

NAVIGATING A RISK-FILLED SEA: INSIGHTS ON HOW THE LAW AND INSURANCE CHART A COURSE BY ALLOCATING LIABILITIES AND CREATING INCENTIVES

*Stephen M. Shapiro**

ABSTRACT

Risk can be defined as the probability and extent of liability. Risk management involves identifying, evaluating, and minimizing liabilities, which is critical to the success of a wide range of enterprises. Managers often turn to insurance to reallocate risk, and to experts such as surveyors, engineers, attorneys, and accountants to identify and evaluate risks and to advise on how to reduce them. The law also ascertains, allocates, and liquidates liabilities, and affects how insurance reallocates them.

Policymakers—both industrial and legal—must be aware of how industry practices, expert services, insurance provisions, and legal structures are intertwined to achieve diverse, and perhaps competing, goals. Changing a condition to support one outcome will likely impact others. Systemic analysis can identify these intertwined impacts, which is critical to feasibly furthering these goals by developing and successfully implementing changes to these practices and services, insurance, and the law.

* J.D. The George Washington University Law School, 2018; M. Eng'g, Virginia Polytechnic Institute & State University, 1991; B.S.M.E., Tufts University, 1982. The author serves as a law clerk to the Hon. S. Martin Teel, Jr., U.S. Bankruptcy Court for the District of Columbia. He previously served in the federal civil service—in the U.S. Departments of Transportation, Commerce, and Labor—and retired as a Commander in the U.S. Coast Guard Reserve. The author is a licensed Professional Engineer and a former Third Assistant Engineer of Motor Vessels. The views expressed herein represent only the author's. The author would like to thank Senior Associate Dean Hank R. Molinengo of The George Washington University Law School for his advice and encouragement on the preparation of this Article, the librarians of the Jacob Burns Law Library for their ready assistance, and the editors and staff of the *Fordham Journal of Corporate & Financial Law* for their collaboration and helpful suggestions.

This Article focuses on safety management in the maritime context, but similar issues apply to rating and reducing risks of many types in varied fields: credit, trade, construction, securities, medicine, manufacturing, and political risks—to name a few.

This Article first details how marine insurance coverage is placed on ships in the United States and in England, and considers the role of surveyors in placing insurance coverage. It outlines how liability is determined by American and English courts, including the duties of a shipowner and the impacts of a breach—which can void an insurance policy. Further, this Article discusses the duties of underwriters and of surveyors who support underwriters and shipowners—with particular emphasis on the potential liabilities of surveyors, and how American and English courts have agreed and diverged on imposing them. These duties stem from common law, statute, tort, and contract.

Finally, this Article suggests changes to the current risk management system to reduce conflicts of interest and increase safety incentives. Policymakers include courts in the United States and England, as admiralty is among the few remaining areas of federal common law. As the British Parliament recently updated the United Kingdom’s century-old statute on marine insurance law, the Article outlines how those updates might influence risk management going forward.

TABLE OF CONTENTS

INTRODUCTION425

I. COVERAGE PLACEMENT AND SHIP CLASSIFICATION 427

 A. HOW MARINE INSURANCE POLICIES ARE ISSUED
 IN ENGLAND 428

 B. HOW MARINE INSURANCE POLICIES ARE ISSUED
 IN THE UNITED STATES..... 429

 C. TYPES OF OCEAN MARINE INSURANCE POLICIES429

 D. CLASSIFICATION SOCIETIES 430

 E. PREMIUM RATES 432

II. THE LEGAL LANDSCAPE UNDERPINNING MARINE
 LIABILITIES AND INSURANCE 434

 A. LIABILITY 435

 B. WARRANTY OF SEAWORTHINESS.....444

III. SUGGESTIONS FOR ALLOCATING RISKS 449

CONCLUSION..... 456

INTRODUCTION

This Article reviews how current business and legal structures support risk management, and whether changes to these structures could increase incentives for risk reduction. This inquiry focuses on the business and legal relationships between key private parties with interests in and responsibilities for the safe condition of commercial vessels in the context of marine insurance coverage,¹ but is applicable to other insurance, rating, and risk management contexts. The principals in the maritime context are shipowners, charterers, cargo owners, and insurance underwriters;² other key parties include insurance brokers and ship classification societies and surveyors.

The relevant legal regime addressing these relationships is unique and longstanding, with the U.S. Constitution affording “admiralty and maritime jurisdiction” to the federal courts.³ While admiralty is among the few remaining areas of federal common law,⁴ state laws also come

1. For a review of safety risk management—i.e., the identification, measurement, and reduction of risks—of commercial vessel operations from an engineering perspective, *see generally* Stephen Mark Shapiro, Development, Evaluation, and Implementation of Safety Measures to Prevent Marine Accidents (Aug. 1, 1991) (unpublished M. Eng’g thesis, Va. Polytechnic Inst. & State Univ.), <https://vtechworks.lib.vt.edu/handle/10919/30919> [<https://perma.cc/48QV-A292>]. The relationships of other parties with critical commercial vessel safety interests outside of the marine insurance context, such as flag states that register vessels and the port states where these vessels call, are beyond the scope of this Article.

2. Principals eligible to purchase coverage include those who have an interest against the loss of or damage to the vessel or its cargo—such as charterers, lenders financing ship mortgages, freight forwarders, and underwriters buying reinsurance. *See* WILLIAM TETLEY, *INTERNATIONAL MARITIME AND ADMIRALTY LAW* 593–95 (2002). The important safety interests of crew members and other maritime workers are addressed by specific laws and are beyond the scope of this Article. *See, e.g.*, TETLEY, *supra*, at 561–64 (discussing the Jones Act, 41 Stat. 1007 (1920), codified at 46 U.S.C. § 30104 (2012)).

3. U.S. CONST. art. III, § 2.

4. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (“[T]here is an established and continuing tradition of federal common lawmaking in admiralty.”); *see also* *Norfolk S. Ry. Co. v. James N. Kirby Pty. Ltd.*, 543 U.S. 14, 28 (2004); NICHOLAS J. HEALY ET AL., *CASES AND MATERIALS ON ADMIRALTY* 68 (5th ed. 2012); DAVID W. ROBERTSON ET AL., *ADMIRALTY AND MARITIME LAW IN THE UNITED STATES* 106 n.3, 113 (3d ed. 2015). *But see* ROBERTSON ET AL., *supra*, at 121 n.2 (citing Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999)); Young, *supra*, at 274 (citing Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1341–60 (1996)).

into play regarding certain aspects of maritime law,⁵ and in particular, marine insurance law.⁶ Much of U.S. maritime law is derived from or has been influenced by the laws of England in light of England's historic and ongoing role in international shipping, and the significant presence of the shipping industry and related services in London and other parts of the United Kingdom.⁷

The U.K. statutory law on marine insurance was largely stable between 1906 and 2015.⁸ However, Parliament recently updated U.K. insurance law, with the Insurance Act 2015⁹ coming into force in 2016.¹⁰ It remains to be seen how much of the new Insurance Act 2015 (the "Act") might be adopted through statutory or common law in the United States, whether the Act may alter the relationships among key parties, and how changes to these relationships might serve to reinforce incentives for marine safety.

Part I of this Article describes the placement of marine insurance coverage and the requisite classification survey. Part II examines relevant legal aspects of marine liability and insurance, including those stemming from the Act. Part III explores how maritime law and industry practice could evolve to further promote safety through the allocation of relevant

5. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216–18 (1917) (interpreting the "saving to suitors" clause of the Judiciary Act of 1789, § 9, as authorizing state maritime law only for a situation where the uniformity of a national rule is not indicated); *Norfolk S. Ry. Co.*, 543 U.S. at 27 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)).

6. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 317–21 (1955) (declining to replace state laws with uniform federal common law admiralty rules for interpreting marine insurance contracts in light of longstanding state regulation of insurance in the United States).

7. See, e.g., LESLIE J. BUGLASS, *MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES* 4–5 (3d ed. 1991); CARL E. McDOWELL & HELEN M. GIBBS, *OCEAN TRANSPORTATION* 24–27, 104–07 (1954); Thomas J. Schoenbaum, *The Twelfth Nicholas J. Healy Lecture on Admiralty Law Wish List: Maritime Matters Our Government Might Profitably Address*, 46 J. MAR. L. & COM. 463, 468–69 (2015). See generally, EDGAR GOLD, *MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARITIME POLICY AND SHIPPING LAW* 71–100 (1981); TETLEY, *supra* note 2, at 15–30; James Alsop, *Maritime Law—The Nature and Importance of its International Character*, 34 TUL. MAR. L.J. 555 (2010); William Tetley, *Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317 (1999).

8. Marine Insurance Act 1906, 6 Edw. 7 c. 41 (U.K.).

9. Insurance Act 2015, c. 4 (U.K.).

10. HARRY WRIGHT, *THE INSURANCE ACT 2015: A PRACTICAL GUIDE TO CHANGES IN UK INSURANCE LAW* 2 (rev. Oct. 2016), available at <http://www.lmalloyds.com/act>.

risks, and how safety incentives need to be balanced with other legal and practical considerations.

I. COVERAGE PLACEMENT AND SHIP CLASSIFICATION

While American insurance companies have issued marine insurance since the early days of the United States, it is not unusual for American shipowners to obtain coverage in England,¹¹ which remains the dominant source of marine insurance worldwide.¹² In 1976, only 4 percent of the world's tonnage was registered in the United States.¹³ In light of the global nature of shipping,¹⁴ the particulars of marine insurance policies issued in England remain significant in both international and U.S. marine insurance law practice.¹⁵ Therefore, a review of how business and legal structures affect safety should consider those structures in both the United Kingdom and the United States.

11. Cf. BUGLASS, *supra* note 7, at 3–5; see FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL 127 (6TH ED. 2010).

12. TETLEY, *supra* note 2, at 581.

13. ROY L. NERSESIAN, SHIPS AND SHIPPING: A COMPREHENSIVE GUIDE 7 (1981). This figure does not include vessels owned by American interests that are registered under flags of convenience, such as the 22 percent of global tonnage registered in Liberia. *See id.* at 5–7 (noting that over a quarter of Liberian flag ships were owned by American interests in 1981). During the first half of the prior century, the American seagoing fleet increased from four percent of global tonnage in 1900 to over 13 percent in 1950. McDOWELL & GIBBS, *supra* note 7, at 105.

14. *See generally* NERSESIAN, *supra* note 13, at 1–10.

