

Risk Shifting Provisions **in Maritime Contracts**

Issues Considered



Issues Considered

- Risk Shifting Provisions in Marine Service Contracts
- Validity of Risk Shifting Provisions
- Other Considerations of Validity
- Defenses to Enforcement

Introduction and Issues Considered

- Hull and P&I Responses
- Marine Service Provider's Liability Cover
- Case Study: MARJORIE MORNINGSTAR

Risk Shifting Provisions in Marine Service Contracts



Risk Shifting

Duty



Breach



Causation



Damages

Typical Risk Shifting Provisions

- Exculpatory Clause
- Limitation of Liability
- Waiver of Subrogation
- Indemnification
- Reciprocal Indemnity
- Provision of Liability Insurance

Theories of Recovery

- Breach of Contract
- Express and Implied Warranties
- Negligence
- Gross Negligence/Willful Misconduct

Validity of Risk Shifting Provisions



Validity of Risk Shifting Provisions

- The validity of risk shifting clauses in maritime contracts is governed by the General Maritime Law of the United States.
- Close scrutiny by courts to insure sufficient incentives against negligence.
- Courts balance these incentives against freedom of contract between parties with equal relatively bargaining power.

Validity of Risk Shifting Provisions

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

- Towing contract provided a clause that towage was at the “sole risk” of the barge owner.
- Exculpation clause held contrary to public policy:
 - Negligence is discouraged by making wrongdoers pay damages; and
 - Towing companies can overreach where there is limited competition.

Exculpatory Clause

(1) Limitation of liability

- (a) The Yacht Owner consents to carriage of the Yacht on deck, at the Yacht Owner's sole risk. Neither the vessel nor the Carrier shall be liable for any loss or damage or liability of any nature no matter how caused or by whom caused, including, but not limited to any unseaworthiness or want of fitness. In case of carriage to or from the United States and only insofar as COGSA and/or Harter Act applies, neither the Carrier, the Vessel nor any and all of their respective Servants shall in any event be or become

- Dockwise Yacht Transport Terms and Conditions

Limitation of Liability

Furthermore, we undertake to perform work on vessels ...only upon the condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract, tort or otherwise, to its owners ... for any injury to such vessel ... unless such injury is caused by our negligence ... and in no event shall our aggregate liability ... exceed the sum of \$300,000.00.

– Alcoa Steamship Terms and Conditions

Limitation of Liability

Contractual limitation of liability may be based on value of goods and services provided rather than a fixed dollar amount:

“Diesel Repower Systems, Inc.’s total dollar amount of liability is the purchase price of the equipment sold on this invoice.”

– Diesel Repower Refit Contract

Waiver of Subrogation, Indemnity, and Named Insured



Waiver of Subrogation

Owner waives any right or claims against the Marina for damage sustained by Owner which is covered under any insurance policy, and Owner shall cause Owner's insurance carriers to waive their respective rights of subrogation with respect to the same.

- Dog River Marina Berth Lease and Storage Agreement

Indemnification

- *The Owner... hereby agrees to release, save harmless, defend and indemnify Rybovich... including indemnification for costs and attorneys fees, from, against, and for claims for damage to the vessel, its gear, equipment, and content, or for injury to the Owner... arising from duties assumed under this agreement or by operation of law, use of the vessel or any individual's presence on Rybovich's property, except where attributable to gross negligence or willful misconduct by Rybovich.”*
 - *Rybovich Refit and Repair Clause*

Reciprocal Indemnity

- *Each party accepts responsibility and liability for the death or personal injury of its own personnel... whether or not caused by the negligence or gross negligence of the other party... Each party further agrees to indemnify and hold harmless the other party, as regards both liability and legal costs, in the event the aforesaid personnel or their dependents pursue claims for death or personal injury against the party who is not responsible for them under this contract.*

– BIMCO Standard Ship Repair Contract

Provision of Liability Insurance

All policies under subparagraphs iii), iv), and v) above shall name TECO Ocean Shipping as an additional insured, waive subrogation as to TECO Ocean Shipping, provide no recourse against TECO Ocean Shipping for the payment of deductibles, premiums or other charges and shall provide that payments under paragraph v) shall be made to TECO Ocean Shipping for distribution by it to both TECO Ocean Shipping and the Shipyard as their respective interests may appear.

