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THE ETERNAL CONFLICT BETWEEN CARGO AND HULL: THE FIRE STATUTE—A SHIFTING SCENE

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INTRODUCTION

The "Fire Statute," enacted as section one of the Limitation of Liability Act of 1851,¹ exonerates a shipowner from liability for fire loss to cargo except where the fire was caused by his "design or neglect."² For more than three quarters of a century, the statute provided the shipowner with the sole protection from liability for fire and loss. Then, in 1936, Congress enacted the Carriage of Goods by Sea Act (COGSA),³ which provided a more comprehensive scheme of carrier liability limitation.⁴ Section 4(2)(b) of COGSA, in particular, provided an exemption from liability for loss or damage to goods due to fire except where caused by the

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¹ Act of March 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. §§ 181-188 (1976)).

² 46 U.S.C. § 182 (1976). 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.

³ Act of April 16, 1936, ch. 229, 49 Stat. 1207 (current version at 46 U.S.C. §§ 1300-1315 (1976)).

⁴ See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 3-22 to 3-37 (2d ed. 1975).

carrier's "actual fault or privity."⁵ The new legislation expressly provided, however, that a carrier's rights and obligations under the Fire Statute were to be unaffected.⁶ Most importantly, COGSA imposed, on every carrier covered by the legislation, a duty to exercise due diligence to make his ship seaworthy.⁷ The failure to satisfy this duty of due diligence expressly precluded the carrier from obtaining the liability exemption contained in section 4(1) of COGSA.⁸

Section 4(2)(b), the fire exemption clause of COGSA, however, contained no express requirement of due diligence.⁹ Nonetheless, the question arose whether the fire exemption clause was subject to the carrier's obligation to exercise due diligence to make his vessel seaworthy. This question had arisen, prior to the enactment of COGSA, under the Fire Statute and was rejected by the Supreme Court.¹⁰ Since the Fire Statute and the fire exemption clause were to exist side-by-side, the early court decisions refused to read a due diligence requirement into the fire exemption clause, and equated "actual fault or privity" with "design or neglect."¹¹ Recently, in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*,¹² the Ninth Circuit held that the fire exemption clause is subject to an overriding obligation—the carrier's duty to exercise due diligence to make his ship seaworthy.¹³ Moreover, and notwithstanding nearly 150 years of established judicial precedent, the *Sunkist* court held that the failure to exercise due diligence to make his vessel seaworthy deprives the carrier of the protection of the Fire Statute.¹⁴

This Article will examine the departure which *Sunkist* has taken from the traditional learning. Commencing with a discussion of the origins of the Fire Statute and COGSA, the Article will focus upon the standards which must be satisfied to obtain the benefits of the Fire Statute and the COGSA fire exemption. With this background, a careful and detailed analysis will be made of the

⁵ 46 U.S.C. § 1304(2)(b) (1976); see note 41 *infra*.

⁶ 46 U.S.C. § 1308 (1976); see note 42 *infra*.

⁷ 46 U.S.C. § 1303(1)(a) (1976).

⁸ 46 U.S.C. § 1304(1)(1976).

⁹ See note 42 *infra*.

¹⁰ *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 425-28 (1932).

¹¹ See note 87 and accompanying text *infra*.

¹² 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).

¹³ 603 F.2d at 1341.

¹⁴ *Id.*

Sunkist decision and the legal precedent upon which it is based. Finally, the Article will examine the ramifications which the *Sunkist* decision is likely to have on maritime insurance and time charterers.

ORIGINS OF THE FIRE STATUTE AND THE COGSA FIRE EXEMPTION CLAUSE

During the infancy of our merchant marine, United States courts refused to accept any method of limiting shipowner liability.¹⁵ Accordingly, our shipowners were unable to compete with British and Continental shipping since, even before the American Revolution, the latter had been protected by broad schemes of shipowner liability limitation.¹⁶ The infamous burning of the Lexington and the litigation that ensued, however, brought congressional attention to the plight of our merchant marine.¹⁷ In order to erase the disadvantage faced by American shippers,¹⁸ Congress, in 1851, enacted the Limitation of Liability Act (the Act).¹⁹ The primary provision of the Act limited a shipowner's liability to the value of his interest in the vessel and the freight then pending when the loss occurred without his "privity or knowledge."²⁰

¹⁵ See, e.g., *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 383 (1848); *The Rebecca*, 20 F. Cas. 373 (C.C.D. Me. 1831) (No. 11,619). See generally Lugenbuhl, *Limitation of Liability* in ILLINOIS STATE BAR ASS'N & AM. TRIAL LAWYERS ASS'N, CURRENT DEVELOPMENTS IN ADMIRALTY LAW 108 (1966).

¹⁶ FLORIDA BAR, MARITIME LAW AND PRACTICE § 10.1 (1980).

¹⁷ See *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 378-79 (1848). In *Merchants' Bank*, the Lexington, en route from New York to Connecticut, was destroyed by fire. See *id.* at 378-79. A wooden crate marked "contents unknown" was lost as a result of the fire. *Id.* at 379-80. It was discovered subsequently that the box contained \$18,000. *Id.* The court held the shipowner liable despite a contractual provision placing the risk of loss on the shipper. *Id.* at 385. It was this harsh result that directly prompted enactment of the Limitation of Liability Act. See generally Note, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370 (1964).

¹⁸ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 413-14 (1954); 23 CONG. GLOBE, 31st Cong., 2d Sess. 776 (1851).

¹⁹ Act of March 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. §§ 181-196 (1976)).

²⁰ 46 U.S.C. § 183 (1976). As presently codified, section 3 of the Limitation of Liability Act provides in part:

(a) Privity or knowledge of owner; limitation The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases pro-

Where the loss was caused by fire, however, another section of the Act, known as the "Fire Statute," exonerated the vessel owner from liability unless the fire was caused by the shipowner's "design or neglect."²¹

The considerations which led Congress to enact the Fire Statute are not difficult to discern. Fire was one of the principal hazards to which the maritime venture was subjected, since automatic sprinklers and stream smothering devices were unknown in 1851. Therefore, a fire at sea, once started, was especially difficult to control. Moreover, since the sail vessel was then in vogue and the safer steam vessel was not yet in commercial use, maritime entrepreneurs were afraid to invest large sums of money in shipping. A catapult was needed to vault a competitive American shipping industry onto the international scene. Thus, the 1851 Act was enacted to encourage investment in American shipping by affording our domestic merchant marine with the same protections enjoyed by shipowners of other maritime nations.²² The American statute, however, did not go as far as the original English Fire Statute of 1786²³ which provided for unconditional exoneration from liability, without exception for the owner's "design or neglect."²⁴

Toward the end of the nineteenth century, however, European shippers began to insert exculpatory clauses in their bills of lading

vided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (1976).

²¹ 46 U.S.C. § 182 (1976); see note 2 *supra*. The constitutionality of the provision was upheld in *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 589-90 (1883). As far as its scope is concerned, the exoneration provision applies only to shipboard fires and has no application to those fires occurring on shore. See *Constable v. National S.S. Co.*, 154 U.S. 51, 59 (1894). Accordingly, many contracts include an exemption clause for damages resulting from fire before and after loading. These clauses are upheld if the fire is not caused by the negligence of the vessel owner. See *id.* at 79. Furthermore, the Fire Statute may be invoked only where damage to the cargo was caused by the ignition or combustion of materials from which a fire ensued. Damage caused by heat alone is not within the ambit of the statute. See *The Buckeye State*, 39 F. Supp. 344, 347 (W.D.N.Y. 1941). The statute does apply to foreign and domestic vessels, *The "Scotland,"* 105 U.S. 24, 31 (1881), and, under 46 U.S.C. § 188 (1976), the statute applies to all vessels used on lakes and rivers. *In re Garnett*, 141 U.S. 1, 11 (1891).

²² See Lugenbuhl, *supra* note 15, at 110; Springer, *Amendments to the Federal Law Limiting the Liability of Shipowners*, 11 ST. JOHN'S L. REV. 14, 14 (1936).

²³ See 26 Geo. 3, c. 86 (1786).

²⁴ *Id.* Although the original English Fire Statute was more liberal than the American Fire Statute, the English law subsequently fell more into line with the American approach. See *Merchant Shipping Act, 1894*, 57 & 58 Vict., c. 60.

which exonerated them from all liability for cargo damage.²⁵ The purpose of these clauses was to circumvent the general maritime law which regarded carriers as insurers, hence, imposing absolute liability²⁶ upon them for cargo damage.²⁷ American courts, however, held such clauses to be violative of public policy.²⁸ As a result, British carriers were able to use such exculpatory clauses to gain competitive advantage over American carriers in the form of lower shipping charges.²⁹ In an effort to remove this new competitive disadvantage to American shipping, without sacrificing the policies served by the general maritime law, Congress enacted the Harter Act of 1893.³⁰ This legislation made it unlawful for a carrier to exonerate himself fully for liability based on his own fault.³¹ A

²⁵ See A. KNAUTH, OCEAN BILLS OF LADING 118-19 (4th ed. 1953). An example of an exemption from liability typically found on the back of a bill of lading was the "exception of rust," which provided that the carrier was not to be cast in liability for damage to merchandise caused by rust. G. GILMORE & C. BLACK, *supra* note 4, § 3-23.

²⁶ Losses or damages occasioned by acts of God or the public enemy, however, were exceptions to the general maritime rule that the carrier was an insurer. See G. GILMORE & C. BLACK, *supra* note 4, § 3-22; A. KNAUTH, *supra* note 25, at 116.

²⁷ *The Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7, 23 (1858); see *The Main v. Williams*, 152 U.S. 122, 126 (1894).

²⁸ *E.g.*, *Liverpool and Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441 (1889); A. KNAUTH, *supra* note 25, at 118.

²⁹ British courts historically had upheld exculpatory clauses in bills of lading. See G. GILMORE & C. BLACK, *supra* note 4, § 3-23; Note, *Limitations on Liability for Negligence in Documents of Title*, 32 NEB. L. REV. 600, 601 (1953). Consequently, "American ship owning interests [were not operating] on a competitive basis with British interests insofar as limitation of liability was concerned." *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1333 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).

³⁰ Act of Feb. 13, 1893, ch. 105, 27 Stat. 445 (current version at 46 U.S.C. §§ 190-196 (1976)). The Harter Act was enacted, in part, to eradicate the dominance of British shipping caused by such freedom from liability. *Sunkist Growers, Inc. v. Adelaide Shipping Lines*, 603 F.2d 1327, 1333 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980). Nevertheless, the Act was not intended to shield carriers from all liability. See *Koppers Conn. Coke Co. v. James McWilliams Blue Line, Inc.*, 89 F.2d 865, 866 (2d Cir.), *cert. denied*, 302 U.S. 706 (1937). Indeed, the Act balances the interests of carriers desirous of freedom from negligence liability and of shippers who would hold the carriers strictly liable. See *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969), *cert. denied*, 397 U.S. 96 (1970).