15. This is reinforced by the discussion of British marine insurance policies in sources intended primarily for students and practitioners in the United States. *See, e.g.*, ALEX L. PARKS, 1 THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE (1987); THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAW § 19 (2001); Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 TUL. L. REV. 331 (1991). Similarly, it is perhaps also telling that the latest books specific to marine insurance practice in the United State are older than their British and international counterparts. Compare BUGLASS, *supra* note 7, and PARKS, *supra*, and WILLIAM D. WINTER, MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE (3d ed. 1952), with HOWARD BENNETT, THE LAW OF MARINE INSURANCE (2d ed. 2006), and OZLEM GURSES, MARINE INSURANCE LAW (2d ed. 2017), and SUSAN HODGES, CASES AND MATERIALS ON MARINE INSURANCE LAW (1999), and BARIS SOYER, WARRANTIES IN MARINE INSURANCE (3d ed. 2017).

A. HOW MARINE INSURANCE POLICIES ARE ISSUED IN ENGLAND

In England, marine insurance developed in the 1700s and initially was issued almost exclusively by individual underwriters.¹⁶ Corporate insurance entities were effectively barred by statute¹⁷ until 1824.¹⁸ The risks transferred from a shipowner or other “assured” through a marine insurance policy are typically split among multiple underwriters.¹⁹

British brokers, who serve as agents of the shipowners—rather than the underwriters²⁰—arrange policies by providing prospective underwriters a “slip” containing relevant details about the ship, its flag (country of registration), its owner and operator, and the intended voyages and cargoes.²¹ The broker and initial (“lead”) underwriter negotiate the major terms and the premium, as well as the percentage of the policy risk to be assumed by the lead underwriter.²² The broker then circulates the slip—now incorporating the terms, premium, and percentage accepted by the lead underwriter—to additional prospective underwriters until all of the risk has been accepted.²³

A separate contract is created upon each acceptance.²⁴ Centuries ago, the total risk might be spread in this manner among fifty individual

16. BENNETT, *supra* note 15, ¶ 1.16 (2d ed. 2006).

17. Bubble Act 1720, 6 Geo. c. 18, § 18 (Eng.).

18. Marine Insurance Act 1824, 10 Geo. 4 c. 114 (Eng.) (repealing provisions of the Bubble Act that effectively limited corporate insurers to two chartered entities); BENNETT, *supra* note 15, ¶¶ 1.16–18 (noting that the two chartered entities made little headway into the market, leaving individual underwriters with over ninety percent of the marine insurance market while the Bubble Act was in effect).

19. BENNETT, *supra* note 15, ¶ 2.04.

20. BUGLASS, *supra* note 7, at 9 (citing *Anglo-African Merchants Ltd. v. Bayley* [1970] 1 QB 311, 322).

21. BENNETT, *supra* note 15, ¶¶ 2.04–2.08; WINTER, *supra* note 15.

22. BENNETT, *supra* note 15, ¶ 2.07 (quoting *American Airlines v. Hope*, [1974] 2 Lloyd’s Rep. 301, 304).

23. *Id.*; 2 SCHOENBAUM, *supra* note 15, § 19-1, at 439–40 (quoting *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144–45 (C.D. Cal. 1979), *aff’d in part & rev’d in part* 669 F.2d 1259 (9th Cir. 1982)). In 2007, slips that were previously formatted by the individual brokers drafting them were made consistent with the institution of the uniform Market Reform Contract. GURSES, *supra* note 15, at 22. An earlier uniform London Market Principles (“LMP”) slip was introduced in 2002. BENNETT, *supra* note 15, ¶¶ 2.02, 2.05.

24. GURSES, *supra* note 15, at 23 (citing *Gen. Reinsurance Corp. v. Forsakringsaktiebolaget Fennia Patria*, [1983] 2 Lloyd’s Rep. 287).

underwriters.²⁵ Today it is still common for the risk to be spread among fifteen to twenty underwriters.²⁶ These underwriters may include the traditional individual underwriters, syndicates of individuals, or incorporated insurance companies.²⁷

B. HOW MARINE INSURANCE POLICIES ARE ISSUED IN THE UNITED STATES

In the United States, marine insurance policies may be placed by a broker, who is an agent of the assured, or by an agent of the underwriter.²⁸ Most American policies on ships are written for a fixed duration of time rather than the duration of a voyage.²⁹ Contracts may be placed orally, with a written copy to follow.³⁰ A written agreement to issue a policy may be documented in a binder, which is similar to the slip used in England.³¹ However, unlike the English slips, the binder might not represent an immediate commitment of coverage—as portions of the total risk may remain to be placed with other underwriters.³² Also unlike in England, American marine underwriters are almost entirely corporate entities.³³

C. TYPES OF OCEAN MARINE INSURANCE POLICIES

Several types of marine insurance policies are available, depending on the interests at risk with respect to each assured.³⁴ Hull insurance covers the structure and machinery of a ship; it is typically issued for a specific duration of time, but may also be issued to cover one or more specific voyages.³⁵ Hull insurance also includes limited liability coverage

25. See WINTER, *supra* note 15, at 111.

26. Seth B. Schafler, *Understanding the Restructured London Insurance Market: Establishing the Key Players and Their Roles*, 6 ENVTL. CL. J. 27, 36 (1993).

27. See *id.*

28. See BUGLASS, *supra* note 7, at 10. American brokers, while agents of the assured, are paid by the underwriters. WINTER, *supra* note 15, at 128.

29. BUGLASS, *supra* note 7, at 11.

30. See PARKS, *supra* note 15, at 32–33.

31. *Id.* at 33.

32. See *id.* at 33–34.

33. WINTER, *supra* note 15, at 126.

34. See TETLEY, *supra* note 2, at 589–92; see generally Hayden & Balick, *supra* note 15 (providing a fuller discussion of the types of coverage addressed in this Section).

35. See TETLEY, *supra* note 2, at 589–90; BENNETT, *supra* note 15, ¶¶ 7.15, 7.20.

for collisions with other vessels.³⁶ The limitation,³⁷ to three-fourths of the amounts paid by the assured,³⁸ arose out of underwriters' concern to provide owners an incentive for careful navigation.³⁹ Shipowners typically belong to protection and indemnity ("P&I") clubs that provide mutual self-insurance for the remaining quarter of collision liability and for other liabilities, such as pollution damages.⁴⁰ Shippers typically purchase cargo insurance to cover loss or damage to goods shipped by vessel.⁴¹ While basic cargo insurance only covers the goods while on the vessel, the shipper may purchase an extension to cover the "landside risks attendant to ocean transport."⁴²

D. CLASSIFICATION SOCIETIES

A shipowner engages a classification society to survey its vessel to verify that the condition of the hull and machinery conform to the technical standards established by the society.⁴³ Maintaining the vessel

36. See TETLEY, *supra* note 2, at 603–04.

37. This limitation is descriptively known as a "Running Down Clause." *Id.*; HODGES, *supra* note 15, at 535–38.

38. HODGES, *supra* note 15, at 535; TETLEY, *supra* note 2, at 603–04.

39. CHARLES WRIGHT & C. ERNEST FAYLE, A HISTORY OF LLOYD'S: FROM THE FOUNDING OF LLOYD'S COFFEE HOUSE TO THE PRESENT DAY 368–69 (1928).

40. BENNETT, *supra* note 15, ¶¶ 16.03–16.13; TETLEY, *supra* note 2, at 591–92; 603–04; *Protection and Indemnity (P&I) Insurance*, THE AMERICAN CLUB, <http://www.american-club.com/page/protection-indemnity-insurance> [<https://perma.cc/VDM3-RFDF>] (last visited Mar. 14, 2018) (listing the specific liabilities covered by The American Club's P&I policy). The American Club is the only one of the world's fourteen P&I clubs that is domiciled in the United States. See *About the Club*, THE AMERICAN CLUB, <http://www.american-club.com/page/about-the-club> [<https://perma.cc/V4AK-XEH8>] (last visited Mar. 14, 2018); TETLEY, *supra* note 2, at 591.

41. See BENNETT, *supra* note 15, ¶¶ 10.77–10.83; HODGES, *supra* note 15, at 88–93; TETLEY, *supra* note 2, at 591.

42. Hayden & Balick, *supra* note 15, at 322 (describing "warehouse-to-warehouse" coverage).

43. See BENNETT, *supra* note 15, ¶ 19.71. See also WINTER, *supra* note 15, at 98–99 (describing the process by which a shipowner has a new vessel built under class); Machale A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL. MAR. L.J. 75, 77–81 (1997) (describing the classification process, with particular emphasis on the requisite engineering expertise to develop standards and conduct surveys).

“in class” is typically a requirement for underwriting.⁴⁴ In colonial times, the underwriter engaged surveyors to assess the condition of assureds’ ships.⁴⁵ Lloyd’s Register of Shipping, a catalog of “classed” vessels meeting the survey standards of that society, was originally “owned and produced by . . . underwriters.”⁴⁶ Shipowners, concerned that the survey standards were unfair to older vessels, initiated a rival register, which was “accused of currying favour with shipowners by undue leniency in classification.”⁴⁷ In response to the rival, Lloyd’s Register relaxed its rules, leading the underwriters to lose confidence in both.⁴⁸ Stakeholders, including shipowners and underwriters, agreed to merge both registers under broad-based management.⁴⁹

Nearly two-hundred years later, many registers are published by societies throughout the world, and concerns over the survey standards of some remain: “Some have pointed to the conflict of interest inherent in the current classification system . . . [b]ecause shipowners hire and pay the classification societies”⁵⁰ Some shipowners have opted to have

44. BENNETT, *supra* note 15, ¶ 19.73 (reprinting hull clause provisions requiring classification as a condition to continued coverage). While classification societies no longer assign vessels different grades of classification based on their seaworthiness, underwriters might glean some assessment of these finer gradations from the societies’ survey reports. See MUHAMMAD MASUM BILLAH, *EFFECTS OF INSURANCE ON MARITIME LIABILITY LAW: A LEGAL AND ECONOMIC ANALYSIS* 185 n.62 (2014).

45. See WRIGHT & FAYLE, *supra* note 39, at 85. At least to some extent, underwriters still conducted their own surveys to supplement those by the classification societies at the midpoint of the last century. See WINTER, *supra* note 15, at 102. This practice of supplemental surveys has resumed, or increased, in recent times. See ELIZABETH R. DESOMBRE, *FLAGGING STANDARDS: GLOBALIZATION AND ENVIRONMENTAL, SAFETY, AND LABOR REGULATIONS AT SEA* 190 (2006); Anders Ulrik, *The Underwriters’ Perspective*, in *CLASSIFICATION SOCIETIES* 37, 41 (Jonathan Lux ed., 1999).

46. WRIGHT & FAYLE, *supra* note 39, at 87.

47. *Id.* at 304.

48. *Id.* at 304–05.

