Legal Lookout

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Classification Societies probably don't have duties to third parties, but even if they do, a "reckless misconduct" standard is tough to meet.

Vessel manufacturing, marketing, sale and purchase, financing and documentation, operation and insuring are all dependent in various ways on the determinations of classification societies, those independently operated vessel survey organizations that publish rules and standards for various classes of watercraft. Their function includes surveys and issuance of classification certifications that vessels are fit for their intended purpose. A certification that a vessel is "good to go" typically is prerequisite to a vessel getting underway, certainly in the most cost-effective way.

By and large, classification societies aren't liable to third parties for mishaps following an erroneous survey, although there are exceptions (*see, e.g.,* November 2003 Legal Lookout article "No Class Act: A bad survey lands a classification society in hot water"). This is because maritime law imposes on shipowners a nondelegable duty to run only seaworthy vessels, and an ability to deflect liability to a survey organization might encourage lackadaisical attitudes about safety. Classification societies might be reluctant to inspect and bless older or inherently risky vessels if significant liability might attach to a slip-up. And a survey shouldn't be taken as a "guarantee" that a vessel's innards are hunky-dory; rather, they're an inspector's best opinion after a once over designed for specific (contract-documented) purposes. It's when a classification society is specifically aware of concerns, or perhaps has a direct dialogue with a concerned third party, that it can find itself liable for missing a problem.

Courts have been reluctant to expand classification society liability, and even claimants with compelling – if novel – new theories of accountability can find themselves tossed out of court on summary judgment. Just ask Spain, which tried to recoup the costs of an oil spill from classification society the American Bureau of Shipping ("ABS"), which blessed tanker the PRESTIGE for operations for which its structural integrity allegedly was unfit. Spain filed suit in the U.S. District Court for the Southern District of New York, claiming that usual standards of negligence and due care which have barred claims against classification societies in the past were inapplicable because, here, ABS behaved inexcusably worse than just carelessly. Spain thought ABS acted with "reckless disregard."

Although both are species of tort liability, reckless misconduct involves conscious disregard of known dangers which one's acts or omissions create, whereas negligence may be found when the perpetrator honestly didn't know his/her/its conduct imposed a danger. Because the former is more egregious, the law holds the feet of reckless tortfeasors closer to the fire when damages result. Spain felt like ABS's conduct in failing to find weaknesses in the PRESTIGE's structural integrity rose to the level of reckless misconduct that should be the basis of liability notwithstanding general negligence standards.

And what did ABS do that ostensibly was so naughty? Previous tanker oil spills had prompted classification societies, including ABS, to examine their own policies and procedures to consider making certain amendments to their rules, including mandatory (1) computer structural modeling under a program called "SafeHull"; (2) annual inspections of ballast tanks; and (3) minimum two-surveyor assignments. Spain argued that ABS knew that inspections utilizing these enhanced efforts were necessary to adequate testing, and disregarded that knowledge to the detriment of third-party entities (like Spain) that might suffer from an oil spill.

Legal Lookout

A novel theory indeed, but how compelling was it? Not very, in the opinion of two federal courts. The district court dismissed Spain's action on summary judgment, finding that the tort-based reckless behavior standard still requires a direct relationship between the alleged tort perpetrator and the aggrieved claimant. Here, ABS had no connection with Spain, so it didn't fulfill this requirement. Spain was never intended to be a beneficiary of ABS's classification certification. Volumes have been written about the extent to which a duty not to behave recklessly may be enforced against an entity *sans* connection with its victim, and to the extent a connection is required, what satisfies that duty.

Higher on the judicial hill, the Second Circuit Court of Appeals saw no need to analyze the district court's ruling. It agreed with Spain that the notion that a reckless misconduct allegation might be distinguishable from the mostly negligence-based claims previous court decisions have addressed, and might even suffice to impose liability on a classification society. But the Second Circuit concluded that even if reckless conduct could conceptually be a basis for liability, no reasonable jury could conclude ABS had acted recklessly with regard to the PRESTIGE, at least in a way that caused Spain's damages. Nothing in the record suggested a SafeHull computer analysis was essential to effective conclusions about a tanker's structural integrity. Information obtained from other surveys was irrelevant because no evidence demonstrated the PRESTIGE was substantially similar to other vessels for which the program had been used.

Similarly, even had ABS mandated annual inspections of ballast tanks, the PRESTIGE had none. Its ballasts were designed for cargo, saltwater or were designed to operate as so-called "cargo/ballast tanks," none of which were up for consideration for mandatory annual inspection. And what difference could Spain point to that a second surveyor would have made? None, said the court.

Lastly, Spain argued that ABS's Houston office, which issued the certificate, had a duty to review a gauging report (measuring steel thickness) issued by its Hong Kong office. Spain also pointed out that the vessel's master had sent ABS a fax alerting it to structural and other problems. But these could at most amount to negligence, and not recklessness.

This decision is consistent with long-held judicial notions that surveyors which perform quality checks and related functions, particularly in the maritime context, aren't intended to be guarantors to the world at large of the results of their findings. The determinations they make are contextual, i.e., within the confines of the contractual relationships pursuant to which they're provided. Absent a direct relationship with them, industry shouldn't look to classification societies as likely sources of financial recovery.

Ref: *Reino de España v. The American Bureau of Shipping, Inc., et al.*, 691 F.3d 461 (2nd Cir. 2012); and "No Class Act: A bad survey lands a classification society in hot water."

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