³¹ 46 U.S.C. § 190 (1976). The Harter Act prohibits shipowners or their privy from inserting clauses in bills of lading which exculpate them from liability for negligence or other malfeasance. *Id.*; see *Levatino Co. v. American President Lines, Ltd.*, 233 F. Supp. 697, 701 (S.D.N.Y. 1964), *aff'd*, 337 F.2d 729 (2d Cir. 1964); *Norjac Trading Corp. v. The Mathilda Thorden*, 173 F. Supp. 23, 27 (E.D. Pa. 1959). Clauses which limit the duty to equip and load vessels properly or which limit the obligation to exercise due diligence to make the vessel seaworthy are also unlawful and void. 46 U.S.C. § 191 (1976); see *The Carib Prince*, 170 U.S. 655, 660-61 (1898); *The Willdomino*, 300 F. 5 (3d Cir. 1924), *cert. dismissed*, 270 U.S. 641 (1925). One commentator summarized the Act and its ramifications by

shipowner who exercised due diligence to make his vessel seaworthy, however, was exempted by the Harter Act from all liability resulting from navigational or management errors.³² Significantly, the Harter Act did not exonerate a carrier from liability for fire loss.³³ Thus, the Fire Statute remained as the sole protection to American shipowners from liability for loss due to fire.

Where the Harter Act was inapplicable, the persistence of carriers to insert limitation of liability clauses in their bills of lading led the International Maritime Committee to enact the Hague Rules of 1921,³⁴ which embodied the general principles of the Harter Act.³⁵ The Hague Rules, however, were purely voluntary,³⁶ and did not obtain the force of law in this country until 1936 when Congress enacted COGSA.³⁷ The principal objective of COGSA was to continue the major provisions of the Harter Act, thereby protecting carriers from excessive liability while discouraging carrier

stating that it permits the shipowner to escape liability only if he uses due diligence to make his ship seaworthy. See CANFIELD & DALZELL, *THE LAW OF THE SEA*, 122-23 (1937). If he does not "bargain" to escape liability on these terms, he cannot limit his liability at all, and he assumes an absolute obligation to provide a seaworthy vessel. It should be noted that the Harter Act was largely superseded by COGSA, 46 U.S.C. §§ 1300-1315 (1976), except with respect to inland transportation, and the period before the cargo is loaded aboard the vessel and the period after discharge of the cargo until its proper delivery. See 46 U.S.C. §§ 1300, 1311 (1976); *Isthmian S.S. Co. v. California Spray-Chem. Corp.*, 290 F.2d 486, 488 (9th Cir. 1961), *modified on rehearing*, 300 F.2d 41 (9th Cir. 1962).

³² 46 U.S.C. § 192 (1976). See also 46 U.S.C. §§ 1300, 1304(2)(a) (1976); *Orient Mid-East Lines, Inc. v. Shipment of Rice on Board S.S. Orient Transp.*, 496 F.2d 1032, 1037 (5th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); *Wilbur-Ellis Co. v. M/V Captayonnis "S"*, 451 F.2d 973, 974 (9th Cir. 1971) (*per curiam*), *cert. denied*, 405 U.S. 923 (1972).

³³ *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 427 (1932).

³⁴ A. KNAUTH, *supra* note 25, at 126. After a series of maritime conferences, the Hague rules were revised and given legal effect in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931. The United States expressed adherence to this convention with the passage of COGSA, Act of April 16, 1936, ch. 229, 49 Stat. 1208 (current version at 46 U.S.C. §§ 1300-1315 (1976)).

³⁵ *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1278 (5th Cir. 1976); *Encyclopaedia Britannica, Inc. v. S/S Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). The Hague rules established "uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959). As such, the rules were intended to balance the interests of carriers and shippers. *Encyclopaedia Britannica, Inc. v. S/S Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). Thus, the rules cannot be used by carriers as a complete shield from liability. *Accord*, *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F.2d 603, 605-06 (2d Cir.), *cert. denied*, 329 U.S. 774 (1946).

³⁶ A. KNAUTH, *supra* note 25, at 126.

³⁷ Act of April 16, 1936, ch. 229, 49 Stat. 1208 (current version at 46 U.S.C. §§ 1300-1315 (1976)); see *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1278 (5th Cir. 1976).

negligence or indifference.³⁸ Thus, conditioned upon due diligence, section 4(2)(a) of COGSA exonerated carriers from liability resulting from navigational or management errors.³⁹ The limitations of liability contained in COGSA, however, are far more comprehensive than those contained in both the Harter Act and the Limitation of Liability Act.⁴⁰ The most important of the COGSA liability exemptions, for purposes of this Article, is contained in section 4(2)(b), which exonerates the carrier from loss due to fire except where "caused by [his] actual fault or privity."⁴¹ Notably, section 8 of COGSA expressly preserved the carrier's rights and obligations under the Fire Statute.⁴² Thus, as the state of the law now stands, two distinct statutes, each containing its own standard of care, provide for exoneration from liability for fire loss. A shipowner is exempt from liability due to fire loss under the Fire Statute—absent his "design or neglect,"⁴³ and under the fire exemption clause of COGSA—absent his "actual fault or privity."⁴⁴

The coexistence of the Fire Statute and the fire exemption clause of COGSA raises two significant issues. First, the question arises as to how these statutes were intended to interrelate. Second, there has been an inquiry into whether the fire exemption clause incorporates the due diligence standard of section 4(1) of COGSA.⁴⁵ Before addressing these questions, however, it is helpful

³⁸ See *Tessler Bros. (B.C.) Ltd. v. Itaipacific Line*, 494 F.2d 438, 444 (9th Cir. 1974); *General Elec. Co. v. M/V Lady Sophie*, 458 F. Supp. 620, 621 (S.D.N.Y. 1978).

³⁹ 46 U.S.C. § 1304(2)(a) (1976). Section 4(2)(a) provides: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ." *Id.*

⁴⁰ Compare 46 U.S.C. § 1304 (1976) with 46 U.S.C. § 192 (1976) and 46 U.S.C. §§ 181-183 (1976).

⁴¹ 46 U.S.C. § 1304(2)(b) (1976). Section 4(2)(b) provides: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(b) Fire, unless caused by the actual fault or privity of the carrier . . ." *Id.*

⁴² 45 U.S.C. § 1308 (1976). Section 1308 provides in pertinent part: "The provisions of [the Carriage of Goods by Sea Act] shall not affect the rights and obligations of the carrier under the provisions of the [Fire Statute] . . ." *Id.*

⁴³ See note 2 *supra*.

⁴⁴ See note 41 *supra*.

⁴⁵ 46 U.S.C. § 1304(1) (1976). Under section 3 of COGSA, 46 U.S.C. § 1303 (1976), the carrier has an obligation both "before and at the beginning of the voyage," to, *inter alia*, use due diligence to make his ship seaworthy and to "[p]roperly man, equip, and supply the ship." § 1303(a) & (b). So long as the carrier satisfies these obligations he will be immune from liability under section 4(1) of COGSA, 46 U.S.C. § 1304(1) (1976), which provides in part:

Neither the carrier nor the ship shall be liable for loss or damage arising or

to examine the judicial interpretations of both the "design or neglect" standard of the Fire Statute and the "actual fault or privity" standard of the fire exemption clause.

THE FIRE STATUTE STANDARD

As seen earlier in this Article, the Fire Statute was enacted in 1851 as part of the Limitation of Liability Act.⁴⁶ The core section of the Act allowed a shipowner to limit his liability for loss occasioned or incurred without his "privity or knowledge."⁴⁷ Where the loss is due to fire, however, the Fire Statute applies, and the exemption from liability is complete absent the owner's "design or neglect."⁴⁸ Not surprisingly, shortly after the Act was enacted, the question arose whether the "privity or knowledge" language contained in the Act imposed a stricter standard than the "design or neglect" phraseology of the Fire Statute.⁴⁹ Since the modern tendency is to treat the two standards as synonymous,⁵⁰ it is important to examine the development of each.

As one would suspect, the "privity or knowledge" clause has been the subject of a plethora of interpretations.⁵¹ Indeed, one commentator has noted:

Judicial attitudes shape the meaning of such catch-word phrases for successive generations. In the heyday of the Limitation Act it seemed as hard to pin "privity or knowledge" on the petitioning shipowner as it is thought to be for the camel to pass through the needle's eye. To the extent that in our own or a subsequent generation the philosophy of the Limitation Act is found less appealing, that attitude will be implemented by a relaxed attitude toward what constitutes "privity or knowledge," "design or neglect."⁵²

resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied . . .

⁴⁶ See note 1 and accompanying text *supra*.

⁴⁷ 46 U.S.C. § 183(a) (1976 & Supp. III 1979); see note 20 *supra*.

⁴⁸ See note 2 *supra*.

⁴⁹ See, e.g., *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 601-02 (1883).

⁵⁰ See *Great Atl. & Pac. Tea Co. v. Brasileiro*, 159 F.2d 661, 664 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947), wherein the court stated that the negligence test "is the same as is the test of 'privity, or knowledge.'" *Id.* at 664.

⁵¹ See G. GILMORE & C. BLACK, *supra* note 4, at § 10-20.

⁵² *Id.*

One of the first judicial interpretations of the "privity or knowledge" clause emphasized some fault or negligent act attributable to the owner.⁵³ According to this early definition, "knowledge" required an owner's failure to take action appropriate to the circumstances to avert a loss or damage when he knew or should have known that the circumstances required such action.⁵⁴ Hence, the limitation statute worked for the benefit of the owner. He reaped the Act's benefits when he was *personally* blameless even though his employees may have been at fault in the performance of their duties.⁵⁵ Thus, while an owner was fully liable for his own conduct, he had only limited liability for the acts or omissions of others, and was completely exonerated if no negligence could be shown by the master or members of his crew. The concept of personal fault or negligence on the part of the owner continues to be an essential element of the privity or knowledge standard.

In 1932, the Supreme Court first interpreted the "design or neglect" language of the Fire Statute in the case of *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*⁵⁶ In *Earle*, a vessel was held exempt from liability under the Fire Statute despite the ship's being rendered unseaworthy before departure due to the

⁵³ *Lord v. Goodall, Nelson & Perkins S.S. Co.*, 15 F. Cas. 884 (C.C. Cal. 1877) (No. 8,506), *aff'd*, 102 U.S. 541 (1881). In *Lord*, Judge Sawyer stated that:

As used in the statute, the meaning of the words "privity or knowledge," evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions.

15 F. Cas. at 887.

⁵⁴ See *Coryell v. Phipps*, 317 U.S. 406 (1943); *La Bourgogne*, 210 U.S. 95 (1908); *Greater New Orleans Express. Comm'n v. Tug Claribel*, 222 F. Supp. 521 (E.D. La. 1963), *aff'd sub nom. Coleman v. Jahncke Serv.*, 341 F.2d 956 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966).

