A Commercial Fisherman's Guide to Marine Insurance and Law

Dennis W. Nixon

Marine Affairs Program
NOAA/Sea Grant
The University of Rhode Island

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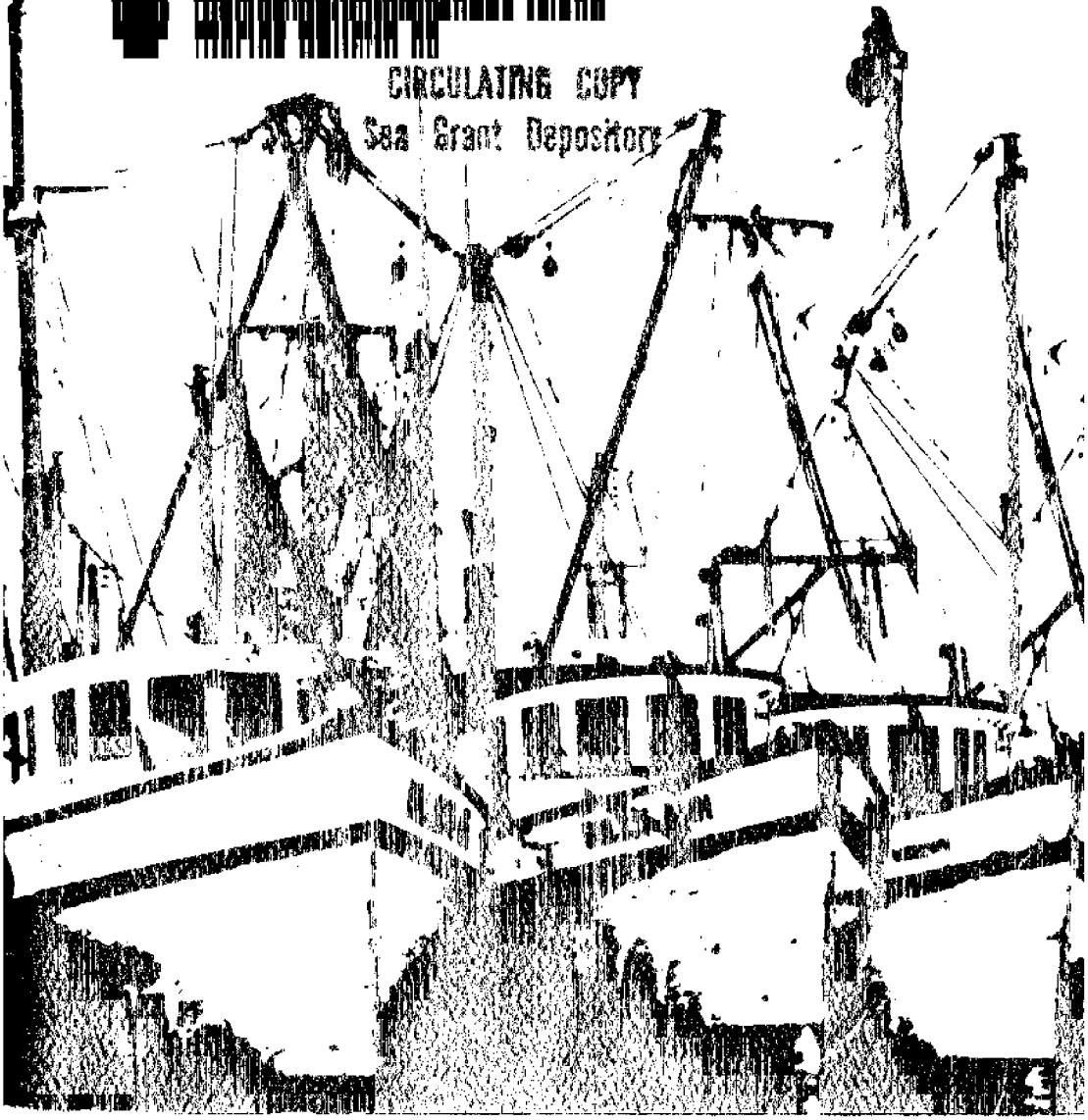

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Introduction

Since the Magnuson Act of 1976, the United States commercial fishing industry has undergone several significant changes. Increased catches for a variety of species are the result of more effort, in terms of both the number of vessels and the fishing power of the new vessels involved. With the increased financial commitment required to operate the newer and larger vessels, the vessel owner needs a more sophisticated understanding of the financial, legal, and insurance issues involved in the operation of a fishing vessel.

If one can view the business of commercial fishing as fishing for dollars and not fish, this guide is intended to help a fisherman repair the legal holes in his existing net, avoid a few financial hang-ups, and perhaps design a new net to retain even more dollars at the end of the year. Since one of the major boat-operating costs today is insurance premiums, the framework of this guide is based on the expensive but frequently unread marine insurance policy. With the terms of the policy as a discussion point, specific cases involving admiralty law, fishing vessels, and insurance coverage will be used to give some meaning to the archaic language of the policy itself.

The guide is divided into four parts. Chapter One sets the legal framework for the discussion, with an explanation of the federal admiralty court system. Chapter Two discusses the business of marine insurance and the relationship between agents, brokers, and underwriters. Chapter Three involves an analysis of a standard hull policy and the perils it covers. Chapter Four discusses the protection and indemnity policy, with special emphasis on the frequently litigated issue of injuries to crew members.

Just as preventive maintenance is necessary for the long-term operation of a vessel, so too preventive legal planning can assist in the safe and profitable operation of a commercial fishing operation. Use of this guide can be an effective step in that direction.

The perils of the sea are dramatically illustrated in this photograph of a rescue operation by a U.S. Coast Guard helicopter near Nags Head, N.C., in December 1969. Three men were basket-hoisted to safety from the trawler *Oriental*. Photo by Aycock Brown, courtesy of the U.S. Coast Guard. From the files of the National Fisherman.

Chapter One
Admiralty Law and the Commercial Fisherman

Jurisdiction

Commercial fishing, by definition, is a maritime activity; if the fishing is conducted in United States waters, or by a United States registered vessel on the high seas, it is subject to United States admiralty law. Article III, Section 2, of the United States Constitution places all cases of admiralty and maritime jurisdiction within the federal court system. The Judiciary Act of 1789 implemented this constitutional provision and gave the federal district courts original jurisdiction over admiralty cases.

Why is that fact significant for a commercial fisherman? Simply stated, unlike the majority of businesses, the most important body of law for the fishing industry comes from the federal and not the state court system. That may not seem important at first glance, but in practical terms it means a great deal. For example, financing of vessels of over five net tons is done under the terms of the federal Ship Mortgage Act of 1920; to obtain such financing, the vessel must be documented under federal law. If a crew member is injured in the course of his duties, it is federal admiralty law and not state workmen's compensation laws that apply. In some areas, such as salvage, there is not even a comparable body of law at the state level—only the admiralty court system has devised a remedy for that unique maritime problem. Most relevant to this publication is the fact that virtually all disputes regarding the contract of marine insurance will be decided in a federal court under its admiralty jurisdiction.

In contemporary admiralty practice, there are two methods for filing suit that an aggrieved party can use, and in practice they are often used together. The first is known as an *in personam* action: a complaint is alleged against a person or corporation for some liability involving a maritime activity. This is very much like the kind of action filed in a state court when one party is aggrieved by another's actions. The second method, however, is unique to admiralty and is of great importance in understanding the substantive aspects of admiralty law to be discussed in subsequent sections. It is known as an *in rem* action: a method by which one is able to sue an inanimate object (a vessel) and have it seized by a United States Marshal. If the vessel (or its owner) does not defend itself against the action, it can be sold at auction to satisfy the obligation alleged

in the suit. If the vessel is sold at auction for more than the judgment awarded, the unfortunate former owner may petition the court for the balance of the proceeds.

When a vessel has been seized by a Marshal as the result of a complaint, the owner cannot move it until he posts a bond with the court equal to the amount of the dispute. In many cases, that bond will be provided by the vessel's protection and indemnity insurance policy if the incident responsible for the suit is a named peril under the policy. The vessel can then return to fishing while the suit progresses through the legal system. In one case involving an offshore lobster boat in Newport, Rhode Island, the vessel was seized late on a Friday but quick action with the insurance company and the court had the vessel underway the next day at noon.

Since fishing vessels are very mobile assets, the advantages of an *in rem* action if you have a valid claim against a vessel are lost if you hesitate and let the asset disappear. In a small negligence case several years ago, a lobsterman's boat was damaged by the wake of another; the vessel responsible was moved from New England to Florida immediately after the accident. Since the corporation which owned the vessel had no other assets, an *in personam* action was pointless. The costs involved in locating the vessel and filing suit in Florida were such that it was inadvisable to take the case any further. The *in rem* suit can only be filed in the district where the vessel is currently located.

Maritime Liens

If the suit has been filed promptly and the vessel seized by a United States Marshal, it may turn out that a bond is not filed by the owners or insurers and the vessel is held until the claims against it are resolved in court. What usually happens in cases of this type, unfortunately, is that the auction price of a vessel rarely equals the amount of claims against it. More often than not, an *in rem* action against a vessel brings a flurry of other claims, which are joined to the original action. Typically, a "troubled" vessel which has not been able to make its mortgage payments owes many other people money as well. Perhaps the crew hasn't been paid in full for several trips; the shipyard bill was not paid when the repairs were completed; the fuel dock and grocery store have bills outstanding; a collision with another ship caused significant damage and a salvage tug worked diligently to save the unlucky vessel and return it to port.