49. See *id.* at 305–07.

50. DESOMBRE, *supra* note 45, at 187. “When the American Bureau of Shipping introduced stricter survey requirements . . . twenty owners . . . left that classification society.” *Id.* See also BENNETT, *supra* note 15, at 592 n.134 (“A classification society surveyor may . . . face a conflict of interest between the fundamental duty to act impartially and ethically . . . and pressure from a shipowner to . . . adopt a less rigorous approach”); John R. Hutchison, *Practical and Political Considerations*, in *CLASSIFICATION SOCIETIES*, *supra* note 45, at 27, 32–35 (recounting the relevant history of Lloyd’s Register, noting the similar current conflict of interest, and discussing potential alternative structures to address it); Frank L. Wiswall, Jr., *Classification*

their ships classed by societies with less rigorous standards.⁵¹ To address these concerns, the most prominent classification societies formed the International Association of Classification Societies (IACS), which issues joint standards and conducts independent audits of member society surveys.⁵² IACS has worked to enforce quality among its members.⁵³ Further, underwriters can—and do—factor the reputation of a ship’s classification society into its decision to write or continue coverage for the vessel or its cargo.⁵⁴

E. PREMIUM RATES

To a very large extent, [marine insurance] is inherently a system of estimates and the importance of the judgment and ability of the underwriter cannot be overemphasized.

A marine insurance rate is really a composite—a general judgment—of all the numerous factors which have a bearing upon the particular hazard underwritten.⁵⁵

The experience and reputation of the shipowner has traditionally been a major factor in an underwriter’s assessment of the overall risk and corresponding premium.⁵⁶ It is not entirely clear to what extent an underwriter considers a vessel’s condition—perhaps knowing only what

Societies: Issues Considered by the Joint Working Group, INT’L J. SHIPPING L. 171, 1773 (1997) (raising “whether the historical relationship, in which a society performs services according to requirements set by the insurer but performs them pursuant to a contract with the insured, needs to be re-examined”).

51. See DESOMBRE, *supra* note 45, at 183 (recounting the sinking of an oil tanker, with an “enormous oil spill,” after its owner opted to have it reclassified by a less prominent society in lieu of submitting to the survey demanded by its former more established society).

52. See BENNETT, *supra* note 15, ¶ 19.71, 592 n.134.

53. See DESOMBRE, *supra* note 45, at 186 (noting IACS’s expulsion of a society when its surveys were found deficient after a vessel under its class sank).

54. See SUSAN HODGES, LAW OF MARINE INSURANCE 47, 113 (1996).

55. SOLOMON S. HUEBNER, MARINE INSURANCE 181 (1920). Professor Huebner’s observations of a century ago remain accurate today: “[A]n underwriter, such as one operating at Lloyd’s of London or a U.S. insurer, will quote an applicant a rate based on a subjective estimate of the risk involved in the particular case.” MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 359 (9th ed. 2008). See also Shapiro, *supra* note 1, at 28–41 (addressing the challenges in determining these relevant but imprecise risks and translating them into dollars).

56. See HUEBNER, *supra* note 55, at 181–83.

may be inferred from a vessel's classification as to its condition—as a factor into the premium charged for such coverage.⁵⁷ An assured's loss history is clearly a factor, and such information is more readily available to the underwriter than information, beyond classification, about a vessel's condition.⁵⁸ British and American insurers have developed guidance for insurers in the form of a "Joint Hull Agreement" to set renewal rates based on a shipowner's claims experience within the preceding three years;⁵⁹ however, the precise terms of this agreement and the extent to which it is uniformly applied is uncertain.⁶⁰ International and domestic U.S. laws limit the financial liability of shipowners, in large part to lower the rates and increase the availability of insurance coverage—which is compulsory for vessels carrying certain cargoes.⁶¹

Interestingly, a marine insurance policy need not specify the value of the vessel insured.⁶² However, hull policies almost always include a figure or specific basis for a valuation.⁶³ Similarly, a premium amount is

57. See BILLAH, *supra* note 44, at 185 (asserting structural seaworthiness as a factor); DORFMAN, *supra* note 55, at 359 (listing seaworthiness as a factor); Jan de Bruyne, *Liability of Classification Societies: Cases, Challenges, and Future Prospectives*, 45 J. MAR. L. & COM. 181, 207 (2014) (citing *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993) ("[T]he purpose of a certificate is . . . to permit shipowners to take advantage of the insurance rates available for a classed vessel.")). *But see* DESOMBRE, *supra* note 45, at 184 n.11 (noting that underwriters refused to set lower rates for IACS-classed vessels); *see also* HUEBNER *supra* note 45, at 191 (finding that P&I clubs do not typically differentiate rates based on survey results).

58. BILLAH, *supra* note 44, at 184–85; *cf.* HUEBNER, *supra* note 55, at 190.

59. D.S. HANSELL, INTRODUCTION TO INSURANCE § 28.8, at 278 (1999). Marine insurance enjoys a partial exemption from U.S. antitrust laws. Merchant Marine Act of 1920 § 29, 15 U.S.C. § 38 (2012). The Senate Judiciary Committee conducted an in-depth review of the marine insurance industry in the context of this exemption in 1960. *See generally*, SUBCOMM. ON ANTITRUST & MONOPOLY, S. COMM. ON THE JUDICIARY, S. REP. NO. 86-1834, at 61–108. (2d Sess. 1960). The Subcommittee suggested a narrow interpretation of the exemption such that "pools or syndicates writing ocean marine coverage should not be permitted to claim the benefits of the exemption except upon a clear showing of the necessity of doing business in this manner." *Id.* at 108.

60. Chris Reeder, *Maritime Lien Status for Unpaid Hull or Liability Insurance Premiums: Whether the Nonpayment of Hull and Protection and Indemnity Insurance Premiums Should Create a United States Maritime Lien Against the Insured Vessel in Favor of The Insurer*, 15 TUL. MAR. L.J. 285, 291–92 (1991) (noting the terms of the Joint Hull Agreement were not publicly available).

61. BILLAH, *supra* note 44, at 35–37.

62. GURSES, *supra* note 15, at 8–9.

63. *Id.* at 8.

not considered an essential term for establishing a policy contract.⁶⁴ Where a policy is established with the premium amount “to be arranged,” U.K. law provides that “a reasonable premium is payable” as a default arrangement.⁶⁵ While no U.S. cases have addressed such an unspecified premium, the result if such a case arises—particularly on whether or how to incorporate that provision of U.K. law—would be determined based on the law of the relevant State.⁶⁶

II. THE LEGAL LANDSCAPE UNDERPINNING MARINE LIABILITIES AND INSURANCE

Beyond the business and contractual roles and relationships among underwriters, shipowners and other assureds, and classification societies, this Article now turns to the legal implications that these roles and relationships may bear on risk management. Professor Thomas Schoenbaum of the University of Washington School of Law has noted the influence of both the U.K. Marine Insurance Act 1906⁶⁷ and U.S. state law, in light of U.S. Supreme Court guidance often deferring to state law on matters of marine insurance.⁶⁸ Part II looks further to the laws of liability and warranty—particularly in light of the Act⁶⁹ and its provisions on “fair presentation,” which revised the duty of utmost good faith and outlined responsibility for information that parties know or “ought to know.”⁷⁰

64. *Id.* at 139–40 (citing *Willis Mgmt. v. Cable & Wireless Plc.* [2005] Lloyd’s Rep. 597).

65. *Id.* (quoting the Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 31 (U.K.)).

66. *See* Robert Bocko et al., *Marine Insurance Survey*, 20 TUL. MAR. L.J. 5, 34 (1995) (citing *Wilburn Boat v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 321 (1955)).

67. Marine Insurance Act 1906, 6 Edw. 7 c. 41 (U.K.).

68. Schoenbaum, *supra* note 7, at 470–72 (discussing the ongoing implications of *Wilburn Boat* on the duty of utmost good faith and the law of warranties in the United States).

69. Insurance Act 2015, c. 4 (U.K.).

70. *Id.* §§ 3–8. The Insurance Act 2015 also updates the law of warranties. *Id.* §§ 9–11.

A. LIABILITY

Historically, a shipowner's liability has been limited to the loss of her vessel.⁷¹ Limitation facilitates investment in shipping as well as the availability and affordability of liability insurance.⁷² However, in the United States, the limitation may serve as an undue disincentive to obtaining insurance that might otherwise be prudent and available to cover greater risks.⁷³ In both England and the United States, the limitation is contingent on the shipowner lacking "privity or knowledge" of the cause of the loss.⁷⁴ An underwriter is protected by these limits by virtue of its assured shipowner's limit.⁷⁵ State law determines whether a third party may bring a direct action against an underwriter.⁷⁶

The Second Circuit rejected a shipowner's suit for negligence against a classification society, holding that "a shipowner is not entitled to rely on a classification certificate as a guarantee to the owner that the vessel is

71. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 12-1, at 809 (5th ed. 2012).

72. See *id.* at 809 n.1, 810. But see BILLAH, *supra* note 44, at 41–51 (suggesting that limitations tied with insurance may unduly reduce an assured's incentives to minimize risk); Shapiro, *supra* note 1, at 28–37, 76–81 (discussing the relation among risk reduction, cost, and insurance).

73. See SCHOENBAUM, *supra* note 71, § 12-1, at 811. Professor Schoenbaum notes that U.S. law has not kept pace with updates adopted by other maritime countries. *Id.* § 12-1, at 810–11 (citing the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. §§ 30501–30512 (2012)).

74. *Id.* § 12-1, at 810, § 12-6. Relevant jurisprudence interpreting privity in the United Kingdom and the United States diverge. *Id.* at 826 n.1 (citing Richard J. Violino, Note, *The Continuing Conflict between United States and English Admiralty Law on Limitation of Liability: Whose Privity Binds the Corporate Shipowner*, 10 FORDHAM INT'L L.J. 338 (1986)). "[P]rivacy or knowledge is deemed to exist [in the United States] when the owner has the means to learn of the unseaworthy condition, or when knowledge could have been obtained from reasonable inspection." Violino, *supra*, at 347 (citing *States S.S. Co. v. United States (The Pennsylvania)*, 259 F.2d 458 (9th Cir. 1957)). In England, an owner may be denied limitation of liability for an employee's negligence that an owner might have prevented. *Id.* (citing *F.T. Everard & Sons, Ltd. v. London & Thames Haven Oil Wharves, Ltd. (The Anonity)*, [1961] 2 Lloyd's List LR 117 (CA) (Eng.)). See also *infra* note 108 (citing another use of "privity" referring to parties' "mutuality of interest").

75. *Id.* § 12-4, at 816.