⁵⁵ See *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 731 (9th Cir. 1969); *McDonald v. The 204*, 194 F. Supp. 383, 390-91 (S.D. Ala. 1961). In *McDonald*, the court stated that, although the owner is liable under the doctrine of respondeat superior for his employees' negligence, he nevertheless may limit his liability pursuant to section 183. *Id.* at 390. Limitation of liability, however, presupposes the owner's lack either of privity or knowledge of his employees' negligence. *Id.* at 391. In order for the shipowner to limit his liability, however, he must use reasonable care in the selection of his master, officers, and crew. See, e.g., *Cleveland Tankers, Inc. v. Szwed*, 154 F.2d 605 (6th Cir. 1946); *W.E. Valliant & Co. v. Rayonier*, 140 F.2d 589 (4th Cir.), *cert. denied*, 322 U.S. 748 (1944).

⁵⁶ 287 U.S. 420 (1932).

negligent stowage of coal in her bunkers by the chief engineer.⁵⁷ In reaching its decision, the *Earle* Court determined that the statutory phrase "neglect of such owner" meant the personal negligence of the owner and, in the case of a corporate owner,⁵⁸ it meant only the negligence of its managing officers or agents to whom the corporation had delegated the inspection and decision making processes.⁵⁹ Thus, the Court reasoned that the negligence of the chief engineer or other ship officers, including the master, did not on the basis of respondeat superior deprive the owner of the statutory exoneration from liability.⁶⁰ Moreover, the Court held that the statutory immunity applied even though the vessel was in fact unseaworthy at the commencement of the voyage.⁶¹ Thus, the Fire

⁵⁷ *Id.* at 424, 429.

⁵⁸ A corporate shipowner's privity or knowledge is, necessarily, that of its employees. *United States v. Standard Oil Co.*, 495 F.2d 911, 917 (9th Cir. 1974). Whether such privity or knowledge will be imputed to the corporate owner—thereby depriving the corporate owner of the protections of the Fire Statute—is dependent upon the position of the employee within the corporate hierarchy. *Id.* "The significant classification . . . is between those employees with sufficient managerial authority to bind the corporat[ion] . . . as distinguished from those employees having no general powers of superintendence over the whole or a particular part of the business." *Id.*; see *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 730-31 (9th Cir. 1969); *In re P. Sanford Ross, Inc.*, 204 F. 248, 251 (2d Cir. 1913). Thus, if the corporate employee having privity or knowledge is not a managerial agent, and if the managerial agents themselves are unaware, the corporation may assert the Fire Statute immunity. See *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 731 (9th Cir. 1969). See generally 3 BENEDECT ON ADMIRALTY § 42 (I. Hall 7th rev. ed. 1980).

⁵⁹ 287 U.S. at 424-25.

⁶⁰ *Id.* at 425; see *Craig v. Continental Ins. Co.*, 141 U.S. 638, 646 (1891); *Walker v. The Transp. Co.*, 70 U.S. (3 Wall.) 150, 154-55 (1865); *American Tobacco Co. v. The Katingo Hadjipatera*, 81 F. Supp. 438, 445 (S.D.N.Y. 1948), *modified*, 194 F.2d 449 (2d Cir. 1951); *The Doris Kellogg*, 18 F. Supp. 159, 166 (S.D.N.Y. 1937), *aff'd*, 94 F.2d 1015 (2d Cir. 1938) (*per curiam*).

⁶¹ 287 U.S. at 425-28. In rejecting the argument that the protection of the Fire Statute is implicitly subject to the owner's overriding obligation to make his vessel seaworthy, the *Earle* Court stated:

The fire statute, in terms, relieves the owners from liability "unless such fire is caused by the design or neglect of such owner." The statute makes no other exception from the complete immunity granted. The cargo-owners do not make the broad contention that the statute affords no protection to the vessel owner if the fire was caused by unseaworthiness existing at the commencement of the voyage. Their contention is that . . . the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable, and if the unseaworthiness could have been discovered by due diligence there was necessarily neglect of the vessel-owner.

. . . .

The courts have been careful not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty.

Statute gave immunity to owners for a fire loss due to unseaworthiness existing at the commencement of the voyage provided that there was no personal neglect on the part of the owner. Lack of personal neglect which excused the owner was deemed broad enough to encompass not only the neglect which immediately occasioned the fire, but also negligence concerning the vessel's seaworthiness.⁶²

The *Earle* Court's broad construction of the Fire Statute clearly effectuates the underlying congressional intention of the Act.⁶³ Moreover, the interpretation of the "design or neglect" clause given in *Earle* appears to comport with the judiciary's conception of the "privity or knowledge" clause.⁶⁴

Delegation of Duty

Another important question is the extent to which an owner may delegate his duty to provide a seaworthy ship. Under the Limitation of Liability Act, an owner may delegate his duties as they relate to seaworthiness⁶⁵ to his master and crew,⁶⁶ as well as to sev-

Id. at 425-26 (footnotes omitted). See also *Hartford Accident & Indem. Co. v. Gulf Ref. Co.*, 230 F.2d 346, 355 (5th Cir.), *cert. denied*, 352 U.S. 832 (1956).

⁶² Even with the passage of COGSA, the holdings of the various circuits were substantially within the guidelines established by *Earle*. See, e.g., *Albina Engine & Mach. Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619, 623 (9th Cir. 1961); *Auto Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 76 (2d Cir.), *cert. denied*, 350 U.S. 885 (1955); *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886, 889 (5th Cir.), *cert. denied*, 346 U.S. 915 (1953); *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134, 146 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953); *American Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449, 452 (2d Cir.), *cert. denied*, 343 U.S. 978 (1948); *Hoskyn & Co. v. Silver Line, Ltd.*, 143 F.2d 462, 465 (2d Cir.), *cert. denied*, 323 U.S. 767 (1944).

⁶³ Congress enacted the Fire Statute to shield shipowners from loss caused by fire, thereby "extinguish[ing] fire claims as an incident of contracts of carriage." *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 254 (1943). In accordance with this legislative intent to exonerate shipowners from fire loss, the statutory language has been liberally construed by the Court to provide complete rather than limited immunity from liability. *Id.*; see 3 *BENEDICT ON ADMIRALTY*, *supra* note 58, § 182, at 1-6 n.5.

⁶⁴ See note 50 and accompanying text *supra*.

⁶⁵ Clearly, the owner has a duty to see that the vessel is seaworthy. See, e.g., *The Silvia*, 171 U.S. 462, 464 (1898). Seaworthiness requires, among other things, that the ship be properly manned, *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204, 210 (5th Cir.), *cert. denied*, 393 U.S. 983 (1968), equipped, *In re Oskar Tiedemann & Co.*, 179 F. Supp. 227, 236 (D. Del. 1959), *aff'd*, 289 F.2d 237 (3d Cir. 1961); *The T.J. Hooper*, 53 F. Supp. 107, 111 (S.D.N.Y. 1931), *aff'd*, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), maintained, *Coleman v. Jahncke Serv., Inc.*, 341 F.2d 956, 959 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966), and fit to do the job that it is intended to do. Moreover, courts and commentators have stated that the owner warrants the seaworthiness of his vessel. See *Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1016 (2d Cir. 1972); *Trans-Amazania Iquitos, S.A. v. Georgia S.S.*

eral independent contractors, such as surveyors, loading specialists, ship repairers, and stevedores.⁶⁷ So long as the owner selects permissible delegates, and exercises care in ascertaining their competence, he will not lose the protection of the Act because of a delegate's negligence.⁶⁸ Thus, unseaworthiness will not bar limitation if the owner has hired competent personnel to man, inspect, load, or repair the vessel in the absence of knowledge of their negligence. If the owner knew or should have known, however, that the delegates were incompetent, or if he selected a managing agent or supervisory employee, the priority requirement would be satisfied, and the owner will lose his protection under the Act.⁶⁹

Similarly, the test for determining when the design or neglect of another will be imputed to the owner has been held to be the same under the Fire Statute as under the Limitation Act.⁷⁰ An

Co., 335 F. Supp. 935, 941 (S.D. Ga. 1971); *CANFIELD & DALZELL*, *supra* note 31, at 70. Thus, the vessel bears liability for loss to the goods if, when she commenced the voyage, she was unseaworthy, "and if the loss would not have arisen but for that unseaworthiness." *Id.* The warranty, however, "does not require an absolutely perfect ship [since] the true criterion is that degree of fitness which the average prudent and careful owner requires of his vessel at the commencement of the voyage." *Id.*

⁶⁶ *In re Brasea, Inc.*, 583 F.2d 736, 738 (5th Cir. 1978) (per curiam); *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 728-29 (9th Cir. 1969); *Shaver Transp. Co. v. Chamberlain*, 399 F.2d 893, 895 (9th Cir. 1968); *The Yungay*, 58 F.2d 352, 355-56 (S.D.N.Y. 1931). In *Yungay*, the court clearly stated:

The limitation acts entitle the owner to a limitation of his liability for losses suffered without his privity or knowledge, meaning actual and not constructive privity or knowledge The act would fail of its purpose, the encouragement of the business of navigation, if full liability should be visited upon owners through the creation . . . of nondelegable duties.

58 F.2d at 356.

⁶⁷ See *Petition of Long*, 439 F.2d 109, 113-14 (2d Cir. 1971), wherein the court stated that the shipowner could limit his liability for the loss of cargo upon a showing that overloading of his ship by stevedores occurred without his privity or knowledge. *Id.*

⁶⁸ See *Coryell v. Phipps*, 317 U.S. 406, 412 (1943); *The Princess Sophia*, 278 F. 180, 189 (W.D. Wash. 1921), *aff'd*, 61 F.2d 339 (9th Cir. 1932), *cert. denied*, 288 U.S. 604 (1933); *Van Eyken v. Erie Ry.*, 117 F. 712, 717 (E.D.N.Y. 1902). In *Coryell*, the Supreme Court noted that a shipowner who "selects competent men to store and inspect a vessel" may avail himself of the benefit of limited liability under the Act. *Coryell v. Phipps*, 317 U.S. 406, 412 (1943).

⁶⁹ *Coleman v. Jahncke Serv., Inc.*, 341 F.2d 956, 957-58 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966); *Texas & Gulf S.S. Co. v. Parker*, 263 F. 864, 867-68 (5th Cir.), *cert. denied*, 253 U.S. 488 (1920).

