

## *The Fire Defenses Under U.S. Law*

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### I INTRODUCTION

Prior to the adoption of the Carriage of Goods by Sea Act,<sup>1</sup> contractual clauses excusing or limiting a maritime common carrier's liability for negligent acts of the carrier or its servants or agents were deemed void as against public policy.<sup>2</sup> The carrier was viewed as an insurer for damage to cargo, including damage resulting from fire.<sup>3</sup> The only exceptions to the carrier's liability were where damage resulted from acts of God, acts of a public enemy or inherent defect of cargo.<sup>4</sup> In 1851, Congress passed the Limitation of Shipowner's Liability Act,<sup>5</sup> which limited this hitherto essentially unlimited liability regime. The Limitation Act provided that the shipowner could limit its liability to the value of the owner's interest in the vessel plus pending freight, if certain requirements were met.<sup>6</sup> A prominent feature of the Limitation Act was an affirmative defense providing complete exoneration from liability for damage caused by fire.<sup>7</sup> This section came to be known as the Fire Statute.

In 1936, Congress enacted the Carriage of Goods by Sea Act.<sup>8</sup> COGSA also contains a fire defense.<sup>9</sup> The COGSA fire exception enables the carrier to escape liability for cargo damage under certain circumstances.<sup>10</sup> COGSA

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<sup>1</sup> 46 U.S.C. app. §§1300 et seq.

<sup>2</sup>See Williams, *The American Maritime Law of Fire Damage to Cargo: An Auto-de-Fe for a Few Heresies*, 26 Wm. & Mary L. Rev. 569, 572 (1985).

<sup>3</sup>See id.

<sup>4</sup>See id.

<sup>5</sup>46 U.S.C. app. §§181-88.

<sup>6</sup>See id. §§183 (governing amount of liability) and 185 (governing petition for limited liability).

<sup>7</sup>See id. §182.

<sup>8</sup>46 U.S.C. app. §§1300 et seq. (COGSA).

<sup>9</sup>See id. §1304(2)(b) (hereinafter the COGSA fire exception).

<sup>10</sup>See id.

explicitly states that it does not modify or revoke the Fire Statute.<sup>11</sup> Thus, depending upon the contractual relationships between the various parties, both the Fire Statute and the COGSA fire exception often supply defenses to the same action.

The Fire Statute and the COGSA fire exception have different words but similar purposes. Their interpretation, and the elements and burdens of proof for each defense, have been determined by the judiciary. This paper will examine each of the fire defenses, the elements of a fire damage claim, the burdens of proof involved, and how the courts have reacted recently to fire defenses.

## II THE LANGUAGE OF THE STATUTES

### *A. The Fire Statute: Its Provisions and Application*

The Fire Statute provides:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.<sup>12</sup>

This section immediately prompts three questions: (1) who qualifies as an owner; (2) what property is covered, and (3) what is design or neglect? A complete answer to the first question is to be found in the Fire Statute itself and elsewhere in the Limitation Act, of which the Fire Statute forms a part. The person or entity owning the vessel is expressly covered in the Fire Statute itself. Charterers, who may be “deemed the owner” for purposes of the Act,<sup>13</sup> are covered by language found elsewhere in the larger Limitation Act. This section reads:

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.<sup>14</sup>

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<sup>11</sup>See *id.* §1308.

<sup>12</sup>46 U.S.C. app. §182.

<sup>13</sup>See *id.* §186.

<sup>14</sup>*Id.*

This provision extends the ability to limit liability under the Fire Statute to demise or bareboat charterers (who typically take over complete operational control of a chartered vessel for a period of time), but not to voyage or time charterers.<sup>15</sup>

The Fire Statute applies to claims not just of damage to cargo, but also to those of damage to a wide range of property interests.<sup>16</sup> An owner's protection under the Limitation Act is not limited to claims relating to a bill of lading or other document of title. In other words, the owner can limit its liability for damage to any property ("merchandise") brought onto the ship.<sup>17</sup>

What constitutes "design or neglect" has been answered in case law. Virtually every court that has interpreted this phrase has taken it to mean negligence<sup>18</sup> that either causes the fire or hinders its extinguishment. The negligence must be that of the owner or someone from the owner's corporation at the managerial level.<sup>19</sup>

Taking the language of the relevant portions of the Limitation Act in light of related case law, the Fire Statute applies to actions against an owner or bareboat charterer for loss of, or damage to, property on board the vessel, when that loss or damage was caused by fire. The vessel's owner (including a bareboat charterer) will be able to avoid liability for such loss or damage unless the loss or damage was due to that owner's own negligence.

### *B. The COGSA Fire Exception: Its Provisions and Application*

The COGSA fire exception states, "(2) neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (b) Fire, unless caused by actual fault or privity of the carrier."<sup>20</sup> The COGSA fire exception prompts questions similar to those prompted by the Fire Statute: (1) who qualifies as carrier; (2) what property is covered; and (3) what is actual fault or privity?

As was so regarding the Fire Statute, an answer to the first question is found in COGSA itself. COGSA defines a carrier as not only the vessel's owner (or bareboat charterer), but also as a voyage or time charterer, where the contract of carriage is evidenced by a bill of lading or some other simi-

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<sup>15</sup>See *id.*; Williams, *supra* note 2 at 573 (describing the mechanics of the fire statute).

<sup>16</sup>See Williams, *supra* note 2 at 579.

<sup>17</sup>See 46 U.S.C. §182 (extending coverage to "any merchandise whatsoever, which shall be shipped, taken in, or put on board . . .").

<sup>18</sup>See *infra* notes 32-36 and accompanying text.

<sup>19</sup>See *infra* sections II.D and II.E.

<sup>20</sup>46 U.S.C. app. §1304(2)(b).

lar document of title.<sup>21</sup> Thus, the COGSA fire exception offers protection from liability to a larger class of potential defendants related to the vessel.

The term “actual fault or privity” has been interpreted by courts to mean the same thing that “design or neglect” means in the Fire Statute. In *Accinanto, Ltd. v. Cosmopolitan Shipping Co.*,<sup>22</sup> the United States District Court for the District of Maryland concluded that “actual fault or privity” in the COGSA fire exception is to be construed as substantially equivalent to “design or neglect” in the Fire Statute.<sup>23</sup> In *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*,<sup>24</sup> the United States District Court for the Southern District of New York found that the phrases “design or neglect” in the Fire Statute and “fault or privity” in the COGSA fire exception have been held to have essentially the same meaning.<sup>25</sup>

### *C. Differences Between the Fire Statute and COGSA*

The defendant in a claim for damage to property from a shipboard fire must first determine which fire defense it will assert, or that it will assert both. The Fire Statute is available only to the bareboat charterer or owner, while the COGSA exception is available to any charterer, as well the owner. The Fire Statute can apply to claims arising from the loss of, or damage to, any property brought aboard, while COGSA (and therefore its fire exception) applies only to claims arising from the loss of, or damage to, “cargo” shipped under a bill of lading or other document of title.<sup>26</sup> COGSA only

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<sup>21</sup>See 46 U.S.C. §10301(a) (stating “The term carrier includes the owner or the charterer who enters into a contract of carriage with a shipper”). See id. §1301(b) (defining contract of carriage as “contracts of carriage covered by a bill of lading or similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulated the relations between a carrier and a holder of the same”). See id. §1301(c) (excepting from the definition of “goods,” and therefore from the coverage of COGSA “live animals and cargo which by the contract of carriage is stated to be carried on deck and is so carried”).

