

WARRANTIES AND EXCLUSIONS IN PROTECTION & INDEMNITY POLICIES

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This paper will address warranties and exclusions typically used in connection with Protection & Indemnity ("P&I") insurance.

We will consider a number of standard clauses which are characterized as warranties, although in some cases these are actually exclusions. The wording of these warranties is usually fairly straight-forward. However, before a court can determine the effect of a breach of warranty, it must decide what law to apply.

This is where the waters get murky, as it often does in matter of marine insurance, thanks to the decision of the United States Supreme Court in Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 1955 A.M.C. 467 (1955), reh'g denied, 349 U.S. 907 (1955). After long following the course of English law, American courts now often tack back and forth between state and federal laws in resolving marine insurance disputes, all because of Wilburn Boat and its progeny.

Depending upon the circumstances of the case, the court must decide if English law, American law, or the law of another country applies. If the Court decides that American law applies, Wilburn Boat dictates that it must then choose between the general maritime law and the law of a particular state. As addressed below, if the Court decides to apply the law of a particular state, this may have great significance with respect to the consequences of a breach of warranty on whether coverage is found.

I. OVERVIEW OF P&I COVER

a. What Is It?

Generally speaking, P&I insurance is third-party liability insurance covering vessel owners for specific named risks.^[2]

P&I policies are not comprehensive general liability coverage, nor do they cover all possible risks or liabilities to which a vessel owner may be exposed. "Instead, a P&I policy only insures the vessel owner against those risks specifically set forth in the policy, and no others". Robert T. Lemon, "*Limitation Of Liability To That Of Shipowner*", Marine Protection & Indemnity Policy Annotations Project, MLA Doc. 761 at 12848 (The Mar. Law Assoc. of the U.S. 2001) (hereinafter "MLA P&I ProJECT").^[3]

b. Who Writes It?

A high percentage of the world's ocean-going vessels are insured for liabilities by P&I Club, which are mutual associations of vessel owners and managers, the concept for which dates back to property damage pooling arrangements established among shipowners in the 18th Century. See T. G. Coghlin, "Protection & Indemnity Clubs", [1984] Lloyd's Mar. Comm. L. Q . 408. The terms and conditions, or "Rules", of coverage for many of the world's larger P&I Clubs can be found in Volume 7A of Benedict on Admiralty (Matthew Bender 2002).

P & I insurance is also written by various Lloyd's syndicates and London market companies, and other commercial liability insurers in the United States and elsewhere. Commercial P&I insurance of this type is typically written using the SP-23 (rev. 1/56) form or the SP-38 (1955) form. These forms, along with additional terms of coverage for certain commercial P&I underwriters are also found in Volume 7A of Benedict on Admiralty. See F. Ty Edmonson, "A Comparison Of The SP-23 and SP-38 Forms", MLA P&I Project at 12923 *et seq.*

c. The Insuring Clause

Virtually all P&I policies only cover liabilities incurred by the assured in its capacity "as owner" of a vessel or vessels which are listed, or "scheduled" in the policy. See Simon Harter, "Marine Insurance", 8 Benedict on Admiralty (Desk Reference) (Matthew Bender 2002) at 12-20 (hereinafter "8 Benedict").

In addition, cover under P&I policies is traditionally written on an indemnity, or "pay first" basis, meaning that the insurer undertakes to reimburse the assured for all sums which it has become liable to pay and shall pay on account of a covered risk. See Alex L. Parks, 2 The Law and Practice of Marine Insurance and Average 1004 (1987) ("It cannot be overemphasized that a P&I policy is, strictly speaking, an *indemnity* policy and not a liability policy, although the indemnity is basically against liabilities.").

d. General Categories of Risks Insured

The following categories of risks are usually covered by a P&I policy:

- (1). Personal injury to or illness or loss of life of crew members.
- (2). Personal injury to or loss of life of stevedores.
- (3). Personal injury to or loss of life of passengers and others.