⁷⁰ Compare *Coryell v. Phipps*, 317 U.S. 406, 410-11 (1943) with *Waterman S.S. Co. v. Gay Cottons*, 414 F.2d 724, 729 (9th Cir. 1969). As in the case of the Limitation of Liability Act, the decision as to whether or not to impute the neglect of an employee to the owner under the Fire Statute hinges upon the employee's posture. Generally, the neglect of managing agents and supervisory employees will be imputed to the vessel owner, but that of lower level employees will not. See *Coryell v. Phipps*, 317 U.S. 406, 410-11 (1943); *Craig v. Conti-*

owner, therefore, will not be deprived of the protection of the Fire Statute unless he fails to ascertain the competence of his delegates, or unless the negligent delegate is a managing agent or supervisory employee.⁷¹ Thus an owner has been found liable for the negligence of a port captain,⁷² a marine superintendent,⁷³ and a port engineer.⁷⁴ The negligent acts of the officers and crew, however, have not been imputed to the owner.⁷⁵ Moreover, it has been held that it is permissible under the Fire Statute to delegate the duty to make a vessel seaworthy.⁷⁶ For example, owners have enjoyed the protection of the Fire Statute despite the negligence of a chief engineer,⁷⁷ an independent surveyor,⁷⁸ or a repair yard.⁷⁹ A caveat is necessary, however, since some of the cases have indicated that the owner has a continuing duty to supervise any delegation of duties relating to seaworthiness.⁸⁰ Yet, it should be emphasized that neither the Fire Statute nor the Limitation of Liability Act refers, either expressly or impliedly, to a duty of due diligence to make a vessel seaworthy.⁸¹

mental Ins. Co., 141 U.S. 638, 646-47 (1891); *Walker v. Transportation Co.*, 70 U.S. (3 Wall.) 150, 153 (1865).

⁷¹ See notes 58-60 and accompanying text *supra*.

⁷² *E.g.*, *American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co.*, 270 F.2d 499, 502 (9th Cir. 1959). The court held that "[i]f the Port Captain *had* acted with reasonable promptitude, the carrier would have been exonerated and no question as to the amount of damages would have arisen, for there would have then been no liability." *Id.* (emphasis added).

⁷³ *E.g.*, *Verbeeck v. Black Diamond S.S. Corp.*, 269 F.2d 68, 71-72 (2d Cir.), *cert. denied*, 356 U.S. 933 (1959); *In re Great Lakes Transit Corp.*, 81 F.2d 441, 443-44 (6th Cir. 1936).

⁷⁴ *E.g.*, *Great Atl. & Pac. Tea Co. v. Brasileiro*, 159 F.2d 661, 664 (2d Cir. 1947). The *Brasileiro* court held that a port engineer's negligence properly could be imputed to the shipowner since his word as to the condition of ships and the need for repairs was final. *Id.*

⁷⁵ See notes 58-59 *supra*.

⁷⁶ *Earle & Stoddart v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 425-28 (1932); *Hartford Accident & Indem. Co. v. Gulf Refining Co.*, 230 F.2d 346, 355 (5th Cir.), *cert. denied*, 352 U.S. 832 (1956).

⁷⁷ *E.g.*, *Earle & Stoddart, Inc. v. Ellerman's Wilson Line*, 287 U.S. 420, 425-27 (1932).

⁷⁸ *E.g.*, *Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha*, 133 F.2d 781, 786-87 (2d Cir.), *aff'd*, 320 U.S. 249 (1943).

⁷⁹ *E.g.*, *The Older*, 65 F.2d 359, 359 (2d Cir. 1933); *Hershey Chocolate Corp. v. The S.S. Robert Luckenbach*, 184 F. Supp. 134, 139 (D. Or. 1960), *aff'd*, 295 F.2d 619 (9th Cir. 1961).

⁸⁰ See, *e.g.*, *Bank Line, Ltd. v. Porter*, 25 F.2d 843, 844-45 (4th Cir.), *cert. denied*, 278 U.S. 623 (1928).

⁸¹ See notes 20 & 28 *supra*.

Burden of Proof

One of the most salient differences of interpretation between the Limitation Act and the Fire Statute relates to the burden of proof. With respect to the Limitation Act, the courts have consistently placed the burden of establishing lack of privity and knowledge on the shipowner.⁸² Of course, the claimant has the burden of establishing the liability of the shipowner in the first instance.⁸³ Although the burden of proof under the Fire Statute has never been explained precisely by the Supreme Court, the majority view is that carriers must make out a prima facie defense under the Fire Statute by establishing that the claimant's damage was caused by fire.⁸⁴ The burden of going forward then shifts to the cargo owner to prove that the loss was caused by the design or neglect of the shipowner.⁸⁵

THE COGSA STANDARD

Section 4(2)(b) of COGSA exempts a shipowner from liability for fire loss except where the fire was caused by his "actual fault or privity."⁸⁶ Significantly, this standard has been interpreted to have the same meaning as the "design or neglect" standard embodied in

⁸² See *In re Marine Sulphur Queen*, 460 F.2d 89, 104 (2d Cir. 1972); *Valliant & Co. v. Rayonier, Inc.*, 140 F.2d 589, 591 (4th Cir.), cert. denied, 322 U.S. 748 (1944); *Henson v. Fidelity & Columbia Trust Co.*, 68 F.2d 144, 145 (6th Cir. 1933); *Christopher v. Grueby*, 40 F.2d 8, 14 (1st Cir.), cert. denied, 282 U.S. 876 (1930).

⁸³ See *In re G.B.R.M.S. Caldas*, 350 F. Supp. 566, 572 (E.D. Pa. 1972), aff'd mem., 485 F.2d 680 (3d Cir. 1973), wherein the court stated that the "[c]laimant must prove that the destruction or loss was proximately caused by negligence on the vessel and once negligence has been shown to be the cause, the burden shifts to the shipowner to demonstrate that he comes within the statutory exemption." *Id.*; see G. GILMORE & C. BLACK, *supra* note 4, at § 10-25.

⁸⁴ See *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 673 (2d Cir. 1973); *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886, 887 (5th Cir.), cert. denied, 346 U.S. 915 (1953); *Hershey Chocolate Corp. v. The S.S. Robert Luckenbach*, 184 F. Supp. 134, 139 (D. Or. 1960), aff'd sub nom., *Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619 (9th Cir. 1961). *But cf. Verbeeck v. Black Diamond S.S. Corp.*, 269 F.2d 68, 71 (2d Cir. 1959) (upon showing of negligent operation of ship, burden of proof of availability of Fire Statute exemption is on shipowner). See also Thede, *Statutory Limitations (Other Than Harter and COGSA) of Carriers' Liability to Cargo—Limitation of Liability and the Fire Statute*, 45 Tul. L. Rev. 959, 985 (1971).

⁸⁵ See *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 673 (2d Cir. 1973).

⁸⁶ 46 U.S.C. § 1304(2)(b) (1976); see, e.g., *In re Skibs A/S Jolund*, 250 F.2d 777, 784 (2d Cir.), cert. denied, 356 U.S. 933 (1958). See generally *American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co.*, 270 F.2d 499, 501 (9th Cir. 1959) (dictum).

the Fire Statute.⁸⁷ Unless an owner is personally responsible for the start of a fire, has delegated his care of the ship to a known incompetent, or has selected a negligent managing agent or supervisory employee, he will enjoy the fire exemption protections of COGSA.⁸⁸ Other sections of COGSA, however, condition limitation of liability upon the carrier's exercise of "due diligence" to make his ship seaworthy.⁸⁹ There is some question, therefore, whether actual fault or privity is the sole standard of care.⁹⁰ If the fire exemption clause is read alone, exoneration is not conditioned upon the owner's exercise of due diligence.

The *Sunkist* case appears to require shipowners to demonstrate their exercise of due diligence before exoneration from liability can be claimed.⁹¹ Resolution of the due diligence issue, therefore, is imperative for there is a great difference between the two standards. In particular, actual fault requires personal negligence, whereas the exercise of due diligence is a nondelegable duty.⁹²

⁸⁷ See, e.g., *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 672 (2d Cir. 1973); *Ionmar Compania Naviera, S.A. v. Central of Ga. R. Co.*, 471 F. Supp. 942, 952 (S.D. Ga. 1979); cf. *American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co.*, 270 F.2d 499, 501 (9th Cir. 1959) (dictum) ("exemptions under both acts are considered identical as to a shipowner-carrier").

⁸⁸ See *American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co.*, 270 F.2d 499 (9th Cir. 1959); *In re Skibs A/S Jolund v. Black Diamond S.S. Corp.*, 250 F.2d 777 (2d Cir.), cert. denied, 356 U.S. 933 (1957); 46 U.S.C. § 1304(2)(b) (1976).

⁸⁹ COGSA provides that the carrier will not be liable for damages resulting from unseaworthiness unless he fails to exercise due diligence to make the vessel seaworthy. See 46 U.S.C. § 1304(1) (1976). This standard requires that the carrier exercise the same degree of care as would the reasonably prudent vessel owner. 2A *BENEDICT ON ADMIRALTY*, supra note 58, at § 82. The duty to exercise due diligence to make one's vessel seaworthy is not delegable. E.g., *Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania De Vapores, S.A.*, 388 F.2d 434, 439 (2d Cir.), cert. denied, 393 U.S. 828 (1968); *John Penny & Sons, Ltd. v. M/V Swivel*, 266 F. Supp. 302, 307 (D. Mass. 1967); *G. GILMORE & C. BLACK*, supra note 4 at § 3-27; *Villareal, The Concept of Due Diligence in Maritime Law*, 2 J. MAR. L. & COM. 763, 767 (1971). Thus, the carrier cannot escape liability through COGSA's protections by showing that he exercised due care in selecting a delegate. Rather, it must be shown that these agents exercised due diligence to make the vessel seaworthy. See *International Nav. Co. v. Farr & Bailey Mfg. Co.*, 181 U.S. 218, 225 (1901) (decided under due diligence standard of Harter Act).

⁹⁰ See, e.g., *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1335-36 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980); *In re Liberty Shipping Corp.*, 509 F.2d 1249 (9th Cir. 1975); *American Tobacco Co. v. The Katango Hadjipatera*, 81 F. Supp. 438 (S.D.N.Y. 1948), modified, 194 F.2d 449 (2d Cir. 1950), cert. denied, 343 U.S. 978 (1951); *Accinanto, Ltd. v. Cosmopolitan Shipping Co.*, 99 F. Supp. 261 (D. Md. 1951), modified on other grounds, 199 F.2d 134 (4th Cir.), cert. denied, 345 U.S. 992 (1951).

⁹¹ *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1335-36 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980).

⁹² When courts speak of the nondelegability of the duty to exercise due diligence, they

Thus, if a due diligence standard is read into the fire exemption clause, a shipowner could not escape liability for the negligence of an independent contractor to whom he had delegated duties relating to seaworthiness.