<sup>22</sup>99 F. Supp. 261, 1951 AMC 1464 (D. Md. 1951), modified on other grounds, 199 F. 2d 134, 1952 AMC 1651 (4th Cir. 1952).

<sup>23</sup>According to Judge Chestnut: “In my view the phrase ‘actual fault or privity’ contained in [COGSA] is to be construed as substantially equivalent to ‘design or neglect’ in the fire statute.” 99 F. Supp. at 261, 1951 AMC at 1467.

<sup>24</sup>403 F. Supp. 562, 1976 A.M.C. 375 (S.D.N.Y. 1975).

<sup>25</sup>See id. at 566-67, citing *Asbestos Corp. v. Compagnie de Navigation Fraissinet & Cyprien Fabre*, 480 F. 2d 669 (2d Cir. 1973). See also *Ionmar Compania Naviera, S. A. v. Central of G. R. Co.*, 471 F. Supp. 942, 1979 AMC 1747 (S.D. Ga. 1971) vacated and remanded on other grounds sub nom. *Ionmar Compania Naviera, S. A. v. Olin Corp.*, 666 F.2d 897, 1982 AMC 1489, (5th Cir. 1982); *The Buckeye State*, 39 F. Supp. 344, 1941 AMC 1238 (W.D.N.Y. 1941).

<sup>26</sup>COGSA excepts from this provision live animals and deck cargo. 46 U.S.C. app. § 1301(c).

applies from “tackle to tackle,” i.e., from loading until discharge.<sup>27</sup> The Fire Statute does not have such a restriction.<sup>28</sup> By force of law, COGSA applies only to shipments to or from the United States, although it may be, and routinely is, made applicable to domestic shipments by agreement of the contracting parties.<sup>29</sup>

While both statutes provide a defense to a claim for loss of, or damage to, cargo by fire, they are conceptually different. The Fire Statute offers exoneration from liability, while the COGSA fire exception is an exception to liability.<sup>30</sup>

#### *D. The Meaning of “Design or Neglect” and “Actual Fault or Privity”*

The defenses afforded an owner or charterer by both statutes may be overcome by proof of negligence or intent.<sup>31</sup> Once the defendant has met its burden of proof for a fire defense, the burden returns to the plaintiff. In order to defeat a fire defense, the plaintiff must prove “design or neglect” or “actual fault or privity” on the part of the owner or charterer. While these phrases have been held to mean the same thing,<sup>32</sup> just what they mean has never been clearly defined. “Neglect” in the Fire Statute and “fault” in the COGSA fire exception have been said to mean the same thing,<sup>33</sup> and “neglect” has been held to mean negligence, so “fault” must also mean negligence of the owner

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<sup>27</sup>“The term ‘carriage of goods’ covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.” 46 U.S.C. app. § 1301(e). COGSA’s reach may be, and in fact often is, extended before and after by contractual arrangement. See, e.g., *Grace Lines Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 371, 1974 AMC 1136, 1149 (9th Cir. 1974) (COGSA’s terms can be incorporated into a carriage contract even where it would not otherwise govern).

<sup>28</sup>See 46 U.S.C. app. § 182.

<sup>29</sup>See *supra* note 27.

<sup>30</sup>See *Williams*, *supra* note 2 at 577.

<sup>31</sup>See *The Buckeye State*, 39 F. Supp. 344, 1941 AMC 1238 (W.D.N.Y. 1941) (in the Fire Statute design means intent and neglect means negligence). See *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 1943 AMC 1209 (1943) (“design and neglect” in the Fire Statute means the same thing as “actual fault and privity” in the COGSA fire exception).

<sup>32</sup>See *In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 1982 AMC 1710 (2d Cir. 1982); *J. Howard Smith, Inc. v. S.S. Maranon*, 501 F.2d 1275, 1974 AMC 1553 (2d Cir. 1974); *Asbestos Corp., Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 1973 AMC 1683 (2d Cir. 1973); *Alfa Romeo, Inc. v. S.S. Torinita*, 499 F. Supp. 1272, 1980 AMC 2138 (S.D.N.Y. 1980).

<sup>33</sup>See *Hearings on S.1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong. 2d Sess. 13, 141 (1936) (where it was pointed out that “the word ‘fault’ corresponds generally with the word ‘neglect’ and the word ‘privity’ to the word ‘design’”), quoted in *Ta Chi Navigation*, 677 F.2d at 228, 1982 AMC at 1710.

or carrier.<sup>34</sup> Design has been interpreted to mean “a causative act or omission, done or suffered willfully or knowingly by the shipowner,”<sup>35</sup> so privity should mean the same thing. What is nevertheless uncertain is whether proof of merely constructive knowledge is sufficient, or proof of actual knowledge is instead necessary to show “privity” or “design” on the part of the owner or carrier.<sup>36</sup>

### *E. Imputed Liability*

Another troubling issue is whether the negligent acts of agents or servants of the owner or carrier may be imputed to the owner or carrier, enabling the fire defense to be overcome and the owner or carrier to be exposed as a consequence. In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*,<sup>37</sup> the issue was put to the Supreme Court of the United States in a case in which the Fire Statute was invoked. For a unanimous Court, Justice Brandeis responded:

In all cases where immunity from liability for damage by fire was held to be lost because of the neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act.<sup>38</sup>

This appears to mean that, at least under the Fire Statute, the acts of “managing agents” may be imputed to the owner so as to revive the owner’s exposure. The issue then becomes, who are “managing agents?”

In *Consumers Import Co. v. Kawasaki Kisen Kaisha Kaisha*,<sup>39</sup> the Supreme Court considered an argument that, even when a defense under the

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<sup>34</sup>See *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. at 252, 1943 AMC at 1211 (the “neglect of the owner” mentioned in the statute means the owner’s persona; negligence, or in the case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates). Accord *Hershey Chocolate Corp. v. The S.S. Robert Luckenbach*, 184 F. Supp. 134, 1960 AMC 1143 (D.Or. 1960) (quoting *Consumers Import*); *Ta Chi Navigation*, 677 F.2d at 228, 1982 AMC at 1713 (“Neglect as thus used means negligence . . . . If the carrier shows that the damage was caused by fire, the shipper must prove the carriers negligence caused the damage”) (citations omitted).

<sup>35</sup>*The Strathdon*, 89 F. 374, 378 (E.D.N.Y. 1898).

