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715 (1993).

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Vessel pollution policy's language:

Liability as owner of vessels.

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- **CERCLA; a ship is not a facility.**
- **Had no COFR for drydocks.**

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Result:

- **Won on summary judgment on a technical bankruptcy issue.**

- **"Claim to wrong insurers" motion was begun, but never filed**

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BURMA/MYANMAR

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Unocal did not have the right insurance.

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Burma / Myanmar

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Discovery of natural gas in the 1970's in Andaman Sea.

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Pipeline built.

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Myanmar army first “secured” the route.

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- **Karen tribal area.**

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- **Chased villagers out and burned villages.**

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- **Shot anyone who opposed or refused to leave.**

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U.S. human rights groups became involved.

- Earth Rights International.
- Human Rights Watch.

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6. **Filed nine lawsuits in California against Unocal:**
   - **Murder;**
   - **Rape;**
   - **Torture;**
   - **Forced labor;**
   - **Forced relocation;**
   - **Confiscation of property;**
   - **Slavery;**
   - **Human rights violations;**
   - **Violation of the Law of Nations;**
   - **Crimes Against Women;**
   - **8 other causes of action.**

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Vicarious liability for acts of Myanmar army.

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Tendered to London Underwriters.

- Declined.

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“LOSS” defined in Underwriters’ policy as:

“Accident, including continuous or repeated exposure to the same general harmful conditions.”

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Political risk.

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- **Declared or undeclared war, hostile actions by national or international forces, civil war, revolution, insurrection, and civil strife, including politically motivated terrorism and sabotage, are all examples of political violence.**

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Unocal's response:

- **Not the Myanmar army, but "rogue soldiers".**
- **Policy is ambiguous.**
- **Not our intentional acts.**

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Terrorism coverage protects against violent acts undertaken by individuals or groups that do not constitute national or international armed forces with the primary intent of achieving a political objective.

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Political risk coverage is available from:

- London market.
- OPIC.

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October 2007:

Summary judgment for Underwriters.

- **War risk exclusion applies.**
- **Policy not ambiguous.**
- **No accident.**

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- **$80 million claim dismissed.**

- **Unocal did not have the right insurance.**

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- **Previously had purchased Political Risk coverage from OPIC.**

- **Cost-saving?**

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Conclusion:

Don’t be afraid to fight a good case if the assured failed to buy the right insurance.

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- **No obligation to tell assured he needs higher limits.**

- **Claimants frequently say you had to tell them. They are wrong.**

AGA Fishing Group Ltd. v. Brown & Brown, Inc. 2008 WL 2687494 (1st Cir. 2008).

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- **No obligation to tell assured he needs different type(s) of insurance.**

  Fitzpatrick v. Hayes, 57 Cal.App.4th 916 (1997).

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