All of the relevant American cases prior to *Sunkist* implicitly have taken the position that the fire exemption clause is independent of the rest of COGSA.⁹³ The Second Circuit's decision in *Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*⁹⁴ is illustrative. In *Asbestos Corp.*, a defective oil pump caused a fire to break out in the engineroom of the defendant's vessel.⁹⁵ Since all of the ship's fire fighting equipment⁹⁶ was either located in or had to be operated from the engineroom, it quickly became impossible to utilize the fire fighting equipment. Six hours later, the fire spread to the ship's cargo holds.⁹⁷ At trial, the shipowner contended that he had used due diligence to make the ship seaworthy and that, in any event, it was exonerated from

mean that the carrier cannot discharge the obligation imposed by this standard by simply delegating it to a competent agent. 2A BENEDICT ON ADMIRALTY, *supra* note 58, at § 84. Thus, the delegate's lack of due diligence will be imputed to the vessel owner, and any protection dependent on that standard of care will be lost. *See, e.g.*, *Ore S.S. Corp. v. D/S A/S Hassel*, 137 F.2d 326, 330 (2d Cir. 1943); *In re Thebes Shipping, Inc.*, 486 F. Supp. 436, 458 (S.D.N.Y. 1980). Indeed, courts have recognized that the duty to exercise due diligence is "a heavy burden." *See, e.g.*, *Dow Chem. Co. v. S.S. Giovannella D'Amico*, 297 F. Supp. 699 (S.D.N.Y. 1969). The "actual fault or privity" test is a less onerous standard from the carrier's perspective, for it requires a showing that the shipowner was personally negligent before a claim for exoneration can be defeated. Thus, negligence of servants cannot deprive the vessel owner of the protections made conditional under this standard. *See, e.g.*, *J. Howard Smith, Inc. v. S.S. Maranon*, 501 F.2d 1275, 1277 (2d Cir. 1974), *cert. denied*, 420 U.S. 975 (1975); *Bubble Up Int'l Ltd. v. Transpacific Carriers Corp.*, 458 F. Supp. 1100, 1105 (S.D.N.Y. 1978).

⁹³ *See, e.g.*, *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 75 (2d Cir.), *cert. denied*, 350 U.S. 885 (1955); *cf. Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886, 886-88 (5th Cir.), *cert. denied*, 346 U.S. 915 (1953) (Fire Statute is independent of the "safety statute"). Indeed, the Supreme Court has stated that "[t]he fire statute . . . relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner.' The statute makes no other exception from the complete immunity granted." *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 425 (1932).

⁹⁴ 480 F.2d 669 (2d Cir. 1973).

⁹⁵ *Id.* at 670. The fire began when the oil pump began to spray oil onto the manifold of a propulsion engine. *Id.*

⁹⁶ *Id.* at 670-71. The fire pumps were controlled from the engineroom. *Id.* at 671 n.3. Additionally, the portable fire extinguishers were located there, as were the controls for the steam smothering system. *Id.*

⁹⁷ *Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 345 F. Supp. 814, 817 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 669 (2d Cir. 1973). It took approximately 6 hours for the fire to spread from the engineroom to the bridge and finally to the cargo holds. 345 F. Supp. at 817.

liability under the Fire Statute and COGSA.⁹⁸ According to the district court, the threshold issue was whether the defendant had exercised due diligence before and at the beginning of the voyage to make the ship seaworthy.⁹⁹ The court concluded that the defendant had not, reasoning that the fire would not have spread to the cargo holds if all of the fire fighting equipment and systems had not been located in the engineroom.¹⁰⁰ In addition, the court found that the lack of fire fighting equipment amounted to "design or neglect" and "privity or knowledge."¹⁰¹ The district court, therefore, ruled that the shipowners were not exempt from liability under either COGSA or the Fire Statute.¹⁰²

In affirming the district court's decision, the Second Circuit agreed that the cargo damage resulted from the carrier's failure to exercise due diligence to make the vessel seaworthy.¹⁰³ The court's affirmance, however, was not based on the shipowner's lack of due diligence. The court clearly recognized that the due diligence standard was distinct from "design or neglect" or "actual fault or privity."¹⁰⁴ Rather, the rationale for the court's conclusion that the carrier was not entitled to the protections of the fire exemption clause or the Fire Statute was based upon the carrier's personal negligence.¹⁰⁵

⁹⁸ 345 F. Supp. at 816.

⁹⁹ *Id.* The district judge noted that the cargo owners established a prima facie case under COGSA by showing that the carrier received the cargo in good order but that upon delivery the goods were damaged. *Id.* at 820. The court stated that the burden then shifted to the carrier to show that the damage was not due to negligence or that it fell within one of COGSA's exoneration provisions. *Id.*

¹⁰⁰ *Id.* at 823.

¹⁰¹ *Id.* The court noted that in failing to provide fire fighting equipment which could have been controlled from outside the engineroom, the shipowners "display[ed] a total disregard for minimal protection of cargo and rendered the [vessel] unseaworthy." *Id.* This, the court reasoned, rose to the level of "design or neglect" and "privity or knowledge." *Id.*

¹⁰² *Id.*

¹⁰³ 480 F.2d at 670. The Second Circuit called the district court's opinion "a clear comprehensive and detailed statement of both the facts and the controlling law." *Id.*

¹⁰⁴ The *Asbestos* court treated unseaworthiness and due diligence as threshold issues. *See id.* Finding a lack of due diligence, the court moved to the next issue—the vessel owners' claim that they were entitled to exoneration under the Fire Statute and the fire exemption clause. *Id.* at 672.

¹⁰⁵ *See id.* at 673. The Second Circuit noted that it is the carrier's burden to demonstrate his own due diligence. *Id.* at 672. The court stated, however, that the Fire Statute and the fire exemption clause shift this burden to the cargo owner. *Id.* at 672-73. Thus, "[i]f the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage." *Id.* at 673. Additional support for this reading of *Asbestos* can be found by looking to the district judge's opinion in the case, since the Second Circuit

The decision in *Asbestos Corp.* is hardly persuasive authority for reading a due diligence requirement into the fire exemption clause. The application of the due diligence standard by a Canadian court to its own analog to the COGSA fire clause, however, lends credence to the opposite point of view. In *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd.*,¹⁰⁶ the British Privy Council held that a carrier's duty to exercise due diligence is an overriding obligation under Canada's version of the fire exemption clause.¹⁰⁷ An employee in *Maxine*, acting under instruction from the ship's master, caused a fire by applying a blow torch to cork insulation around a frozen scupper pipe.¹⁰⁸ After attempts to control the fire failed, the master was forced to scuttle the ship and the plaintiff's cargo was lost.¹⁰⁹ The trial court and the Canadian Supreme Court both found that the shipowners were entitled to the benefits of the exoneration provisions in the Canadian statute.¹¹⁰ The Privy Council reversed, however, finding that the unseaworthiness of the vessel was the proximate cause of the fire and the resultant loss of cargo.¹¹¹ Most significantly, the Council rejected the notion that the fire exemption clause provides complete and unconditional exoneration for fire loss without any inquiry into seaworthiness or due diligence.¹¹² Hence, the defenses of management error and lack of fault or privity are not available to the

expressly endorsed his statement of the facts and law. *Id.* at 670-71; see note 103 *supra*. It is clear that the district judge in *Asbestos* was not imposing a due diligence prerequisite to the COGSA fire exemption. Indeed, he stated that COGSA's "fault or privity" standard is equivalent to the Fire Statute's "design or neglect" standard. 345 F. Supp. at 821. The district court explicitly recognized that "design or neglect" means the personal negligence of the owner. *Id.* at 820. In contrast, the due diligence standard encompasses not only *personal* neglect, but the crew's negligence as well. See note 89 and accompanying text *supra*. It seems clear, therefore, that the district judge was not conditioning the protections of either the Fire Statute or the COGSA fire clause on a carrier's due diligence.

¹⁰⁶ [1959] A.C. 589 (P.C.) (Can.).

¹⁰⁷ See *id.* at 602-03. The Privy Council stated that if the overriding obligation to exercise due diligence is not fulfilled, and damage proximately results, none of the immunities mentioned in the Canadian version of COGSA would protect the carrier. See *id.* at 602-03. These "immunities" are virtually the same as those provided for in the American COGSA. Compare 46 U.S.C. § 1304(2) (1976) with Carriage of Goods by Water Act, CAN. REV. STAT., c. C-15, Sched., Art. IV, r.2 (1970). Like COGSA, the Canadian statute provides that the carrier must exercise due diligence to make his ship seaworthy, and that if this duty is discharged there shall be no liability for unseaworthiness. See *id.* at Art. III, r.1(a).

¹⁰⁸ [1959] A.C. at 593.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 601.

¹¹¹ *Id.* at 603-04.

¹¹² *Id.* at 602-03.

carrier who has failed to exercise due diligence to make his vessel seaworthy.¹¹³ Moreover, the Privy Council held that the owner's personal diligence was not enough to escape liability for unseaworthiness, since the applicable statute also required that due diligence be exercised by those to whom the owner delegated his responsibility.¹¹⁴

No case in the United States prior to *Sunkist*, however, ever held that the fire exemption clause of COGSA incorporates a due diligence standard.¹¹⁵ Moreover, the analogy to *Maxine Footwear* is far from perfect. At this point, therefore, a careful scrutiny of *Sunkist Growers, Inc. v. Adelaide Shipping Lines Ltd.*¹¹⁶ is appropriate.

SUNKIST GROWERS: AN INAPPROPRIATE DEPARTURE FROM TRADITION

In *Sunkist*, a cargo of fresh lemons owned by the plaintiff, *Sunkist*, was loaded in good order and condition aboard the *Gladiola* for refrigerated transportation to Poland.¹¹⁷ Shortly before departure from California, *Sunkist* was advised that the vessel would be stopping in Ecuador to load bananas; it did not object, however, to this deviation in course.¹¹⁸ Upon the ship's arrival in Ecuador, a fire broke out in the engine room.¹¹⁹ The blaze was caused by the separation of a fitting and ferrule in the low pressure diesel fuel line of the vessel's number one generator which permitted diesel fuel oil to spray onto the hot surfaces of the numbers one and two generators.¹²⁰ Upon hearing an alarm, an extra third engineer proceeded directly from the unmanned engine room to the generator

¹¹³ *Id.* The Council noted that if the contention of the carrier was correct that due diligence is not at issue in fire cases—then there would be “a very strong case for saying that there was no fault or privity of the carrier.” *Id.* at 602.

¹¹⁴ *Id.* at 602. In holding that an owner's personal diligence does not vitiate liability for unseaworthiness where his agent does not use due diligence, the Privy Council is in accord with the weight of American authority. See note 89 and accompanying text *supra*.

¹¹⁵ See note 93 and accompanying text *supra*.

¹¹⁶ 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).