<sup>36</sup>The most probable explanation for the lack of litigation on this issue is there is no need for it. A plaintiff need only show negligence or intent/knowledge to overcome a fire defense. Constructive knowledge is the concept of imputing knowledge onto a defendant because a reasonable person would have had actual knowledge in similar circumstances. This is part of proving negligence. If a plaintiff can show constructive knowledge, it can show negligence, and overcome the fire defense. Courts have never needed to consider if constructive knowledge would suffice for the “design” or “privity” requirement because it is already part of showing negligence.

<sup>37</sup>287 U.S. 420, 1933 AMC 1 (1932).

<sup>38</sup>See *id.* at 428.

<sup>39</sup>320 U.S. 249, 1943 AMC 1209 (1943) (*The Venice Maru*).

Fire Statute protected the owners, a bill of lading signed “for the master” left the ship exposed to liens arising from fire damage. In the course of an opinion holding any such liens extinguished by operation of the statute, Justice Jackson wrote for a unanimous Court: “[N]eglect of the owner’ means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates.”<sup>40</sup>

In *Ore Steamship Corp. v. D/S A/S Hassel*,<sup>41</sup> the United States Court of Appeals for the Second Circuit analyzed a charter party which purported to endow the owner with all of the COGSA defenses, including the fire exception, but with a proviso that: “they do not result from a lack of diligence on the part of the Owners or Managers of the vessel.”<sup>42</sup> Confronting this proviso, the court stated, “It is well settled that such language used in this context refers not merely to a failure of personal diligence on the part of the owners, but also to a failure of diligence by those employed by them to make the ship seaworthy.”<sup>43</sup> While this rendition more specifically defines “managing agents,” the case involved claims of damage not from fire but from seawater,<sup>44</sup> and is therefore not directly on point. Fourteen years later, the Second Circuit clarified the matter in a case involving claims of damage from fire. In *Petition of Skibs A/S Jolund*,<sup>45</sup> the time charterer asserted to cargo claims a defense based on the COGSA fire exception. In the course of discussing whether the alleged negligence was with “the actual fault and privity of the carrier,” the court stated:

If the failure to cover the cargo here was negligence, it was plainly “that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.”<sup>46</sup>

This surely means that if, under COGSA, a carrier is to be held liable for the negligent action of an employee or agent, then that person must have been acting at the time within the scope of his authority. If the plaintiff is able to show that the “manager” was negligent within the scope of his

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<sup>40</sup>320 U.S. at 252, 1943 AMC at 1211.

<sup>41</sup>137 F.2d 326, 1943 AMC 951 (2nd Cir. 1943) (*The Cypria*).

<sup>42</sup>See 137 F.2d at 330, 1943 AMC at 952.

<sup>43</sup>See *id.*

<sup>44</sup>See 137 F.2d at 327, 1943 AMC at 951.

<sup>45</sup>250 F.2d 777 (2d Cir. 1957).

<sup>46</sup>*Id.* at 784.

authority, the manager's negligence may be imputed to the carrier for purposes of overcoming a defense based on the COGSA fire exception.<sup>47</sup>

The United States Court of Appeals for the Ninth Circuit adopted the Second Circuit's view of "privity or knowledge" in *States Steamship Co. v. United States*.<sup>48</sup> In this case, as in the *Ore Steamship* case, the claims involved were not of damage by fire but of loss as a result of the ship's sinking, so this case, too, is not directly on point. It does go to show the developing trend in the circuits to impute the negligent acts of the ship's management personnel to the carrier or owner for purposes of their statutory defenses, provided that the manager was acting within the scope of his delegated authority.

As time passed, and litigation continued concerning what acts could be imputed to a carrier or owner for purposes of overcoming a statutory defense, such as those in the Fire Statute and COGSA, courts more sharply defined the class of "managing agents." In *Asbestos Corp., Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*,<sup>49</sup> the Southern District of New York found that the owners were themselves negligent, but discussed anyway the matter of imputed liability:

The Fire Statute provides that the vessel owner is not liable to the shipper for losses caused by fire on board unless such fire is caused by the "design or neglect of such owner." It is established law that "the design or neglect" through which the owner loses this exemption must be personal to the owner. Negligence on the part of the master, any crew member or agent is not imputed to the owner. *However, courts have found that fault of managing agents to whom the corporation delegates the task of inspection, decisions on precautions and the like is the fault of the owner . . . .* "Actual fault or privity" under COGSA and "design or neglect" under the Fire Statute have the same meaning.<sup>50</sup>

In *Hanson & Orth, Inc. v. M/V Jalatarang*,<sup>51</sup> cargo interests made claims against the shipowner and the stevedore for damage from fire, and the shipowner counterclaimed for general average contribution to expenses from extinguishing the fire. On the way to finding that cargo interests had failed to prove sufficiently a causal link between any negligence on the part of the shipowner or its agents and the cargo's loss, the United States District Court

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<sup>47</sup>In *Jolund*, the court of appeals was also invited to impute "design or neglect" under the Fire Statute, but found it unnecessary, agreeing with the court below that the lack of proof of the fire's cause obviated a finding as to the status of the allegedly negligent "agent," and therefore any ruling as to that status would be treated under the statute. *Id.* at 788.

<sup>48</sup>259 F.2d 458, 1957 AMC 2277, clarified, 1958 AMC 1775. (9th Cir. 1957).

<sup>49</sup>345 F. Supp. 814, 1972 AMC 2581 (S.D.N.Y. 1972).

<sup>50</sup>345 F. Supp. at 821, 1972 AMC at 2588 (emphasis added).

<sup>51</sup>450 F. Supp. 528 (S.D.Ga. 1978).

for the Southern District of Georgia had this to say about imputing negligence in fire fighting to the corporate shipowner:

[The Act] provides that “No owner . . . shall be liable . . . for . . . loss or damage to merchandise . . . by means of . . . fire . . . unless such fire is caused by the design or neglect of such owner.” [COGSA] contains a similar provision. “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . Fire, unless caused by the actual fault or privity of the carrier . . . .” The terms “design or neglect” of the owner and “actual fault or privity” bear the same meaning . . . . Design or neglect means a causative act or omission wilfully or knowingly done or permitted by the owner personally . . . . “Neglect” in the case of a corporate shipowner contemplates negligence of the managing officers and agents as distinguished from the master or members of the crew or subordinate employees. Negligence by a crew in fighting a fire cannot be imputed to a ship owner seeking exoneration from liability.<sup>52</sup>

In 1984, the United States Court of Appeals for the Fifth Circuit was invited in *Westinghouse Electric Corp. v. M/V Leslie Lykes*<sup>53</sup> to consider with respect to imputed liability the difference under COGSA between the fire exception and other carrier defenses. According to the court, “In a COGSA case involving a defense other than fire, the Carrier is liable for the negligence of its servants or agents in the loading, handling, stowing, carrying, caring for, or discharge of the cargo.” Regarding imputed liability, the court stated,

[*Consumers Import* <sup>54</sup> held that] “[n]eglect of the owner” means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates . . . . *Consumers Import* is particularly compelling . . . for two reasons. First, it is the Supreme Court’s most recent word on the Fire Statute. Second, the negligence was . . . by shore-based persons who were delegated the task of designing and planning the stowage. Because the delegees were not managerial agents with a broad range or responsibility in the corporation and because they were “qualified by experience to perform the work,” such negligence was not the “design or neglect” of the owner.<sup>55</sup>

<sup>52</sup>Id. at 537-38.