A vessel in that much trouble is likely to be abandoned by the

owner to the court. All of the aggrieved parties mentioned above have what is known as a maritime lien against the vessel. This lien is a property right in the vessel equal to the amount of liability. With the exception of the Preferred Ship's Mortgage, recorded at the vessel's port of documentation, under the terms of the Ship Mortgage Act of 1920 none of these liens arising from contract or tort need to be recorded in advance of the court hearing. Unlike a "mechanic's lien" on shore, which is dependent upon possession of the property, the maritime lien runs secretly with the vessel and is not extinguished by a private sale to a good-faith purchaser. There are four ways a maritime lien can be extinguished: by payment of the amount in question, judicial sale of the vessel, destruction of the vessel, or unreasonable delay in pressing the claim, known as "laches."

That fact should make the buyer of any vessel very cautious. Besides the structural survey typically performed on a vessel, a legal and financial survey ought to be conducted as well to insure that the boat is free of all liens. A good sales agreement will have a clause in which the seller warrants that the vessel is "free from all liens," but if it is not, the new buyer will have to defend his vessel from lien claimants and recover any amounts lost in a breach of contract action against the seller (who is usually in Brazil by then!). Horror stories abound in this field of law. One remarkable case involved an individual who bought a vessel "for a very good price" from a stranger on the end of the dock. The boat had a new diesel and was in fine shape; the deal was quickly consummated. Later that day, during a small celebration aboard, a private detective appeared and presented a bill to the crestfallen new owner. The new diesel had been installed at a nearby shipyard at a cost of $10,000 and the vessel had skipped without paying. The previous owner had, of course, disappeared by then, and the new owner learned a very expensive lesson about maritime liens.

For the moment, let's return to the troubled vessel that has a variety of claims outstanding. Since there is rarely enough money to pay off all claimants at a vessel auction, the courts and Congress have devised a process to determine priorities among liens. Surprisingly, the bank with its Preferred Ship's Mortgage must get in line behind a number of other claimants before it can claim a share of the auction proceeds. According to the Ship Mortgage Act of 1920 (46 U.S.C. 953), the maritime liens for the crew wages, the collision damages to the other vessel and for the salvage tug all rank above the mortgage. After the banks (and likely with very little chance of payment), the liens of the shipyard, the fuel dock, and

the grocery store will be considered. With that kind of ranking structure, it should not be surprising that shipyards, fuel docks, and grocery stores require cash before the vessel moves.

One other interesting point that distinguishes maritime liens from typical land liens is the ranking of claims within a particular class, such as crew wages. Ashore, the general rule is "First in time, first in right," but in admiralty the reverse is true: the most recent lien in a class takes priority over earlier liens. The reason behind the difference makes good sense. If you have a claim against a vessel, it should be taken care of quickly, since others will be looking to that vessel as security for payment as well. If you hesitate in pressing your claim for too long and create an unreasonable delay, the lien can even be extinguished through the doctrine of laches.

Collision

The law of collisions at sea is based upon the concept of comparative fault. The trial court must determine, based upon all available evidence, the degree of fault to attribute to each vessel, and allocate the damages accordingly. Official findings by a United States Coast Guard Board of Inquiry regarding fault would be considered very important evidence in the case. Thus, if you are involved in a collision, it is very important to take the Coast Guard investigation seriously, since its outcome may dictate the results of a later civil action between the two vessel owners. The mechanics of the comparative fault rule can best be illustrated with a few examples:

(1) Vessel A: 100% at fault, $5,000 damage
Vessel B: 0% at fault, $10,000 damage

In this case, Vessel A would have to pay a total of $15,000; $5,000 for its own, and $10,000 for Vessel B.

(2) Vessel A: 50% at fault, $5,000 damage
Vessel B: 50% at fault, $10,000 damage

In this case, the total amount of damage is $15,000; since each vessel was 50% at fault, each should pay $7,500. Vessel A must pay Vessel B $2,500.

(3) Vessel A: 20% at fault, $5,000 damage
Vessel B: 80% at fault, $10,000 damage

The total amount of damages is, again, $15,000. Vessel A is responsible for 20% of the damage, or $3,000; Vessel B is responsible for 80% of the damage, or $12,000. Vessel B must pay Vessel A $2,000.

As complicated as the rule may seem, it is a vast improvement over the "divided damages" rule which prevailed until 1975, when it was discarded in the landmark case of U.S. v. *Reliable Transfer*, 421 U.S. 397 (1975). Under that rule, damages were divided equally despite gross disparities in the degree of fault involved. Insurance payment for collision damage will be discussed in Chapter Three.

Salvage

The law of salvage is one of the most remarkable and misunderstood subjects in admiralty law. Most of the "conventional wisdom" on the subject is simply wrong. Salvage is *not* a license to steal. Rather, it is a reward system designed to encourage the rescue of vessels and property at sea and to preserve them for their owners. A salvor does not "own" a vessel he has pulled off a rock; he has an ownership interest, or a maritime lien, just as a crew member has a lien for back wages. To execute that lien, the salvor must file suit in federal district court and ask for his salvage award. He may *not* sell the vessel and pocket the proceeds. The court may seize and sell the vessel as part of an *in rem* action, but the maximum award one may receive is 50% of the value of the property as saved. Only if the property has been actually and legally abandoned can the salvor petition the court for the balance (a very rare circumstance).

There are two types of salvage: contract and pure. Contract salvage occurs when a professional salvor, typically armed with a Lloyd's Open Form Salvage Contract, agrees to attempt to save a vessel on a "no-cure, no-pay" basis. If he is unsuccessful, he will receive nothing; if he is successful, his award will be based upon a percentage of the value of the goods saved. If the salvor and vessel owner cannot agree upon an appropriate fee, it is settled through binding arbitration by a committee of Lloyd's.

Pure salvage, on the other hand, occurs without written agreement, and the amount awarded is at the discretion of the federal district court. In determining the amount of the award, courts examine a series of factors that were first expressed in the 1888 Supreme Court case of *The Blackwall*, 77 U.S. 1 (1870). They are:

(1) the labor expended by the salvors in rendering the salvage service;
(2) the promptitude, skill, and energy displayed in rendering the service and saving the property;

(3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
(4) the risk incurred by the salvors in securing the property from the impending peril;
(5) the value of the property saved; and
(6) the degree of danger from which the property was rescued.

There is no *statutory* salvage law. The law evolves on a case-by-case basis. The following are cases in which fishing vessels have become involved with salvage activities.

In *The Star*, 53 F.2d 890 (W.D. Wash. 1931), one fishing boat towed another off a dangerous reef. The salved vessel denied payment, saying it was merely the custom for one fishing vessel to aid another. The court held otherwise, stating that such a custom superceding the right to a salvage award would be contrary to public policy. The vessel was awarded $500. A similar issue was presented in *Nicastro v. The Peggy B.*, 173 F. Supp. 61 (D. Mass. 1959), in which a dragger from Gloucester came across a disabled 25-foot motorboat with a seriously ill man aboard near Nantucket Shoals. The crew stopped fishing, rushed the man to shore, and saved the boat as well. His insurance company denied the salvage claim of the dragger, however, arguing that the crew was engaged in a humanitarian rescue operation, which is not compensable, and that the salvage of property was only incidental. The court disagreed and held that the crew was entitled to a salvage award even if their first thought in rendering assistance was a humanitarian one. The value of the vessel saved was $6,800; the crew was awarded $3,000.

In *Di Girolamo v. Malone*, 211 F. Supp. 660 (D. Mass. 1962), the fishing vessel *Madonna* came upon the unmanned motor yacht *Miss Waltham*, sitting low in the water, in stormy seas, about 60 miles offshore. After a difficult tow, lasting eight hours, the vessel was brought safely back to port. The District Court judge held that $1,875 constituted a reasonable award for salvage of a $7,500 power yacht by a $35,000 fishing vessel.

The following two cases are interesting in that they involve salvage of fishing gear. In *Medina v. One Nylon Purse Seine*, 259 F. Supp. 769 (S.D. Cal. 1966), the crew of the tuna seiner *Ecuador* sighted and took aboard a purse seine valued at $15,000. The court awarded them $7,500 from the proceeds of the sale of the net; if no claims were filed the balance was to be paid to the crew and owners upon expiration of one year and one day as additional

compensation for the salvage. In *Colby v. Todd Packing Co.*, 77 F. Supp. 956 (D. Alaska 1948), the court found that fishtrap frames, composed of large logs bolted into an oblong structure giving buoyancy and shape to the trap, may be the subject of salvage when found adrift under conditions constituting marine peril.

Before leaving the subject of salvage, a word of caution is in order. The concept of "negligent salvage" is gaining increasing acceptance. That is, anyone undertaking a salvage effort will be held to reasonable standards of seamanship. A suit which was recently filed could have a "chilling effect" on anyone's willingness to become involved in a rescue operation. Vessel A lost power and requested Vessel B to help pull back its net. Vessel B came alongside and rigged the appropriate lines. The crew on Vessel A, however, did not clear the deck, and two of them were seriously injured when a turning block on Vessel A collapsed and the warp swept the deck. Crew members on Vessel A have filed suit against Vessel B, alleging that the salvage operation was carried out in a careless and negligent manner. The suit might not be successful, but Vessel B must hire attorneys and defend itself from the action. If the suit is successful, the age-old custom of fishermen coming to the aid of each other may very quickly fade into history.

