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BATTEN DOWN THE HATCHES – A PROACTIVE AND CREATIVE APPROACH TO SUBROGATION

In American Steamship Company and Armstrong Steamship Company v. Hallett Dock Company et al. (Case No. 09-2628-MJD-LIB), Brent Reichert and Gerardo Alcazar brought a subrogation action against the Hallett Dock Company for damages that occurred during the docking of the M/V WALTER J. MCCARTHY JR., a one-thousand foot long lake freighter. In February 2012, a federal jury in Duluth, Minnesota found in favor of the American Steamship Company, the MCCARTHY's owners, and awarded \$4,682,322.55—every dollar American Steamship and its marine insurers had sought for pollution prevention, repair costs, and lost business income. In addition to the trial verdict, American Steamship subsequently sought and was awarded prejudgment interest and allowable court costs.

The damage to the MCCARTHY occurred on Monday, January 14, 2008 as it attempted to dock for winter-layup in Superior, Wisconsin at Hallett Dock No. 8. The MCCARTHY had never used Hallett Dock No. 8 before so a few days before arrival crew members checked the nautical charts and publications to confirm the available depths in the slip. They also twice confirmed with Hallett Dock that Dock No. 8 could handle the vessel. Despite these assurances, a hidden underwater concrete and rebar mooring house that had collapsed fifteen months earlier lay in wait in the slip in an area represented as safe by Hallett. The MCCARTHY hit the hidden hazard, its hull was breached, and water rushed into the engine room. Significant flooding occurred, requiring nearly \$4.2 million in engine room repairs and other costs and expenses.

While good facts certainly helped, the success of the subrogation action in American Steamship depended on the creative, proactive approach counsel for American Steamship used in the case. From the start of the litigation all the way through trial, Reichert and Alcazar looked for innovative ways to frame issues and pressure the defendant.

For example, after focused discovery, American Steamship's lawyers utilized the Pennsylvania Rule, a well-established maritime doctrine, to help show that Hallett was negligent since it failed to comply with federal statutes. Early in the case, Reichert and Alcazar identified two federal statutes that Hallett likely violated: the Rivers and Harbors Act (33 U.S.C. § 403) and Wreck Act (33 C.F.R. § 64.11). These laws guard against the creation of an obstruction in navigable waters and require the marking of a known hidden obstruction. Over several depositions, the attorneys developed the facts necessary to establish that Hallett both created and failed to mark the hidden obstruction. On a motion for summary judgment, the presiding district court judge found a presumption of negligence against Hallett because it violated these two federal statutes.

A similarly proactive and creative approach to settlement also helped maximize the ultimate recovery for our client. Originally, the case included five defendants. Three "minor" defendants were eliminated early in the case through confidential settlements. Then, shortly before trial, American Steamship initiated confidential settlement discussions with the shipyard—the only other remaining defendant besides Hallett. Settlement at this late stage focused the trial on Hallett, the party that owned Dock No. 8 and failed to properly warn of the hidden obstruction. This settlement sought to turn an enemy into an ally. Deposition testimony suggested that the shipyard would testify at trial that Hallett did not warn it about the obstruction and that if Hallett had warned it, the shipyard would have tried to stop the MCCARTHY from moving too far into the slip. This testimony supported the trial theme that the cause of the incident started and ended with Hallett.

Since the jury found that Hallett was 100% at fault and the sole direct cause of the incident, American Steamship and its insurers recovered at trial all of their alleged damages that resulted from the casualty, an uncommon and noteworthy result in a subrogation case. In summary, the jury found that Hallett was negligent and that Hallett breached its contract with American Steamship, breached one or more express warranties, breached an implied warranty of workmanlike performance and negligently misrepresented or failed to disclose certain facts.



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Brent has served as lead counsel on numerous occasions and represented numerous companies and/or insureds and their carriers and recovered the losses they have sustained due to admiralty and maritime incidents, warehouse collapses, plant fires, explosions, turbine generator failures, construction defects, food contamination incidents and other calamitous events. He has experience in defending against class action claims and in complex litigation involving the defense of insurance companies regarding policy matters and the defense of companies in losses caused by construction defects, personal injuries, alleged product defects and food contamination outbreaks.



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Jerry's practice is focused on general business and commercial litigation; large property insurance subrogation and coverage litigation; catastrophic loss investigation, adjustment and recovery; products liability defense; and food contamination and food recalls, defense against food-borne illness claims and recovery of costs and losses caused by food contamination outbreaks. He received his J.D. from the University of Wisconsin Law School.

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ADMIRALTY AND MARITIME LAW Q & A WITH BRENT REICHERT



Rain or shine, sleet or snow, Minneapolis partner **Brent Reichert** has been acing out opponents ever since his championship reign on the high school and college tennis and basketball courts. Throughout his 30+ year career as a trial attorney with Robins, Kaplan, Miller & Ciresi L.L.P., Brent has proven adept at handling cases with complex factual and legal issues from a variety of industries and across practice areas as diverse as admiralty and maritime, large property insurance subrogation and coverage litigation, class action defense, products liability defense, general business and commercial litigation, and food contamination and food recall cases. Never satisfied with the comfort zone, he litigates tenaciously on behalf of clients in order to resolve the large, catastrophic loss disputes that serve as the hallmarks of his career. His most recent trial success of that kind occurred on behalf of client American Steamship Company, in a case involving subrogation and maritime matters.