¹¹⁷ 603 F.2d at 1329. *Sunkist* conducted their shipping transactions with Salen, a Swedish corporation, pursuant to a 3-year contract wherein the latter agreed to transport *Sunkist*'s citrus cargoes on a weekly basis. *Id.* The *Gladiola*, a general cargo vessel, was owned by the claimant Adelaide Shipping Lines, a British corporation, and chartered by Salen. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

flat.¹²¹ While the flow of oil could have been stopped easily at that point by turning a valve or by pulling a nearby pin, the engineer failed to do either. The second engineer arrived on the scene, but he too failed to close either valve.¹²² Consequently, the fire spread to the oil in the bilges and along the inflammable butyl-insulated cable, the room filled with dense smoke, and it became necessary to evacuate.¹²³ The master ordered the remotely controlled fire extinguisher system into action, but the fire was already out of control and could not be extinguished until three days later.¹²⁴ Although the cargo of lemons had not been damaged by the fire, the refrigeration system had been destroyed.¹²⁵ It became necessary to find local refrigeration storage or markets, or to provide for the transshipment of the cargo.¹²⁶ When these alternatives could not be effected, the lemons, valued at over \$350,000, were given to the military authorities for distribution to the people.¹²⁷

The district court held that both the shipowner and the time charterer were exonerated from liability under both the Fire Statute and the fire exemption clause of COGSA.¹²⁸ While the district court found that the vessel could have been made safer through better maintenance, by modification of existing equipment, or by adding additional equipment,¹²⁹ the court noted that neither a prudent owner nor charterer would have made these modifications or additions.¹³⁰ Moreover, the district court found that a particular type of ferrule should have been maintained in a particular joint, but that the failure to maintain the proper ferrule was the fault of the crew rather than the failure of the owner.¹³¹ Finally, the court

¹²¹ *Id.*

¹²² *Id.* at 1330. Characterizing the failure of the two engineers to extinguish the fire "as a Shakespearean comedy of errors, with a result akin to one of his tragedies," the court attributed it to the engineers' inexperience in fire-fighting as well as the lack of proper instruction. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*; see *Sunkist Growers, Inc. v. Adelaide Shipping Lines Ltd.*, [1976] A.M.C. 2597, 2603-04 (N.D. Cal. 1976), *rev'd*, 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).

¹²⁹ [1976] A.M.C. at 2602.

¹³⁰ *Id.* The court noted that the prudent vessel owner, "[a]rmed only with foresight," could not be expected to make the modifications set forth which were, in part, products of hindsight. *Id.*

¹³¹ *Id.* at 2602-03.

noted that the shipowner's case was not damaged by the fact that the crew should have been instructed specifically on how to deal with engineroom fires.¹³²

On appeal to the Court of Appeals for the Ninth Circuit, the court addressed two issues which are critical to future application of the fire liability exoneration provisions: whether the defendants were required to exercise due diligence to make the vessel seaworthy as a prerequisite to claiming a fire exemption under COGSA; and, if so, whether the defendants failed to exercise due diligence by not maintaining proper equipment or by failing to man the vessel with a crew trained in fighting engineroom fires.¹³³ Determining that the findings of the district court were "elastic" and "equivocal,"¹³⁴ the court of appeals answered both questions in the affirmative and reversed.¹³⁵ Specifically, the court held that the vessel owner and charterer were required to use due diligence to make the vessel seaworthy in order to obtain the benefits of both the Fire Statute and the COGSA fire exemption clause, and that they failed to carry their burden of proving that they had satisfied that standard.¹³⁶ According to the court of appeals, the failure to comply with COGSA before and at the inception of the voyage was twofold. First, the carrier and charterer violated Lloyd's Rule by failing to provide a flanged Serto ferrule fitting in the low compression fuel joint.¹³⁷ Second, the carrier and charterer failed to use

¹³² *Id.* at 2603. The court noted that a reasonable vessel owner or charterer would have relied on the certification of its crew members with respect to their prior firefighting experience and knowledge. *Id.*

¹³³ 603 F.2d at 1330.

¹³⁴ *See id.* at 1334. The court of appeals' treatment of the district court's findings appears to violate rule 52(a) of the Federal Rules of Civil Procedure. Under rule 52(a), "[f]indings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a) (emphasis added). Accordingly, while the findings of fact by the trial court need not be deemed conclusive by an appellate court, the party challenging the findings has a substantial burden to overcome. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585, at 729 (1971). Indeed, a reviewing court should not reverse a finding of fact by the trial court unless it is firmly convinced that a mistake occurred at the trial level. *See, e.g.,* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). *See generally* 9 C. WRIGHT & A. MILLER, *supra*, at § 2585. The court of appeals' reference to the district court's "elastic" and "equivocal" findings, and its substitution of its own findings are not in keeping with the requirements of rule 52(a).

¹³⁵ 603 F.2d at 1340-41.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1334 & n.2. Lloyd's Rule, Chapter E. § 312 provides: "Transfer, suction and other low pressure oil pipes and all pipes passing through oil storage tanks are to be made of cast iron or steel, having flanged joints suitable for a working pressure of not less than 7

due diligence in making the vessel seaworthy by failing to man the vessel with a crew properly trained in engine room fire fighting. In particular, the crew failed to utilize the proper equipment to shut off the oil and failed to utilize properly the portable fire extinguisher, all of which evidenced a lack of fundamental preparation and knowledge of the various means available to efficiently control fire.¹³⁸

The *Sunkist* decision obviously marks a departure from the traditional understanding of fire liability limitations in this century. Unfortunately, the court's limited analysis was inadequate to arrive at a proper decision.¹³⁹ Since the appellees raised both the Fire Statute and the COGSA fire exemption clause as defenses, a detailed analysis of the issues relevant to each of these must be undertaken.

The Fire Statute Defense

Three questions are pertinent to determining the applicability of the Fire Statute: (1) Was the fire caused by the design or neglect of the owner? (2) Is the Fire Statute conditioned upon the vessel owner's use of due diligence before or at the inception of the voyage? and (3) Who has the burden of proving liability under the Fire Statute?

The district court in *Sunkist* found that the vessel could have been made safer by possible modification, maintenance, or additional equipment.¹⁴⁰ A prudent owner, the court found, would not necessarily have made most of the modifications.¹⁴¹ Moreover, the court determined that the failure to maintain or replace the defective ferrule was due to the negligence of the crew rather than the fault of the owner in failing to notice the latent defect.¹⁴² There

KG/CM² (100 lb./in.²)." 603 F.2d at 1334, n.2. According to the court of appeals, the failure to provide a flanged Serto ferrule fitting was not only a clear violation of Lloyd's Rule, but ultimately caused the fire by allowing the diesel oil to spray upon the hot generators. *Id.* at 1334.

¹³⁸ 603 F.2d at 1334-35.

¹³⁹ See notes 163-202 and accompanying text *infra*.

¹⁴⁰ *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, [1976] A.M.C. 2597, 2602 (N.D. Cal.), *rev'd*, 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980).

¹⁴¹ [1976] A.M.C. at 2602. The district judge implied that any modifications made through "reasonable foresight would not have prevented the fire." *Id.*

¹⁴² *Id.* at 2602-03. The district court found that even an experienced engineer would not have noticed, through "normal and reasonable external inspection" that the wrong type of ferrule had been installed. *Id.* at 2602.

also was no specific finding that such maintenance had been delegated to the chief engineer.¹⁴³ The shipowner, therefore, should not have been held responsible for the crew's negligence. The Fire Statute protects the owner in such circumstances unless it is found that he knew or should have known that the crew selected was incompetent.¹⁴⁴ The trial court specifically found, however, that the ship's engineers were competent.¹⁴⁵ Moreover, the licensed crew's prior fire fighting experience and training belied the fact that it was incompetent.¹⁴⁶ Therefore, no acceptable theory substantiates the attribution of design or neglect to the *Sunkist* defendants.

Due diligence to make a vessel seaworthy, either before or at the inception of a voyage, is not a condition to exoneration from liability under the Fire Statute.¹⁴⁷ The statute's only exception is expressed in terms of design or neglect. If a requirement of due diligence is to be read into the statute, therefore, it must be done so by COGSA. Yet, it is still not clear whether the COGSA fire exemption clause is conditioned upon the carrier's due diligence.¹⁴⁸ Furthermore, by its terms, COGSA specifically saves the Fire Statute from repeal.¹⁴⁹ Indeed, if due diligence were to be applied to the Fire Statute, the exoneration provision would be stripped of its own long-established standards.¹⁵⁰ Thus, due diligence should have no applicability to the Fire Statute—the *Sunkist* court overlooked this basic premise.

Traditionally, when courts considered the Fire Statute in the context of common-law liability, the burden of proving the shipowner's design or neglect was placed squarely on the cargo owner.¹⁵¹ The courts did not diverge from this approach until after COGSA cases began to arise. It was in these cases that the courts began to intertwine burden of proof principles with the imposition

¹⁴³ See *id.* at 2598-2603.

¹⁴⁴ See notes 65-69 and accompanying text *supra*.

¹⁴⁵ [1976] A.M.C. at 2601.

¹⁴⁶ *Id.* The ship's engineers had been trained in fire fighting. *Id.* Indeed, in order to obtain certification, a number of the engineers were required to attend a 4-day course in practical training. *Id.*

¹⁴⁷ See 46 U.S.C. § 182 (1976).

¹⁴⁸ See notes 89-90 and accompanying text *supra*.

¹⁴⁹ By its own terms, COGSA "[does] not affect the rights and obligations of the carrier" under the Fire Statute. 46 U.S.C. § 1308 (1976).

¹⁵⁰ The concept of due diligence imposes a higher standard of care on the vessel owner than does the design or neglect test. See note 92 and accompanying text *supra*.

¹⁵¹ See, e.g., *The Older*, 65 F.2d 359, 359-60 (2d Cir. 1933); *The*, *supra* note 84, at 985.

of a due diligence prerequisite to exemption under COGSA's fire clause.¹⁵² It is submitted that the burden of proof under the Fire Statute should not be affected by COGSA, particularly since due diligence is not a valid condition precedent to exoneration under the 1851 statute.

The COGSA Defense

The *Sunkist* court addressed two controversial issues in considering COGSA's application: (1) whether the vessel owner must exercise due diligence before he can claim protection of COGSA's fire exemption; and (2) whether there was indeed a lack of due diligence in *Sunkist*.¹⁵³ The Ninth Circuit read COGSA as imposing on the carrier an overriding obligation to exercise due diligence to make his ship seaworthy.¹⁵⁴ Thus, the court reasoned, if this duty was breached, proximately resulting in fire and cargo loss, the vessel owner would be "at fault."¹⁵⁵ He, therefore, would be unable to benefit from the fire exemption clause of COGSA.¹⁵⁶ This conclusion is faulty in that it misconstrues established judicial precedent.¹⁵⁷ Additionally, the *Sunkist* court's construction of the clause deviates from Congress' purpose in enacting the statute.¹⁵⁸ The specific purpose of COGSA was to ensure that the United States merchant marine would remain a viable competitor among the shipping nations of the world.¹⁵⁹ Since nearly all maritime countries had fire statutes, it indeed would have been foolhardy for Congress to have weakened shipowner protections in this area. Thus, while the *Sunkist* court correctly recognized that COGSA represented an attempt to balance the conflicting interests be-

¹⁵² See, e.g., *Maxine Footwear Co. v. Canadian Gov't Merchant Marine, Ltd.* [1959] A.C. 589, 602-03.

¹⁵³ 603 F.2d at 1330.

¹⁵⁴ *Id.* at 1337-38.

¹⁵⁵ *Id.* at 1341.

¹⁵⁶ *Id.*

¹⁵⁷ See notes 163-202 and accompanying text *infra*.