- (4). Loss of personal effects.
- (5). Diversion expenses.
- (6). Life salvage.
- (7). Collision liabilities in certain respects.
- (8). Loss or damage to property other than cargo.
- (9). Pollution.
- (10). Wreck Removal expenses.
- (11). Cargo's unpaid proportion of general average.
- (12). Cargo liabilities.
- (13). Certain salvage expenses.
- (14). Fines and penalties.
- (15). Costs of defending covered claims.

See e.g., Coghlin, supra at 405-411.

e. General Categories of Exclusions

Coverage provided under the SP-23 form is subject to the following exclusions and limitations of coverage:

- (1). Hull Coverage and War Risks.
- (2). Cancellation of Charter and Liability arising out of Towage (NB: usually covered by P&I Clubs but not commercial market).
- (3). Limitation of liability to that of a shipowner.
- (4). Limitation of liability to that imposed in the absence of contract.
- (5). Limitation of the amount insured for any one accident or occurrence (NB: Club cover is, in most respects, theoretically

“unlimited”). See SP-23 (rev. 1/56)
Form, 7A Benedict on Admiralty, supra at 2-3.

II. TYPES OF P&I WARRANTIES

Depending on the nature of the assured’s activities and of the types of vessels listed under the policy, there are various types of warranties which can be included in a P&I policy. Often, these warranties are the same, or very similar, to warranties used in hull policies. It is also the case that certain clauses which are characterized as warranties are, in fact, exclusions.

a. No Implied Warranty of Seaworthiness

In contrast to the situation with respect to hull policies, there is no implied warranty of seaworthiness in a P&I policy. See Sorenson v. Boston Ins. Co., 20 F.2d 640, 1927 A.M.C. 1288 (4th Cir. 1927); George A. Moore & Co. v. Eagle Star & British Dominions Ins. Co., 5 F.2d 358, 1925 A.M.C. 729 (N.D. Cal. 1925, aff’d, 9 F.2d 296 (9th Cir. 1926); see also Graydon S. Staring, “*The Implied Warranty of Seaworthiness in a Marine Protection and Indemnity Policy*”, MLA Annotations Project at 12877. As the court stated in Texaco v. Universal Marine, Inc., 400 F.Supp. 311, 1976 A.M.C. 226 (E.D.La. 1975):

It would be a *non sequitur* to conclude that the unseaworthiness of the [vessel] would negate coverage [of liability for injury] under a policy whose purpose is to protect for the insured’s own negligence. Id. at 322, quoted in Staring, supra at 12877.

b. Express Warranty of Seaworthiness

Although there is no implied warranty of seaworthiness, P&I policies sometimes contain an express warranty that the assured will exercise due diligence to maintain the scheduled vessel in a seaworthy condition.

St. Paul Fire & Marine Ins. v. Belle of Hot Springs, 844 F.2d 550 (8th Cir. 1988) involved a P&I policy containing an express warranty that the assured would exercise due diligence to maintain the vessel in a seaworthy condition. The master of an excursion vessel left an inexperienced deck hand at the wheel while he went to tend bar. The deck hand’s attempt to dock the vessel resulted in personal injuries. The Court held that leaving an unqualified deck hand in charge rendered the vessel unseaworthy in breach of the express warranty. See Edward F. LeBreton, III & Marc Thomas Summers, “*Express Warranties*”, MLA P&I Project at 12901.

c. Trading/Navigation Warranty

Trading warranties, which are also referred to as navigation warranties, restrict the geographic scope of the scheduled vessel’s operation. If the vessel exceeds

the scope of the stated navigational limit, the assured is in breach of the warranty.

The SP-38 contains a unique treatment of navigational warranties by expressly incorporating the limits set under the hull policy covering the vessel:

The navigation limits in the policy covering the hull, machinery, etc. of the vessel named herein are considered incorporated herein.

See 7A, Benedict on Admiralty *supra* at 2-16; see also, F. Ty Edmonson, “*A Comparison of the SP-23 and SP-38 Forms*”, MLA P&I Project, *supra* at 12927.

d. Crew Warranty

This warranty typically provides that the covered vessel will sail with a certain number of crewmembers onboard. Sometimes the warranty is expressed as an exact number, other times as a minimum or maximum number. Still other warranties require that the names of all crewmembers be submitted to the underwriters as a condition of coverage.