- TECO Ocean Shipping Standard Terms & Conditions for Shipyard Repair and Conversion

Limitations on Risk Shifting Provisions

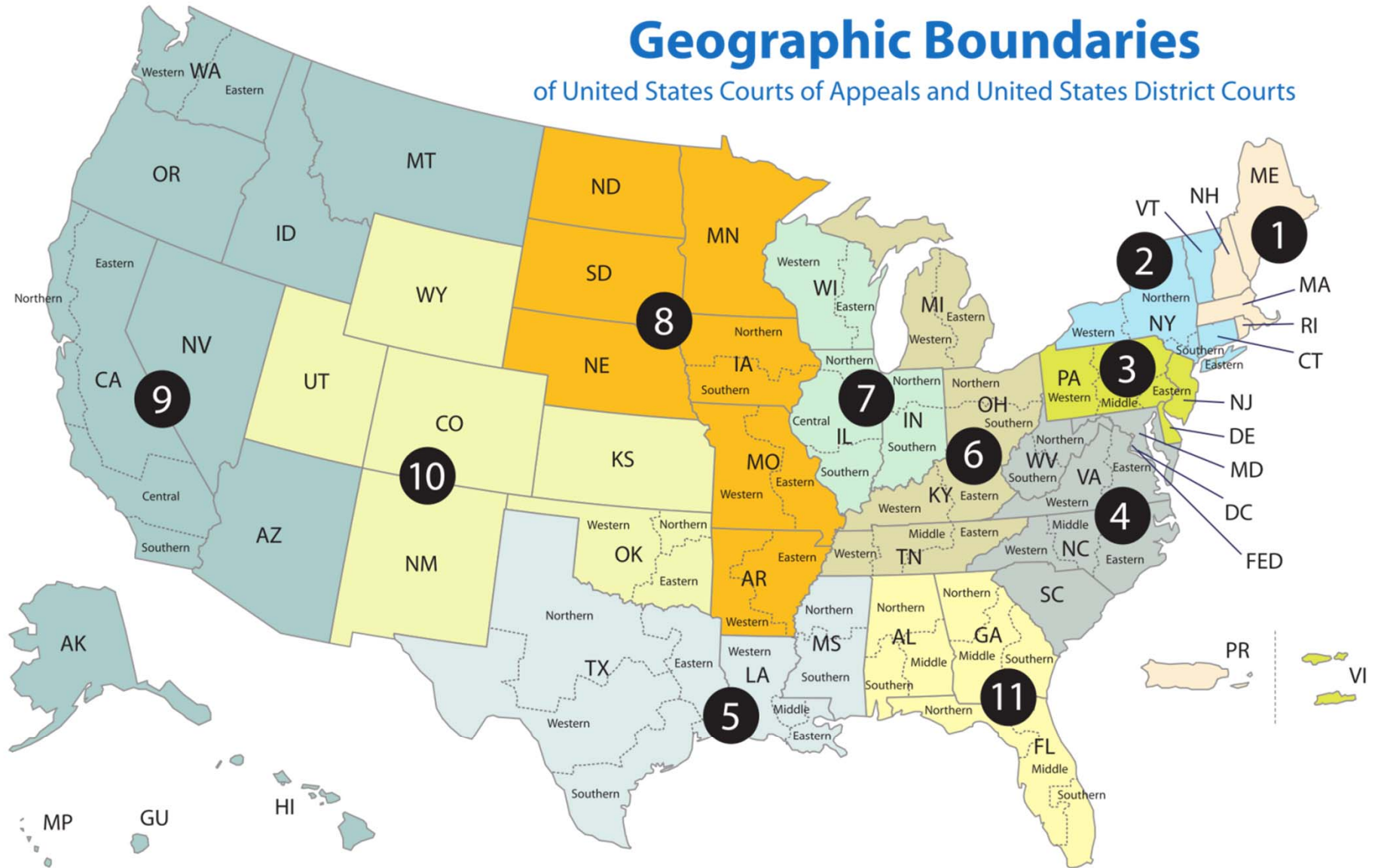


Limitations on Risk Shifting Provisions

- Some Provisions Routinely Enforced:
 - Provision of Insurance
 - Indemnification
 - Reciprocal Indemnity
 - Waiver of Subrogation
- Some Provisions Receive Greater Scrutiny:
 - Limitation of Liability: Moderate Level of Scrutiny
 - Exculpatory Clauses: Significantly Greater Scrutiny