The examples discussed above have made it clear that admiralty law is quite different, in both substance and procedure, from the legal system regulating the terrestrial components of our food-production system. Fishing vessels share a legal system with freighters, tankers, and even yachts—and this system should be understood by those who want to function effectively within it.

The scalloper *Captain Lawrence* hard aground at Beavertail, Jamestown, R.I., as spectators look on, August 1980. The vessel was a total loss. *Photo by David Muedter. From the files of the URI Marine Advisory Service.*

Chapter Two
The Business of Marine Insurance

Fishermen and insurance underwriters have more in common than one might suspect. Like fishermen, who rely on their skill to find and harvest fish in the daily gamble of income vs. expenses, insurance underwriters gamble on their ability to judge risks and to generate enough premium dollars to pay for the inevitable losses. Just as "high-liners" within the fishing fleet earn the respect of their colleagues, so do the underwriters who consistently produce a good profit ratio to premiums earned.

History

Marine insurance developed along with other concepts of maritime law in the late Middle Ages and formed the basis of the vast insurance industry today. The industry was well established in England by the seventeenth century, and those involved in the business met in a number of coffeehouses in London, the most famous of which was operated by Edward Lloyd. That original association of insurers, now known collectively as Lloyd's of London, has retained its prominence in the marine insurance world and provides the facilities for over 10,000 underwriters and approximately 300 syndicates. The procedure for spreading the risk among individuals at Lloyd's was responsible for the term "underwriter": once an individual had decided to accept the risk of insuring a ship or cargo, he would ask his colleagues to share a fixed percentage of the risk (and the premium) and write their names under his on the policy.

Although some larger vessels and groups of vessels are underwritten in the London market, most United States fishing vessels today are insured with American companies. There are two important facts to be aware of in understanding the United States marine insurance market today: first, in comparison with other types of insurance activity it is virtually unregulated; and second, insurance companies are able to make money while they are apparently losing money.

Regulatory Authority

In fields other than marine insurance, individual states have developed elaborate insurance commissions which regulate everything

from maximum premiums to how quickly claims must be paid. In states with high losses in categories like automobile theft, it's not unusual for all of the companies operating in that market to be charging virtually the same premiums. Without the flexibility to change the rates to meet higher losses, the only choice companies have in a regulated market is to pull out altogether.

That is not the case with marine insurance. The underwriter has far more control over pricing decisions and whether or not he wants to accept the risk at all. There are two reasons for this continued independence in what is otherwise a highly regulated industry. The first reason is the unique nature of every "marine adventure." No two vessels or captains are alike. If an automobile is not maintained properly, it may not start on a cold winter morning; if a bilge pump is not maintained properly the vessel may sink on a cold winter morning. There is a much greater potential for catastrophic loss in the marine market, and for that reason marine insurers have managed to maintain their independence.

The other reason relates to the international nature of the business of marine insurance. A highly regulated United States marine insurance company would not have the flexibility to compete with the comparatively unregulated markets of London, Norway, Sweden, and Japan when they quote on vessels in the United States. Since a broker has the ability to choose either United States or foreign markets, United States insurance companies would be under a substantial handicap if they alone worked in a highly regulated environment.

Profits and Losses

The second important fact about the insurance industry today is that insurers can make money while they are apparently losing money. The method is very simple. Insurance companies are "cash cows." Huge sums of dollars are generated from premiums and quickly invested before losses must be paid. When interest rates are high and the companies are very successful at investing their dollars, they can afford to "lose money" on the premium-to-loss ratio as long as it is offset by substantial investment income. Underwriters are pressured to generate dollars by lowering premium costs in spite of increasing loss ratios. According to some industry officials, "the ability to underwrite effectively is lost" during a highly competitive scramble for dollars, and the companies are unable to adjust quickly when interest rates decline.

All of the above is pretty good news for the commercial fisherman.

High investment income for the past six years has offset an alarming increase in underwriting losses for ocean marine insurance. Despite the painful bite insurance premiums take out of operating expenses, the cost could have been much worse! So much for the good news.

The bad news is that, with the lowering of interest rates to more moderate levels, the investment departments of the insurance companies aren't producing as well, and insurers can no longer rely upon investment income to offset underwriting losses. According to *Best's Aggregates and Averages*, an industry rating source, the picture is particularly bleak in ocean marine insurance. For the period 1977-81, the category of ocean marine had the second-worst loss to premium-earned ratio among the 12 kinds of insurance rated. The percentage loss of –7.6 was exceeded only by the category of medical malpractice. The combined loss and expense ratio for 1981 was 110—which means that for every $1 of premium earned $1.10 was paid out for expenses and losses.

It is not possible to separate fishing vessels from all other vessels covered in the ocean marine category. However, discussions with a variety of industry officials support the conclusion that fishing vessels have contributed their share to the combined loss ratio. The *Journal of Commerce* reported on March 23, 1983, that the mysterious sinkings of five crab boats in Alaskan waters caused the domestic insurance companies to pull out of that market. The London companies stayed in, but have doubled their rates. Later reports have indicated that one or two domestic companies, with London backing, are still in the market but with much higher rates.

With less money to be made in marine insurance, companies may make the decision to pull out of the ocean marine market altogether and emphasize other lines of business. That contraction of the capacity of the market has been offset by the decline of operating merchant ships due to the worldwide economic recession. However, with any reduction of capacity, coupled with increasing losses and decreasing interest rates, one thing is clear: premiums will increase, probably steadily, for several years until one or more of the conditions affecting the market discussed above reverses its current trend.

Another factor affecting premium costs, if not the rate, is inflation. Well-maintained older boats have increased in value at or better than the rate of inflation. Thus, if a fisherman wants to insure his boat for its current market value, his premium costs will increase each year even if the rate charged for hull insurance remains the same. That can be a bitter pill to swallow if the price

per pound paid to the fisherman has not increased at the same rate.

The rapid expansion in capacity of the United States fishing fleet after 1976 had an impact on an individual fisherman's insurance costs as well. In many cases, successful fishermen sold their fully-paid-for, older wooden boats, which usually were underinsured because there was no bank mortgage requiring full coverage. The newer steel vessels were insured at a lower rate, but with dramatically higher declared hull values; hence, premiums soared. Partial assumption of the risk or self-insurance of a percentage of the value was no longer an option, since the bank wanted its substantial interest fully protected. Rather suddenly, insurance costs became a major operating expense.

Group Insurance Programs

One method for keeping that cost under control is to participate in a group insurance program as a member of a fishermen's cooperative or association underwritten by one company under a single policy. There are several reasons why participation in a group program should be less expensive. First, the insurance company's overhead costs (typically, 25-30% of the premium dollars generated) can be reduced somewhat by working with one large client rather than 50 small accounts. Central billing and claims processing can be used for further savings. Second, an association generating hundreds of thousands of dollars of premiums annually is a much more attractive client for the insurance company seeking to maintain a strong cash flow, and frequently a better rate will be available. Third, if the association is relatively stringent on admission and safety standards for the fleet through self-regulation, claims against the group program will be reduced to the point where rates can be kept stable or lowered. Finally, if a group stays with the same company for several years, an independent loss record for that group can be developed, giving the underwriter an independent (and, it is hoped, lower) statistical claim base upon which a lower rate can be based. However, the converse can be true as well. If a group is not selective about the members it admits to a group program, if it is not aggressive with safety and loss-prevention programs, the group as a whole may find itself paying higher premiums than normal based upon a higher than average loss record. The conclusion is simple: if the fishermen's association helps the insurance company save some money, it is likely that those savings will be passed on to the group through rate reductions or credits.

Another method groups of fishermen have used with mixed success is self-insurance. Initially, the idea has great appeal. Rather than let an insurance company and its shareholders profit from fishermen's premiums, why not form a company owned by fishermen to do the same? The problem, very simply, is exposure. Not the kind of exposure problem you run into in a survival suit in the North Atlantic, but a legal and financial exposure to claims far in excess of the capital assets of the fledgling company. The premiums generated for the year may be able to pay routine claims but would not be able to cover catastrophic fleet losses. To spread some of the risk of that potential catastrophic loss, the fishermen's group would have to purchase reinsurance in the commercial market—a very costly undertaking because of the high exposure involved. In most cases today, the start-up costs of a new company, coupled with even a good premium-to-loss ratio and the costs of reinsurance, make it very difficult for a new venture to compete financially with the established commercial firms. Even when Bermuda-based "captive" insurance companies are formed (requiring less start-up capital than in the United States), the costs of reinsurance in today's market make it difficult, if not unusual, for a plan to succeed.

There are, however, always exceptions to the rule. The United Marine Fund in the state of Washington was formed over 50 years ago by a group of fishermen unwilling to pay increased hull rates. In 1981, there were 240 members paying $1 million in premiums annually. Enough capital has accumulated over the years so that small claims are paid with the interest earned on investments. The reason for the group's success must be attributed to the strong membership standards they have maintained, seeking seasoned operators with proven records. The Massachusetts Lobstermen's Association has also developed a successful program by carefully scrutinizing membership applications. They have imposed some operational limitations as well: the vessels must not travel more than 25 miles from shore and must make port at least once every 24 hours. Reinsurance covers the association for any single loss above $20,000. Reserves are slow to accumulate when reinsurance must be purchased for such a small amount, but such plans have an important psychological advantage over completely commercial programs: substantial peer group pressures exist to keep claims at a minimum, since each claim has an impact on the eventual success or failure of the pool.