In Fireman’s Fund Ins. Co. v. Cox, 742 F.Supp. 609, 1990 A.M.C. 908 (M.D. Fla. 1989), *aff’d*, 892 F.2d 87 (11th Cir. 1990), the P&I policy covering a fishing boat contained an express warranty voiding coverage if there were more than three crew members aboard. While at sea, the captain and mate were attacked by two crewmembers. The captain went missing and was presumed dead and the mate was injured. Because the vessel went to sea with five crewmembers, the underwriters denied coverage. The assured asserted that only two crewmembers were aboard, on the theory that the captain, mate and cook did not fall within the definition of “crewmember”. The court granted summary judgment in favor of underwriters.

In Albany Ins. Co. v. Jones, 1997 A.M.C. 1407 (D. Alaska 1996), the Court considered a crew warranty to be similar to a navigation warranty and ruled that federal law applied, obviating the need for any causal connection between the breach and the loss.

A related warranty is that the assured complies with U.S. Coast Guard regulations with respect to manning and navigation requirements. See Osprey Underwriting Agency Limited Protection and Indemnity Wording, 7A Benedict on Admiralty *supra* at 1-1510.

e. Change in Management or Use

This warranty typically provides that if the management or ownership of the assured company changes, or if the use to which the scheduled vessel is put changes, the assured is in breach of this warranty.

In Parfait v. Central Towing, Inc., 660 F.2d 608, 1982 A.M.C. 698 (5th Cir. 1981), rehearing denied, 667 F.2d 1189 (5th Cir. 1982), a crewmember was injured three days after the corporate owner of a tug sold all of its stock and replaced its directors and officers. The new owner of the tug settled the claim and submitted the claim under the P&I policy. The court held that the assured was not entitled to recover under the policy because the warranty against “changes of management” without the insurer’s approval voided the policy. See Stephen M. Calder, “Loss of Life, Injury and Illness”, MLA P&I Project at 12722.

f. Class Maintenance and Survey

This warranty requires that the scheduled vessel follow the requirements of the relevant classification society. Examples of the requirements of such warranties are: (1) the vessel must remain in “class”, (2) the assured must give all required notices to the classification society; (3) the assured must follow all recommendations or requirements of the classification society; and (4) the assured must keep the vessel in the same classification society during the period of coverage.

An example of a particular warranty is quoted from New York Marine v. Gulf Marine, 1994 A.M.C. 976 (E.D. La. 1993) (hull policy):

If the classification society of the Vessel or her class therein be changed, canceled, or withdrawn, then unless the underwriters agree thereto in writing, this policy shall automatically terminate at the time of such change

See also P&I Rules of the West of England Ship Owners Insurance Association (Luxembourg) at Rule 20, 7A Benedict on Admiralty, *supra* at 1-241.

g. ISM Compliance

Certain policies contain warranties that the assured will comply with the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (known as the “ISM Code”), which was incorporated into the Safety of Life At Sea Convention and came into force in 1998.

h. Lay Up / Watchman Warranty

Warranties of this type require that, for example, during certain seasons, or at particular times of year, the vessel will be laid up, or removed from operation. A related warranty is that during the period of lay-up, the vessel will be protected by a

watchman. While such warranties are more frequently seen in hull policies, they do have application in the P&I context. For example, the risk to an underwriter is clearly increased if, during a period when the underwriter believes the vessel is laid-up, it is in fact at sea.

i. Towage Warranty

Commercial P&I policies often include warranties or exclusions resulting in a lack of coverage for tower's liabilities unless the liability arises from emergency salvage operations or resulting from the loss of life, injury or illness of any person. See SP-23 (rev. 1/56) Form, 7A Benedict on Admiralty, *supra* at 2-9; Employer's Ins. of Wassau v. International Marine Towing, 864 F.2d 1224, 1989 A.M.C. 2974 (5th Cir. 1989). see also F. Ty Edmonson, "A Comparison of the SP-23 and SP-38 Forms", MLA P&I Project, *supra* at 12931.