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



11th Circuit

- Valid Risk Shifting Provisions:
 - Provision of Insurance
 - Indemnification
 - Reciprocal Indemnity
 - Waiver of Subrogation
 - Limitation of Liability
- Unenforceable Risk Shifting Provisions
 - Exculpatory Clauses

5th Circuit

- Valid Risk Shifting Provisions:
 - Provision of Insurance
 - Indemnification
 - Reciprocal Indemnity
 - Waiver of Subrogation
 - Limitation of Liability
- Unenforceable Risk Shifting Provisions
 - Exculpatory Clauses

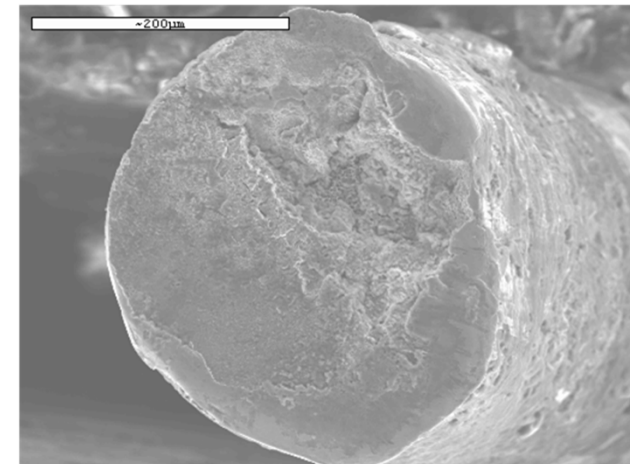
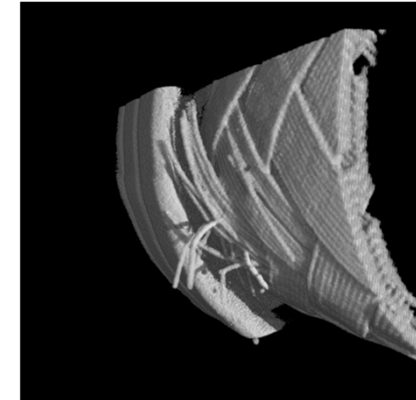
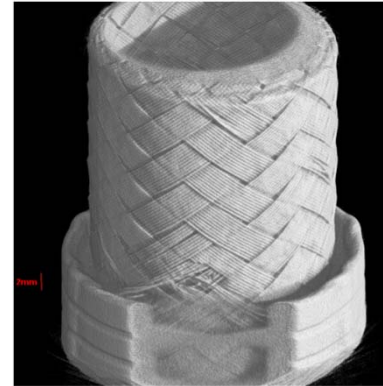
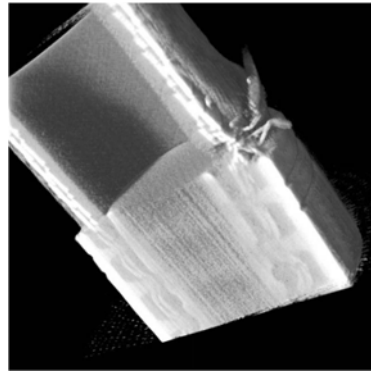
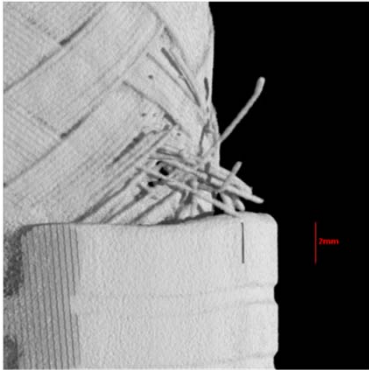
2nd Circuit

- Valid Risk Shifting Provisions:
 - Provision of Insurance
 - Indemnification
 - Reciprocal Indemnity
 - Waiver of Subrogation
 - Limitation of Liability
 - Exculpatory Clauses

9th Circuit

- Valid Risk Shifting Provisions:
 - Provision of Insurance
 - Indemnification
 - Reciprocal Indemnity
 - Waiver of Subrogation
 - Limitation of Liability
 - Exculpatory Clauses

Other Considerations of Validity



Requisites and Drafting Criteria

- Risk Shifting Provisions General Requirements:
 - Relative Equality in Bargaining Power
 - In Writing
 - Clear and Unambiguous

Other Considerations of Validity

Joint and Several Liability: The extent to which risk shifting clauses may impact the principles of Joint and Several Liability under the General Maritime Law is unclear.