Insurance Brokers

This discussion of the "business of marine insurance" has focused on the insurance company, represented by the underwriter, and the fisherman. However, the fisherman rarely has any personal contact with the underwriter; rather, he deals with a broker who places the business with the insurance company that he believes will provide the best coverage, market security, service, and price for the fisherman. The broker's primary legal obligation is to the assured—the fisherman.

If a broker represents himself as particularly skilled in marine insurance matters, he must exercise the skill and care expected of an experienced broker; he is legally responsible for any errors and omissions in his recommendations. Marine insurance brokers, like doctors and lawyers, have to be concerned about malpractice actions from clients who are materially injured by their negligence. Suits against brokers are likely to occur when an insurance company refuses to pay a claim not covered under the terms of its policy, although it was a type of coverage the assured requested. If the broker's liability is established, he is usually required to assume the position of insurer and pay the claim. Most marine insurance brokers purchase malpractice, or "Errors and Omissions," insurance to protect themselves in that type of situation. It is not unreasonable to ask your broker if he carries "Errors and Omissions" insurance and in what amount.

The important thing to remember is that the broker works for you, not the insurance company. His commission is earned from your premium dollars, and you should expect and get service from him in the same way that you receive professional advice from your accountant and your attorney.

Chapter Three
The Hull Policy

The contract of marine insurance is unquestionably the most complex legal document the commercial fisherman must face. An honest attempt to read and understand the basic hull policy without some outside assistance must be considered one of the more frustrating experiences anyone can encounter. The hull policy has been variously described as "obscurity itself" by a noted admiralty scholar, and a "labyrinth of verbiage" by a federal circuit court judge. Some of the language in the policy is over 350 years old—a fact interesting to historians, but troublesome to the boat owner.

Another factor complicating the picture somewhat is that although most hull policies contain the same basic clauses, there are subtle differences between them which could affect both price and coverage. Three of the most commonly used forms for fishing vessels include the AHAB, the American Institute Time Hulls (AITH), and the Taylor. The discussion that follows will emphasize the clauses that virtually all of the former have in common and that involve the vast majority of claims.

Perhaps the greatest single reason to continue reading this chapter is that the hull policy is *not* an "all risk" insurance contract. Rather, it protects the owner (the "assured") from certain named perils if the assured satisfies a number of important conditions. If the assured fails in one of his duties, the company simply will not pay. Contrary to their friendly image on television advertisements, insurance companies don't *like* paying claims. They are, after all, in the business of making money, not giving it away, and generally insist upon a strict interpretation of the contract language—to do otherwise would be a disservice to their shareholders. Questionable claims may be paid in cases where the assured is a valued client or there is a significant public relations issue involved—and where the amount in question is relatively small. Large claims are always carefully examined, and you must be prepared to argue your case in court should the company decide to disallow your claim.

An important thing to remember is that courts consider the contract of marine insurance to be *uberrimae fidei*—a little bit of Latin for "of utmost good faith." That is, the court expects that full and honest disclosure of all material facts has been made to the

company. If there has been any material misstatement of facts, the policy will likely be voided.

The mechanics of the policy are relatively simple. First, the company and the assured agree on a value for the vessel and its gear, commonly based on its current market value, not replacement value. Some companies will write a policy for replacement value, at higher cost, as long as there is no "moral hazard," a dramatic difference between market and replacement value creating an obvious temptation (a separate policy may be written for expensive electronic gear). Second, the navigation limits of the vessel are determined. Smaller coastal vessels will pay less for a policy when they are limited to 25 miles from shore and can quickly seek shelter from storms (although they will usually pay a higher rate based on their relatively low value). Offshore vessels will pay more for the increased risk of riding the storm out at sea. Third, the condition of the vessel is determined and verified by a marine surveyor acceptable to both the assured and the company. Finally, the experience of the master and his crew are scrutinized—the most important part of the process, according to many agents and underwriters. The term of the policy is then set, usually for one year. Shorter intervals would be too costly to administer, while longer intervals present problems related to changes in the vessel's condition and market value.

The rate charged is expressed as a percentage of the vessel's agreed market value. The amount is determined by examining the four factors described above with an eye toward what the competition is charging for the same coverage. Previous claims on the policy and the size of the deductible have a large part in the determination as well.

Perils Clause

The heart of any hull policy is the so-called "Perils Clause." In its simplest form, it reads:

> Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Waters named herein, Fire, Lightning, Earthquake, Assailing Thieves, Jettisons, Barratry of the Master and Mariners and all other like Perils that shall come to the Hurt, Detriment, or Damage of the Vessel.

If that language seems outdated, keep in mind that this clause is a modern version of one first used on the good ship *Tiger* in 1613.

This clause provides protection for six categories of risks:

(1) perils of the seas,
(2) fire, lightning, and earthquake,
(3) assailing thieves,
(4) jettisons,
(5) barratry of the master and mariners, and
(6) all other like perils.

The first category, perils of the seas, is the most inclusive and by far the most important peril dealt with in insurance policies. Accidental groundings, collisions, and sinkings caused by extraordinary sea and wind conditions are clearly covered. The difficulty in applying this clause comes in deciding whether the sea and wind conditions were truly "perilous." To gain insurance in the first place, the assured must show that his vessel is seaworthy and able to withstand the ordinary stress of weather, wind, and waves that it is likely to encounter in its normal operations. Generally, courts have found that perils of the seas are of an extraordinary nature or arise from irresistible force or overwhelming power and cannot be guarded against by the ordinary exertions of human skill and prudence. Damage caused through natural decay, worms, or ordinary wear and tear would not be covered under this clause.

The remaining categories of losses in the Perils Clause are more straightforward. Fire, lightning, and earthquake damage is easily understood. The term "assailing thieves" covers losses occasioned by the criminal acts of those who obtain access to the property by force. It would not cover theft or embezzlement by the crew. "Jettison" refers to the intentional act of throwing some part of the vessel overboard for a sound reason. A heavy piece of deck equipment which broke loose during a storm, threatened further injury to the vessel and crew, and could not be resecured could be cut free and allowed to fall overboard and be compensable under this clause. "Barratry of the master and mariners" has been defined as being any unlawful or fraudulent act committed by masters or seamen, contrary to their duty to the owner, whereby the latter suffers injury. Courts in the United States and Great Britain have struggled with the meaning of the final category, "like perils." Generally, they have found that its purpose was to include in the coverage all losses which, although perhaps not technically or strictly speaking covered in the specific perils enumerated, are at least very similar.

In *Southport Fisheries, Inc. v. Saskatchewan Government*

Insurance Office, 161 F. Supp. 81 (E.D.N.C. 1958), the court noted that the enumerated perils have a common quality in that they render vessels defenseless. In that case, acid thrown on fish nets by persons unknown was held not to be a "like peril" because it did not render the vessel defenseless and thus was an ordinary risk—not compensable under the Perils Clause.

Additional Perils Clause

Since the *Tiger* policy was drafted in 1613, major developments in maritime trade and technology have occurred, creating new risks, which nervous vessel owners have pressed for inclusion into the basic hull policy. Thus, after the basic "Perils Clause" in hull policies today, we have the "Additional Perils Clause." Once again, it is a fairly standard clause, found with only slight variations in all hull policies. It states that:

> The insurance also covers loss of or damage to the vessel caused by the following:
>
> (1) Accidents in loading, discharging or handling cargo, or in bunkering;
> (2) Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons, or pontoons;
> (3) Explosions on shipboard or elsewhere;
> (4) Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);
> (5) Breakdown of or accidents to nuclear installations or reactors not on board the insured vessel;
> (6) Contact with aircraft, rockets or similar missiles, or with any land conveyance;
> (7) Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Insured hereunder;
> (8) Negligence of Masters, Officers, Crew or Pilots provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them.

The Taylor and AITH versions of this clause are nearly identical; the AIIAB version does not cover three of the situations mentioned above: (1) breakdown of motor generators or other electrical machinery and electrical connections thereto; (2) damage to machinery caused by crew negligence (hull only); and (3) negligence of charterers and repairers.

The three most important, and most heavily litigated, sections of this clause relate to latent defects, the negligence of the crew, and the requirement that the owner use "due diligence" in providing a seaworthy vessel. The clause is often referred to as the "Inchmaree Clause," after a vessel of the same name whose loss by latent defect went uncompensated; coverage for losses occasioned by latent defects was added soon thereafter through this clause, which was first used in 1889.

The determination of what is or is not a latent defect can be extraordinarily difficult. At the very least, it must be a defect which the owners could not have discovered through the exercise of the "due diligence" to provide a seaworthy vessel, required at the end of the clause. In *Ferrante v. Detroit Fire and Marine Insurance Co.*, 125 F. Supp. 621 (S.D. Cal. 1954), the court considered whether a crank shaft had broken due to a latent defect. The court found that the break was caused by inadequate lubrication and a negligent engineer; no latent defect was found. The court gave this definition of latent defect:

> A latent defect is a hidden defect and generally involves the material out of which the thing is constructed as distinguished from the result of wear and tear.

If the court had found that the crank shaft had broken from a latent defect, the next problem would have been to determine how much the insurance company would have had to pay for the consequential damage to the engine caused by the broken shaft. Keep in mind that the cost of replacing or repairing the defective part itself is *not* covered under this clause. Rather, it covers damage to the vessel and machinery *caused* by the latent defect. Thus, in this case, the owner will pay for the new crank shaft, the insurance company will pay for other engine parts damaged by the breaking shaft, and the costs of tearing down the engine will likely be split between the owner and the insurance company.