III. APPLICABLE LAW

Policies of marine insurance are maritime contracts. In determining the applicable law, federal choice-of-law rules are applied. Under federal choice-of-law rules, the court must determine which law to apply to the policy by "ascertaining and valuing points of contact between the transaction [giving rise to the cause of action] and the states or governments whose competing interests are involved." Lauritzen v. Larsen, 345 U.S. 571, 582, 73 S.Ct. 921 (1953). In Advani Enterprises, Inc. v. Underwriters at Lloyd's, 140 F.3d 157, 1998 A.M.C. 2045 (2d Cir. 1998), the Second Circuit set out the following factors to be considered in determining what law is to be applied to a marine insurance contract:

(1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued and signed; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* at 162.

See also, J. Barbee Winston and David B. Sharpe, "Choice of Law in P&I Insurance", MLA P&I Project, *supra* at 12862 et seq.

a. Marine Insurance Act 1906

Should the Court determine that English law applies, the principal provisions dealing with express warranties are Sections 33 and 34 of the Marine Insurance Act 1906, Edw. 7, ch. 41.

Of particular relevance to this discussion is Section 33 which provides in subsection 3 as follows: A warranty, as above defined, is a condition which must be exactly complied with whether it be material to the risk or not. If it be not so

complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as of the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

b. Wilburn Boat

The Court may determine that the law of the United States or a particular state applies. Unlike our colleagues in the United Kingdom, we do not have the benefit of a marine insurance act or other national statutory enactment codifying the law of marine insurance in the United States. See 8 Benedict at 12-3.

For many years, courts in the United States addressing questions of marine insurance followed the instruction of the Supreme Court to “accord respect to established doctrines of English maritime law”. Standard Oil v. United States, 340 U.S. 54, 1950 A.M.C. 365 (1950). See also Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 1924 A.M.C. 107 (1924). This direction was in recognition of the “special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.” Queens Ins. Co., *supra* at 493.

In 1955, this hallowed tradition was cast aside by the Supreme Court in its decision in Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310, 1955 A.M.C. 467 (1955), *reh’g denied*, 349 U.S. 907 (1955). The Court held in Wilburn Boat that where there is an established federal admiralty rule on an issue in a marine insurance case, federal law will apply, and absent such controlling federal law, marine insurance contracts may be interpreted under state law.

This seemingly instructive language has led lower courts to significantly different conclusions. See Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 1991 A.M.C. 2211 (5th Cir. 1991), *cert. denied*, 502 U.S. 901 (1991) (state law applies unless there is an “entrenched” federal rule); Lexington Ins. Co. v. Cooke’s Seafood, 835 F.2d 1364, 1988 A.M.C. 1238 (11th Cir. 1988) (federal law applies unless a state interest is found to apply); Antilles Steamship Co. v. Memer of the American Hull Syndicate, 733 F.2d 195, 1984 A.M.C. 2444 (2d Cir. 1984) (English law applied in accordance with pre-Wilburn authority). See 8 Benedict at 12-3 n. 8.

In the event the particular court finds that there is no “established” or “entrenched” federal rule, it must then decide which state law to apply. This, too, is not always an easy exercise. See Machale A. Miller, Scrapping Wilburn Boat - The Need for Uniformity in Marine Insurance Law Outweighs Local Interests, 719 MLA Report 10293, 10321 (Sept. 30, 1995) (describing three different choice of law tests applied in decisions of the Fifth Circuit). See 8 Benedict supra at 12-3. n. 9.

c. Attempts to Achieve Predictability

In an attempt to bring some certainty and predictability to the interpretation of their policies, some underwriters include express choice of law clauses, which are often coupled with jurisdiction or arbitration clauses.

