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MARITIME INSURANCE FOR OFFSHORE RISKS: CURRENT POLICY FORMS, INDUSTRY PROBLEMS, AND RECENT DECISIONS

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The importance of insurance to owners or operators engaged in offshore drilling operations and the accompanying exposure to liability for personal injuries and death is best illustrated by the fact that the insurer or underwriter pays for the damages resulting from most maritime casualties.

Insuring offshore risks has been an evolutionary process, starting the the 1950's with an amalgamation of marine and non-marine concepts and progressing until today, where there are sophisticated new coverages tailored to meet the demands and requirements of vessel owners, oil operators, service companies, and other maritime venturers.

This paper focuses briefly on the coverage of some aspects of maritime liabilities, particularly in the area of personal injury and death.

If the assured is a vessel owner, he may buy what is commonly known as P&I insurance, the term P&I standing for "Protection and Indemnity," which generally covers legal liability for: (1) loss of life of or personal injury to or illness of *any* person except employees of the assured covered under any compensation act; (2) hospital, medical, or other expenses necessary and reasonable incurred in respect to loss of life of or personal injury to or illness of a member of the crew or any other person; (3) repatriation expense, travel, maintenance, and cure of a member of a crew; (4) loss or damage to any vessel or craft or property thereon, not caused by collision, provided such liability does not arise by reason of a contract made by the assured; (5) damage to any dock, pier, harbor, bridge, buoy, lighthouse, or other structure or property insofar as same is not covered by full Hull insurance; (6) cost or expense of, or incidental to, the removal of the wreck of the vessel named therein when compulsory under law; and (7) loss of or damage to any other vessel or craft, or property thereon, caused by collision with the insured

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vessel, insofar as such liability would not be covered by full insurance under the standard form of Hull policy.

Although these coverages will vary as between the ocean form and so-called river or inland forms, the coverages provided by traditional primary P&I insurance are predicated on liabilities imposed by reason of some act or omission of the vessel which, under usual concepts of imputed responsibility, would impose liability on the vessel owner.

The term "owner" as used in this statement includes what is commonly referred to as owner *pro hac vice*, meaning an owner "for this occasion." Such an owner also is commonly referred to as a "bareboat charterer." Under a bareboat charter, the charterer, in contrast to a time or voyage charterer, furnishes all crew, fuel, equipment, and supplies, takes complete control of the vessel, and directs her navigation and operation. Major oil operators and others engaged in a drilling venture offshore usually are named as additional assureds in P&I policies. Unless the client occupies a position of owner or bareboat charterer in connection with all vessels used by him in the performance of his offshore operations, he should not depend solely upon the protection afforded by the vessels' P&I policies.

This limitation of coverage generally has been sustained in the decisions which have interpreted this issue and is best exemplified by the decision of the United States Court of Appeals for the Fifth Circuit in *Lanasse v. Travelers Insurance Company*.[1]

A crew member aboard a utility tender owned by Cheramie, and under a time charter to Chevron, suffered serious bodily injuries during a loading operation. Chevron ordered the vessel to go to a Chevron fixed offshore production platform to move a welding machine from the west to the east side of the platform. Chevron's crane operator lowered the welding machine onto the afterdeck of the vessel, which was then shifted to the other side of the platform. After the plaintiff had attached the hook to the cargo, but before he had moved clear of the machine, Chevron's crane operator began lifting but stopped when the machine was raised five or six inches above the deck. This caused the load to swing against the starboard railing of the vessel and back into the plaintiff. The crane operator then lowered the machine back onto the deck. The plaintiff, while attempting to get out of the way, was knocked back and crushed.

The district court found that the negligence of Chevron's crane operator was the sole proximate cause of the injury. Further, the

1. 450 F.2d 580 (5th Cir. 1971), *cert. denied*, 406 U.S. 921 (1972).

vessel was found not to be unseaworthy, and no member of the vessel's crew was held to be guilty of negligence. Consequently, Chevron was held liable for the full amount of the funds provided to the plaintiff in settlement of his claim.

Chevron appealed this decision on the ground, among others, that its liability was covered under the terms of the P&I policy procured by Cheramie pursuant to the terms of the charter party. Under the terms of the policy, Chevron was named as an additional assured, and the underwriters' rights of subrogation against Chevron were waived expressly.