The case of *Gulf Coast Trawlers, Inc. v. Resolute Insurance Co.*, 239 F. Supp. 424 (S.D. Tex. 1965), is an interesting example of the application of the seaworthiness warranty found in the Additional Perils, or Inchmaree Clause. This was an action brought by a ship-owner against his insurers to recover for the sinking of his shrimp

trawler, the *Joyce Marie*, which was lost on a fishing trip in the Gulf of Mexico in November 1963. The owner claimed that the vessel was in all respects seaworthy and that the loss was a result of the perils insured against. The insurance company maintained a different view: they argued that at the time of the loss the vessel was unseaworthy because the vessel had on board only a two-man crew including the captain, and that it had a defective, improperly maintained or repaired clutch. They also strongly hinted that the sinking was intentional—an "insurance job."

The court dismissed both of the insurance company's arguments and held that the alleged unseaworthiness must directly relate to the cause of the sinking. They stated that a two-man crew can result in a finding of unseaworthiness in personal injury cases where an injury can be directly attributed to undermanning; here, however, there was no evidence that the sinking would have been prevented with another crew member aboard. The court also held that the slipping clutch had no direct relationship to the mysterious sinking of the vessel. No evidence was presented which related to the claim of intentional sinking, and thus the court ruled in favor of the vessel owner, despite the admittedly mysterious nature of the sinking.

A different result was reached in the case of *Aguirre v. Citizens Casualty Co. of New York*, 441 F.2d 141 (5th Cir. 1971). The fishing vessel *Esmeralda* was trawling for shrimp shorthanded, with a crew of two instead of its normal complement of three men. While the captain was helping his crew member retrieve the two nets and head back to port, he engaged the autopilot and went to the stern of the vessel. The starboard net remained in the water longer than the port net, which caused the vessel to turn slowly toward shore and run aground several minutes later while the captain was still in the stern of the vessel. The owner's request for damages under the standard AHAB hull policy was denied. The court held that the owner's breach of the express warranty of continuing seaworthiness by operating shorthanded suspended coverage and relieved the insurer of liability for damage. In this case, the grounding would likely have been avoided if the vessel had been sailing with a full crew.

In *Hauser v. American Central Insurance Co.*, 216 F. Supp. 318 (E.D. La. 1963), the owner of a shrimp trawler sued under his hull policy for the loss of his vessel resulting from an explosion, since that is one of the Additional Perils covered in the Inchmaree Clause. In this case, the court had strong evidence that the owner had not used due diligence in providing a seaworthy vessel. Investigations disclosed that the explosion was caused by a butane stove, which the owner had promised to remove from the vessel to comply

with the insurance company's safety standards. Recovery under the policy was thus denied.

The importance of complete disclosure to the underwriters is illustrated by the case of *Pacific Queen Fisheries v. Symes*, 307 F.2d 700 (9th Cir. 1962). As in the case above, the *Pacific Queen* was destroyed by an explosion, and the owner filed a claim for total loss under his hull policy. The *Pacific Queen* had been built as a United States Navy salvage vessel in 1943. Although diesel-powered, the vessel was also outfitted with two 1,500-gallon gasoline tanks for use in powering salvage equipment. The vessel was converted in 1950 to a salmon freezer and transport vessel, and operated between Puget Sound and Bristol Bay, Alaska. It served as the mothership for three small gillnet boats which were gasoline-powered. In 1955, the vessel was surveyed and the tankage arrangements were found to be in good order. The vessel was also examined, although not as closely, in 1957, shortly before the explosion. However, the vessel owners had made an important change the previous year, a change that they did not bring to the attention of the surveyor. The gasoline tank capacity had been increased from 3,000 to 8,000 gallons by filling two tanks formerly used for diesel fuel with 5,000 gallons of gasoline. The owners inserted below-deck exposed gasoline discharge valves into fittings that had been designed and used for insertion of permanently secured drainage plugs. Eight days before the explosion, some 500 gallons of gasoline had accidentally spilled into the bilge. The court held that the owners were required to advise the surveyor in 1957 of the alterations of the fuel tanks requiring special examination. Since they did not, the insurance was void for failure to disclose material increases in the risk.

The *Pacific Queen* is an important case to remember. There is always a temptation to "get something by" the insurance company surveyor that the owner does not want to replace or repair. The implications of a decision to avoid full disclosure should now be apparent. That lesson cost the owners of the *Pacific Queen* $325,000.

Collision Clause

The third clause to be considered, after the Perils and Additional Perils, is the collision clause, the "Running-Down Clause." As was discussed earlier, collision damages to the insured's own vessel are covered in the Perils Clause. The collision clause is not designed to cover damages to the insured vessel; rather, it indemnifies the assured for damages he is liable for as the result of a collision. The amount of liability is limited to the amount

of insurance the assured has on his own hull. Further, it does not extend to loss of life, personal injury, or damage to shoreside structures. That liability is picked up in the vessel's protection and indemnity policy, discussed in Chapter Four. Vessels can procure excess collision insurance for those instances where the physical damages caused are in excess of the valued hull policy. Another alternative, if the same company is writing both the hull and the protection and indemnity policies, is to eliminate the collision clause entirely from the hull policy and transfer all collision liability for vessels, loss of life, personal injury, and damage to shoreside structures to the protection and indemnity policy.

War Risks

The fourth clause to be considered is designed to *exclude* coverage for damage caused as a result of wars, strikes, or other civil commotions. In its modern version, it is a combination of the old "Free of Capture and Seizure" and "Strikes, Riots, and Civil Commotions" warranties. War risks are broadly defined to include everything from seizure of the vessel to damage sustained from torpedoes and mines dragged from the bottom. For that reason alone, it is critically important that commercial fishermen purchase special war risk insurance which is attached as a rider on the hull policy.

Salvage and Sue and Labor Clauses

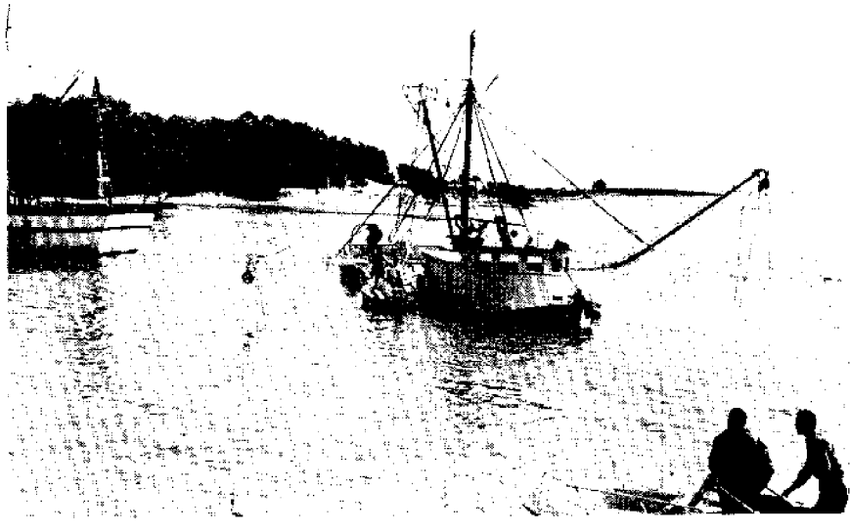
The "Salvage Clause" and "Sue and Labor Clause" are very similar in all the forms and have been relatively infrequently litigated. The Salvage Clause simply states that the underwriter will be responsible for salvage charges incurred to preserve the insured property. The purpose of the Sue and Labor Clause is to encourage the assured to take all reasonable steps that a prudent uninsured owner would take, once a misfortune has overtaken the venture, to protect the property insured and to save it from further damage after a loss has been incurred. Obviously, if a major expense is anticipated, every effort should be made to notify and involve the insurance company as soon as possible. In any case, insurance companies would much rather pay reasonable sue and labor charges under the policy than a total loss.

Miscellaneous

The remaining clauses in the hull policy can be summarized quite briefly. The "Change of Interest Clause" provides for immediate

termination of the policy if the vessel is sold or chartered on a bareboat basis unless the underwriters agree in writing. The "Cancellation Clause" provides for termination of the policy if the premium is not paid within 30 or 60 days, depending upon the form used. The "Total Loss Clause" provides that there will be no recovery for a constructive total loss unless the expense of recovering and repairing the vessel exceeds the agreed value. Finally, the "Claims Clause" specifies: (1) how the underwriter must be notified of loss; (2) that the underwriter decides the port where the damaged vessel is repaired; and (3) that the underwriters have a right of veto as to which repair firm is hired.

This concludes the discussion of the hull policy and its protection for the assured. There is, however, one last rider to mention—it is coverage for which the assured pays but which benefits the ship's mortgage holder and not the assured. It is known as "Breach of Warranty," and most banks today insist the vessel owner purchase it. Very simply, it is fall-back insurance for the bank; if for some reason the vessel is lost and a claim is denied under the hull policy, the bank may recover the amount that is outstanding on the ship's mortgage. If the owner loses, the bank still wins.



The trawler *Beach King*, out of Darien, Ga., half submerged in the waters near Amelia Island in Florida, December 1970. The people on board were rescued by the Florida Marine Patrol and the Nassau County police; the shrimper eventually broke up on rocks nearby. *From the files of the* National Fisherman.