Other Considerations of Validity

Indemnity: Under federal maritime law, a “contract of indemnity should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties.”

More strictly construed for losses not expressly identified or reasonably inferred.

- Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 333 (5th Cir.1081)

Gross Negligence



Gross Negligence

- Clauses limiting liability in any form will be inapplicable to acts of gross negligence under maritime law.
 - Lykes Bros. SS. v. Waukesha Bearings Corp., 502 F.Supp. 1163 (E.D. La. 1980).
- “Pinpointing the exact meaning of gross negligence under federal admiralty law proves surprisingly difficult.”
- Federal courts most often look to state law.
 - Lobegeiger v. Celebrity, 2011 WL 3703329 (S.D. Fla. 2011)
 - See also Royal Ins., 194 F.3d 1009 (9th Cir. 1999)

Gross Negligence

- Generally, both state and federal courts define gross negligence as a conscious disregard of a particularly foreseeable harm.
 - Lobegeiger v. Celebrity, 2011 WL 3703329 (S.D. Fla. 2011)
 - Farrell v. Fisher, 578 So. 2d 407 (Fla. 4th DCA 1991)
 - Ambrose v. New Orleans, 639 So.2d 216 (La. 1994)
 - Colnaghi v. Jewelers Prot. Serv., 81 N.Y.2d 821 (N.Y. 1993)
 - Santa Barbara v. Superior Court, 41 Cal.4th 747 (Cal. 2007)

Defenses to Enforcement



Defenses to Enforcement

- Requirements for enforceable risk shifting provisions are not limited to Bisso concerns
- Provisions are also subject to traditional rules of contract interpretation

Rules of Construction

- ***Contra Proferentem***
 - Ambiguities to be construed against the drafter.
- **Plain Meaning**
 - The meaning that a person of average intelligence, knowledge, and experience would deem reasonable.
- **Definition/Description**
 - If a term is defined or described, that meaning is given to the term wherever it appears in the agreement, unless the context clearly requires otherwise.

Rules of Construction

- **Custom and Usage**

- Words have a technical meaning not ordinarily associated with common language.
- Extrinsic evidence (including opinion testimony) has been permitted to explain and interpret terms when the meaning depends on trade practice.

Hull and P&I Responses



Risk Shifting and Policies

- Clear trend in the marine service industries shifting risk away from actor.
- Has the marine insurance industry implemented responsive changes?
 - New terms, conditions, and/or rates?

Policies Covering Yard Periods

- Historically, hull policies have had no coverage restrictions on yard periods or the work to be completed
 - American Yacht Form R.12
 - Contains no provision regarding yard periods
 - American Institute Hull Clauses
 - Covers “negligence of repairers”
 - May designate or veto a yard post casualty
 - International Hull Clauses (Institute Time Clauses)
 - Covers the “negligence of repairers”

Policies Covering Yard Periods



Right To Recover

You may have the right to recover from another party who is responsible for your loss or loss to the insured boat. If we pay your loss under this policy, this right of recovery will belong to us up to the amount that we have paid you. If you take any action that impairs our right to recover, we can consider this policy void and without effect as to such loss. However, signing a written contract for dockage, slip rental, moorage, hauling/launching, storage, repair or maintenance of the insured boat which includes a waiver of subrogation provision shall not void this policy.

- Boat U.S. Yacht Policy

Refit and Repair Clauses

- Reliance on *uberrimae fidei* is uncertain and requires policy provisions to protect insurers.
- ICOMIA Refit, Repair, and Hot Work Clause imposing duties on the owner to:
 - Notify the insurer of such work
 - Insure adequate SRLL coverage
 - Refrain from agreements impairing insurer rights

ICOMIA

Refit, Repair and Hot Work Clause

It is a condition of this Policy that You will, whenever the Vessel is Contracted to undergo any refit, repair or Hot Work:

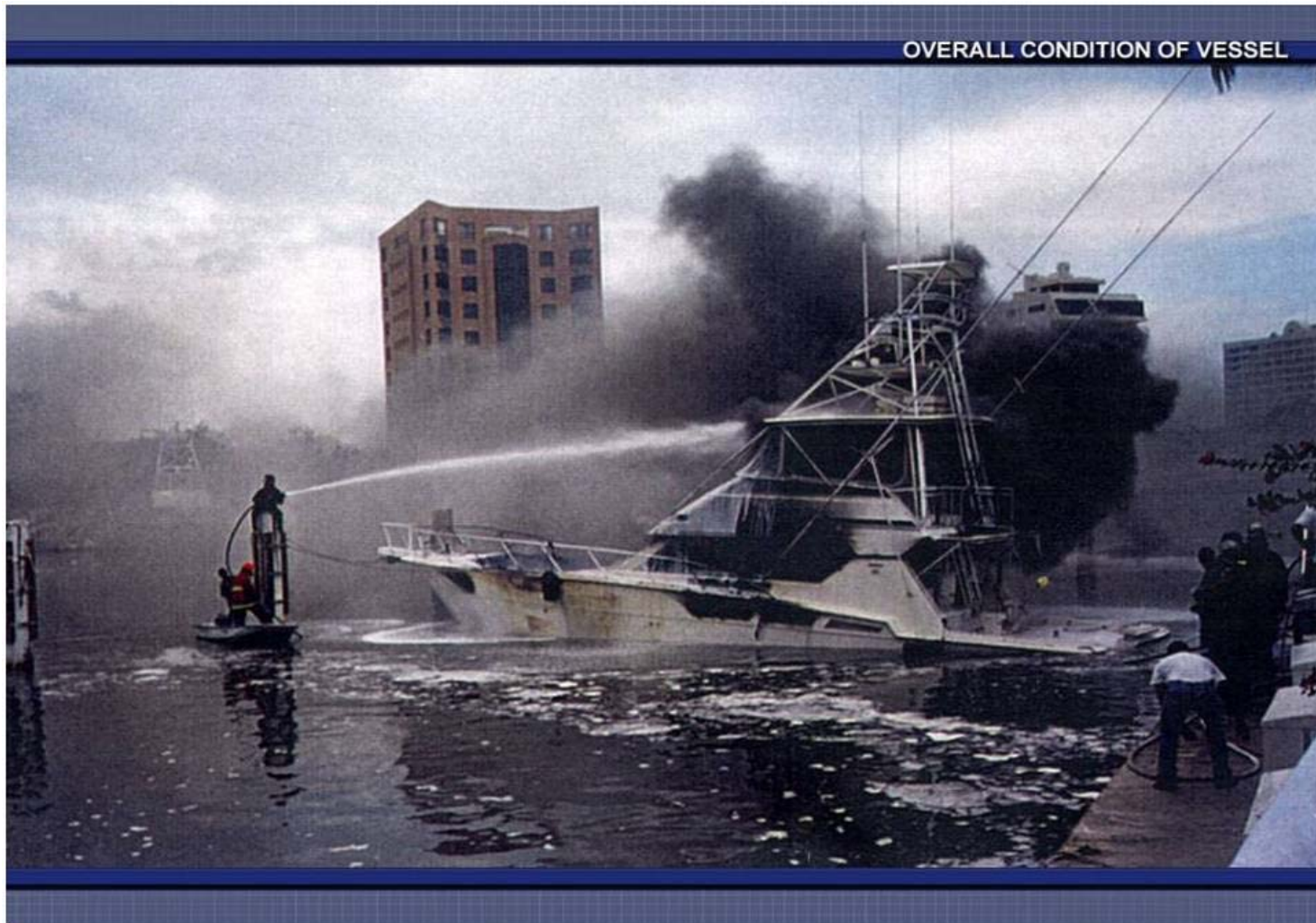
- i. give notice to us in advance of arrival at yard or commencement of works (as applicable);
- ii. insure that the yard and/or other contractors carry current and operative liability insurance indemnifying the yard and/or others in respect of all liabilities towards You and the Vessel up to at least the lesser of the Insured Value of the Vessel or €5,000,000 (or equivalent) (€2,000,000 in the case of other contractors), and provide evidence of such coverage to us in the form of a copy of the relevant valid insurance certificate or other evidence of coverage satisfactory to us; and

ICOMIA

Refit, Repair and Hot Work Clause

- iii. insure that the yard and/or other contractors impose no contractual exclusions or limitations of liability, nor any waiver or other limitations of our subrogated rights of recovery;
provided that if we are given notice in accordance with (i) above, we may, at our discretion, waive (ii) and/or (iii) above on terms to be agreed

Other Hull Policy Restrictions



Other Hull Policy Restrictions

It is further understood and agreed that this insurance will remain in full force during routine maintenance and annual refit.