76. *Id.* § 12-4, at 816–17. An underwriter effectively retains its derivative liability limit in a direct action. *Id.* at 817 n.6.

soundly constructed.”⁷⁷ The court reserved the question of similar liability to a third party.⁷⁸ The Second Circuit cited a district court’s earlier discussion of classification society liability approvingly.⁷⁹ However, the circuit court did not fully follow that district court’s analysis: the district court rejected the imputation of a warranty of seaworthiness upon a classification society,⁸⁰ but importantly noted that “the duty to use due care to detect and warn of hazards”⁸¹ “appears to provide a sounder basis for tort liability of a ship classification society.”⁸² The Second Circuit joined the district court in explicitly rejecting the imputation of a warranty,⁸³ but perhaps impliedly rejected the concept of a classification society’s duty to exercise due care in tort by ignoring that element of the district court’s analysis.⁸⁴

The Second Circuit later allowed a similar claim based on a duty of care in contract, where the plaintiff was a cargo owner that had retained a surveyor to ensure that a ship’s cargo hold was free from contamination.⁸⁵ The court distinguished this survey, which it found to have conferred a guarantee of non-contamination, from the classification survey that the court earlier found did not confer a guarantee of seaworthiness in

77. *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993). The court based its holding on the shipowner’s own responsibility for its vessel’s condition as well as the large differential between the cost of classification and the cost of damages that liability could pose. *Id.*

78. *See id.*

79. *Id.* (citing *Great Am. Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999, 1009–13 (S.D.N.Y. 1972), *aff’d*, 478 F.2d 235 (2d Cir. 1973)).

80. *Great Am. Ins. Co.*, 338 F. Supp. at 1009, 1011–12.

81. *Id.* at 1012.

82. *Id.* (citing *Skibs A/S Gylfe v. Hyman-Michaels Co. (The Gyda)*, 304 F. Supp. 1204, 1210, 1214 (E.D. Mich. 1969) (finding that the National Cargo Bureau—a corporation providing inspection services to the shipping industry—that was engaged by the plaintiff ship charterer and cargo owner to “oversee the loading of . . . cargo for . . . the protection of the interest of the insurance underwriters,” had breached its contractual duties by: (1) by removing its surveyor from the scene during most of the loading period, and (2) by failing to advise the charterer that it was unsafe to sail with the cargo already at dangerous temperatures)). *But see* Miller, *supra* note 43, at 90–93 (criticizing the *Great American* opinion as unduly hesitant to impose liability).

83. *Sundance Cruises Corp.*, 7 F.3d at 1084.

84. *Id.* at 1084–85 (finding the owner’s ultimate responsibility for seaworthiness sufficient grounds to dispose of “all of Sundance’s tort and contract claims”).

85. *Int’l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1284 (2d Cir. 1994). The court found that the contractual duty of care precluded an independent duty of care in tort.

Sundance Cruises.⁸⁶ The court left the surveyor responsible for most of the nearly \$1 million of contamination damage to the cargo.⁸⁷

The Second Circuit subsequently considered—but ultimately avoided—the question of whether a classification society may be liable in tort for recklessness to an injured third party.⁸⁸ The court found that even if such an action were available, the plaintiff’s case failed to meet the standard that would be applicable: that the defendant disregarded “an unjustifiably high risk of harm to another caused by the defendant’s actions . . . that was obvious and thus should have been known to the defendant.”⁸⁹

The Fifth Circuit addressed the liability of a classification society to a shipowner in *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*⁹⁰ In *Otto Candies*, a vessel that had been classed by Nippon Kaiji Kyokai (“NKK”), the Japanese classification society, required extensive repairs to meet the classification standards of the American Bureau of Shipping

86. *Id.* at 1284–85. The court noted that “guarantee[ing] the condition of the hold so as to insure the preservation of the cargo,” was the “end and aim of the [inspection] transaction”) (quoting *Glanzer v. Shepard*, 135 N.E. 275, 275 (N.Y. 1922)), whereas the survey in *Sundance Cruises* was conducted “merely . . . to take advantage of the insurance rates available to a classed vessel.” *Id.* at 1285 (quoting *Sundance Cruises Corp.*, 7 F.3d at 1084). *But see id.* at 1288–89 (Mishler, J., dissenting) (finding that International Ore held a position, knowledge, and responsibility comparable to that of the shipowner in *Sundance Cruises*). *Sundance Cruises* distinguished its holding from *Glanzer* by noting that *Glanzer* was a buyer who had foreseeably relied on a weight certificate issued by a weigher retained by the seller. *Sundance Cruises Corp.*, 7 F.3d at 1084 (citing *Glanzer*, 135 N.E. at 275). Judge Cardozo in *Glanzer* found that “the law impose[d] a duty [of the weigher] toward buyer as well as seller in [that] situation,” *Glanzer*, 135 N.E. at 275, and that there was no “need to state the duty in terms of contract or of privity” since “[g]iven the contract and the relation, the duty [was] imposed by law.” *Id.* at 276. With respect to the “safe berth warranty,” see discussion *infra* note 142, a shipowner is entitled to it as a third-party beneficiary where a charterer receives the warranty directly from a facility that is unaware of the owner’s identity. See *In re Frescati Shipping Co.*, 718 F.3d 184, 199–200 (3d Cir. 2013), *aff’d on other grounds sub nom.* CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 140 S. Ct. 1081 (2020).

87. *Int’l Ore & Fertilizer Corp.*, 38 F.3d at 1281–82, 1286. The court found that the apportionment of damage in tort was error, but that it was procedurally barred from raising the damage award to the full amount of damages in contract since the appellant did not cross-appeal that issue. *Id.* at 1286.

88. *Espana v. Am. Bureau of Shipping, Inc.*, 691 F.3d 461, 463 (2d Cir. 2012).

89. *Id.* at 469 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)).

90. 346 F.3d 530 (5th Cir. 2003) (Judge Jones’s opinion heavily cites MILLER, *supra* note 43).

(ABS) after the vessel was purchased by Otto Candies for passenger service in the United States.⁹¹ Otto Candies sued NKK for the cost of those repairs, claiming that NKK negligently misrepresented the condition of the vessel by issuing it a classification certificate.⁹² In affirming the district court's judgment awarding damages to Otto Candies, the Fifth Circuit agreed with the district court's finding "that NKK provided false information by issuing a class certificate free of recommendations in light of the various defects in the hull and machinery."⁹³ The Fifth Circuit similarly upheld the lower court finding that Otto Candies "justifiably relied on the false information."⁹⁴ Even so, the Fifth Circuit held that this false information and reliance constituted negligent misrepresentation only "because NKK actually knew at the time it reclassified the [vessel] that the results of the classification survey were to be conveyed to Otto Candies for the purpose of influencing its [purchase] decision,"⁹⁵ whereas "mere foreseeability" of reliance would be "insufficient."⁹⁶

The Fifth Circuit believed that the circumstances bringing such liability must be limited in order to avoid chilling the willingness of

91. *Id.* at 532–33.

92. *See id.* at 533, 537–38. The elements for a claim of negligent misrepresentation include (1) that the defendant, in the course of providing professional services, provided false information guiding the plaintiff in a business transaction; (2) that the defendant failed to exercise reasonable care in obtaining that information; (3) that the plaintiff justifiably relied on the false information in the business transaction the defendant intended to influence; (4) that the plaintiff suffered economic loss due to the transaction; and (5) the defendant knew that the information it provided was for the benefit and guidance of the plaintiff or a "limited group" including the plaintiff. *Id.* at 535 (citing RESTATEMENT (SECOND) OF TORTS § 552 (AM. LAW INST. 1977)).

93. *Id.* at 537.

94. *Id.* at 538.

95. *Id.* at 537.

96. *Id.* at 536. *But cf. Frescati Shipping Co.*, 718 F.3d 199, 199–200, *aff'd on other grounds sub nom. CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081 (2020) (finding a shipowner is entitled to a warranty arising from a charterer's safe berth contract clause as a third-party beneficiary, even where another charterer, who grants the warranty to the charterer in privity with the shipowner, is unaware of the shipowner's identity). The Third Circuit also appears receptive to certain shipowner claims of negligent misrepresentation, at least where the vessel is an invitee. *See id.* at 213–14. The court entertained the same shipowner's claim that a docking facility provided incorrect information *to its vessel* as to the maximum safe draft of ships docking there. *Id.* However, the court upheld the district court's finding that the specific information provided by the facility to the vessel was "factually irrelevant to the casualty." *Id.*

societies to survey vessels not in prime condition, diminishing the owner's duty to maintain seaworthiness, and unduly increasing classification costs and fees.⁹⁷ The Fifth Circuit's reasoning in *Otto Candies* would seem similarly applicable to a prospective suit by an underwriter, as well as a shipowner; however, it may be important that *Otto Candies* was decided under general federal maritime law, and not state law.⁹⁸

On the surface, the Second Circuit, as reflected through *Sundance Cruises*, and the Fifth Circuit, as reflected through *Otto Candies*, are in conflict: *Sundance Cruises* rejected classification society liability to a shipowner, while *Otto Candies* affirmed such a claim.⁹⁹ The *Sundance Cruises* rejection was more specifically to a "guarantee" of seaworthiness, while the *Otto Candies* allowance was as to "negligent misrepresentation."¹⁰⁰ Arguably, if not persuasively, this difference in terminology might avoid a conflict; such avoidance relies on distinguishing breach of a "guarantee" from "negligent misrepresentation."¹⁰¹ However, the Fifth Circuit understood its *Otto Candies* opinion as creating a conflict, as it characterized *Sundance Cruises* as rejecting a claim for negligence.¹⁰²

97. See *id.* at 535.

98. *Id.* at 534 n.1. A similar suit by an underwriter attempting to recover from or avoid its responsibilities under a policy may well turn on state law. See *supra* notes 6, 68 and accompanying text. The relative privity (or proximity, see *infra* note 108) or lack thereof between a classification society and an underwriter may also be a significant distinguishing factor. See *supra* notes 43 and 45 and accompanying text (on retaining classification societies); *supra* note 86 (distinguishing *Sundance Cruises* from *Glanzer*); *infra* note 108 and accompanying text (finding requisite proximity lacking under English law).

99. See *supra* notes 77 and 88 and accompanying text.

100. See *supra* notes 77 and 87 and accompanying text. See also MILLER, *supra* note 43, at 103–04 (suggesting negligent misrepresentation as an appropriate cognizable standard).

101. See P.F. Cane, *The Liability of Classification Societies*, 1994 LLOYD'S MAR. & COM. L.Q. 363, 365 ("[I]t does not follow from the [Second Circuit's] proposition that a certificate contains no warranty of that which is certified that the giver of the certificate is under no duty to take care in issuing the certificate."). Perhaps some degree of this circuit split reflects divergence as to how the blurring of some distinctions between contract and tort liability should evolve. See *Privity of Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (discussing this evolution). See also *infra* note 143 (discussing CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 140 S. Ct. 1081 (2020)).