Chapter Four
The Protection and Indemnity Policy

Categories of Losses

The protection and indemnity (P & I) policy is much more straightforward and is easier to understand than the hull policy. Its objective is to indemnify, or pay the owner back, for liabilities created by the insured vessel which are not already covered in the hull policy. Typically, five categories of liabilities are covered. The first category is by far the most important and the reason this type of policy was first developed: compensation and medical expenses for the injury or death of any member of the crew. The details of personal injury actions will be discussed later in this chapter.

The second category involves damage caused by the vessel to "any fixed or movable object or property of whatever nature." That would seem to include other vessels; however, a clause later in the policy specifically excludes coverage which is already provided under the hull policy. Unless that later clause is canceled, then, the basic hull policy collision clause covers damage to other vessels caused by collision. The broad language of this clause goes much farther than the hull policy. It would include damage to docks and piers from collision, damage to docks and moored vessels from excessive wakes, and even damage to properly marked stationary fishing gear by a trawler.

The third category covers the expenses involved in the removal of the wreck of the vessel where that removal is required by law, but if the assured recovers any salvage value from the wreck, that amount will be deducted from the claim.

The fourth category involves fines or penalties levied against the vessel by any state, federal, or foreign government as the result of some violation of laws, but this clause will not apply if they result "directly or indirectly from the failure, neglect, or default of the assured. . . .to exercise the highest degree of diligence to prevent a violation of any such laws." Thus, a fine for negligent operation of the vessel would be paid if the assured had no knowledge that his crew was negligent or reckless and had made every effort to find crew members who were competent and qualified.

The final category covered under the P & I policy is that for expenses involved in investigating and/or defending claims arising out of a liability of the assured covered by the P & I policy. This is

particularly important in the area of crew injuries, where the costs of defending against such claims may be substantial.

That is basically all that the P & I policy covers. However, its application is far more complex, especially in the areas of personal injury and death. The important thing to remember is that the P & I policy comes into force only when there is an obligation which the vessel owner is legally liable to pay. In regard to personal injury, there are three independent causes of action an injured fisherman can pursue and for which the vessel may be found liable.

Maintenance and Cure

The first and oldest remedy available to an injured fisherman is known as maintenance and cure. It is defined as the legal obligation of the vessel owner to maintain and cure a seaman injured in the service of the vessel. That definition sounds simple enough, but the cases to be discussed will demonstrate the complexity of its application. The rationale for this remedy is that the vessel owner has an obligation to treat illness and injury aboard ship where the seaman has no alternative for treatment; that obligation continues ashore until the injured seaman has recovered to the maximum extent practicable.

A basic question, which was disputed for some years, was whether or not a fisherman, operating under a lay or shore system, could be considered a seaman and thus qualify for the maintenance and cure remedy under general maritime law. The question was considered in both *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955) and *Sterling v. New England Fish Co.*, 410 F. Supp. 164 (W.D. Wash. 1976). Vitco and Sterling were both ship's cooks; Vitco suffered a series of heart attacks on board a California tuna boat, while Sterling injured his right knee disembarking from a purse seiner in Ketchikan, Alaska. Both men were found to be seamen under general maritime law and entitled to maintenance and cure. Today the issue is seldom disputed.

One might assume that the phrase "in the service of the vessel" might limit recovery to injuries received while actually aboard the vessel. However, courts have taken a broader view and extended the remedy to incidents which occur ashore if they are related to the "service of the vessel." In the *Betsy Ross*, 145 F.2d 688 (9th Cir. 1944), seaman Ruljanovich was injured in a warehouse on land while getting a net for the vessel on which he was employed. The California Industrial Accident Commission argued that it was a workmen's compensation case and that they had exclusive jurisdiction. The court found, however, that his

actions were consistent with maritime employment and Ruljanovich was allowed to recover under maintenance and cure.

After maintenance and cure has been awarded, there is the problem of when it should be terminated. Progress is often difficult to measure with chronic back and shoulder injuries. In *Luksich v. Misetich*, 140 F.2d 812 (9th Cir. 1944), the court considered the appropriate recovery period for a fisherman suffering from a dislocated shoulder. The court stated that recovery should not be extended beyond the time when the maximum degree of improvement to his health was reached. They found no authority for the proposition that a longer period was justified or that a seaman permanently injured in the course of his employment should receive maintenance for life. In *Baun v. Hudson*, 108 F. Supp. 523 (D. Alaska 1952), a fisherman sought maintenance for the period of disability resulting from the aggravation of an old back injury while working aboard the defendant's fishing vessel. The court concurred and held that, although the injury was apparently permanent, maintenance would be allowed only for the period of time after the voyage when an improvement in his condition may reasonably be expected from nursing, care, and medical treatment.

The duty to disclose prior injuries or illnesses by a crew member was the principal issue in *Fardy v. Trawler Comet*, 134 F. Supp. 528 (D. Mass. 1955). In that case, the plaintiff John Fardy shipped aboard the fishing vessel *Comet* on December 6, 1952. He was not asked and did not disclose anything about his health or prior medical history, but just two weeks earlier, he had been diagnosed as having an abnormal thyroid and was advised to have an operation within two months. Therefore, he knew that the work would probably prove to be too difficult for him and that he would soon have to have an operation that would require a week in a hospital and a period of convalescence. On December 31, 1952, on his return from his second trip on the *Comet*, Fardy was unable to work until he had the thyroid operation and had recovered from its effects. He sought maintenance for that period, and payment of his medical expenses. The vessel owner defended the suit on two grounds: (1) the non-disclosure of the illness; and (2) the lack of liability for an illness which did not really occur on the vessel. The court found in favor of the vessel owner and held that a fisherman is bound to disclose to a prospective employer the existence of a disease which he knows is likely to incapacitate him. Furthermore, the judge noted that he did not believe that maintenance, however much it may have been extended in recent years, was intended to impose liability for an elective operation which the seaman knew about before his employment.

A problem related to the disclosure issue is the case where the fisherman is not aware that he is in the beginning stages of a disease when he joins a vessel. In *Dragich v. Strika*, 309 F.2d 161 (5th Cir. 1962), the plaintiff seeking maintenance and cure was a tuna fisherman who was unable to continue working because of the progressively debilitating effects of Parkinson's Disease. In a review of previous cases on this issue, the court found that maintenance and cure should be granted unless it could be shown that the seaman knowingly or fraudulently concealed the illness from the shipowner. In this case, the fisherman was unaware that he was suffering from the illness when he joined the vessel and was therefore entitled to receive maintenance and cure.

Unlike the remedies to be discussed later in this chapter, maintenance and cure is only intended to compensate an injured fisherman for expenses actually incurred. In *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293 (5th Cir. 1973), a menhaden fisherman was injured in a fall aboard his vessel. He was treated in a Public Health Service Hospital, which until recently provided free medical care to injured seamen—a little-known subsidy to vessel owners provided by the federal government. The fisherman claimed maintenance expenses for the period in which he was a patient at the hospital, when, in fact, he incurred no medical expenses. The court held that because an award of maintenance and cure is intended to compensate the injured seaman for monies spent for ordinary support and medical expenses during the course of treatment, it is essential that the plaintiff actually incur those expenses. But when the fisherman refuses treatment, is cared for through independent charity, or, as in this case, availed himself of a free public facility, the law clearly requires that no maintenance and cure be given for the days voluntarily spent without care or under public or private charity. This case was followed in *Bosarge v. Triple T Boats, Inc.*, 403 F. Supp. 1260 (S.D. Ala. 1975), in which an eighteen-year-old fisherman was injured by a chain aboard the defendant's vessel. He recovered from the injury at his parents' home and incurred no actual expenses. Maintenance and cure was denied, since he could not prove any expenses.

Jones Act

Congress recognized the limitations of the maintenance and cure remedy when it passed the Jones Act of 1920. This statute provides that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (46 U.S.C. 688)

Although the statute is based upon the negligence concept, it eliminates or modifies several important defenses for the vessel owner. Under negligence law of that era, the "fellow servant rule" prevailed. Simply stated, that rule provided that a defendant employer would not be found liable if the injury was caused by the negligence of a fellow employee. That defense was eliminated in the Jones Act. The harsh contributory negligence rule was also eliminated; that rule prohibited an injured party from recovering damages as the result of someone else's negligence if he had also been guilty of some minor degee of negligence. The rule was replaced with the comparative fault concept, which will allow a seaman to recover from his injuries even if partially negligent, but will cause the eventual judgment to be reduced by a percentage representing his degree of fault.

The greatest number of Jones Act cases occurred between 1920 and approximately 1950. The statute served as the vehicle for nearly all of the seamen's personal injury and death actions during that period. In the late 1940s and early 1950s, the Supreme Court reformulated the doctrine of "unseaworthiness" and in effect used the power of "judicial legislation" to create a remedy that was more desirable than the Jones Act. The unseaworthiness remedy will be discussed in detail in a later part of this chapter. The continuing vitality of the Jones Act remedy is based upon the fact that by statute the plaintiff is entitled to a trial by jury. Both maintenance and cure and unseaworthiness are considered remedies afforded by general maritime law, and thus are tried only before a judge without a jury. Since a jury is likely to be more sympathetic in the awarding of damages than a judge, the injured seaman will virtually always allege negligence under the Jones Act in his complaint. Through a legal doctrine known as "pendent jurisdiction," the jury is then able to decide not only the Jones Act negligence issue, but also the maintenance and cure and unseaworthiness claims as well.