<sup>53</sup>734 F.2d 199, 1985 AMC 247 (5th Cir. 1984).

<sup>54</sup>320 U.S. 249 (1943). See text *supra* at note 39.

<sup>55</sup>Id. at 210. The court goes on to state that, “Other courts have reached the same conclusion with respect to the delegation of stowage decision in the context of the Fire Statute” (citing *The Ocean Liberty*, 199 F.2d 134 (4th Cir. 1952); *American Tobacco Co. v. The Katingo Handjipatera*, 194 F.2d 449, 1951 AMC 1933 (2d Cir. 1951)). For similar holdings on fires resulting from non-stowage negligence by non-managerial agents, see *Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619, 1961 AMC 2215 (9th Cir. 1961) (*The Robert Luckenbach*); *Globe & Rutgers Fire Ins. Co. v. United States*, 105 F.2d 160, 1939 AMC 912 (2d Cir. 1939). The court also quoted from *Benedict on Admiralty*:

In Chapter 7 dealing with due diligence, it was pointed out that a carrier cannot avoid its statutory

In 1985, the Fifth Circuit further clarified the matter of imputed liability in *Union Oil Co. v. M/V Point Diver*:<sup>56</sup>

The phrase “actual fault or privity” in light of the Limitation Act means complicity by managerial levels in the fault that caused the casualty. Under these principles the owner is relieved of personal liability when he or managerial persons have not been personally negligent or privy to the negligence of servants or agents. It is similar to the Fire Statute’s use of the phrase “design or neglect.” A finding of neglect of owner means personal negligence, or in the case of a corporate owner, negligence of managing officers and agents as distinguished from that of the Master or his subordinates... “Actual fault or privity” as contained in . . . COGSA . . . has been held to be substantially equivalent to “design or neglect” in the Fire Statute.<sup>57</sup>

More recently, in *In re Tecomar S.A.*,<sup>58</sup> the Southern District of New York defined “managing officer” as “anyone whom the corporation has delegated general management or general superintendence of the whole or a particular part of the business,<sup>59</sup> and, in 1996, the Ninth Circuit reiterated its view of the rule of *Consumers Import*, that only the negligent acts of corporate managing officers and agents can be imputed onto the shipowner or carrier.<sup>60</sup> The circuits that have considered the question have all held that in the case of a corporate owner, negligent acts of the corporate managers and agents acting within the scope of their authority are imputable. Because the Fire Statute has been regarded as saying essentially the same thing as the COGSA fire exception with regards to knowledge, if the carrier is a corporation, and it has delegated responsibility to a manager, it too can be held liable for the negligent acts of that manager.

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obligation to exercise due diligence to make its vessel seaworthy by delegating that obligation to another. However, that principle is inapplicable in cases where damage to cargo by fire is within the exemption of the Fire Statute. If a vessel owner delegates to an independent agency of good repute the duty of laying out and supervising the stowage of a vessel or making her seaworthy; or if the owner in this regard relies upon the ship’s officers or other qualified minor employees who are not the owners managing representatives; and the negligence of those delegees is the proximate cause of subsequent fire loss of cargo, that negligence does not of itself defeat the owner’s right to the exemption of the Fire Statute.

2A Benedict on Admiralty §146 (7th ed. 1983). See H. Longley, *Common Carriage of Cargo*, 172-73 (1967).

<sup>56</sup>756 F.2d 1223 (5th Cir. 1985).

<sup>57</sup>Id. at 1228.

<sup>58</sup>765 F. Supp. 1150, 1991 AMC 2432 (S.D.N.Y. 1991) (*The Tuxpan*).

<sup>59</sup>765 F. Supp. at 1180-81, 1991 AMC at 2446.

<sup>60</sup>See *Nissan Fire & Marine Ins. Co., Ltd. v. M/V Hyundai Explorer*, 93 F.3d 641, 1996 AMC 2409 (9th Cir. 1996).

## III

## ELEMENTS OF A FIRE DEFENSE AND BURDENS OF PROOF

*A. Elements of a Fire Damage Claim: Making Out a Prima Facie Case*

A plaintiff does not make a claim for fire loss or damage per se, but simply a claim for loss or damage. In order to establish a prima facie case, the plaintiff need do no more than prove the fact of loss or damage. Ordinarily, when cargo is lost or damaged, the plaintiff may do this by showing, first, that goods were delivered to the shipowner or carrier "in good order and condition" and then, in cases of loss, that the goods were never received thereafter or, in the case of damage, that they were received in that condition.<sup>61</sup> The showing in either case is relatively straightforward. A clean bill of lading proves the delivery of the goods in sound condition. It also proves the contract of carriage that includes an undertaking by the carrier to safely deliver the goods at their destination. A damage survey (often conducted jointly with the shipowner) quantifies the extent of the loss or damage, and a commercial invoice usually proves the cargo's value. Once the plaintiff makes its prima facie case, it falls on the shipowner who would invoke either fire defense to prove<sup>62</sup> that the loss or damage was caused by fire.<sup>63</sup>

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<sup>61</sup>See *Andina Coffee, Inc. v. M/V Ciudad de Armenia*, 1989 U.S. Dist. LEXIS 8522, \*6, 1989 AMC 2546, 2549 (S.D.N.Y. 1989) (holding the claimant must first establish a prima facie case by demonstrating that the cargo was delivered to the carrier in good order and condition and was damaged or missing upon outturn). Accord *United States v. Ultramar Shipping Co., Inc.*, 685 F. Supp. 887, 897, 1988 AMC 527, 541 (S.D.N.Y. 1987); *Black Sea & Baltic Gen. Ins. Co., Ltd., v. SS Hellenic Destiny*, 500 F. Supp. 677, 678 n.3, 1981 AMC 926 (S.D.N.Y. 1980).

<sup>62</sup>See, e.g., *In re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 686, 1990 AMC 1544, 1561 (9th Cir. 1990) (*The Damodar Tanabe*).