102. See *Otto Candies*, 346 F.3d at 534; see also MILLER, *supra* note 43, at 96–97.

It is not entirely clear whether negligence or negligent misrepresentation may afford a shipowner a cognizable cause of action against a classification society under English law.¹⁰³ However, at least with respect to a third party, such as the owner of cargo lost on a sunken classed vessel, English law precludes these types of tort actions.¹⁰⁴

In *Mariola Marine Corp. v. Lloyd's Register of Shipping (The Morning Watch)*,¹⁰⁵ the facts bore some similarity to those in *Otto Candies*. The Morning Watch underwent a special survey for an owner in preparation for the listing and sale of the vessel through a broker; Lloyd's was aware that this was the purpose of the special survey.¹⁰⁶ The court found that this constituted Mariola's reasonably foreseeable reliance on the vessel's class based on the special survey.¹⁰⁷ However, the court found that English law does not presume proximity among parties based merely on reasonably foreseeable reliance on a vessel's classification, and that the particulars of Mariola's relationship with Lloyd's lacked the

103. Compare *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 296 (2015) (Elrod, J., dissenting) (noting that negligent misrepresentation is not cognizable under English law), with *Cane*, *supra* note 101, at 365 ("It is well accepted . . . that building surveyors . . . can certainly be held liable for failure to take reasonable care in conducting the survey.").

104. See Peter Cane, Case and Comment, *Classification societies, cargo owners and the basis of tort liability* (The Nicholas H), 1995 LLOYD'S MAR. & COM. L.Q. 433, 434–35. Plaintiffs might face fewer hurdles to classification society liability on the European continent. See Bertrand Courtois, *Exposing Class Liability*, MAR. ADVOC., no. 22, April 2003, as posted in AVO-ARCHIVE, <http://www.avoarchive.com/display.php?id=815> (last visited Apr. 7, 2018). Mr. Courtois also summarizes the *Morning Watch* and *Nicholas H* opinions discussed *infra*. *Id.*

105. [1990] 1 Lloyd's Rep. 547 (QB) (Eng.).

106. *Id.* at 557.

107. *Id.* The elements of a claim for negligent misrepresentation under English law include (1) reasonable foreseeability of reliance, (2) proximity of the plaintiff to the defendant, and (3) that a duty of care be "just and reasonable" in light of the circumstances. *Id.* at 556.

“requisite degree of proximity.”¹⁰⁸ The court then declined to reach the question of whether a duty of care would be “just and reasonable.”¹⁰⁹

Whether a third-party action against a classification society could be “just and reasonable” was considered and rejected in *Marc Rich & Co. v. Bishop Rock Marine Co. (“The Nicholas H”)*.¹¹⁰ This case was an action in tort by a cargo owner against the classification society that surveyed and cleared The Nicholas H after it underwent temporary hull repairs in Puerto Rico. The vessel, carrying \$6 million of bulk metal belonging to the cargo owner, left port and sank days later.¹¹¹ Lord Steyn, writing for the House of Lords, opened his analysis by noting that “[i]n this area the common law develops incrementally on the basis of a consideration of analogous cases where a duty has been recognised or desired.”¹¹² He reaffirmed that the proximity element must be satisfied regardless of whether the claimed damages are physical or economic.¹¹³ The lack of contact between the classification society and the cargo owner suggested a lack of proximity.¹¹⁴ However, Lord Steyn found that even assuming without deciding that plaintiffs had established sufficient proximity with the classification society,¹¹⁵ the claim must fail as not being just and reasonable.¹¹⁶

Lord Steyn’s analysis finding such a cause of action not to be just and reasonable relied heavily on the economic relationships between

108. *Id.* at 561. The court noted that the sale of the vessel was not the sole purpose of the survey, that Mariola was not the prospective purchaser at the time of the survey, and that a prudent purchaser might well have arranged for a more thorough type of survey. *See id.* at 561–63. An important word on terminology here: some but not all usage of proximity and privity is interchangeable. “Privity” refers to the “relationship between two parties, each having a legally recognized interest in the same subject matter.” *Privity*, BLACK’S LAW DICTIONARY (11th ed. 2019). It similarly refers to the level of relationship or “mutuality of interest” sufficient to allow the parties to sue each other—esp. parties to a contract. *See id.*; *Privity of Contract*, *id.* “Proximity” can also refer to the “condition of being near in . . . relation.” *Proximity*, *id.* The court in *The Morning Watch* thus used “proximity” consistent with “privity” here. The author uses “privity” similarly, *infra* Part III, with “mutuality of interest” being both a practical and a legal matter.

109. *Id.* at 563.

110. [1996] 1 AC 211 (HL) (appeal taken from Eng.).

111. *Id.* at 231–32.

112. *Id.* at 236.

113. *Id.* at 235–36. The cargo owners unsuccessfully argued that the proximity element does not apply in actions for physical damage. *Id.*

114. *See id.* at 238.

115. *Id.* at 241.

116. *Id.* at 242.

underwriters, classification societies, shipowners, and cargo owners—and the practical and policy implications that would result from allowing such claims.¹¹⁷ He was also mindful that the purpose of a classification society is to “classif[y] merchant ships in the interests of safeguarding life and ships at sea.”¹¹⁸ Perhaps the key consideration for Lord Steyn was the impact that tort liability would have on international rules regarding shipping contracts and limits on liability.¹¹⁹ He noted:

Cargo owners take out direct insurance in respect of the cargo. Shipowners take out liability risks insurance in respect of breaches of their duties of care in respect of the cargo. The insurance system is structured on the basis that the potential liability of shipowners to cargo owners is limited under the Hague Rules and by virtue of tonnage limitation provisions. And insurance premiums payable by owners obviously reflect such limitations on the shipowners' exposure.¹²⁰

Lord Steyn continued:

[I]f a duty of care is held to exist in this case, the potential exposure of classification societies to claims by cargo owners will be large. That greater exposure is likely to lead to an increase in the cost to classification societies of obtaining appropriate liability risks insurance. Given their role in maritime trade classification societies are likely to seek to pass on the higher cost to owners. Moreover, it is readily predictable that classification societies will require owners to give appropriate indemnities. Ultimately, shipowners will pay.¹²¹

Peter Cane characterized Lord Steyn's opinion as taking the “risk management approach” to tort liability, which focuses on “whether shifting the injured's loss to the injurer would result in an improvement in the way the risk of such losses is distributed in society.”¹²² That contrasts with the “interactional approach,” which Cane describes as “being the allocation of losses according to principles of personal responsibility for the causation of injury and damage[,] . . . in correcting wrongs, in providing compensation for losses[,] and in deterring certain

117. See *id.* at 238–42 (Lord Steyn cited heavily from Cane, *supra* note 101).

118. *Id.* at 230.

119. See *id.* at 238–40.

120. *Id.* at 239.

121. *Id.* at 240.

122. Cane, *supra* note 103, at 434–35.

types of unacceptable behaviour.”¹²³ He found Lord Lloyd’s dissent exemplified this approach.¹²⁴

Lord Lloyd argued that their Lordships were “not here asked to extend the law of negligence into a new field. We are not even asked to make an incremental advance.”¹²⁵ He found that the classification society’s purpose of “promoting the safeguard of life and property at sea” established proximity with the crew since the surveyor “knew that their lives would be at risk if he allowed the ship to sail in an unseaworthy condition.”¹²⁶ He applied this proximity to the cargo since “it is a universal rule of maritime law—certainly it is the law of England—that ship and cargo are regarded as taking part in a joint venture.”¹²⁷ Lord Lloyd found “[t]he fact that the cargo owners were unaware that [the surveyor] had been called in . . . quite beside the point.”¹²⁸ In arguing that a duty of care would be “just and reasonable,” Lord Lloyd noted that “[r]emedies in the law of tort are not discretionary. Hospitals also are charitable non-profit making organisations. But they are subject to the same common duty of care”¹²⁹ Lord Lloyd was also skeptical of any negative impact that a classification society’s duty of care might have on the marine insurance regime:

[T]he court should be wary of expressing any view on the insurance position without any evidence on the point, and should not speculate as to the effect, if any, of an extra layer of insurance on the cost of settling claims. For what it may be worth, I would for my part doubt whether it would make much difference. More generally, I suspect that a decision in favour of the cargo owners would be welcomed by members of the shipping community at large, who are increasingly concerned by the proliferation of substandard classification societies.¹³⁰

123. *Id.* at 433.

124. *See id.* at 433–34.

125. *Marc Rich & Co.* [1996] 1 AC at 230 (Lord Lloyd, dissenting).

126. *Id.* at 225.

127. *Id.* at 226.

128. *Id.* at 227.

129. *Id.* at 228. *See also* James A. Henderson, Jr., *The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems*, 40 FLA. ST. U. L. REV. 221, 254 (2013) (noting the decline of judicial recognition of charitable immunities with the greater availability of insurance).

130. *Marc Rich & Co.* [1996] 1 AC at 229.

B. WARRANTY OF SEAWORTHINESS

An assured impliedly warrants or guarantees the seaworthiness¹³¹ of his vessel to his insurance underwriter as of the start of a voyage under a policy issued for that voyage.¹³² In the United States, this warranty extends to the duration of the voyage.¹³³ The warranty of seaworthiness stems more from a purpose to protect an insurer from undue risks that the insurer has not in fact knowingly agreed to underwrite, rather than to discourage negligence by a shipowner or operator.¹³⁴ However, this warranty does give a shipowner a financial incentive to ensure seaworthiness.¹³⁵

131. BUGLASS, *supra* note 7, at 41 (quoting WILLARD PHILLIPS, 1 A TREATISE ON THE LAW OF INSURANCE ¶ 695, at 378 (5th ed. 1867)) (“[T]hat the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment, and outfit, generally, are such as to render it in every respect fit for the proposed voyage or service.”). *See also* GURSES, *supra* note 15, at 117 (citing similar definitions of “seaworthiness” from historic and modern cases).

132. *See* BENNETT, *supra* note 15, ¶¶ 19.20, 19.23. Policy terms typically waive enforcement of this warranty against a cargo owner as it is typically less practical for a cargo owner to warrant the seaworthiness of a vessel carrying her cargo. *Id.* ¶ 19.21; ROBERTSON ET AL., *supra* note 4, at 467 n.1. The commonly used Inchmaree Clause, which insures against latent risks that are not otherwise covered by a hull policy, has been interpreted as waiving the warranty of seaworthiness with respect to latent conditions—particularly in the United States. *See* 1 PARKS, *supra* note 15, at 391–94; SOYER, *supra* note 15, § 6.29, at 204.

133. BUGLASS, *supra* note 7, at 42.

134. BENNETT, *supra* note 15, ¶ 19.22 (noting that the warranty obviates the need to show that the unseaworthiness was the cause of a loss, as such a showing may be difficult or impossible); *cf.* Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993) (“Sundance may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck’s negligently maintained brakes failed.”). *But see* Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp, 346 F.3d 530, 535 (5th Cir. 2003) (“Imposition of undue liability on classification societies could . . . diminish owners’ sense of responsibility for vessel safety”); *Emp’rs Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1433 (5th Cir. 1992) (“The absolute nature of this implied warranty of seaworthiness is grounded in a public policy choice.”); *see also Wausau*, 978 F.2d at 1433 (quoting *The Caledonia*, 157 U.S. 124, 134 (1895) (“The warranty is intended to take ‘away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them.’”).

