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Wayne F. Emard

Michelle T. Leighton

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VESSEL OWNER'S RIGHT TO RELY ON THE STEVEDORE TO PROTECT LONGSHOREMEN FROM PRE-EXISTING OBVIOUS DANGERS: AN ANALYSIS OF THE *TAYLOR* and *OLLESTAD* DECISIONS

*Wayne F. Emard**

I. INTRODUCTION

> Now over a dozen years ago, amendments to the Longshoremen and Harbor Workers' Compensation Act (LHWCA) beached the skow UNSEAWORTHINESS built by *Sieracki*, to launch a new vessel for longshoreman recovery—the clipper REASONABLE CARE. Able crafters though they were, the Shipbuilders of Capitol Hill were unwilling to venture out on the waters of tort law and left the REASONABLE CARE adrift in the doldrums of vagueness, its destiny in the steady hands of its nine Supreme Pilots and its energetic (but rarely cohesive) Circuit and District crew. 'Through the Straits of *De Los Santos*,' was the Pilot's terse command.[1]

The crew of the Ninth Circuit Court of Appeals has recently

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* B.A. *magna cum laude*, Providence College 1976; J.D. *cum laude* University of San Francisco School of Law 1982. Mr. Emard is an associate in the firm of Acret and Perrochet, San Francisco and Los Angeles, California.

1. Stass v. American Commercial Lines, Inc., 720 F.2d 879, 880 (5th Cir. 1983). It is initially noted that the Longshoremen's and Harbor Workers' Compensation Act was amended in 1984, including Section 905(b). However, these amendments do not have a significant bearing on this article.

chartered the clipper REASONABLE CARE on two separate voyages through the Straits of *De Los Santos*.[2] With Judge Anderson at the helm in *Taylor v. Moram Agencies*,[3] the court braved the choppy seas created by tropical storms *Subingsubing*,[4] *Davis*,[5]

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2. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) (hereinafter cited as *Scindia*). In *Scindia*, three principles were enunciated. First, the vessel owner must exercise ordinary care under the circumstances in turning over a vessel and equipment in such a condition that an expert stevedore can carry on its operation with reasonable safety. In discharging its duty, the owner is entitled to rely on the stevedore's performance of its task with reasonable care. Vessel owner must also warn the stevedore of any hidden unsafe conditions on the ship of which the owner is, or should be, aware. Second, once the stevedore begins its operations, the vessel owner has no duty to supervise its work or to inspect the area assigned to the stevedore, unless contract provision, positive law, or custom impose such a duty. In short, the vessel owner has no general duty to monitor the stevedore's operations, but is entitled to rely on the stevedore's expertise and reasonableness. This reliance, however, is not justified if some explicit duty is recognized by the parties or imposed by law. Third, the vessel owner has a duty to protect the stevedore's employees during the stevedore's operations only if the owner becomes aware that the ship or its gear poses a danger to the stevedore's employees and the owner learns that the stevedore is acting unreasonably in failing to protect its employees. The vessel owner is charged with knowledge of the defect if the danger develops during the stevedore's operations and the owner has actual knowledge of it, or if the danger exists at the outset, in which case the owner must be deemed to have knowledge. *Id.* at 166-77.

3. Taylor v. Moram Agencies, 739 F.2d 1384 (9th Cir. 1984) (per Anderson, J.; the other panel members were Skopil, O., and Ferguson, W., dissenting).

4. Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982) (per Fletcher, B.B.; the other panel members were Pregerson, J., and Reinhardt, S.). In *Subingsubing*, a longshoreman was injured when he stepped on a small piece of wood, called a "dead-eye," used to stop the steps of a rope ladder from moving. The issue was whether the shipowner owed a duty of reasonable care to remove from the ship's deck, before the longshoremen came aboard, a dangerous, non-obvious, tripping hazard. The trial court granted summary judgment to the defendant, holding that there was no duty to inspect, discover, remedy, or warn of wood on the deck within the confines of the stevedoring operation. The Ninth Circuit reversed, stating that the issue in the instant case was not whether the shipowner had a continuing duty to inspect and supervise the operations of the stevedore, but whether the owner, in the exercise of the duty of reasonable care, should have removed the tripping hazard before the longshore worker came on deck. The court noted that the vessel owed the longshore worker a duty that extended to at least exercising ordinary care under the circumstances to have the ship and its equipment in such a condition that an expert and experienced stevedore would be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property. *Id.* at 781-82.