¹⁵⁸ See *Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 63 (1936). In these hearings, it was stated that COGSA would exempt the carrier from liability for certain types of loss without requiring an initial showing of due diligence. *Id.* Although some of these exemptions were said to require a showing of due diligence if unseaworthiness contributed to the loss, this was not the case regarding COGSA's fire clause. *Id.*

¹⁵⁹ See notes 15-19 and accompanying text *supra*. See generally G. GILMORE & C. BLACK, *supra* note 4, at §§ 3-22, 3-23.

tween "cargo" and "hull,"¹⁶⁰ it is submitted that the panel tipped the scales too far in the wrong direction at the expense of our merchant marine. Congress did not intend such a dramatic shift in emphasis from the statutory schemes of the Harter and Limitation of Liability Acts when it enacted COGSA.¹⁶¹

Even if the Ninth Circuit had been correct in its interpretation of the fire exemption clause, its determination that due diligence was absent from the outset of the voyage was erroneous. The application of due diligence should be related directly to the cause of the fire and not to the configuration of the owner's vessel or the training of his crew. Given the finding that the defect in the ferrule was latent and not reported, one must wonder what level of diligence the *Sunkist* court believed was due. Thus, while the Ninth Circuit's ruling that the duty may not be delegated to escape liability is a reasonable one, where the delegate acts with due diligence, there is no omission to impute to the owner.¹⁶²

LEGAL PRECEDENT FOR SUNKIST

The Ninth Circuit's decision to make applicability of the protection of the 1851 Fire Statute contingent upon a showing of due diligence is unsound in light of prior decisions. The *Sunkist* court relied on the Canadian *Maxine Footwear* case, calling it "highly persuasive."¹⁶³ While *Maxine Footwear* appears to set an arguably applicable precedent for the *Sunkist* decision insofar as COGSA is concerned,¹⁶⁴ there are several key factors which distinguish the

¹⁶⁰ The *Sunkist* Court characterized COGSA as "part of an overall plan to settle the adverse interests of carriers and cargo shippers." 603 F.2d at 1333.

¹⁶¹ See *Hearings on S. 1152, supra* note 158, at 63. Indeed, it seems that Congress wished to afford carriers more protection than was granted under the Harter Act. See *id.*

¹⁶² See note 92 and accompanying text *supra*.

¹⁶³ 603 F.2d at 1337; see notes 106-14 and accompanying text *supra*.

¹⁶⁴ Using a Canadian case as precedent for an American decision is not inherently suspect. Indeed, this approach would ordinarily be proper in view of the similarity of the two COGSA statutes—both derived from the Hague Rules. See notes 34-39 and accompanying text *supra*. See generally 51 Stat. 233 (1924), reprinted in A. KNAUTH, *supra* note 25. As one commentator noted:

Our courts are inclined to follow the decisions of the House of Lords in shipping cases because of the importance of uniformity in the decisions of two such important maritime nations, *unless our courts have already decided the particular [sic] issue or some question of public policy is involved [sic]*. The Hague Rules, which are the basis of both the Canadian Act and the United States Act, were designed to be an international code and the language of the Sections of both Acts under consideration is identical.

2A BENEDICT ON ADMIRALTY, *supra* note 58, at § 147 (footnotes omitted) (emphasis added).

two cases. First, Canada, unlike the United States and Great Britain, has no Fire Statute. There is, however, a fire exemption clause in the Canadian counterpart to COGSA.¹⁶⁶ Consequently, assuming *arguendo* that due diligence is required under the Canadian statute, *Maxine Footwear* is persuasive authority for the *Sunkist* decision only with respect to the fire exemption clause in COGSA. It is of no aid in interpreting the standard of care required under the Fire Statute—a factor which the *Sunkist* court failed to explain. Of course, if COGSA was intended to supercede the Fire Statute, since the latter was enacted 85 years earlier, the *Sunkist* court would have been correct in relying on *Maxine Footwear*.¹⁶⁶ COGSA explicitly states, however, that the Fire Statute survives and is applicable according to its terms.¹⁶⁷ Second, unlike in the Canadian “precedent,” the fire in *Sunkist* occurred well after the voyage had begun.¹⁶⁸

The Ninth Circuit in *Sunkist* also relied on the Second Circuit's decision in *Asbestos Corp.*¹⁶⁹ as precedent for reading a due diligence requirement into the Fire Statute.¹⁷⁰ This is simply incorrect; the Second Circuit's finding of liability under the Fire Statute was predicated on the negligence of the individuals in authority, not upon a lack of due diligence.¹⁷¹ The *Sunkist* court's improper

Thus, using the Canadian case as precedent would only be appropriate absent American authority or countervailing public policy considerations. It is submitted, however, that the legislative history of the American COGSA raises unique issues which undercut the Ninth Circuit's reliance on Canadian law.

¹⁶⁶ See note 107 and accompanying text *supra*.

¹⁶⁶ See note 164 *supra*.

¹⁶⁷ See 46 U.S.C. § 1308 (1976); note 42 and accompanying text *supra*.

¹⁶⁸ In *Maxine Footwear*, the Privy Council implied that the duty to exercise due diligence lasts “until the vessel starts on her voyage.” [1959] A.C. at 603. In *Sunkist*, the fire began more than a week after the vessel set sail. 603 F.2d at 1329. Thus, even under Canadian authority, liability would not attach.

¹⁶⁹ *Asbestos Corp. v. Compagnie De Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669 (2d Cir. 1973); see notes 94-105 and accompanying text *supra*.

¹⁷⁰ 603 F.2d at 1335. The Ninth Circuit accused the district court of “misreading” *Asbestos*. See *id.*

¹⁷¹ See 480 F.2d at 670-73. The *Asbestos* court addressed the issues of “due diligence” and “design or neglect” in two separate sections of its opinion. See *id.* The Court agreed with the district court's finding that the vessel owners failed to exercise due diligence “in equipping the vessel adequately to fight an engine room fire.” *Id.* at 671. This finding was significant because it meant that the vessel owners could not take advantage of the “unseaworthiness” exemption of COGSA. Cf. 46 U.S.C. § 1304(1) (1976) (no liability for damages “resulting from unseaworthiness unless caused by want of due diligence”). At that point, the appellants had to rely on the Fire Statute or COGSA's fire exemption. This reliance was misplaced, however, because the court found negligence on their part. 480 F.2d at 672.

reliance on *Asbestos Corp.* was compounded by its failure to accept the Second Circuit's formulation of the burden of proof. The *Asbestos Corp.* opinion states that COGSA ordinarily places the burden of proving due diligence on the carrier, but that the burden shifts to the shipper when the fire exemption clause is invoked.¹⁷² The *Sunkist* court expressly refused to follow this rule, however, stating that it was a gratuitous assertion and entirely insignificant to the *Asbestos Corp.* decision.¹⁷³

The Ninth Circuit also relied on one of its prior decisions, *New York Merchandise Co. v. Liberty Shipping Corp.*,¹⁷⁴ for support. In *Liberty Shipping*, another fire at sea case, the district court found that the cause of the fire was "unknown."¹⁷⁵ The Ninth Circuit, however, reasoning that the fire spread because of the owner's lack of due diligence, held that the protections of the Fire Statute and COGSA fire exemption clause were inapplicable.¹⁷⁶ While *Sunkist* is consistent with this proposition, the principle itself is faulty. Indeed, the *Liberty Shipping* panel missed the point of the fire exoneration provisions. Concededly, where a fire is caused by the shipowner's neglect, liability should attach. Where, however, the owner's mere lack of due diligence enabled the fire to spread, statutory exoneration should remain available. Indeed, both the Fire Statute and the fire exemption clause appear to be quite precise in requiring that fire be caused by owner negligence before exoneration will be foreclosed.¹⁷⁷ Thus, *Liberty Shipping* and, therefore, *Sunkist's* reliance on it, must be regarded as questionable.

In *Albina Engine & Machine Workers, Inc. v. Hershey Chocolate Corp.*,¹⁷⁸ the Ninth Circuit applied the Fire Statute in a traditional manner. In *Sunkist*, however, the court chose to distinguish this case, relying instead on *Liberty Shipping* for support. It is

¹⁷² *Id.* at 672-73.

¹⁷³ 603 F.2d at 1335-36.

¹⁷⁴ 509 F.2d 1249 (9th Cir. 1975).

¹⁷⁵ *Id.* at 1250. The district court attributed the cargo loss to fire and unseaworthiness. *Id.* While the cause of the fire was unknown, the unseaworthiness was said to exist in two respects. First, the crew did not have sufficient knowledge of the ship's firefighting system. *Id.* Second, the cargo holds could not be sealed off because of a mechanical defect. *Id.*

¹⁷⁶ *Id.* at 1252.

¹⁷⁷ See 46 U.S.C. §§ 182, 1304(2)(b) (1976). *But see* Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado, 205 F.2d 886, 888-89 (5th Cir.), *cert. denied*, 346 U.S. 915 (1953); Globe & Rutgers Fire Ins. Co. v. United States, 105 F.2d 160, 165-66 (2d Cir.), *cert. denied*, 308 U.S. 611 (1939).

¹⁷⁸ 295 F.2d 619 (9th Cir. 1961).

submitted that this was erroneous. In *Albina*, a fire occurred while repairs were being made to a ladder in the ship's hold by a crew employed by an independent contractor.¹⁷⁹ When they began to weld the ladder, "a spark or piece of burning metal flew into the cargo of burlap bags."¹⁸⁰ Because the fire fighting equipment was being repaired, the fire was not extinguished until after the local fire department arrived. The principal theory of liability sought to be applied to the owner was that its port engineer had delegated to the chief engineer the task of ensuring that alternate fire equipment was in place.¹⁸¹ The court not only conceded that the delegation of this duty was proper, but it also held that the owner was not liable because the delegate was not a managing officer.¹⁸² A second asserted basis for recovery was that the marine superintendent should have cleared the cargo from the hold before the welding began. The district court, however, also found the superintendent to be a mere subordinate employee, and not a managerial official.¹⁸³ Thus, because the owner was not personally negligent, the Fire Statute exonerated him from liability.¹⁸⁴

The *Sunkist* court asserted that *Albina* was distinguishable in that the "design or neglect" in *Sunkist* was that of managing officers or supervisory employees.¹⁸⁵ It is asserted that this premise is incorrect. The "neglect" of the owner was said to be twofold: the failure to provide a proper fitting in the fuel joint and the failure to man the vessel with a properly trained crew prior to the commencement of the voyage.¹⁸⁶ The district court, however, found that the crew was negligent in failing to report the replacement fitting.¹⁸⁷ There was no neglect in the owner's failure to notice that a new fitting was installed.¹⁸⁸ Additionally, even if the superintendent engineer could be considered a managing agent, there was no "neglect," for he was not informed of the maintenance problem.

¹⁷⁹ *Id.* at 621.

¹⁸⁰ *Id.* The fire caused by the stray spark resulted in damage both to the ship and its cargo. *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 622. The district court's finding, upheld by the Ninth Circuit, was that the superintendent was "a mere subordinate employee' and not a managerial officer." *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 603 F.2d at 1336.