Q: What are the key considerations in an admiralty and maritime case when a vessel's hull has been breached?

A: Besides obtaining a full understanding of the liability issues, damages in these kinds of cases can be complex. Usually, one insurance company has issued the policy covering pollution losses and clean-up expenses, while another marine hull policy covers the costs of repair to the vessel. But, coverage doesn't usually exist for business interruption losses suffered by the vessel's owner. That means that any large case requires coordination and proof of three very different kinds of damages.

Q: What are some key considerations for pollution insurers in these kinds of cases?

A: Getting "boots on the ground" fast can make a big difference in mitigating loss. Depending on policy language, insurers can be on the hook whether the pollution occurs during the holing and flooding or as part of the effort to get water that has entered the vessel—and become contaminated by oil and fuel—out of the ship. Careful coordination with controlling state and federal agencies will ensure the creation of a plan that satisfies environmental concerns and avoids broadening the scope of any potential clean-up.

Q: What about claims for business losses?

A: The result in the American Steamship case should open the eyes of ship owners to the willingness of juries to hold parties accountable for actions that lead to serious property damage and loss of business. And, our understanding of the business of shipping in general and the specifics of shipping on the Great Lakes helped us establish how the MCCARTHY's

unavailability at the beginning of the shipping season caused lost business income.

Q: How important is an early response?

A: Critical. But for the tremendous efforts of the MCCARTHY's crew, the losses to the ship would have been much greater. They took prompt action during the incident and then many crew members volunteered to stay on the ship for several months during repairs to get the ship up and running as fast as possible. In addition, a prompt investigation into the facts of the incident help shape your legal theories and strategy. However, parties need to be careful that their investigators don't do anything to put key attorney-client and work-product privileges at risk.

Q: Jury deliberations in American Steamship were quite short in this case. What do you attribute that to?

A: Our trial team took great care to prepare exhibits that the jury could understand and we conveyed the facts in an easy-to-follow manner. We created three substantial, easy-to-use manuals that contained every invoice, check, and record of payment to show the jury that we deserved our requested damage amount. We also used new and old trial methods, including storyboards, warning signs and buoys, PowerPoint presentations, and barcode technology, to clearly and succinctly tell our story, cross-examine opposing witnesses, and highlight our arguments. Those techniques must have been quite convincing, as we were awarded every single penny we requested.

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CONSIDERATIONS RELATING TO NAMED STORM PROVISIONS

The National Weather Service assigns a name to any weather disturbance that intensifies into a tropical storm. In the wake of “Superstorm Sandy,” issues have arisen that relate to provisions in first-party property insurance policies relating to “named storms.”

Named Storm Definitions

Some commercial property insurance policies contain what is referred to as a “named storm” definition. While the specific language varies, these definitions frequently contain common elements that need to be evaluated when determining the application of the definition to a particular insurable event.

A “named storm” definition usually refers to the storm’s having been named or otherwise declared to be a certain type or category of storm by a meteorological authority. It is important to pay close attention to the exact wording of the definition. The mere fact that a storm has a name does not necessarily make it a “named storm” under a policy’s terms and conditions. Assuming the storm constitutes a “named storm” according to the policy’s definition, there will usually be a question as to whether the claimed damages fall within the parameters of the definition.

The purpose of named storm definitions has been the subject of much debate and a number of legal decisions. One expressed view is that these definitions group various perils for the purpose of defining an “occurrence.” Others posit that such definitions are intended to create a separate peril, which then defines the nature of the loss and the application of other policy provisions. Still others claim that these definitions are designed to support the application of special limits or deductibles.

Other Policy Provisions

The policy should be reviewed to determine whether it contains a deductible, sublimit, or both, tied specifically to the named storm definition. Is the deductible expressed as a percentage of some value? Does the sublimit apply per occurrence and in the annual aggregate? If flood damages are claimed, the policy should be reviewed to determine whether it contains a flood deductible and/or sublimit.

Issuance of Executive Orders or Other Bulletins and Their Impact on Named Storm Clauses

After Sandy came ashore, several states, including New York and New Jersey, issued pronouncements and executive orders that related to the application of hurricane deductibles. In most instances, the import of these proclamations was to prevent the application of hurricane deductibles, which typically are larger than the standard deductible.

In conclusion, there are many issues to consider when a named storm may be involved in a loss. The language of the policy is of critical importance. Another factor to be aware of is whether a given state has issued notices relating to application of policy provisions tied to the named storm definition. The effect of such notices is beyond the scope of this article, but their existence is important information in the face of a potential claim.



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