The fifth circuit held that the P&I policy did not provide coverage of the plaintiff's claim because, although Chevron was a named assured, it did not become liable "as owner of" the vessel.[2] The vessel "offered nothing further than a condition or locale for the accident."[3] The fifth circuit concluded:

> [W]here injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury. Nothing more occurred here, for it was Chevron's actions as a platform operator or as a crane operator that caused the harm, and that does not make it a liability of a shipowner.[4]

Shortly after *Lanasse* was reported, the United States District Court for the Eastern District of Louisiana confronted an analogous but different controversy in *Dow Chemical v. Tug THOMAS ALLEN*.[5] Dow owned a workover barge which was being towed by the Tug THOMAS ALLEN from one drilling rig to another. The Dow service engineer in charge of the barge insisted that the tug navigate its tow through a relatively shallow bay in which there were many unmarked gas pipelines, despite the fact that the tug was not equipped with appropriate pipeline charts. Although the tug's master initially protested, he capitulated. The tug collided with a gas pipeline and the barge was damaged in the resulting explosion and fire, which also injured a barge crew member.

The court found the Dow service engineer negligent in insisting that his barge be towed through the shallow bay without adequate charts or other guides to the pipeline locations.[6] Further, the tug

2. The policy provided that the insurance company "undertakes to pay up to the amount hereby insured . . . such sums as the assured, as owner of the Vessels as per Schedule, shall have become legally liable to pay and shall have paid . . . ."

3. 450 F.2d at 584.

4. *Id.* (citation omitted).

5. 349 F. Supp. 1354 (E.D. La. 1972).

6. *Id.* at 1360.

captain was held to be negligent in failing to refuse to undertake the hazardous journey.[7]

The P&I policy provided coverage only for "those losses or damage for which the insured became legally liable as owner of the vessels named in the policy."[8] Although Dow was named as an additional assured, the workover barge was not named in the policy. The Tug THOMAS ALLEN was named. Since Dow's liability arose solely from its negligence as a barge owner and not "in respect of" the insured tug, as required by the tug's P&I policy, the policy was held not to provide coverage of Dow's liability.[9]

Although the result in the *Dow* case is essentially similar to *Lanasse*, the different factual situation apparently caused the court to recognize an additional requirement for the establishment of P&I coverage by an additional assured. Unlike *Lanasse*, the assured vessel was not merely a locale for the casualty, but was directly involved in the accident and was partially responsible for the occurrence. However, since the additional assured's liability arose out of negligence relating to another uninsured vessel, the tug's policy provided no coverage. The only coverage afforded was to the named assured for its negligence in the operation of the named vessel and the consequent legal liability.

The principle enunciated in the *Dow* case was applied several years later in *Wedlock v. Gulf Mississippi Marine Corp.*,[10] in which a crew member from a tug was injured when, while attempting to free a tow line, he fell into an open hatch on a McDermott barge in tow of a tug.[11] The court found that the casualty was proximately caused by McDermott's negligence in delivering the barge with an open hatch cover *and* by the tug's crew's negligence in shining a blinding spotlight into the plaintiff's eyes.[12]

The tug's P&I policy named McDermott as an additional assured "as respects all vessels covered" under the policy, which specifically named the tug as an insured vessel.[13] However, since the barge was not named, and McDermott's negligence arose only out of its capacity as a barge owner and not as a charterer of the insured tug, the policy did not cover McDermott's liability.

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7. *Id.*
8. *Id.* at 1362.
9. *Id.*
10. 554 F.2d 240 (5th Cir. 1977).
11. *Id.* at 241.
12. *Id.* at 243.
13. *Id.* at 242.

Interestingly, McDermott argued that since there was a causal nexus between the insured tug and the casualty, *Lanasse* authorized a finding of coverage of McDermott's negligence, because it was an additional assured with respect to the tug. However, the court rejected this contention on the ground that there are two prerequisites to coverage: (1) There must be some causal operational relation between the vessel and the injury resulting from the additional assured's negligence, *and* (2) This causal relation must be in respect of an insured vessel.[14]

In *American Motorists Insurance v. American Employer's Insurance Company*,[15] the *Dow* and *Wedlock* issues were not present, and *Lanasse* was found to be clearly controlling.

In *American Motorists*, a crewboat was docked at a fuel facility. A crew member left the vessel, went to an office, leaned out of a window and fired three shots from his pistol. One bullet ricocheted off a bottle and injured a third person.[16] The P&I policy on the crewboat was held not to provide coverage of the assured's liability for the crew member's actions, because there was no causal relation between the insured vessel and the injury.[17]

Approximately seven years after the *Lanasse* opinion, a decision distinguishing *Lanasse* and finding coverage under a P&I policy was rendered. In *Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.*,[18] the crewboat M/V STONES RIVER was transporting members of a Southern Natural Gas drilling crew from a drilling rig to port during rough weather and heavy seas. The weather and sea conditions caused tremendous pitching and rolling of the vessel, which resulted in the passengers' being tossed about.[19] One member of the drilling crew was thrown from his seat into the air and landed across the seat frame, sustaining serious physical injuries.[20]