¹⁸⁶ *Id.* at 1334-35.

¹⁸⁷ [1976] A.M.C. 2597, 2600-01.

¹⁸⁸ *Id.*

Finally, the ship's log, routinely inspected by high level management, did not reflect the need for repairs.¹⁸⁹ Thus, *Sunkist* is on all fours with the *Albina* case. Both cases involved shipowners who, with their privy, had no basis on which to believe the vessels were unseaworthy. There being no basis for a finding of neglect, the Fire Statute's protection should have been available to the owner in *Sunkist*—under the authority of the *Albina* decision.

The court also attempted to distinguish *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*,¹⁹⁰ by stating that *Ludwig* primarily involved stevedore negligence and, therefore, the exemption provisions of COGSA were not in issue there.¹⁹¹ In *Ludwig*, dangerous cargo was destroyed by fire because of spontaneous combustion. The court held that the carrier could not be held liable for "neglect" if predicated on a theory that stowage of cargo is a nondelegable duty. Thus, the negligence in the performance of the stevedore's tasks was not to be imputed to the carrier under the Fire Statute or in determining whether it exercised due diligence to make the vessel seaworthy.¹⁹² Actually, this case militates against the Ninth Circuit's view that the Fire Statute must be conditioned on COGSA's due diligence standard because it demonstrates that a vessel owner may properly delegate the stowage duty to an independent stevedore without losing the protection of the Fire Statute.¹⁹³ The same should be true of the duty to use due diligence to make the ship seaworthy. If the vessel owner delegates this duty, he should not have to give up his protection under the Fire Statute. COGSA imposes both duties upon the shipowner,¹⁹⁴ but the *Sunkist* court failed to indicate why delegation of one duty carries such a price, while delegation of the other does not.

*American Tobacco Co. v. Katingo Hadjipatera*¹⁹⁵ was also "distinguished" in *Sunkist* when the Ninth Circuit asserted that the case focused almost exclusively on the Fire Statute, affording COGSA only passing treatment.¹⁹⁶ The *American Tobacco* case involved both the Fire Statute and the COGSA fire exemption

¹⁸⁹ *Id.*

¹⁹⁰ 199 F.2d 134 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953).

¹⁹¹ 603 F.2d at 1340.

¹⁹² 199 F.2d at 143.

¹⁹³ *Id.*

¹⁹⁴ See 46 U.S.C. § 1303(1)(a), (2) (1976).

¹⁹⁵ 81 F. Supp. 438 (S.D.N.Y. 1948), *modified*, 194 F.2d 449 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952).

¹⁹⁶ See 603 F.2d at 1340.

clause, for the suit named not only the owners as defendants but the voyage charterers as well. The inclusion of voyage charterers must invoke considerations of COGSA. The court determined that the vessel owner was not liable because the cargo owner failed to satisfy his burden of proof. There was no evidence that the shipowner had personal knowledge of the improper stowage and under neither statute is the knowledge of the master imputed to the shipowner.¹⁹⁷

Finally, the *Sunkist* panel distinguished the Supreme Court's decision in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*,¹⁹⁸ which held that a failure to exercise due diligence to make a vessel seaworthy will not preclude exoneration under the Fire Statute. The distinction emphasized by the Ninth Circuit was that *Earle & Stoddart* had been decided under the Harter Act, which has no fire exemption clause, as does COGSA.¹⁹⁹ To distinguish *Earle & Stoddart* on this ground is to depart from congressional intent, for under *Sunkist*, exoneration under the Fire Statute would depend upon whether COGSA or the Harter Act was applicable. Congress surely intended COGSA to apply to ocean shipping, but it wished to retain, except for explicitly stated differences, all of the features of the Harter Act in the later statute.²⁰⁰ Thus, the principle enunciated by the Supreme Court in *Earle & Stoddart* should apply to the Fire Statute not only in Harter Act cases, but also where COGSA applies.

Even if *Earle & Stoddart* can be distinguished on the ground that it pertains only to the Harter Act, then the issues raised therein should be resolved in the context of COGSA. For example, it must be decided whether Congress intended the COGSA fire exemption clause to be subject to due diligence.²⁰¹ If so, then the problem arises whether the Fire Statute, not expressly subject to due diligence, must be interpreted to include such a condition despite Congress' expressed intention that the legislation was to survive unmodified by COGSA.²⁰² It is this commentator's view that

¹⁹⁷ 194 F.2d at 449.

¹⁹⁸ 287 U.S. 240 (1932).

¹⁹⁹ 603 F.2d at 1340.

²⁰⁰ See notes 34-37 and accompanying text *supra*.

²⁰¹ See note 158 *supra*.

²⁰² See text accompanying note 42 *supra*. Indeed, one commentator noted:

In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.* the Supreme Court held that a shipowner's breach of its non-delegable duty of due diligence with respect to seaworthiness did not deprive it of the right to exoneration under the

neither question should be answered in the affirmative.

OTHER CONSIDERATIONS: NO REPRIEVE FOR SUNKIST

Perhaps COGSA's greatest contribution to the merchant marine is that it extends exoneration from fire liability to time charterers, who enjoy no such protection under the Fire Statute.²⁰³ The *Sunkist* court, however, without giving adequate consideration to their position, imposed a due diligence requirement upon time charterers.²⁰⁴ Unlike the shipowner, the time charterer's sole interest is limited to loading and stowage of cargo.²⁰⁵ It is usually not involved in the navigation of a ship or the selection of its master or crew. It is the owner who is obliged to keep the ship in proper repair. Indeed, in many instances, the time charterer found liable based upon failure to exercise due diligence can obtain indemnifi-

Fire Statute. Neglect of the owner in the sense of the Fire Statute and in the sense of COGSA means, in the case of a corporate owner, negligence of its managing officers or agents. Negligence of the ship's officers or crew does not deprive the owner of its right to exoneration, although, of course, such negligence will support a finding of a lack of due diligence with respect to unseaworthiness. The Supreme Court's *Earle & Stoddart* decision was rendered prior to the enactment of COGSA, but since COGSA does not narrow an owner's rights under the Fire Statute that decision still states the applicable rule.

5 J. MAR. L. & COM. 129, 133-34 (1973) (footnotes omitted).

²⁰³ See 46 U.S.C. § 1304 (1976). The term "carrier," in 46 U.S.C. § 1304 (1976), has been defined to include time charterers—who are, therefore, exonerated from fire liability. See, e.g., *Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2d Cir. 1972). Pursuant to the Fire Statute, however, time charterers are not entitled to limitation of liability. See *In re Barracuda Tanker Corp.*, 409 F.2d 1013, 1015 (2d Cir. 1969). Conversely, the limitation of liability provisions of the Fire Statute have been held to be applicable to bareboat charterers. See *Allen N. Spooner & Son, Inc. v. Connecticut Fire Ins. Co.*, 206 F. Supp. 495 (S.D.N.Y. 1962), *rev'd on other grounds*, 314 F.2d 753 (2d Cir.), *cert. denied*, 375 U.S. 819 (1963); *Tracy Towing Line, Inc. v. City of Jersey City*, 105 F. Supp. 910, 913 (D.N.J. 1952).

Under a time charter arrangement, an owner provides a fully equipped ship to the time charterer in return for monthly compensation. 2B *BENEDICT ON ADMIRALTY*, *supra* note 58, at § 10. Moreover, since the owner does not surrender all possession and control of the vessel, the liability for negligence in piloting as well as the obligation to provide insurance of the vessel rests entirely upon the owner. *Id.* In contrast, the bareboat charterer is vested with *pro hac vice* ownership, subject to the duties, rights and liabilities that arise out of the incidents of ownership. See *Reed v. Steamship Yaka*, 373 U.S. 410, 412 (1963); *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 957 (9th Cir. 1977); *Williams v. McAllister Bros. Inc.*, 534 F.2d 19 (2d Cir. 1976). Accordingly, a bareboat charterer is liable for damage to the vessel. *Seaboard Sand & Gravel Corp. v. Moran Towing Corp.*, 154 F.2d 399, 402 (2d Cir. 1946).

²⁰⁴ 603 F.2d at 1338.

²⁰⁵ See 2B *BENEDICT ON ADMIRALTY*, *supra* note 58, at § 10-11.

cation from the owner.²⁰⁶ This is because the owner has an obligation, under a time charter arrangement, to supply a seaworthy ship at the beginning of each voyage.²⁰⁷ It is submitted, however, that this possibility of indemnification should provide no excuse for misplaced liability in the first instance. Although COGSA was intended to extend protection to time charterers, the *Sunkist* panel afforded them no more protection than they enjoyed under the 1851 Act.

CONCLUSION

In arriving at its determination that neither the Fire Statute nor the COGSA fire exemption clause are available to carriers who do not exercise due diligence to make their vessel seaworthy, the *Sunkist* court ignored or "distinguished" a number of American precedents, including the Supreme Court's decision in *Earle & Stoddart*.²⁰⁸ Instead, the Ninth Circuit relied upon Canadian precedent, without considering that that nation has no independent Fire Statute, as does the United States.²⁰⁹ Thus, the court failed to focus upon the interrelationship between the COSGA fire exemption clause and the 1851 Fire Statute. Indeed, in construing both pieces of legislation, the court followed the Canadian interpretation of their statute rather than emphasizing congressional intent or several important policy considerations.

Although one could argue that P & I insurance policies will render the *Sunkist* decision of little practical significance, it is strongly suggested that such is not the case. While it is true that the carrier's insurer will pay for the loss based upon an experience premium structure, the indirect effect of such payouts is significant. Since P & I insurance is written with an understanding that the carrier has less risk of liability because of the statutory exoneration provisions, the *Sunkist* decision is dangerous, from a practical perspective, because of its inflationary potential. If the *Sunkist*

²⁰⁶ See, e.g., *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 152-53 (2d Cir. 1976); *Nichimen Co. v. M.V. Farland*, 462 F.2d 319, 331-32 (2d Cir. 1972); *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972).

²⁰⁷ Indeed, courts have held that there is an implied warranty, in most time charter arrangements, that the vessel is seaworthy at the commencement of each voyage. See *The Julia Luckenbach*, 235 F. 388 (2d Cir. 1916) (per curiam), *aff'd sub nom. Luckenbach v. W.J. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918); *Coca Cola Co. v. S/S Norholt*, 333 F. Supp. 946, 948 (S.D.N.Y. 1971); 2B *BENEDICT ON ADMIRALTY*, *supra* note 58, at 53.

²⁰⁸ See notes 56-64 and accompanying text *supra*.

²⁰⁹ See notes 163-168 and accompanying text *supra*.

principles become entrenched in the law, carriers' rates will rise substantially to cover the increase in exposure to liability.

The *Sunkist* decision represents a severe retreat in the protections previously enjoyed by carriers. If Congress feels that the Fire Statute has outlived its usefulness, it is for that body to repeal the legislation. If the courts do so in a piecemeal fashion, much of the legal stability and uniformity necessary for the survival of the American merchant marine will disappear.