To prevail in a Jones Act case, an injured fisherman must be prepared to prove the following:

(1) the plaintiff was a seaman and a crew member of the vessel involved;
(2) the defendant was the owner of the vessel at the time of the accident;
(3) the plaintiff was injured while in the service of the vessel;
(4) negligence on the part of the defendant was a proximate cause of the plaintiff's injuries; and
(5) the extent of plaintiff's damages.

The cases applying the Jones Act can be broken down into two basic categories: first, where it is alleged that the defendant vessel owner failed to provide a safe place to work; and, second, when it is alleged that the injury occurred as the result of the negligence of a fellow servant—the captain or another crew member.

A number of cases will be considered to illustrate the kinds of conditions courts have found unsafe. In *Esta v. Persohn*, 44 S.2d 202 (C.A. La. 1950), the plaintiff fisherman sustained a serious foot injury when one of the shrimp vessel's trawl doors fell on his foot. No tackle was available to move the door safely; the plaintiff was moving it by hand at the defendant's direction. The court found that there was negligence on the part of the defendant in failing to equip his vessel with the proper line and thus requiring that the operation be performed in a dangerous manner.

In *Grantham v. Fishing Boat Redwing*, 235 F. Supp. 89 (E.D.S.C. 1964), *aff'd*, 344 F.2d 590 (4th Cir. 1965), the plaintiff's decedent drowned while serving as a member of the defendant's fishing vessel. The deceased fisherman was a crew member of the *Redwing*, a menhaden purse seiner based in South Carolina. After helping to clean the nets after a day of fishing, the decedent went into the water to wash off, was carried away by the tide, and drowned. The court found that if there were life jackets aboard, they were not accessible; the crew had no idea of their whereabouts; and at the time of the fatality neither captain nor mate was supervising. The court held the vessel negligent under six counts:

(1) in allowing the crew to wash in the tidal river without supervision or proper equipment;

(2) in failing to have life-saving equipment aboard the purse boats;

(3) in failing to have adequate, accessible life-saving equipment aboard the *Redwing*;

(4) in failing to instruct or inform the crew as to life-saving equipment aboard and its use;
(5) in failing to properly supervise all work until its completion; and
(6) in failing to follow and obey United States Coast Guard regulations for uninspected vessels.

Poor ventilation was the negligence alleged in *Hill v. Atlantic Navigation Co.*, 218 F.2d 654 (4th Cir. 1955). In that case, also aboard a menhaden seiner, flammable gases were allowed to accumulate in the crew's quarters which ultimately exploded and severely burned the plaintiff. The forepeak was heated with a wood stove, which was started by dousing the wood with fuel from a nearby kerosene or gasoline can. The court held that the vessel operators had failed to use due care to make the sleeping quarters safe for occupancy.

Winch accidents are one of the more frequent causes of crew injuries. In *Justillian v. Versaggi*, 169 F. Supp. 71 (S.D. Tex. 1954), a seventeen-year-old crew member aboard a shrimp boat lost several of his fingers while attempting to keep a cable from jumping off the winch drum. The court held that the owner of the boat was negligent in (a) failing to provide the fisherman with a safe place to work, (b) in providing a cable of such length or equipment of such character that the cable would "jump," and (c) in that the captain, knowing that the fisherman would attempt to push the cable back, failed to instruct him as to the proper method of attempting such a task. Other cases have focused on alleged design defects or malfunctions which cause the winch to operate improperly, such as in *Radisch v. Franes-Italian Packing Co.*, 158 P.2d 435 (Cal. App. 1945).

Negligence of fellow crew members in the operation of winches has also caused its share of injuries. In *Hudgins v. Gregory*, 219 F.2d 255 (4th Cir. 1955), the plaintiff suffered a hand injury when a fellow crew member operating the winch mistakenly took up cable after being signaled by the plaintiff to slack off. The defendant vessel owner was held liable. In *Nolan v. General Seafoods Corp.*, 112 F.2d 515 (1st Cir. 1940), the mate selected a line for hoisting the net which was too small in diameter. It parted under load, injuring the plaintiff fisherman. The court found that the mate was careless in selecting the wrong-size line and found the vessel owner liable for the injuries caused.

Another example of fellow-servant negligence under the Jones Act is *Martinez v. Star Fish & Oyster Co.*, 386 F. Supp. 560

(S.D. Ala. 1974). Martinez was a new crew member aboard a shrimper out of Galveston. While the vessel was at anchor, the plaintiff left the galley and headed aft; there he slipped on some oil on the deck, fell backward, and struck his head and lower back on the forward fish hatch. Prior to the accident, the plaintiff and at least one other crew member had complained to the captain about diesel oil from an above-deck fuel tank causing a slippery condition. Other than having the deck washed down, the captain did nothing further to prevent the accumulation of oil on the deck. The court found that negligence did exist on the part of the defendant's captain and, therefore, on the part of the defendant in failing to correct the oily condition of his decks despite complaints from his crew members.

Unseaworthiness

The most important remedy for an injured seaman today is the doctrine of unseaworthiness. Simply stated, the doctrine enables an injured seaman to recover against the vessel if his injury was caused by an unseaworthy condition of the vessel, its equipment, or crew. This is true whether or not the unseaworthy condition was caused by the negligence of the vessel owner, which is the standard required under the Jones Act. The doctrine dramatically expands the potential liability of the vessel owner and his insurance underwriter. In computing the award, as in Jones Act cases, contributory negligence on the part of the injured seaman will not prohibit the award, but the award will be reduced in proportion to his degree of negligence.

Although the remedy was available earlier, it was not extensively used in personal injury cases until the United States Supreme Court reviewed and in effect expanded the doctrine in the case of *Mitchell v. Trawler Racer*, 362 U.S. 539, 80 S. Ct. 926 (1960). The plaintiff in that case had been unloading fish at a pier in Boston. He finished the job, went below to clean up, and then attempted to go ashore. To reach the ladder on the pier, he stepped on the vessel's rail. He slipped on "some slimy substance," probably fish gurry created during the unloading of the vessel, fell, and injured his back. His claim against the vessel was that it was "unseaworthy" for the purpose of disembarkation. The issue presented to the Supreme Court was whether or not this condition of so-called "transitory unseaworthiness" should be judged according to the standards of common-law negligence. That standard would require that the owner had to have some knowledge

of the defect and that he failed to take appropriate corrective action. The court held, however, that liability for unseaworthiness is independent of negligence or notice, and granted the plaintiff recovery for his injuries. Tracing the gradual development of the case law on the subject, they found an evolution in which unseaworthiness liability had become divorced from concepts of negligence. Although recovery is substantially easier under the unseaworthiness concept, the court took great pains to point out that although the duty to provide a seaworthy ship is absolute, the vessel owner is not simply liable for all injuries which occur aboard. They stated:

> This is not to suggest that the owner is to furnish an accident free ship. The duty is. . . only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection but reasonable fitness. . . a vessel reasonably suitable for her intended service.

Despite the court's effort to limit its holding, the impact of the case was predicted by dissenting Justice Frankfurter: "The owner is now regarded as an insuror who must bear the cost of insurance."

The most common type of unseaworthiness case involves injury to a seaman as the result of the failure of some piece of equipment aboard the vessel. Under certain circumstances, the vessel owner might be able to recover against the equipment manufacturer in a products liability action.

In *Texas Menhaden Co. v. Johnson*, 332 F.2d 527 (5th Cir. 1964), the plaintiff was operating a winch and boom, tightening the purse line on a menhaden purse seiner. The boom buckled suddenly, and the fisherman's hand was drawn into the winch. The court held that failure of a piece of equipment under proper and expected use is a sufficient predicate for a finding of unseaworthiness. The same standard was applied in *Gibbs v. Kiesel*, 382 F.2d 917 (5th Cir. 1967). In that case, the wooden doors of a shrimp net fell on and injured the plaintiff. There was some question as to whether the doors fell because a cable broke or because they were improperly tied down. The courts found that either condition rendered the vessel unseaworthy because the doors were being put to their "ordinary intended use." In *Solet v. M/V Capt. Dufrene*, 303 F. Supp. 980 (E.D. La. 1969), a weld failed on a padeye when a net was being hoisted aboard. The cables, block, and shackle fell, striking Solet. The court held that the weld was defective and the vessel unseaworthy, since the failure occurred when the gear was being used for its intended purpose.

Winch operations remain a difficult problem for safety experts, the winch representing one of the more frequent causes of injuries to crew members. *From the files of the URI Marine Advisory Service.*

In the cases discussed above, all of the equipment failures occurred while the gear was being used in its customary fashion. A slightly different situation is presented in *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980). In that case, a 165-foot menhaden seiner was attempting to salvage a partially submerged 45-foot shrimp trawler. The captain ordered the crew to attach the seiner's inch-and-a-quarter nylon mooring line to the shrimper and began pulling. The line snapped under the load, whipped forward, and severely injured Allen, who was standing on the vessel's bridge. The court found that using a mooring line for towing a partially submerged 45-foot vessel was a classic case of unseaworthiness. They held that misuse of even nondefective, otherwise seaworthy equipment can create an unseaworthy condition.