<sup>63</sup>It is analytically important to distinguish between negligence and causation. Negligence is the breach of an existing duty. If the owner or carrier is not negligent, although a fire may have caused cargo damage, no duty has been breached. See e.g. *Standard Commercial Tobacco Co., Inc. v. M/V Recife*, 827 F. Supp. 990, 996 (S.D.N.Y. 1993) ("[W]ithout negligence there is to be no liability."). Causation, on the other hand, is how or why the damages were incurred. Although the owner or carrier may have negligently caused a fire, if the fire is not the cause of the cargo damage, or, if the owner or carrier was negligent but such negligence did not cause the fire, causation does not exist. See *Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 1990 AMC 1544 (9th Cir. 1990) (carrier's negligence in not providing a seaworthy ship was not the cause of the fire, so causation was lacking and therefore the carrier could not be held liable). Similarly, in *The Recife*, the court concluded:

Because the *Recife* adhered to the requirements of IMDG Code, it was not negligent in stowing the container which held the calcium hypochlorite pellets on the top of a deck stow. Based on that conclusion, the complaint will be dismissed, notwithstanding the further conclusion that it was just such stowage that gave rise to the fire and the explosion which damaged the cargo. 827 F. Supp. at 1005. The plaintiff must show all four elements of duty, breach, damages and causation in order to make a prima facie case and survive a motion to dismiss.

*B. What is "Fire" and "Fire Damage?"*

When presented with the statutory fire defenses, courts have consistently employed a traditional definition of the word "fire." One general dictionary defines fire as, "the natural agency or active principle operative in combustion: popularly conceived of as a substance visible in the form of flame or of ruddy glow or incandescence."<sup>64</sup> Without a flame, therefore, the shipowner cannot invoke either fire defense.<sup>65</sup> Heat alone does not constitute fire, so liability for damage from heat is not avoidable by resort to a fire defense.<sup>66</sup> Once a flaming combustion has occurred, however, all ensuing consequences, including damage from heat, smoke, explosion, water or chemicals—even jettison of cargo during the fire fight—are covered.

In *American Tobacco Co. v. Gouladris*<sup>67</sup> there was fire attributable to high temperatures in the cargo holds. The plaintiff argued that the carrier should be liable for damage to the cargo caused by the heat before the outbreak of the fire. The court found that "spontaneous heat damage prior to the actual fire is all part and parcel of one continuous and uninterrupted process . . . and is within the scope of the Fire Statute, once actual fire exists."<sup>68</sup> The general rule, traceable to *Schnell v. The Vallescura*,<sup>69</sup> is that, where damage to cargo is caused by two sources, one of which allows the carrier or owner to avoid liability, the carrier or owner bears the burden of proving the extent of damage caused by the source for which the carrier or owner is not liable.<sup>70</sup> This rule is consistent with the allocation of burdens of proof when either fire defense is invoked.<sup>71</sup> The presence of heat independent of fire presents a more troublesome case when the fire was not caused by the carrier or owner. In such a case, the carrier or owner might be responsible for some ascertainable amount of heat damage, but what about the remaining damage?<sup>72</sup> Is

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<sup>64</sup>See 4 Oxford English Dictionary 238 (1961); See also Williams, *supra* note 2 at 583 n.51.

<sup>65</sup>See *id.*; See also *Cargo Carriers, Inc. v. Brown S.S. Co.*, 95 F. Supp. 288, 1940 AMC 2046 (W.D.N.Y. 1950) (heat damage to corn not sufficient to invoke the Fire Statute).

<sup>66</sup>See *The Buckeye State*, 39 F. Supp. at 347, 1941 AMC at 1241 ("fire" in the Fire Statute means "fire caused by ignition or combustion, and it includes the idea of visible heat or light; this is also the popular meaning of the word).

<sup>67</sup>173 F. Supp 140, 1959 AMC 1462 (S.D.N.Y. 1959).

<sup>68</sup>173 F. Supp. at 179, 1959 AMC at 1519. An explosion that causes damage raises a similar problem as the issue of heat damage. See *Republic of France v. United States*, 290 F.2d 395, 1961 AMC 1082 (5th Cir. 1961). The First Circuit recently revisited the explosion problem. See *EAC Timberland v. Pisces, Ltd.*, 745 F.2d 715, 720, 1985 AMC 1584, 1600, at note 7 (1st Cir. 1984) *aff'g* 580 F. Supp. 99 (D.P.R. 1983) (fire defenses applicable when explosion is accompanied almost simultaneously by an immense wall of fire). See also Williams, *supra* note 2 at 585 n.58.

<sup>69</sup>293 U.S. 296, 1934 AMC 573 (1934).

<sup>70</sup>See *id.*; Williams, *supra* note 2 at 585.

<sup>71</sup>See *infra* Parts III.B and Part IV.

<sup>72</sup>See Williams, *supra* note 2 at 585.

the fire to be regarded as an intervening cause reducing the extent of the liability of the owner or carrier?<sup>73</sup> Or is the fire to be regarded instead as a superseding cause, which, according to traditional tort law, would break the causal connection between the owner or carrier's negligence and the damage to the cargo, therefore excusing the owner or carrier from liability?<sup>74</sup>

The location of the fire may be important in determining if the damage to the cargo is indeed damage from fire. The fire defenses provide protection to owners and carriers from liability for fire damage that occurs while the cargo is on the ship.<sup>75</sup> The fire, however, does not have to have *started* on the ship.<sup>76</sup>

### *C. Burdens Of Proof*

After the plaintiff establishes its prima facie case and the defendant proves the loss or damage was caused by fire, the burden of proof ought to fall on the owner or carrier to prove its due diligence in providing a seaworthy vessel.<sup>77</sup> This ought to be so whether the defendant is a carrier raising the fire exception in COGSA, or a shipowner raising the Fire Statute. Only if due diligence is shown, should the carrier or owner be able to claim the ben-

<sup>73</sup>See Restatement (2d) Torts §441 (1965) (defining intervening cause as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed").

<sup>74</sup>See id. §440 ("A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm").

<sup>75</sup>See 46 U.S.C. app. §§ 182, 1304. But see *The Munaires*, 12 F. Supp. 913 (E.D.La. 1935), wherein it was said

The national public policy regarding shipowner's liability for fires is expressed in the Fire Statute, 46 U.S.C.A. § 182. This statute by its terms relieves a shipowner from liability for fires occurring on shipboard, unless caused by his design or neglect. While it does not in express terms relieve a shipowner of liability for fires occurring to cargo on a dock, it does nevertheless permit a shipowner to contract for an exemption for fire damaging cargo on a dock on as broad a basis as that afforded him in respect of fires occurring on shipboard.

*Id.* at 917. In *The Panuco*, 47 F. Supp. 249 (S.D.N.Y. 1942), the court opined that a claimant could recover for damage to goods on a pier from a fire that began on that pier, agreeing with the *Munaires* court that the Fire Statute did not apply to claims of damage to goods ashore. Because the claimant could recover, the pierside claims were properly subject to concursus pursuant to the Limitation Act.

<sup>76</sup>See *id.* (where fire pierside reaches cargo aboard, Fire Statute applicable).

<sup>77</sup>In *Sony Magnetic Products v. Merivienti O/Y*, 863 F.2d 1537, 1989 AMC 1259 (11th Cir. 1989), Judge Kravitch wrote for the court:

A carrier can rebut a shipper's prima facie case by establishing either that it exercised due diligence to prevent the damage to the cargo by properly handling, stowing, and caring for it in a seaworthy ship or that the harm resulted from one of the excepted causes listed in section 1304(2).