Offshore Logistics was found to be primarily liable, because the vessel had been piloted by an inexperienced and unlicensed crew member, had been driven head on into the wave crests rather than diagonally, and had been operated at grossly excessive speeds.[21] Southern Natural Gas was held to be partially responsible, because

14. *Id.* at 244.
15. 447 F. Supp. 1314 (W.D. La. 1978), *remanded on other grounds*, 600 F.2d 15 (5th Cir. 1979).
16. 447 F. Supp. at 1315.
17. *Id.* at 1319.
18. 462 F. Supp. 485 (E.D. La. 1978).
19. *Id.* at 488.
20. *Id.* at 489.
21. *Id.*

the drilling foreman negligently had insisted that the voyage be made in spite of the bad weather.[22]

The crewboat, owned by Offshore Logistics, was covered by primary and excess P&I policies, both of which named Southern Natural Gas, the bareboat charterer, as an additional assured. The policies indemnified against all loss or damage as the assureds "shall as owners of the vessel named herein have become liable to pay . . . ."[23]

After deciding without serious question that the liability of Offshore Logistics, the vessel owner, was clearly covered by the P&I policies, Judge Sear extensively considered the issue of Southern Natural Gas' claim as an additional assured for coverage of its liability under the same policies. Initially, the *Lanasse* requirement of a causal nexus was examined and found to be satisfied.[24] There was only one vessel involved in the casualty, the M/V STONES RIVER, which was named in the policy as an assured vessel. Southern Natural Gas' negligence in sending the vessel out into hazardous sea conditions was the ground on which its liability was assessed. Therefore, this negligence was clearly vessel-related.

However, upon initial examination, the additional requirement that Southern Natural Gas be acting as owner *pro hac vice* of the vessel appeared not to be satisfied. Southern Natural Gas had chartered the vessel and Offshore Logistics had supplied the crew. Although these circumstances usually indicate the existence of a time charter, the court found the agreements between the parties to be contrary to this general indication. Offshore Logistics did not time charter the vessel to Southern Natural Gas. The charter party was in fact a "fairly typical" bareboat or demise charter.[25] In a separate agreement, Southern Natural Gas hired Offshore Logistics "as an independent contractor to man, operate . . . navigate and supply" the vessel.[26] The court concluded that the charter party was a true demise charter, the character of which was unaltered by the operating agreement.[27] Since Southern Natural Gas was a bareboat charterer, it was considered to be the owner of the vessel *pro hac vice*, which status was sufficient to comply with the policy's requirement that the additional assured's liability must arise "as owner of the vessel."[28]

22. *Id.*
23. *Id.* at 489.
24. *Id.* at 490.
25. *Id.* at 491.
26. *Id.*
27. *Id.* at 492.
28. *Id.*

Judge Sear was presented a second opportunity to deal with the *Lanasse* and *Dow* P&I coverage issues in *LaCross v. Craighead*.[29] The plaintiff was the captain of the M/V CATHY RUTH, a supply boat time chartered to AWI, Inc. Captain LaCross was injured when he fell on the vessel's deck on which defendants, AWI and Milchem, had spilled drilling mud.[30] Both defendants were held to be responsible for the plaintiff's injuries.[31]

The vessel owner, against whom no liability was assessed, had obtained a P&I policy on the M/V CATHY RUTH.[32] The policy named AWI as an additional assured, but a printed endorsement limited coverage to liabilities incurred by AWI only as owner or charterer. However, this provision was altered by a typed endorsement which gave the named assured the right to charter the assured's vessels to AWI, which was named as an additional assured during the term of the charter agreement.[33] The typed endorsement named AWI as an additional assured with no requirement that it be acting as an owner or charterer at the time liability was incurred.[34] Therefore, AWI was not required to establish its status as owner or charterer as a prerequisite to general coverage under the policy; AWI had avoided the second obstacle to coverage.

However, the causal operational relation standard of *Lanasse* was applicable to AWI's claim for coverage. The policy provided to AWI the same scope of coverage as that granted to the vessel owner.[35] The basic coverage provision of the policy insured the vessel owner for "such sums as the assured, as owner of the M/V CATHY RUTH, shall have become legally liable to pay . . . ."[36] Consequently, AWI was required to establish that its liability in the present case arose out of its negligence as a vessel charterer rather than as a platform operator.