135. *See* SOYER, *supra* note 15, § 3.46, at 87–88; *cf.* Shapiro, *supra* note 1, at 23, 76.

In English time policies, providing coverage during a specific time period rather than coverage during a specific voyage, a shipowner's implied warranty of seaworthiness—which in breach could void the *entire policy* as of its outset—is replaced by an underwriter's unseaworthiness defense against a *specific claim*.¹³⁶ A shipowner's lack of awareness of an unseaworthy condition due to mere negligence may not give rise to this defense, at least in England, but intentional unawareness of a suspected unseaworthy condition will.¹³⁷

In the United States, an implied warranty of seaworthiness exists at the start of a time policy.¹³⁸ Under some authorities, this is a lesser “warranty,” analogous to the unseaworthiness defense against a specific claim in English law that requires a showing of the assured's awareness of the defect.¹³⁹ However, the Fifth Circuit has clarified that such lesser warranty applies only subsequent to the attachment of the policy, and that an absolute implied warranty applies under the “American Rule” at its very start.¹⁴⁰ Commentators have criticized the American Rule for placing

136. See BENNETT, *supra* note 15, ¶¶ 19.30–19.31. See also GURSES, *supra* note 15, at 121, 169, 181 (noting that the under the Insurance Act 2015, policies now only lapse when a warranty of seaworthiness has been breached, and coverage may resume after the unseaworthy condition is remedied). It remains to be seen if U.S. jurisprudence will incorporate this modified remedy.

137. See BENNETT, *supra* note 15, ¶¶ 19.31–19.34. The degree and nature of a shipowner's awareness, or lack thereof, of a condition constituting unseaworthiness for the purposes of this defense is reflected through the term “privity” as used in English law. See GURSES, *supra* note 15, at 117–119, 181–82; SOYER, *supra* note 15, § 3.68, at 101–04 (interpreting “privity” as used in the Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 39(5)). *But cf.* cases cited *supra* note 74 (denying limitation of liability in the Ninth Circuit due to information the owner was deemed responsible to have known, and in England, where liability was denied due to an employee's negligence) Section 39(5) of the Marine Insurance Act 1906 remains in effect and was not amended by the Insurance Act 2015. See SOYER, *supra* note 15, § 3.60, at 96.

138. BUGLASS, *supra* note 7, at 42.

139. See *id.* at 42, 44–45 (quoting *Gregoire v. Underwriters at Lloyds, Combined Cos.*, 559 F. Supp. 596, 600–01 (D. Alaska 1982)).

140. See *Emp'rs Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1431–32, 1435–36 (5th Cir. 1992). The court expressly rejected *Gregoire* and reaffirmed that a higher degree of warranty properly applies at the inception of time policies under American Rule than under the English rule. *Id.* at 1434–35. The policy at issue in *Wausau* was underwritten by a combination of American and English underwriters, but only the American underwriters brought this suit to recover payment. *Id.* at 1424. The court also found that the implied warranty of seaworthiness is a matter of federal maritime law, but noting that some authorities allocate it to state law. *Id.* at 1431 n.9. See also State Nat'l

American underwriters at a competitive disadvantage, as well as affording inadequate protection to American shipowners and ship mortgagees, despite the value of high maintenance standards.¹⁴¹ But supporters counter that a stern warranty is justified precisely to enforce high standards.¹⁴²

A shipowner's negligence that causes or fails to remedy an unseaworthy condition might still breach the less stringent subsequent implied warranty in the United States, though case law on this point is not

Ins. Co. v. Anzhela Explorer, L.L.C., 812 F. Supp. 2d 1326, 1365–66, 1377–78 (S.D. Fla. 2011) (providing a thorough discussion of the initial absolute and lesser continuing warranties of seaworthiness under the American Rule).

141. See, e.g., BUGLASS, *supra* note 7, at 43–44; Nicholas R. Foster, *The Seaworthiness Trilogy: Carriage of Goods, Insurance, and Personal Injury*, 40 SANTA CLARA L. REV. 473, 500–01 (2000); Michael A. McGlone, *Marine Insurance and the Implied Warranty of Seaworthiness*, 21 LOY. L. REV. 960, 967–69 (1975).

142. *Emp'rs Ins. of Wausau*, 978 F.2d at 1433. See also *id.* (discussing possible rationale for the English Rule, as codified in the Marine Insurance Act 1906 § 39(5), to include “a legislative compromise between the arguments advanced by shipowners against implying an absolute warranty in time policies and the arguments advanced by insurers in favor.”). The U.S. Supreme Court recently resolved a circuit split as to the scope of the “safe-berth clause,” whereby a charterer agrees with the shipowner that facilities selected by the charterer will be safe for the vessel. See *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1086 (2020). This case decided whether the terms of a contract clause constitute a warranty. *Id.* It did not concern the extent of an implied warranty. The Fifth Circuit held that the standard safe-berth clause constitutes a representation creating a duty of due diligence rather than a warranty. *Orduna S.A. v. Zen–Noh Grain Corp.*, 913 F.2d 1149, 1156–57 (5th Cir. 1990), *overruled by CITGO Asphalt Ref. Co.*, 140 S. Ct. at 1093. The Fifth Circuit explained that its interpretation promotes safety by affording an incentive to the master as well as to the charterer. *Id.* However, the Second Circuit held that this clause creates a warranty. *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951) (citing *Stag Line Ltd. v. Bd. of Trade* (1950) 84 Lloyd's Rep 1 (EWCA) 6 (Eng.)) (“[T]he charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice.”). The Third Circuit adopted the Second Circuit's interpretation. *In re Frescati Shipping Co.*, 718 F.3d 184, 203 (3d Cir. 2013), *aff'd sub nom. CITGO Asphalt Ref. Co.* The Supreme Court sided with the Second and Third Circuits, interpreting the clause as a strict warranty as a matter of contract law. *CITGO Asphalt Ref. Co.*, 140 S. Ct. at 1088, 1093. The Court rejected the use of tort principles, *id.* at 1089, and policy justifications, *id.* at 1092–93, to enforce contracts in the absence of an express provision to such effect. U.K. law also maintains the clause to be a warranty, but perhaps no longer an absolute one. See *Gard Marine & Energy Ltd. v. China Nat'l Chartering Co.* [2017] UKSC 35 [26] (allocating risks among the owner, charterer, and insurers). But see Brief of Amicus Curiae Sir Bernard Eder in Support of Respondents at 8–9, *CITGO Asphalt Ref. Co.* (No. 18-565), 2019 WL 4512750 (advocating for a limited interpretation of *Gard Marine & Energy Ltd.*).

entirely clear.¹⁴³ But neither the crew's negligence that results in unseaworthiness, nor their awareness of a subsequent unseaworthy condition—distinct from the shipowner's—is likely to be imputed to the shipowner and constitute a breach.¹⁴⁴ A shipowner affords a separate absolute warranty of seaworthiness to a cargo owner, even if her ship is insured under a time policy after that policy's initial attachment.¹⁴⁵

Just as a shipowner's awareness of an unseaworthy condition may void a policy or afford her insurance underwriter a defense to a claim under it, an underwriter's awareness of that condition prior to issuing a policy—or lack of such awareness due to negligence—may weigh against a court finding a vessel unseaworthy (and thus the warranty breached) or preclude the underwriter from asserting unseaworthiness as a defense.¹⁴⁶

143. See *L & L Mar. Serv., Inc. v. Ins. Co. of N. Am.*, 796 F.2d 1032, 1035–36 (8th Cir. 1986) (noting the ambiguity and inconsistency of relevant case law, but affirming that an owner's negligence may constitute a breach of the implied warranty despite the resulting conflict with English law); *Lemar Towing Co. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652, 660, 665 (E.D. La. 1972) (finding the shipowner breached the warranty through “neglect” by hiring an incompetent crew). See also HODGES, *supra* note 15, at 505–06 (quoting *Lemar Towing*, 352 F. Supp. at 660, to distinguish “incompetence” of the master or crew, which constitutes an unseaworthy condition, from their “negligence,” which does not).

144. See *State Nat'l Ins. Co.*, 812 F. Supp. 2d at 1377–78 (finding that the crew hired by an owner was not per se incompetent, thereby absolving the owner of knowledge of an unseaworthy condition despite the crew's subsequent negligence and incompetence in responding to a casualty that caused the loss of the vessel); BUGLASS, *supra* note 7, at 43 (quoting an American Maritime Cases headnote summarizing *Texaco v. Universal Marine*, 400 F. Supp. 311, 324–25, 1976 AMC 226 (E.D. La. 1975). But see cases cited *supra* note 74 (denying limitation of liability in the Ninth Circuit due to information the owner was deemed responsible to have known, and in England, where liability was denied due to an employee's negligence).

145. See *Texaco*, 400 F. Supp. at 324–25 (distinguishing a “breach of a nondelegable duty [from] a claim alleging bad faith or neglect”).

146. Cf. *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1090–91 (2d Cir. 1986) (finding that an underwriter waived a misrepresentation defense since the underwriter knew, should have known, or suspected that the vessel was unseaworthy due to a prior fire); SOYER, *supra* note 15, § 6.48, at 212 (noting that an insurer's issuance of a policy after awareness of a warranty breach constitutes waiver); see *State Nat'l Ins. Co. v. Anzhela Explorer*, L.C.C., 812 F. Supp. 2d 1326, 1368 (S.D. Fla. 2011) (finding the fact that “[t]he underwriter [had] approved the crew that was on the vessel at the time of loss” was “significant” and constituted evidence that the crew was competent and, therefore, the vessel seaworthy); *St. Paul Fire & Marine Ins. Co. v. Christiansen Marine, Inc.*, 893 So. 2d 1124, 1033–35 (Ala. 2004) (citing *Luria Bros. & Co.* to affirm a finding that an underwriter was estopped from raising an unseaworthiness defense since evidence

“[T]he absolute nature of th[e] warranty [of seaworthiness] does not insulate an insurer from the legal ramifications of its own conduct.”¹⁴⁷ The Act¹⁴⁸ codifies the emerging doctrine in England “that an insurer’s failure to enquire when sufficiently put on notice [is] a waiver” with respect to the assured’s duty of fair presentation.¹⁴⁹ The Act has also clarified the related prior provisions on further information that an insurer was deemed to “know,” “ought to know,” or “is presumed to know.”¹⁵⁰ It remains to be seen, in the course of resolving future cases where the Act may be persuasive or binding authority, whether U.S. or English courts might more broadly extend this concept of deemed knowledge—and of any resulting waiver of the misrepresentation defense to paying on a policy.¹⁵¹

of unseaworthiness within a surveyor’s report was information that the underwriter knew or ought to have known by requesting it); GURSES, *supra* note 15, at 125 (citing *Weir v. Aberdeen* (1819) 106 Eng. Rep. 383 (holding that the underwriter’s knowledge of unseaworthiness prior to issuing a policy waived the warranty of seaworthiness). *But see* 1 PARKS, *supra* note 15, at 264 n.176 (citing cases where an underwriter’s awareness was not held to constitute waiver or estoppel from reliance on the warranty of seaworthiness); SOYER, *supra* note 15, § 6.03, at 190 (citing *Sleigh v. Tyser* [1900] 2 QB 333, 337–38 (Eng.)) (finding that a Lloyd’s surveyor’s approval of a vessel’s fittings and cargo arrangement on behalf of the underwriter was not sufficiently unequivocal conduct to constitute the underwriter’s waiver of the assured’s warranty of seaworthiness).