863 F.2d at 1539, 1989 AMC at 1262.

efit of one of the fire defenses. After all, the two defenses are accepted as *in pari materia*, and due diligence in providing a seaworthy vessel is usually the prerequisite to asserting a defense under COGSA to a cargo damage claim. A majority of courts, however, have taken the view that due diligence is not a condition precedent to a fire defense under either the Fire Statute or the COGSA fire exception.<sup>78</sup>

#### IV THE CIRCUIT SPLIT—IS DUE DILLIGENCE A CONDITION PRECEDENT TO A FIRE DEFENSE?

##### *A. The Split Described*

The Supreme Court of the United States has not ruled as to whether a defendant must prove due diligence in providing a seaworthy ship in order to assert a statutory fire defense. The federal courts of appeals have divided on the question.<sup>79</sup> The Second Circuit was the first to respond in 1973, when it held in *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre* that a defendant need not show due diligence in order to invoke a fire defense.<sup>80</sup> The Ninth Circuit was the next to look at the issue, six year later. In 1979, the Ninth Circuit held to the contrary in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.* that due diligence is a prerequisite to invoking a fire defense.<sup>81</sup> Since the 1970's, both circuits have dealt with the issue of due diligence several more times.<sup>82</sup> The Second Circuit has adhered to its

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<sup>78</sup>See Part IV.

<sup>79</sup>See generally Sturley, Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases, 67 Tex. L. Rev. 1251 (1989); Wong, Legislative Reform: Intercircuit Conflict With Respect to the Burden of Proof Standard Under the Fire Statute and the Fire Exemption Clause of the Carriage of Goods by Sea Act (COGSA), 20 J. Legis. 91 (1994).

<sup>80</sup>In *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 1973 A.M.C. 1683 (2nd Cir. 1973), Judge Timbers wrote for the court:

Generally a shipper can recover against the carrier for damage to his goods merely by showing that the carrier received the goods in sound condition and delivered them damaged. The burden of proof is on the carrier to show that he exercised due diligence. The fire exemption provisions merely shift this burden of proof to the shipper. If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage.

480 F.2d at 672-73, 1973 AMC at 1687 (citations omitted).

<sup>81</sup>603 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979).

<sup>82</sup>Worth noting is the level of vituperation to which both Circuits subsequently stooped in their disagreement. In *Sunkist*, Judge Kilkenny wrote:

Our overlengthy [sic] analysis of the language in *Asbestos Corp.* is prompted by the casual treatment of the burden of proof by the author of the appellate court opinion. Although relying on COGSA, he completely overlooks the language of §§ 1303(1) and 1304(1) which

view that due diligence is not a prerequisite to invoking a fire defense.<sup>83</sup> The Ninth Circuit has modified its position slightly, but still requires the defendant to prove due diligence before invoking a fire defense where an unseaworthy condition is alleged to have caused the fire.<sup>84</sup> The Fifth and Eleventh Circuits have followed the Second,<sup>85</sup> so that, in three out of the four “admiralty” circuits to consider the issue, proof of due diligence in furnishing a seaworthy vessel is not required to invoke either fire defense.

### B. Second Circuit Case Law

The leading case in the Second Circuit is *Asbestos Corp. v. Compagni de Navigation Fraissinet et Cyprien Fabre*.<sup>86</sup> In this case, a faulty screw worked free of an oil pump in the engine room, allowing oil to spray onto the hot engine where it burst into flames. All of the ship’s fire fighting equipment was stored in the engine room and the fire made it impossible for the crew to access that equipment. Although the cargo damage was due to fire, the court found the basis for the carrier’s liability to be the inaccessible stowage of the firefighting equipment, which rendered the vessel unseaworthy. The court assigned the burden of proof as follows: First to the plaintiff, who must present its prima facie case, i.e., that the cargo was delivered in apparent good order and condition and received in damaged condition; then to the carrier or owner, who must prove that the damage was caused by fire; then back to the plaintiff to show that the fire was a result of negligence by the owner or carrier.<sup>87</sup> As far as the court was concerned, the effect of the Fire

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places the burden of showing due diligence to provide a seaworthy ship squarely on the shoulders of the carrier. It is this burden that appellees must overcome in order to invoke the exemptions of either § 1304(2)(b) or the Fire Statute.

603 F.2d at 1335-36, 1979 AMC at 2798-99. Three years later, the Second Circuit rejoined, per Judge Graafland:

Commenting on this Court’s holding in *Asbestos Corp. Ltd. v. Compagnie De Navigation* that the shipper must prove that the carrier’s negligence caused the fire damage, the Ninth Circuit stated that the ‘use of this language was entirely unnecessary’ and constituted a ‘casual treatment of the burden of proof by the author of the appellate court opinion.’ ... We disagree not only with Sunkist’s unflattering characterization of Judge Timbers’ opinion in *Asbestos*, an opinion that was concurred in by Judges Smith and Hayes, but also with the Ninth Circuit’s interpretation of the interrelation between the Fire Statute and COGSA, an interpretation that is concurred in by no other Circuit.

In re *Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 229, 1982 AMC 1710, 1715 (2d Cir. 1982).

<sup>83</sup>See *infra* § IV.B *infra*.

<sup>84</sup>See *supra* § III.E.

<sup>85</sup>See *supra* §§ III.C and D.

<sup>86</sup>480 F.2d 669, 1973 AMC 1683 (2d Cir. 1973), affirming “the well reasoned opinion of Judge Levet below,” *id.* at 673, affirming 345 F. Supp. 814, 1972 AMC 2581 (S.D.N.Y. 1972). No petition for certiorari was sought from the Supreme Court.

<sup>87</sup>480 F.2d at 672, 1973 AMC at 1687.

Statute or the COGSA fire exception was the same: Invocation of either fire defense shifted the burden of proof from the carrier or owner who had to prove due diligence in furnishing a seaworthy vessel to the shipper, who then had to prove the carrier negligent. According to the court: “[I]f the carrier shows the damage was caused by fire, the shipper must prove the carrier’s negligence caused the damage.”<sup>88</sup> Thus, in *Asbestos Corp.*, the Second Circuit excused the carrier or owner from the usual burden for invoking one of the COGSA defenses.