The *Lanasse* standard was applied to this issue, and coverage was denied to AWI because its liability arose out of the negligence of its rig-based employees in unloading cargo from the vessel to the rig. The vessel and crew were guilty of no negligence, and the dangerous condition could have been created on the rig as easily as on the vessel. The only factual distinction with *Lanasse* was that

29. 466 F. Supp. 880 (E.D. La. 1979).
30. *Id.* at 880-81.
31. *Id.* at 881.
32. *Id.* at 882.
33. *Id.* at 883.
34. *Id.*
35. *Id.*
36. *Id.*

AWI's negligent employee was on the vessel's deck when he committed his negligent act. The court obviously considered this distinction to be without meaning. Since the vessel was merely the locale of the accident, the *Lanasse* standard was not satisfied, and coverage was denied.[37]

The customary P&I policy also contains a provision that "in no event shall the assurer be liable to any greater extent than if the assureds were the owner and were entitled to all the rights of limitation to which a shipowner is entitled." The importance of this policy provision is realized when read in light of The Limitation of Liability Act.[38] The Act further provides that a charterer who shall "man, victual and navigate the vessel at his own expense, or by his own procurement" shall be deemed to be "owner" within the meaning of the Act, *i.e.*, entitled to limitation as an owner.[39] This customarily means that the so-called bareboat charterer may limit his liability and that a time charterer may not. Assuming that a vessel is a total loss after a casualty, and that the client is a time charterer, the underwriters could decline liability for any sums over and above the amount which underwriters would have been required to pay had the assured been an owner entitled to limit under the Act. In some instances, this provision may be deleted, for an additional premium.

The P&I policy excludes any contractual liability coverage by means of a clause providing that "liability hereunder shall in no event exceed that which would be imposed on the assured by law in the absence of contract." Since most vessel offshore contracts contain "hold harmless" and "indemnity" agreements, coverage of liability arising thereunder must be obtained elsewhere, generally in comprehensive general liability policies.

The Comprehensive General Liability policy, a derivative of the casualty insurance market as distinguished from the marine market, covers third-party liability and can, for a premium, be endorsed to cover marine operations by the deletion of the watercraft exclusion. If this approach is used, the "care, custody and control" exclusion

37. *Id.* at 884-85.

38. 46 U.S.C. §§ 181-95 (1976). The Limitation of Liability Act provides that a vessel owner, absent personal negligence or privity of knowledge of unseaworthiness, may limit his liability to the value of the vessel following a casualty. However, the effect of the Limitation Act is questionable when Louisiana's Direct Action Statute, La. R.S. 22:655 (Supp. 1958 & 1978), is applicable in view of the decisions which hold that underwriters are not entitled to the benefits of the Act. *See, e.g.*, Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954); Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 987 (1970).

39. 46 U.S.C. § 186 (1976).

also should be deleted to cover certain other potential liabilities of the offshore operator. By endorsement, and for an added premium, this policy generally provides coverage for contractual liability resulting from "hold harmless" and "indemnity" contractual provisions.

Since the P&I policy does not respond for claims under any compensation acts, state or federal, the offshore operator must cover this exposure by what is known as an Employer's Liability policy. This policy has two sections: (1) Section A, which covers compensation liability without limit; and (2) Section B, employers' liability not otherwise covered by compensation. This policy must be endorsed properly to cover the locations and operations of the assured and to correctly refer to, if applicable, the Longshoremen's and Harbor Workers' Compensation Act,[40] the Outer Continental Shelf Lands Act,[41] the state compensation acts applicable to the assured's operations, and the Death on the High Seas Act.[42] If the policy is intended to cover liabilities under the Jones Act for transportation, wages, and maintenance and cure, and for claims under the "borrowed servant" doctrine, it must be endorsed accordingly. Additionally, an endorsement is required to provide that a claim "in rem" shall be considered as a claim against the employer. The coverage must be integrated properly with the assured's P&I policies.

A P&I policy covers vessel liability and the Employers' Liability and Comprehensive General Liability policies cover operational liability. If the client's maritime activities are not limited to particular vessels, then some consideration should be given to using the integrated EL and CGL approach, appropriately endorsed to cover such exposures, and to include liabilities in respect of removal of wreck and debris, repatriation, and fines and penalties. Because of complexities of a drilling operation, it is advisable to procure an umbrella or bumpershoot policy to cover exposures in the catastrophe area. If possible, these policies should be as broad as the primary policies and, as added protection, should provide coverage for exposures not covered by the primary policies, subject, of course, to a deductible that the assured can financially retain.

Obviously, a program to protect assureds as fully as possible requires great care to provide the needed coverage for offshore maritime operations while avoiding overlap, gaps, and duplication which can cause undue problems to the assured and, in some instances, can negate coverage.

40. 33 U.S.C.A. §§ 901-50 (1980).
41. 43 U.S.C.A. §§ 1331-56 (1980).
42. 46 U.S.C. §§ 761-68 (1976).