Notwithstanding the foregoing it is a condition precedent that if vessel is under major repair/alteration including hot work or that the yard has requested a waiver of subrogation from the Owner or his Legal Representatives then prior agreement must be obtained from participating insurers hereunder at terms and conditions to be hereafter agreed.

Furthermore the Owner or his Legal Representatives must provide to participating insurers hereunder a copy of the shipyards Ship Repairers Legal Liability insurance documentation and full details of work being carried out.

- Luxury Yacht Policy (London Market)

Other Hull Policy Restrictions

11.2 Navigation and Use

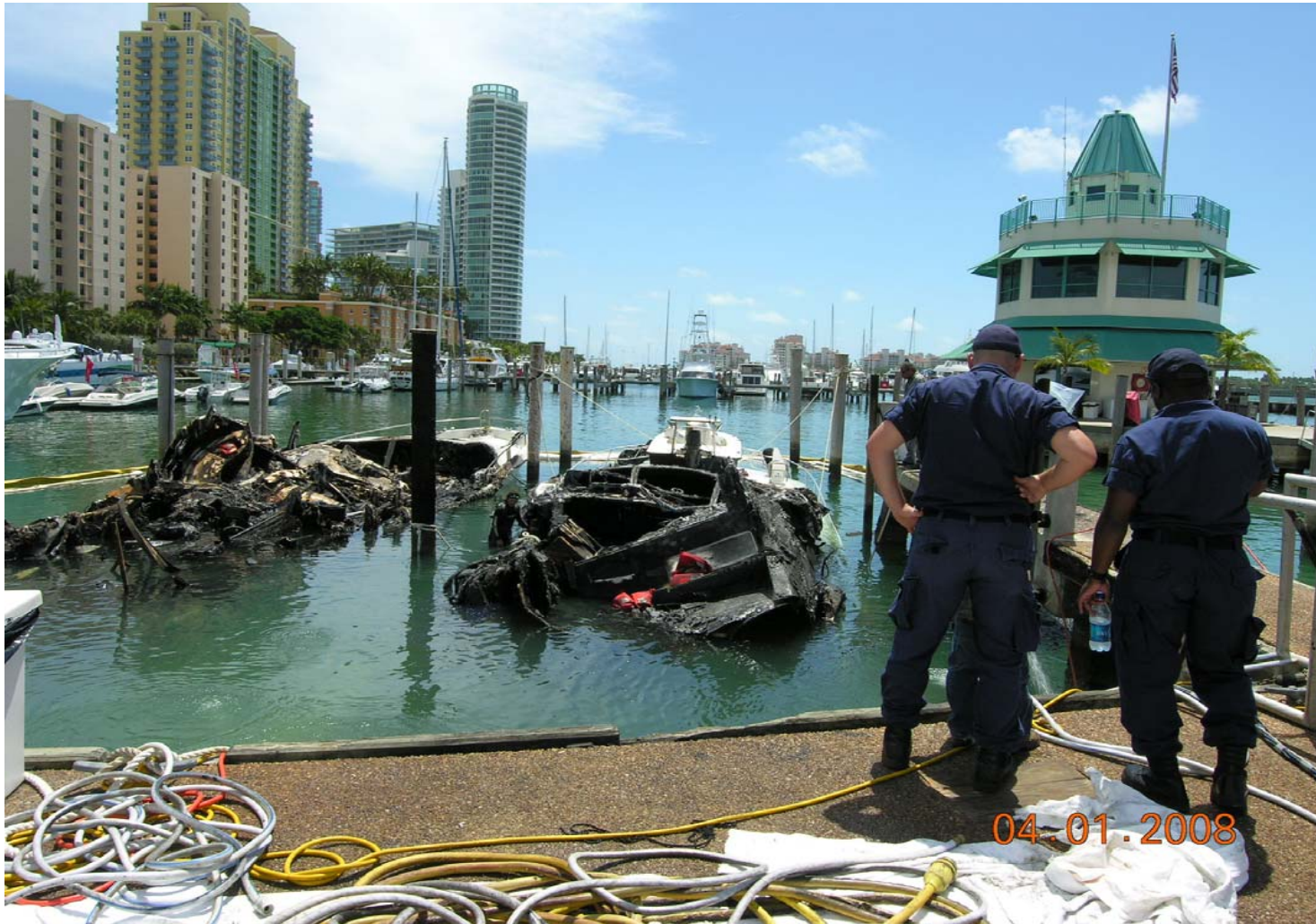
The Vessel is covered while within the navigation limits set out in the Certificate while anchored, moored or navigating, including while aground at her customary berth, at a place of storage ashore, including lifting out and launching, while being moved within a shipyard or marina, while being dismantled, fitted out, refitted, overhauled, undergoing normal maintenance or survey, **but not while being used as a houseboat or undergoing major repair or alteration.** Subject to Clause 8.7 gear and equipment are covered whether on board *the Vessel* or not, while in transit to and from place of storage ashore and while in storage ashore.