For example, the Rules of the leading P&I Clubs have historically included provisions calling for the application of the law of the country in which they are based and for arbitration of any disputes in that country. See e.g., The Rules of The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited (2002) at Rule 40 (“Disputes”) and 42 (“Law of Contract”), 7A Benedict on Admiralty, supra at 1-3 *et seq.*

London arbitration clauses in P&I Club Rules have been upheld in numerous cases. See Montauk Oil Transp. Co. v. Steamship Mutual Underwriting Assoc. (Bermuda) Ltd., 79 F.3d 295, 1996 A.M.C. 1379 (2d Cir. 1996); USX Corp. v. The London Steam-Ship Owner’s Mutual Assoc. Ltd., 2000 A.M.C. 1834 (N.Y. 2000); Stephen Federico v. Charterer’s Mutual Assurance Ass’n Ltd., 158 F.Supp. 565, 2002 A.M.C. 475 (E.D. Pa. 2001), reconsideration denied, 2001 U.S. Dist. LEXIS 13497 (E.D.Pa. 2001).

Similar clauses are occasionally found in commercial P&I policies and have likewise been enforced by American courts. See Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666, 1994 A.M.C. 1581 (5th Cir. 1994), cert. denied, 1995 A.M.C. 3000 (1994); Francesco Dimercurio v. Sphere Drake Ins. PLC No. 1 A/C, 202 F.3d 71, 2000 A.M.C. 2012 (1st Cir. 2000); Stony Brook Marine Transp. Co. v. Leslie Wilton, 1997 A.M.C. 351 (E.D.N.Y. 1996).

In those cases in which the “assured” or “member” is in bankruptcy, however, a term in a policy calling for arbitration may not be applied. In United States Lines v. American Steamship Owners Mutual Protection and Indemnity Association, 197 F.3d 631, 2000 A.M.C. 784 (2d Cir. 1999), cert. denied, 529 U.S. 1038 (2000) (insurance coverage is a “core” issue under the Bankruptcy Code and, therefore, the Bankruptcy Court has discretion not to require enforcement of arbitration clause).

IV. EFFECT OF LAW ON WHETHER COVERAGE IS FOUND^[4]

While these complex issues of applicable law may be of interest as an academic exercise, the consequence in the case of a breach of warranty dispute can, in very real terms, mean the difference between whether or not a claim is covered.

In Alex L. Parks & Edward V. Cattell, Jr., The Law of Tug, Towage and Pilotage (3d ed. 1994), the authors note that:

[U]nder Wilburn, where a state statute requires that the breach of warranty must contribute to a loss, the state statute governs; where the state statute does not so provide, a mere violation of the warranty is sufficient to void the policy even though the loss may not be attributable to the breach. Id. at 506.

Some courts have held since Wilburn Boat that, irrespective of the particular nature of the relevant state law rule, the need for uniformity with respect to certain types of express warranties is sufficient to require the application of federal law. See e.g. Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364 (11th Cir. 1988) (navigational warranty); Albany Ins. Co. v. Jones, 1997 A.M.C. 1407 (D. Alaska 1996) (crew warranty). Under federal law, a breach of warranty suspends coverage for any losses sustained during the period until the breach is cured, regardless of whether the breach was causally related to the suffered loss. See Graham v. Milky Way Barge, Inc., 824 F.2d 376 (5th Cir. 1987).

As the following discussion indicates, state laws on the consequences of a breach of warranty can be grouped into four categories.

a. Test 1: Strict Compliance

As noted above, the Marine Insurance Act 1906, supra, provides in Section 33(3) that:

A warranty ... is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of the warranty, but without prejudice to any liability incurred by him before that date. 6 Edw. 7, ch. 41 at 33.

The English Rule, which is sometimes characterized as “strict compliance” in American cases, provides that a breach of warranty entitles the insurer to rescind the policy. See Hartford v. Lloyd's, 1989 A.M.C. 2576 (E.D.Pa. 1989), cited in LeBreton, MLA P&I Project, supra at 12881.

b. Test 2: “Anti-technical” or Causally-Related Breach

The insurance laws of a number of states include what are referred to as “anti-technical” statutes which require that the breach of warranty must have caused or contributed to the loss in order for coverage to be denied on the basis of the breach. See 8 Benedict at 12-13.