Failure to have certain equipment on board was the unseaworthy condition in *Stevens v. Seacoast Co.*, 414 F.2d 1031 (5th Cir. 1969). A young and inexperienced fisherman was injured aboard the oyster dredger *Elena* on the Gulf Coast. He accidentally grabbed a chain for support which was being used to haul back the dredge. His hand was pulled through a block and severely injured. Although the court stated that the new crew member should have been more closely supervised, they did not find the vessel unseaworthy for that reason. The court based its unseaworthiness determination on the lack of a radio to call for assistance after the injury occurred and the lack of a first-aid kit with sedatives to lessen the pain and suffering felt by the plaintiff.

Undermanning of a vessel can also lead to a finding of unseaworthiness. Captains who occasionally fish shorthanded should keep the following cases in mind the next time they leave the pier without a full complement of crew members. In *June T., Inc. v. King*, 290 F.2d 404 (5th Cir. 1961), a shrimp trawler was fishing with only two men aboard instead of the customary three. The third crew member had come aboard the vessel intoxicated, became ill, and left the vessel before fishing began. When the plaintiff's hand got caught on a cable, there was no one else on deck to shut off the winch, and he was severely injured as a result. The court found that since the accident could have been avoided if there had been a third crew member on deck, the vessel was unseaworthy.

Almost identical fact patterns were present in *Smith v. Seitter*, 225 F. Supp. 282 (E.D.N.C. 1964) and *Sams v. Haines*, 229 F. Supp. 746 (S.D. Ga. 1969). They reaffirmed the principle that a vessel must be "reasonably suited" for the operations it will conduct, and that concept includes the number of crew members required to safely undertake all the duties involved. In the *Petition of New England Fish Co.*, 465 F. Supp. 1003 (W.D. Wash. 1979), the loss of the fishing vessel *Deep Sea* in the waters off Kodiak, Alaska, was attributed to the undermanning and incompetence of the crew, and the vessel was found unseaworthy.

Besides the problem of undermanning, a particularly violent crew member can render a fishing vessel unseaworthy as well. In *Clevenger v. Star Fish & Oyster Co.*, 325 F.2d 397 (5th Cir. 1963), the plaintiff was unloading fish from his vessel when he was attacked by Whitaker, a fellow crew member. Whitaker drove an ice chisel (a steel bar, one inch thick, four feet long, ground to a sharp point at one end) into Clevenger's back, severing two of his ribs and puncturing a lung. The court found that a "defective" crew renders a vessel unseaworthy as readily as defective equipment or a leaky ship. The standard to apply when considering whether a particular crew member is defective is whether or not he is equal in disposition and seamanship to the ordinary men in the calling. In this case, the court held that Whitaker's attack on Clevenger was a breach of the warranty of seaworthiness and Clevenger was allowed to recover against the vessel.

A similar result was found in the case of *Claborn v. Star Fish & Oyster Co.*, 578 F.2d 983 (5th Cir. 1978). Ironically, the same company was the defendant some 15 years after the *Clevenger* decision. In this case, Claborn was stabbed to death by a fellow crew member who had been drinking for several days and had gone nearly a week without sleep. The court found that the attack was unprovoked, sudden, and extraordinarily savage. They held that he was not equal in disposition to ordinary seamen and that his presence aboard the vessel made the vessel unseaworthy as a matter of law. The court also found that the shipowner's lack of knowledge of the seaman's "defect," or dangerous condition which rendered the vessel unseaworthy, was not an adequate defense.

Despite the relative ease of demonstrating an unseaworthy condition, occasionally courts do find that a vessel is "reasonably suitable for her intended service" and deny recovery to injured crew members—especially if the injury is caused by the crew member's own recklessness. In *Little v. Green*, 428 F.2d 1061 (5th Cir. 1970), plaintiff Little was acting as a rigman aboard the defendant's shrimp trawler. He was operating winches to bring in the two nets when the cable attached to one net overrode or wound upon itself on the winch drum. Little tried to correct the override by kicking it. His leg was caught in the cable and drawn into the winch and he was seriously injured. Acting without the captain's knowledge, Little had chained together the vertical levers that controlled the

power to the two winches operating the separate nets with a jury-rigged appliance he had brought aboard. The effect of this chain device was to keep the power to the winches locked in the on or incoming position without the necessity for the rigman's holding the two levers with his hands. Consequently, when Little's foot was caught, the winch power could not be stopped by simply releasing his hand hold on the levers.

In its ruling, the court stated that the rationale behind the doctrine of unseaworthiness is to protect seamen from dangerous conditions *beyond their control*. They found that his injury was attributable to his own contrivance, not to the machinery provided or to procedures prescribed by the vessel. The court rejected recovery for this condition of temporary unseaworthiness *deliberately* brought about, without the shipowner or captain's knowledge, by the seaman who was injured. The language of *Mitchell v. Trawler Racer*, discussed in the beginning of this section, is important to remember:

> The standard is not perfection but reasonable fitness: not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

War Risk, Pollution, and Longshoremen

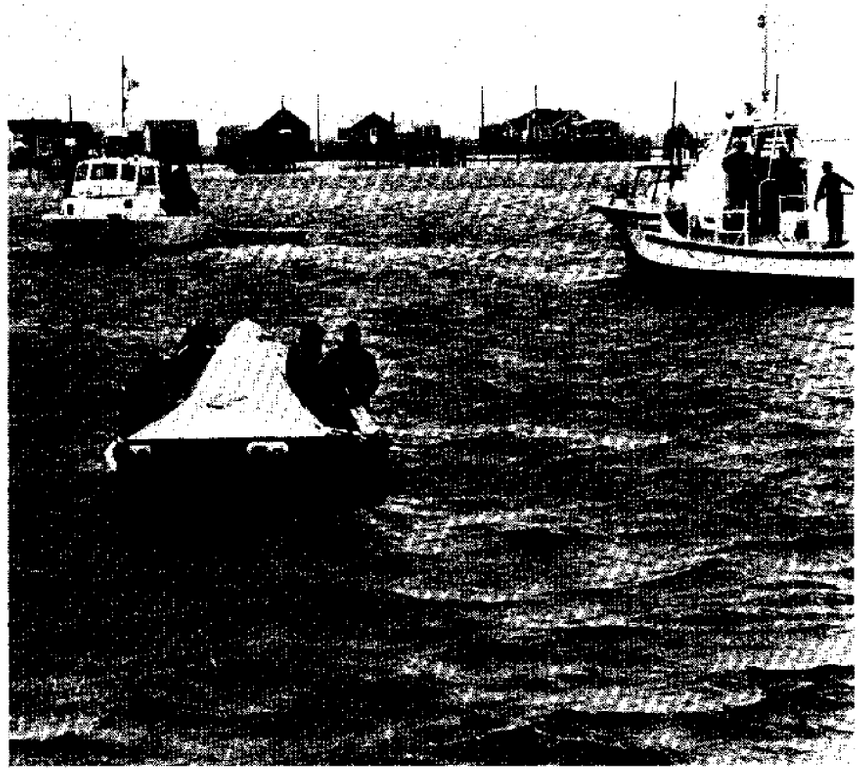
In addition to the basic coverage provided by the protection and indemnity policy, three additional issues are covered by means of special endorsements. They are not automatically included in the policy, and must be added by the broker.

The first endorsement covers war risk protection and indemnity, which is typically excluded in the standard protection and indemnity policy. This clause would come into effect if a crew member were injured or killed if a mine or torpedo dragged to the surface in a net exploded on contact with the vessel. Damage to the vessel would be covered by the hull insurance war risk endorsement, discussed in Chapter Three.

The second endorsement covers damages from accidental pollution caused by the vessel. It includes damage to property and the costs of cleaning up the polluting substance. Coverage is not terribly expensive, and it gives the vessel owner protection from yet another potential liability.

The final endorsement is of critical importance to any vessel owner who employs lumpers to unload the vessel. Lumpers are

provided protection by the federal Longshoremen's and Harbor-workers' Compensation Act (33 U.S.C. 901-50). Compensation under this law includes a wage allowance and medical expenses as well as scheduled recoveries for temporary or permanent total disability and permanent partial disability. The standard protection and indemnity policy specifically excludes longshoremen, and such an endorsement must be added to provide the vessel owner with protection. It is particularly important to maintain this type of coverage, since the vessel owner is not likely to have knowledge of the lumper's previous medical history. It can be very frustrating to pay for a "work-related" back injury which may have occurred far from the vessel's hold. Longshoremen's insurance is a very good idea even if the vessel owner only occasionally uses lumpers.



The URI Marine Advisory Service with the U.S. Coast Guard giving commercial fishermen practical training in survival methods and gear in the port of Galilee, R.I. *Photo by Tom Carbone, Maine Fish and Game Department.*

Conclusion

The dynamic interaction of marine insurance and law should, at this point, be obvious. It is a relationship that pervades every aspect of the business of commercial fishing. This guide is an effort to explain both the legal exposures involved in the operation of a commercial fishing vessel and the corresponding perils which can be insured against.

Marine insurance has become too costly to treat with benign neglect. Insurance coverage should be examined annually to prevent the cost of over-insurance or the risks of under-insurance. The intelligent vessel owner ought to become a more informed marine insurance consumer. Issues like unseaworthiness are really moving targets, since the standards a vessel owner must maintain are constantly shifting.

In addition, it would be wise to take a hard look at vessel operations in light of the cases discussed earlier. Is the winch on board holding a future accident? How many vessel owners have fished shorthanded when a crew member became ill? In other words, a little preventive *legal* maintenance might be just as important in the long run as the routine maintenance on hull and machinery.

Good luck and safe fishing.