147. *St. Paul Fire & Marine Ins. Co.*, 893 So. 2d at 1133.

148. Insurance Act 2015, c. 4 (U.K.).

149. Bernard Rix, *Conclusion: General Reflections on the Law Reform*, in THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW 113 (Malcolm Clarke & Baris Soyer eds., 2016) (discussing the operation of the Insurance Act 2015 § 3(4)(b), 3(5)(e)). *See also* Insurance Act 2015, c. 4, Explanatory Notes ¶ 45 (noting some courts had already adopted that approach).

150. Insurance Act 2015 §§ 3(5)(b)–(d), 5(1)–(3). *See also* Insurance Act 2015, Explanatory Notes ¶¶ 60–67. An underwriter is held to “know” information in a report by his surveyor. *Id.* ¶ 63. *See also* GURSES, *supra* note 15, at 82–89 (comparing information that an insurer was responsible for knowing, despite the assured’s “duty of utmost good faith” to provide information, under the Marine Insurance Act 1906, with the similar information an insurer is responsible for, despite the assured’s “duty of fair presentation” under the Insurance Act 2015); Rix, *supra* note 149, at 113–15 (describing knowledge for which the Insurance Act 2015 holds an insurer responsible for the purposes of fair presentation).

151. *Cf.* Insurance Act 2015, Explanatory Notes ¶ 6 (“The [prior] 1906 Act [was] written in clear forthright terms, which can constrain the courts’ ability to develop the law.”). From an American perspective, this quote is quite remarkable for both its restrained approach to the role of statutes as well as its correspondingly expansive view of the judiciary’s role in lawmaking. *See also* cases cited *supra* notes 146, 147 (including

III. SUGGESTIONS FOR ALLOCATING RISKS

Part III examines measures that the marine insurance industry could take, in addition to areas where relevant law relating to liability and insurance compensation could evolve, to reduce the risk of loss through unsafe or unseaworthy conditions. However, case law suggests that safety is but one of several goals and factors, some of which are competing, that courts must consider in adjudicating disputes—i.e., allocating responsibility—over accident losses. Relatedly, it is important that the overall system of legal precedents and industrial practices places responsibility for risk management squarely on the parties that are best positioned to perform that task—and these are not typically courts or arbitrators.¹⁵² Therefore, an “optimal” selection of loss-prevention measures might *not* necessarily be one that maximizes safety in light of offsets to other important goals.

In developing a list of goals that should be considered, safety—i.e., minimizing the probability and consequences of an accident—is certainly important.¹⁵³ But courts have noted that achieving equity in allocating responsibility is another key goal.¹⁵⁴ And it is crucial that safety measures

examples where some U.S. courts have already found an underwriter’s conduct in light of knowledge to have waived a warranty of seaworthiness defense).

152. See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 477–78 (1976); Henderson, *The Constitutive Dimensions of Tort*, *supra* note 129 at 246–47 (describing how tort law delegates duties for setting standards to risk managers). Even where parties attempt to allocate risk and responsibility by contract, vague provisions can defeat their intent. See, e.g., James A. Henderson, Jr., *Contract’s Constitutive Core: Solving Problems by Making Deals*, 2012 U. ILL. L. REV. 89, 131 n.231 (2012) (noting difficulties courts have enforcing “best efforts” provisions).

153. See, e.g., text accompanying *supra* note 126 (discussing Lord Lloyd’s dissent in *The Nicholas H*, highlighting the safety of life and property at sea); see also *Emp’rs Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1433 (5th Cir. 1992) (quoting *The Caledonia*, 157 U.S. 124, 134 (1895) (characterizing the warranty of seaworthiness as an incentive for safety)).

154. See, e.g., *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 537–38 (5th Cir. 2003) (compensating an owner who had justifiably relied on false information provided by a classification society); *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993) (“Sundance may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck’s negligently maintained brakes failed.”); *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922) (finding that a weigher held a duty to both the buyer and seller in the sale of a product sold by weight).

and legal requirements be practical with respect to insurance and shipping industry operations.¹⁵⁵ Finally, consistent predictability throughout the world as to parties' express and implied duties—supported by uniformity in laws, and in their interpretation—is fundamental to global commerce.¹⁵⁶ These are all important criteria and considerations for the marine risk management system—and other complex risk management systems that have a national or worldwide scope.

The marine insurance industry is in a key position to promote the seaworthiness of the vessels it insures.¹⁵⁷ Underwriters decide what risks they will insure and determine the premiums they will charge shipowners for doing so.¹⁵⁸ Insurers have a strong financial incentive to minimize risk so as to minimize losses, and they have the ability to reinforce similar financial incentives among their assureds.¹⁵⁹

One way that underwriters can—and perhaps, must—promote seaworthiness is through more hands-on engagement with classification societies or other surveyors.¹⁶⁰ Underwriters rely in large part on information provided by shipowners and classification societies to confirm the elements of seaworthiness.¹⁶¹ The Act reinforces an

155. See, e.g., text accompanying *supra* notes 119–21 (quoting Lord Steyn's majority opinion in *The Nicholas H*, counseling caution in that new precedents allocating liability could negatively impact the marine insurance and shipping industries). See also Damien L. O'Brien, *The Potential Liability of Classification Societies to Marine Insurers under United States Law*, 7 U.S.F. MAR. L. J. 403, 420 (1995) (predicting similar far reaching ramifications).

156. See, e.g., Brief of the Maritime Law Ass'n of the United States and the Ass'n of Ship Brokers & Agents (USA) Inc. as Amici Curiae in Support of Petitioners at 21, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081 (2020) (No. 18-565), 2018 WL 6392999; Brief of Amicus Curiae Sir Bernard Eder in Support of Respondents at 2–3, *CITGO Asphalt Ref. Co.*, 2019 WL 4512750; Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 TUL. L. REV. 1619, 1647 (1999) (criticizing the lack of uniformity resulting from the Fifth Circuit's holdings on the American Rule); Young, *supra* note 4, at 341–42, 347 n.475, 357–58 (discussing the merits of uniform rules for maritime commerce and outlining proposals for determining when federal maritime law should preempt state law). See also discussion *supra* note 142 on the Supreme Court's recent resolution of the circuit split interpreting safe berthing clauses in *CITGO Asphalt Refining Co.*

157. See generally BILLAH, *supra* note 44, at 176–99.

158. See *id.* at 184–86.

159. See *id.*; see also Shapiro, *supra* note 1, at 70–71.

160. See *supra* Section I.D.

161. See BILLAH, *supra* note 44, at 180–83, 185–86. See also *supra* notes 20–21 and accompanying text. Underwriters also rely heavily on information about shipowners,

underwriter's duty to avail itself of the information that a classification society can reasonably obtain through a prudent survey, and to make further inquiry where information and experience suggest further information is needed to properly assess risk.¹⁶² To this end, underwriters should collaborate more directly and proactively with the classification societies.

It is not ideal for underwriters to wholly rely on the classification and related surveys that a *shipowner* has purchased.¹⁶³ Lead underwriters should ideally contract and pay for the survey services and information they need to properly assess risk, putting themselves in clearer privity—i.e., clearer mutuality of interest—with the classification society in both a practical and a legal context.¹⁶⁴ Admittedly, thorough real-time surveys will often not be viable in light of the time constraints found with current industry practices, particularly where needs for voyage policies and charters can arise with little opportunity for advance planning.¹⁶⁵ To the extent that underwriters have to rely on off-the-shelf surveys that have already been performed, underwriters—or, perhaps more feasibly, a

their claims history, and specific classification societies. *See supra* notes 57–59 and accompanying text. An underwriter might not have much more information from a classification society about a specific vessel beyond the fact of classification and whatever related information is readily available from that society's published register. *See Miller, supra* note 43, at 82–83, 85–86 (according significant weight to classification itself); Wiswall, *supra* note 50, at 185.

162. *See* Peter MacDonald Eggers, *The Fair Presentation of Commercial Risks Under the Insurance Act 2015*, in *THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW*, *supra* note 149, at 17–20; *see also supra* notes 149–51 and accompanying text.

163. *See supra* notes 51–52 and accompanying text. *But see* Miller, *supra* note 43, at 83–84 (according significant weight to classification itself as confirmation of seaworthiness).

164. Shapiro, *supra* note 1, at 79–81; *see also supra* notes 74, 86, 109 (discussing “privity” and “proximity”). It is also certainly prudent for a shipowner to retain a classification society to support the shipowner in her duty to maintain a seaworthy vessel. *See* text accompanying *infra* notes 176–68. While the shipowner and underwriter do have not have complete mutuality of interest with regard to information relevant to the issuance of a policy and its premium, the divergence of interest is not clearly so great as to suggest a conflict of interest in a classification society serving and holding a duty to both. *Cf. Glanzer v. Shepard*, 135 N.E. 275, 275 (N.Y. 1922). This is not to say that underwriters and owners should necessarily share the cost of the same survey, but rather that the use of separate classification societies by each could entail significant additional costs not clearly justified.

165. *See* Miller, *supra* note 43, at 83, 86–87.

consortium of underwriters—could achieve privity with societies by arranging and paying for classification.¹⁶⁶ But even if there is no workable path for underwriting interests to pay for classification surveys as they did in the past,¹⁶⁷ underwriters could still attain some increased privity with the societies by paying them for information obtained from prior surveys,¹⁶⁸ even if those surveys continue to be arranged and paid for by shipowners—as they would be performed with the understanding that material survey information would ultimately be paid for and relied upon by both.¹⁶⁹

A further related way that underwriters could promote seaworthiness is to more fully use information regarding a vessel's condition in setting premiums for coverage.¹⁷⁰ Such premiums could more precisely reflect the risks assumed by the underwriter and provide the shipowner additional financial incentive to manage those risks.¹⁷¹ Reporting or other methods to facilitate public awareness of the premiums set for specific coverage could help to communicate these incentives effectively.¹⁷²

Turning now from industry practice to jurisprudence as an element of the marine risk management system, examples of situations where certain laws or interpretations intended to promote safety may do so at the expense of “fairness” or equity include: (1) a master or classification society is found negligent and held responsible for the loss of a vessel rather than an underwriter; (2) an owner who does not recover—partially or fully—from an insured loss due to a broadened implied seaworthiness warranty; or (3) an underwriter who is estopped from denying coverage for a loss of an unseaworthy vessel in light of information the underwriter should have known and acted upon.¹⁷³

166. Perhaps analogous to the mirror image of a P&I club. *Cf. supra* note 40 and accompanying text.

167. See *supra* notes 45–46 and accompanying text.

168. This does not suggest that no such information is provided by societies to underwriters now. See Miller, *supra* note 43, at 87.