The Supreme Court held in *Wilburn Boat* that under Texas law, a breach of warranty was only relevant if the breach contributed to the loss. 348 U.S. at 311-2. It has been observed that this holding is “clearly more favorable to the insured than Subsection (3) [of Sect. 34, Marine Insurance Act 1906]”. Cattell et al., “Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906”, 20 Tul. Mar. L. Rev. 40 (1995).

Similarly, under the law of Oregon, a causal relationship must apply between the breach of warranty and the resulting loss. *Rondy’s Inc. v. Ins. Co. of North America*, 1986 WL 22352 (D. Or. 1986), cited in *LeBreton, MLA P&I Project*, supra at 12884.

c. Test 3: Breach that Increases Risk

Jurisdictions falling into this category require that in order to prevail on a claim of breach of warranty, the underwriter must show that the breach increased the insurer’s risk of loss. In Florida, for example, the increased risk must have occurred by “any means within the control of the insured”. Fla. Ins. Code 627.409(2), see also *LeBreton, MLA P&I Project*, supra at 12883.

Test 4: Breach During Period of Suspension

Under this test, in the event the Assured is in breach of a warranty, coverage under the policy is suspended until such time as the breach is cured. Any losses sustained during the period of suspension are not covered, regardless of whether there is any connection between the breach of warranty and the loss.

e. Express Clause on Effect of Breach

Some courts have held that when the policy contains an explicit provision that a breach of warranty voids the policy, the provision is to be upheld and coverage terminated. See *Certain Underwriters at Lloyd’s v. Montford*, 52 F.3d 219, 1995 A.M.C. 1201 (9th Cir. 1995); see also *LeBreton, MLA P&I Project*, supra at 12880, 12882.

f. Last Chance: Held-Covered / “BOW” /Waiver

Policies sometimes include clauses providing that a breach of warranty will not prejudice coverage if an additional premium is agreed upon and paid. Such clauses are referred to as “Held Covered” clauses, or “Breach of Warranty” clauses. It is also possible for an underwriter to waive an assured’s breach of warranty or, by acting in a manner inconsistent with non-liability, be estopped from denying coverage. See *Marine Insurance Act 1906*, supra at sect. 34(3); see also 8 *Benedict*, supra at 12-14.

V. CASES ON THE EFFECT OF LAW ON WHETHER COVERAGE IS FOUND

It is worth examining just a few cases in order to realize the profound effect which the law applied to a given policy can have on the question of whether coverage exists.

a. Captains

In *Prado, Inc. v. Lexington Ins. Co.*, 1990 A.M.C. 2782 (D. Mass. 1990), the policy required that a particular captain be the master of the scheduled vessel. The underwriter asserted a breach of this warranty, arguing that the operation of the vessel by a different captain than the one named in the warranty increased the risk of loss. The court examined the qualification of both captains and held the having a different captain aboard than the one named in the warranty did not increase the risk of loss. Coverage was found.

In *Capital Coastal Corp. v. Hartford Fire Ins. Co.*, 1974 A.M.C. 2039 (E.D. Va. 1974), the policy required that a particular captain be the master of the scheduled vessel and that the policy did not provide coverage when operated by any other master. Applying the strict enforcement standard, the court found the assured was in breach of the crew warranty and found in favor of the underwriter.

b. Crew

In *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 1991 A.M.C. 2211 (5th Cir. 1991), cert. denied, 502 U.S. 901 (1991), the insured breached a warranty providing that the owner of the vessel would be aboard during its operation. The court applied the Texas “anti-technical” statute which provides that a breach of warranty must have caused or contributed to the loss. The court found that the fact that the owner was not onboard did not make the particular loss more likely to have occurred than if the owner had been onboard. As a result, the court found coverage.

In the case of *Albany Ins. Co. v. Ngo Van Nguyen*, 1996 WL 680252 (E.D. La. 1996), Albany Insurance Company tried again. The policy contained an express warranty that the total number of crewmembers aboard the vessel should not exceed three. A collision occurred aboard the vessel which resulted in personal injuries to two crewmembers. At the time of the accident, five crewmembers were aboard. In response to a motion for summary judgment by Albany, the court applied federal law on the basis of an agreement of the parties and found that the breach of warranty voided the policy.