In 1982, the Second Circuit again dealt with the issue in *In re Ta Chi Navigation (Panama) Corp.*<sup>89</sup> In that case, a fire occurred while the ship was en route from Japan to Panama. Most of her cargo was destroyed, while the ship was gutted and later sold for scrap. The shipowner petitioned for limitation, and various claimants resisted. On the way to denying the petition, the district court found that the explosion of a welding torch started the fire, and that, almost immediately, the fire went out of control.<sup>90</sup> For the district court, stowage of the torch and its acetylene tanks in the engine room was negligence attributable to the shipowner. Adopting the view expressed by the Ninth Circuit in *Sunkist*, the district court then denied the limitation petition. On appeal, the Second Circuit reiterated its position on the burden of proof for fire defenses, i.e., that, to overcome a fire defense, the plaintiff must show that the damages from fire were due to the defendant’s “design or neglect” or “actual fault or privity.”<sup>91</sup> The court of appeals then discussed the circuit split on this matter,<sup>92</sup> but reaffirmed its own precedent. For himself and Judges Mansfield and Kearse, Judge Graafeiland wrote:

When Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so. See 46 U.S.C. § 1304(2)(q). The Sunkist court would read the language of subsection (q) into subsection (b) [fire exception], “although Congress did not put it there.” This Court has not put it there either. We adhere to our prior holding that, if the carrier shows the damage was caused by fire, the shipper must prove that the carrier’s negligence caused the fire or prevented its extinguishment. If the shipper fails to meet this burden, the action must be dismissed.<sup>93</sup>

Having taken a stand and reaffirmed it, the Second Circuit has not spoken again on the matter. Even in the interval between its decisions in *Asbestos*

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<sup>88</sup>480 F.2d at 673, 1973 AMC at 1687-88.

<sup>89</sup>677 F.2d 225, 1982 AMC 1710 (2d Cir. 1982). No petition for certiorari was sought.

<sup>90</sup>*In re Complaint of Ta Chi Navigation (Panama) Corp.*, 504 F. Supp. 209, (S.D.N.Y. 1980), reversed and remanded, 677 F.2d 225, 1982 A.M.C. 1710 (2d Cir. 1982).

<sup>91</sup>677 F.2d at 229, 1982 AMC at 1715.

<sup>92</sup>See *id.* See also *infra* notes 101-02 and accompanying text (discussing the *Sunkist* case and the Ninth Circuit’s due diligence prerequisite).

<sup>93</sup>677 F.2d at 229, 1982 AMC at 1715 (citations omitted).

*Corp.* and *Ta Chi Navigation*, however, other circuits had followed the Second Circuit's lead.

### C. Fifth Circuit Case Law

In 1984, the Fifth Circuit announced its agreement with the Second Circuit's refusal to make due diligence a prerequisite to invoking a fire defense. In *Westinghouse Electric Corp. v. M/V Leslie Lykes*,<sup>94</sup> after a shipboard fire destroyed a cargo of steel rotors, cargo interests brought suit, and the carrier sought exoneration pursuant to the Fire Statute and the fire exception in COGSA. The district court ruled that the owner could not invoke a fire defense unless it first had proven either that it had exercised due diligence in providing a seaworthy ship or that an unseaworthy condition did not cause the fire. Accordingly, because the court found that obstruction of a hatchway through which the fire could have been more promptly fought rendered the vessel unseaworthy, the court denied the carrier's petition. Both parties appealed. The Fifth Circuit reversed, providing detailed instructions regarding the burden of proof:

In a maritime cargo claim, the initial burden is on the Cargo to prove "good order—bad order"—that he delivered the goods to the carrier in apparent good order and condition and that, upon return, they were damaged. Once the Cargo has done so, the burden shifts to the Carrier to prove that the harm was caused by one of the statutorily excepted causes. Loss resulting from fire is one of these perils excepted (more so than other perils) from the general liability of the carrier for damage sustained while the goods are in his possession . . . . Once a fire exists, the defense of fire also protects the Carrier from losses resulting from steps taken to extinguish the fire, provided there is not actual fault or privity of the owner concerning the fire fighting efforts. Once the carrier shows that the loss or damage was caused by fire, the burden of proof shifts back onto Cargo to prove that the fire was "caused by the design or neglect" of the shipowner. Thus, the burden is on the Cargo to identify by a preponderance of the evidence that cause of the fire, and also to establish that the cause was due to the "actual fault or privity" of the Carrier.<sup>95</sup>

The court of appeals dealt with the argument that this assignment of the burden of proof is inconsistent with that for other COGSA defenses, that is, the burden on the carrier to show first that there had been due diligence. In the Fifth Circuit's view, an analogous issue had been resolved in similar fashion by the Supreme Court in *Earle & Stoddart v. Ellerman's Wilson Line, Ltd.*,<sup>96</sup>

<sup>94</sup>734 F.2d 199, 1985 AMC 247 (5th Cir.), cert. denied 469 U.S. 1077, 1985 A.M.C. 2400 (1984).

<sup>95</sup>734 F.2d at 206, 1985 AMC at 256.

<sup>96</sup>287 U.S. 420, 1983 AMC 1 (1932).

which had required reconciliation of the then-new Harter Act<sup>97</sup> with the Fire Statute. Relying on the Supreme Court's reasoning in *Earle & Stoddart*, the Fifth Circuit referred to section 1308 of COGSA, which provides that the other sections of the Act will not affect the rights and obligations of a carrier under the Fire Statute. According to the Fifth Circuit, Congress intended by section 1308 for the due diligence prerequisite in section 1303(1) to have no effect when a carrier seeks exoneration under the Fire Statute.<sup>98</sup>

#### *D. The Eleventh Circuit Follows Suit*

The Eleventh Circuit too has fallen in line behind the Second. In *Banana Services, Inc. v. M/V Tasman Star*,<sup>99</sup> the court held that, in order to invoke a fire defense, a carrier or owner need prove only that the damage in question resulted from fire, so a carrier need not prove its due diligence to make the vessel seaworthy. As Judge Black eloquently put it:

Once a shipper establishes a prima facie case, the burden of proof shifts to the carrier demonstrate either (1) it exercised due diligence to prevent the cargo damage [which include making the vessel seaworthy], or (2) the damage was caused by an "excepted cause" listed in 46 U.S.C. App. §1304(2) . . . . This section provides a carrier is not responsible for cargo damage resulting from a fire unless the damage is "caused by the actual fault or privity of the carrier." In addition to the excepted cause for fire, COGSA also preserves a carrier's defense under the Fire Statute . . . . The Fire Statute exonerates carriers from liability for fire damage to cargo unless the fire was caused by the "design or neglect" of the owner . . . . Though the "actual fault or privity" language of section 1304(2)(b) differs from the "design or neglect" language of the Fire Statute, the phrases are functionally equivalent.<sup>100</sup>

Thus, has the Eleventh Circuit joined the Second and Fifth in holding that due diligence is not a condition precedent to invoking a fire defense.

#### *E. The Ninth Circuit Case Law — The Odd Man Out*

The Ninth Circuit has moved closer to the majority view on fire defenses, but it has not yet closed completely the split dividing the circuits. The Ninth Circuit's lone stand began with its decision in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*,<sup>101</sup> where the court held that, without first prov-

<sup>97</sup>Act Feb. 13, 1893, ch 105, 27 Stat. 445, codified as amended at 46 U.S.C. 190-96 (1994).