169. Affording societies a duty to both. See Glanzer, 135 N.E. at 275–76.

170. See *supra* note 57 and accompanying text.

171. See *supra* note 55 and accompanying text.

172. Historically, such information has been sparse. See *supra* notes 59–60 and accompanying text. This awareness might also be furthered if brokers were able to shop for coverage competitively, and report back to the assured on the premium rates quoted and how they were determined.

173. Many readers might arguably find some of these situations equitable, depending on the details of each situation and a reader's view of what is equitable.

But examples where jurisprudence promoting safety might be broadly considered consistent with fairness or equity could include holding a classification society responsible—at least to some extent in contribution—for reckless failure to exercise due care in performing a survey ordered by: (1) an owner to ensure her existing vessel is seaworthy; (2) a prospective owner to ensure the vessel she is negotiating to buy is seaworthy—or that the costs needed to make the vessel seaworthy are properly identified; or (3) an underwriter so that she is fully apprised of the risk she is about to underwrite for a premium she determines to be commensurate with that risk.¹⁷⁴

With regard to these examples, the Second Circuit in *Sundance Cruises* improperly conflated a “guarantee” with a duty to exercise due care.¹⁷⁵ The court offered the analogy of a negligent truck owner seeking contribution from a brake inspector after an accident involving failed brakes.¹⁷⁶ But a prudent truck owner might well order an inspection as part of maintaining his truck in safe condition, just as a prudent shipowner—in furtherance of her duty to maintain a seaworthy vessel—might order a survey by a reputable classification society in furtherance

174. The author readily stipulates that such hypotheticals should be exceedingly rare, as the overwhelming majority of classification society surveyors are dedicated, competent professionals—particularly those who support members of the International Association of Classification Societies. *See, e.g.,* Wiswall, *supra* note 50, at 173. While courts have a critical role, but often face challenges, in placing liability according to established rules of decision and contractual provisions agreed between parties seeking to manage their respective risks, courts are even less equipped to define due care than to determine whether a standard defined elsewhere, such as in contract provisions or applicable industry standards, has been met. *See* Henderson, *Expanding the Negligence Concept*, *supra* note 152, at 499. *See also id.* at 479 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947) (performing extensive risk calculations to determine the care due)); *id.* at 490 (noting challenges in a court’s use of expert testimony in determining negligence). In *Orduna S.A. v. Zen–Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), *overruled on other grounds by* *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081 (2020), the court rejected an appellant’s contention that “the district court was compelled to accept its expert’s testimony . . . because of his prominence in the field.” *Id.* at 1154. “We cannot say the district court committed clear error in accepting the testimony of other experts over that of [appellant’s] no matter how eminent or learned [appellant’s] expert was.” *Id.*

175. *See supra* note 101 and accompanying text.

176. *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993) (“*Sundance* may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck’s negligently maintained brakes failed.”).

of that duty. Far from serving to shirk responsibility, hiring an inspector or surveyor is in keeping with such responsibility. And both the truck owner and shipowner should expect that their inspector and surveyor will exercise due regard—and in any event not reckless disregard—in performing such inspection or survey.¹⁷⁷ While the truck driver in the analogy cited in *Sundance Cruises* was negligent,¹⁷⁸ the court did not address whether the owner or classification society were negligent with respect to the presence of unseaworthy conditions or the failure to detect them. The court concluded that Sundance's nondelegable duty of seaworthiness precluded any transfer of that duty to the classification society.¹⁷⁹ The court further suggested that the society held no duty of diligence to Sundance.¹⁸⁰

While it was reasonable for the court to find that a classification society should not assume an outright duty of seaworthiness akin to an owner's, it does not follow that a society should have no duty to diligently support an owner in that regard. Perhaps a practical compromise is for courts to hold a classification society responsible, at least in part, where its reckless disregard for due diligence or grossly negligent misrepresentation is the cause of or has contributed to a loss.¹⁸¹ There is

177. See *supra* note 101. This does not suggest that hiring a reputable inspector absolves a truck or shipowner of a duty to implement other elements of a prudent maintenance regime. Where a maintenance regime is lacking, an owner would know, or ought to know, that the condition of the truck or vessel could be dubious in spite of any inspection.

178. *Sundance Cruises Corp.*, 7 F.3d at 1084.

179. *Id.*

180. *Id.* (distinguishing *Glanzer v. Shepard*, 135 N.E. 275 (1922); *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931)). The court misread *Glanzer*, which found the weigher there held a duty to both the buyer and seller. *Glanzer*, 135 N.E. at 275. Further, the relationship between Sundance and the classification society should be distinguished from the relationship between the “financially ailing party” and the “inaccurate accountant” in the court's discussion of *Ultramares*. The classification society more directly supported Sundance in its risk management or seaworthiness role. Their roles and duties in that regard are less distinct than those of a company and its accounting firm.

181. See *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 537–38 (5th Cir. 2003); see also *Great Am. Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999, 1012 (S.D.N.Y. 1972). Of course, in such situations a court should not require that a classification society bear all such damages from a loss where it determines that the equities suggest that an owner, underwriter, or other party should share in the loss. See also Henderson, *Expanding the Negligence Concept*, *supra* note 152, at 520–21 (discussing certain relations between parties, the performance of “certain professions, businesses, and trades,” and tangible injuries to persons or property as justifiable limited

no reason to believe that the classification and insurance regimes could not adapt to such an allocation of responsibility, to include affording insurance coverage to classification societies to cover losses now borne elsewhere.¹⁸² Perhaps the concerns of both Lord Steyn and Lord Lloyd can be mutually reconciled in practice.¹⁸³

With respect to the warranty of seaworthiness, the American Rule places a greater duty—and incentive—upon a shipowner to ensure his vessel is seaworthy.¹⁸⁴ The English Rule consequently allocates greater risk to the underwriter.¹⁸⁵ There is no clear answer here; while greater incentives for safety are generally preferable, avoiding a policy for unseaworthiness is absolute—and may absolve an insurer from covering a loss unrelated to the seaworthiness issue.¹⁸⁶ Conversely, under the English Rule, reimbursing an assured for a loss subsequent to a prior known state of unseaworthiness could absolve a shipowner if the actual cause of the loss is unseaworthiness, but where that cannot be firmly determined.

The greater good may be to opt for uniformity. The overall disadvantages of inconsistent American and English rules might well outweigh the specific benefits of the American Rule's stronger safety

exceptions to the usual rule denying liability for economic harm). A grossly negligent or reckless disregard standard, rather than a reasonable care standard, may still provide significant incentives to surveyors and classification societies, while avoiding the adjudication concerns noted by Professor Henderson and the disincentives to classification societies raised by Lord Steyn in *The Nicholas H* and by the Second Circuit in *Sundance Cruises*. See *supra* notes 77, 121 and accompanying text.

182. See text accompanying *supra* note 130.

183. See text accompanying *supra* notes 120–22, 130. An issue worthy of further study is the relative enthusiasm of American and English courts sitting in admiralty for adopting such a policy compromise as a matter of common lawmaking. See *supra* note 152. It seems more likely for English courts, if either, to lead. See *id.*; cf. *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1086, 1092–93 (2020) (analyzing only the text of the disputed clause and rejecting policy considerations). Cf. also *supra* Section II.A. (recounting the policy discussions within the opinions of the House of Lords in *The Nicholas H*).

184. See *supra* note 140 and accompanying text.

185. See *supra* note 142.

186. SOYER, *supra* note 15, § 3.43, at 85–86. See also *id.* §§ 3.77–84 (discussing how the English Rule has addressed causation); cf. Malcolm Clarke, *The Future of Warranties and Other Related Terms in Contracts of Insurance*, in *THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW*, *supra* note 149, at 56–57 (discussing causation more generally with respect to insurance warranties).

incentive.¹⁸⁷ Perhaps any loss of safety incentive due to a more uniform but lenient warranty could and should be recouped through greater imputation of negligence or awareness to the shipowner, thereby more easily triggering a defense from the more lenient warranty.¹⁸⁸ Similarly, a court should look to information that was or should have been known by an underwriter—and the underwriter’s conduct in light of that information—in determining whether the equities lean toward allowing an otherwise proper unseaworthiness defense in part or in full.¹⁸⁹ Particularly where there is no express contract provision to the contrary, perhaps unseaworthiness findings should not always lead to an all or nothing allocation of liability where the equities auger for a compromise result.¹⁹⁰

CONCLUSION

Marine insurance plays a vital role in promoting global commerce by pooling and underwriting marine transportation risks. Lives and fortunes depend on how these risks are addressed and allocated. Safety incentives should be a major factor in risk allocation; however, legislatures and the courts must also give due regard to other important and potentially competing goals such as equity, practicality, and uniformity. Policymakers should employ a systems approach, understanding how a change to one legal or industrial component of this complex system could result in multiple impacts on risk management or other insurance or shipping industry operations.

187. See *supra* note 156; see also *Emp’rs Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1424 (5th Cir. 1992) (describing the loss of a vessel insured by a combination of English and American underwriters, but where only the American underwriters were seeking to avoid coverage).

188. See cases cited *supra* notes 74, 144. Where it is appropriate to afford certain assureds, such as ship mortgagees, coverage despite a shipowner’s breach of a warranty, the policy clauses can incorporate a provision allowing such coverage—such as is traditionally done in cargo policies.

189. See cases cited *supra* note 146.

190. Cf., e.g., *Gard Marine & Energy Ltd. v. China Nat’l Chartering Co.* [2017] UKSC 35 [26] (moderating the safe berth warranty to reallocate liability in certain circumstances). Interpretation of safe berth clauses, see discussion *supra* note 142, is yet another area where uniformity within the United States and with English law would help shipowners and charterers to knowledgeably allocate such risks among each other and their insurers. See Brief for The Mar. Law Ass’n of the U.S. and the Ass’n of Ship Brokers & Agents (USA) as Amici Curiae Supporting Petitioners, *supra* note 156, at 6–7.

Due to the status of federal admiralty law as one of the few remaining areas of federal common law, U.S. courts have an unusual role and responsibility to establish substantive policies in this area through case law. English courts have had a historically large policymaking role in marine insurance law, and the Insurance Act 2015 will likely afford English—and perhaps American—courts with occasions to exercise this role in the near future.