Other Hull Policy Restrictions

Exclusion

- *This insurance does not cover: Loss, damage or expense whilst under refit or repair other than normal maintenance. Any Hot Work during normal maintenance must be notified in advance.*

Marine Service Provider Liability Cover



Marine Service Provider's Liability Cover

- Traditionally, liability cover for marine service providers does not address risk shifting provisions.
- However, the actual risk assumed by the insurer can be dependent on risk shifting provisions in marine service contracts.

Marine Service Provider's Liability Cover

It is a condition of this cover that You must incorporate Your Standard Terms and Conditions into the agreement with the owner of the Watercraft or, their authorised representative prior to commencing repair, service and/or maintenance which exclude Your liability for loss or damage whatsoever, howsoever caused.

— Allianz SRLL Policy (Australia)

Case Study: MARJORIE MORNINGSTAR



Delta Yard Fire Case Study

- \$7.2 Million vessel brought in to shipyard for repairs prior to the end of 2007.
- Captain signed the repair yard's standard contract without reading or signing both pages.
 - “In no event shall yard's aggregate liability for the work done under this contract to all parties in interest exceed in the aggregate the sum of \$300,000 or the sum received by the yard under this repair contract, whichever is less.”
 - Delta Repair Haul and Launch Contract

Delta Yard Fire Case Study

Scope of Work

- Initial scope of work included minor repairs, interior cosmetic work, and regularly scheduled vessel systems maintenance.
- Scope of work subsequently increased by additional work orders to include refit and replacement of major systems throughout the vessel including generator replacement in combination with a complete electrical system renewal.

Delta Yard Fire Case Study

- Vessel's hull policy was renewed during the yard period.
 - Insurers were not advised of the ongoing yard period or any of the work being performed.
- Policy contained an additional provision placing certain duties upon the owner for qualifying yard periods.

Delta Yard Fire Case Study

Discovery revealed the following facts:

- Lead electrician did not understand basic electrical safety measures common to the trade.
- Electrical foreman aware of lack of safety measures.
- Numerous violations of OSHA requirements.
- Vessel fire alarm disconnected, no temporary system or fire watch.
- Yard lacked any fire training and facility was inappropriately equipped to fight fires.

Delta Yard Fire Case Study

Challenges to Limitation of Liability Clause

- Limitation unenforceable due to yard's gross negligence in failing to implement basic safety measures.
- Limitation language too narrow to encompass all claims related to vessel repair.
 - Applicable to “work done under this contract”
- Unclear drafting of the limitation of liability clause required application of *contra proferentem*.
- Drafting did not limit liability for breach of contract.

Delta Yard Fire Case Study

Partial Summary Judgment in Favor of Vessel Owner

- Denying the motion for partial summary judgment to contractually limit liability, the court determined as a matter of law that the contract did not limit Delta's liability to the vessel owner.
- Required language such as:
 - “arising out of”,
 - “connected with”; or
 - “resulting from the work”

Conclusions



Thank You

FOR FURTHER INFORMATION PLEASE CONTACT:

MARK HOUCK

HOUCK ANDERSON P.A.

mhouck@houckanderson.com

LOOK FOR THIS PRESENTATION AND FOLLOW-ON ARTICLES AT:

WWW.HOUCKANDERSON.COM