<sup>98</sup>See *Westinghouse Electric*, 734 F.2d at 207-08, 1985 AMC at 257.

<sup>99</sup>68 F.3d 418, 1996 AMC 260 (11th Cir. 1995).

<sup>100</sup>68 F.3d at 420, 1996 AMC at 263.

<sup>101</sup>603 F.2d 1327, 1979 AMC 2787 (9th Cir. 1979).

ing due diligence, a carrier or owner could not invoke a fire defense. This court opted to treat uniformly the statutory defenses to claims of cargo loss or damage. In all such cases, including those in which the loss or damage resulted from fire, the carrier or owner must prove that it exercised due diligence to make the ship seaworthy before it may claim exoneration under an affirmative defense.<sup>102</sup>

In 1990, the Ninth Circuit returned to this issue in the context of a fire defense, and altered its stance. In *Damodar Bulk Carriers, Ltd.*,<sup>103</sup> the court held that, if unseaworthiness is not found to be the cause of the fire and/or subsequent damage, then the carrier or owner does not have the burden of proving due diligence in providing a seaworthy vessel before it is able to invoke a fire defense.<sup>104</sup> According to the court, this holding does not affect that in *Sunkist*, because in that case, unseaworthiness was the cause of the damage, so it was proper to require the owner or carrier to show due diligence before invoking a fire defense.<sup>105</sup>

The Ninth is the circuit to visit this issue most recently. In *Nissan Fire & Marine Insurance Co. v. M/V Hyundai Explorer*,<sup>106</sup> The court of appeals assigned the burden of proof as it had in *Damodar* and reiterated its position that due diligence was a prerequisite to invoking a fire defense. The Court then went a step further and analyzed the standard of due diligence in fire defense cases. According to the court, while the standard of due diligence is non-delegable when a non-fire COGSA defense is invoked, it is delegable when a fire defense is invoked. Accordingly, as a basis for carrier or owner liability, vicarious liability ought to be unavailable.<sup>107</sup> The court defined due diligence as “all that was proper and reasonable to make to vessel seaworthy.”<sup>108</sup>

The gap between the Ninth and the other circuits seems to be narrowing. The position of the Ninth differs from that of the others now only in cases where unseaworthiness is found to be the cause of the damage. Is this really a distinction without a difference? From the plaintiff’s point of view, there is not much difference between proving unseaworthiness and proving negli-

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<sup>102</sup>603 F.2d at 1341, 1979 AMC at 2807.

<sup>103</sup>903 F.2d 675, 1990 AMC 1544 (9th Cir. 1990).

<sup>104</sup>See 903 F.2d at 685, 1990 AMC at 1560 (“when the unseaworthiness was not the cause of the loss or damage the carrier does not have the burden of showing that the ship was seaworthy as a condition for invoking one of the [fire defenses]”).

<sup>105</sup>See 903 F.2d at 686, 1990 AMC at 1561.

<sup>106</sup>93 F.3d 641, 1996 AMC 2409 (9th Cir. 1996); see Tabrisky, Case Note: COGSA And Fire Statute: Vessel owner bears the burden of proving that it personally exercised due diligence to make its ship seaworthy to escape liability for a fire caused by an unseaworthy condition. *Nissan Fire & Marine Insurance Co., Ltd. v. M/V Hyundai Explorer*, 28 J. Mar. L. & Com. 359 (1997).

<sup>107</sup>See supra § III.E. (discussing imputed liability on corporate carriers and owners for the negligent acts of corporate management).

<sup>108</sup>See *Nissan Fire*, 93 F.3d at 647, 1996 AMC at 2415.

gence, which plaintiff must do in every circuit in order to overcome a fire defense. The elements of a cause of action are basically the same; the only difference is in allocation of the burdens of proof.

## V CONCLUSION

The mechanics of a fire defense are not very complex. In fact, fire cases probably give carriers and shipowners their best chances at success in defending because of the allocation of the burdens of proof. In all of the circuits, the heavier burden is on the plaintiff. In most cargo claims, once a plaintiff makes out a prima facie case, the defendant must then prove a defense. In a fire case, however, all the defendant need show is that the damage was caused by fire. The burden then returns to the plaintiff to show that the managerial staff of the carrier owner was negligent in causing or in extinguishing the fire. This is a much greater burden for plaintiffs than the prima facie case sufficient for other damage claims.

### Appendix Some Practical Considerations in Fire Cases

Listed below are a few somewhat obvious, but nevertheless important, lessons from fire cases, including the *Damodar Tanabe* and *Recife* cases. Most make more particular the general reminder that time is of the essence in the aftermath of a marine casualty.

1. A shipowner's P&I Club and attorneys are too often the last to learn of a fire casualty. Owners are well advised to notify their Club immediately, and the Club, in turn, to get its defense team into action. As with any case, it is preferable to retain attorneys with experience in dealing with fire cases (but see No. 2 below).
2. Retain a competent fire expert immediately. Generally, fire cases are won or lost by experts, not attorneys. Even in the U.S. and U.K. there are only a few well-qualified fire or explosion consultants to be found. It is best to have their contact details ready to hand, so that one or more can be retained promptly. Attention to securing a fire expert should not be distraction from securing the others. Depending on the circumstances of the casualty, you may need experts in other fields, e.g., a marine engineer, stowage or navigation expert.

3. Get your investigation team, i.e., your fire expert and local counsel, to the scene as soon as possible, preferably before maritime authorities, salvors, fire brigades, crew, stevedores, etc., board the vessel and begin disturbing the fire scene, and thus, important evidence.
4. Because managerial negligence is an important issue in fire cases, do not focus exclusively on what happened aboard ship. Remember the home office, too.
5. From the beginning, keep in mind the attorney-client and attorney work product privileges and manage accordingly communications to and from client and experts.
6. Be careful about witness statements. Crew statements are often required in proceedings within other jurisdictions, such as a salvage arbitration in London or a flag state inquiry. They may be discoverable in U.S. proceedings. An attorney's memorandum of interview, which is usually not discoverable, is to be preferred to a statement unless signed statements are absolutely necessary in another jurisdiction.<sup>109</sup> Crew statements can be taken at a relatively early stage, when witnesses are confused or facts unknown. Even with an attorney's guidance, someone can make a serious misstatement. It is better to wait for depositions, when things have calmed.
7. Similarly, resist preliminary reports from experts. They are unnecessary and they are discoverable. If the client wants a preliminary report, the attorney can talk to the expert and then relay information in a privileged conversation.
8. Be prepared for drug and alcohol testing of the crew. Understand the requirements and be prepared to arrange for independent testing.
9. If the fire or explosion results in personal injury or death or pollution of air or water, a criminal investigation is distinctly possible. Be prepared to engage competent criminal counsel. Owners and crewmembers may need separate representation.

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<sup>109</sup>A word about USCG Form 2692, the USCG's Report of a Marine Casualty: It need not be completed by the Master or other ship's personnel. It can be completed instead by the owner's attorney.