VI The Future of Warranties

a. **Fifty years of uncertainty**

There have been many attempts by legal scholars and commentators to overcome the uncertainty created by the Wilburn Boat decision. Over thirty-five years ago, a leading admiralty lawyer called for the creation of a federal statute based on the British Marine Insurance Act 1906. See Nicholas J. Healy, "The Hull Policy: Warranties, Representations, Disclosures and Conditions", 41 Tul. L. Rev. 245, 258 (1967) (Admiralty Law Institute Symposium on the Hull Policy); see also Graydon S. Staring, "A Proposal to Reduce Confusion in the Law of Marine Insurance", 5 Mar. Law 21 (1980).

Efforts to clarify this situation have continued through the decades, with no sign of abatement. See Edward V. Cattell, Jr. et al, "*Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*", 20 Tul. Mar. L.J. 1 (1995); Michael F. Sturley, "*Restating the Law of Marine Insurance, A Workable Solution to the Wilburn Boat Problem*", 29 J. Mar.L. & Com. 41 (1998); see also Graydon S. Staring and George L. Waddell, "*Admiralty Law at the Millenium Marine Insurance*", 73 Tul. L. Rev. 1619 (1999).

Yet as we approach the Golden Anniversary of Wilburn Boat, there is nothing on the judicial or legislative horizon in this country to suggest that the determination of warranty issues under marine insurance policies is going to get any easier or more consistent across the United States.

b. **Approach to Warranties in the new International Hull Clauses - 01/22/02**

As we have noted, under the Marine Insurance Act 1906, warranties must be strictly complied with, and a breach of warranty discharges the underwriter from liability without regard to whether the breach was causally related to the loss.

This result has been criticized by the English Courts. A recent comment to this effect was made by Lord Hobhouse in The Star Sea (2001) 1 LLR 389 WLR:

It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of the English law which allow an insurer to avoid liability on grounds which do not relate to the loss.

The Joint Hull Committee and other consulting groups in London recently issued a new set of hull clauses for consideration by assureds and brokers. The clauses are referred to as the International Hull Clauses - 01/11/02. The clauses are different in numerous aspects from the Institute Time Clauses - Hull 01/10/83, including particularly with respect to the issue of express warranties. Under these new clauses,

certain traditional obligations are no longer stated as warranties, but rather as statements that particular events or actions shall not occur. Rather than relying upon the legal effect of the Marine Insurance Act, the new clauses state explicitly the consequence of a breach of what had previously been expressed as a warranty.

For example, with respect to Navigation Limits, the IHC provides at Clause 11:

In the event of any breach of any of the provisions of Clause 10 [Navigation Provisions], the Underwriters shall not be liable for any loss, damage, liability or expense arising out of or resulting from an accident or occurrence during the period of breach, unless notice is given to the Underwriters immediately after receipt of advices of such breach and any amended terms of cover and any additional premium required by them be agreed.

One might consider this approach to be a combination of the rule in some U.S. states that coverage is suspended during the time of a breach, along with aspects of a Held Covered clause.

Should these clauses, or something like them, be accepted for usage in the U.S. marine insurance market, perhaps we will all one day steer clear of Wilburn Boat.

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[2] For a comprehensive overview of the major types of marine insurance coverage, see Raymond P. Hayden & Sanford E. Balick, "*Marine Insurance: Varieties, Combinations, and Coverages*", 66 Tul. L. Rev. 311 (1991) (Admiralty Law Institute Symposium on Marine Insurance).

[3] The reader is commended to the MLA P&I Project, which was prepared by the Hull and P&I Subcommittee of the MLA's Committee on Marine Insurance. Each section of the SP-23 form is analyzed with case annotations, and various other topics of particular relevance to P&I insurance are also addressed.

[4] A substantial portion of this section and the following section are based upon Edward F. LeBreton III & Marc Thomas Summers, "*Express Warranties*", MLA P&I Project at 1287 *et seq.*