5. Davis v. Partenreederei M.S. NORMANNIA, 657 F.2d 1048 (9th Cir. 1981) (per Grant, R.A., sitting by designation; other panel members were Fletcher, B.B., and Ferguson, W.). In *Davis*, the longshoreman was struck by cargo being unloaded from the vessel allegedly as a result of the dangerous proximity of the gangway to the unloading process. The district court entered judgment on a jury verdict for plaintiff. The jury attributed twenty percent comparative fault to the vessel, forty percent to the plaintiff and forty percent to the stevedore. The judgment, however, was reduced only by the plaintiff's negligence. The Ninth Circuit affirmed, holding that since the gangway was under the concurrent control of the vessel and stevedore, the vessel had a continuing duty to repo-

and *Turner*[6] and, despite dissention by fellow crewmember Ferguson,[7] sailed smoothly through the confines of the straits.

A second crew manned the REASONABLE CARE in *Ollestad v. Greenville Steamship Corp.*,[8] in a subsequent attempt to negotiate the perilous Straits of *De Los Santos* with Circuit Judge Fletcher as the helmsperson. Succumbing to the winds created by *Subingsubing*,[9] *Turner*,[10] and *Davis*,[11] the crew opted to avoid the Straits and seek refuge in the Bay of *Bueno*.[12] While the courage of that crew is admirable, they failed to comply with

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sition it if safety required. Requiring the vessel to pay that portion of the judgment attributable to the stevedore is in keeping with the LHWCA, which shields the stevedore from contribution or indemnity. *Id.* at 1052-53.

6. Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981) (per Fletcher, B.B.; the other panel members were Ferguson, W., and Grant, R.A., sitting by designation). In *Turner*, the vessel PRESIDENT QUEZON was owned by Philippine President Lines and was time-chartered to Japan Lines, Ltd. The cargo of plywood was loaded by a Japanese stevedore pursuant to a contract with the time-charterer. There was expert testimony that the plywood was negligently and improperly stacked, as it was not shored properly. The plaintiff longshoreman was seriously injured when a stack of lumber collapsed and he was hit on the head. A jury verdict in favor of the plaintiff was overturned by the district court when judgment N.O.V. was granted defendant. *Id.* at 1301-02. On appeal, the Ninth Circuit reversed and remanded. The court held that §905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the employer, as defined in the Act. The vessel can ensure safety by chosing reliable foreign stevedore, supervising its work when necessary, and warning the off-loading stevedore of concealed, dangerous conditions created by the foreign stevedore. The court concluded that the vessel had a duty to protect plaintiff from concealed dangers created by the foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of. *Id.* at 1302-04.

7. 739 F.2d 1384, 1389 (1984) (Ferguson, W., dissenting).

8. Ollestad v. Greenville Steamship Corp., 738 F.2d 1049 (9th Cir. 1984) (per Fletcher, B.; the other panel members were Wright, E., and Anderson, J.).

9. 657 F.2d 1048.

10. 651 F.2d 1300. *See also* text accompanying note 6, *supra*.

11. 657 F.2d 1048. *See also* text accompanying note 5, *supra*.

12. Bueno v. United States, 687 F.2d 318 (9th Cir, 1982) (per Fletcher, B.B.; the other panel members were Pregerson, J., and Reinhardt, S.). In *Bueno*, the plaintiff longshore worker, while re-entering the hold of a vessel, fell through a space left open after the removal of scaffolding by a third-party sandblaster. Plaintiff filed a negligence suit in admiralty against his employer, the United States, and the company which jointly contracted with plaintiff's employer to provide sandblasting services. The district court granted summary judgment in favor of all defendants and plaintiff appealed. *Id.* at 318-19. The Ninth Circuit held that a factual issue existed as to whether the United States, as vessel owner, was negligent in its failure to remedy a dangerous situation created by the employer. The court noted that under *Scindia*, the United States, as vessel owner, owed a duty of care to plaintiff, having assumed an affirmative duty to conduct periodic safety inspections during the repairs. Because there were genuine issues of material fact as to whether the United States breached that duty, summary judgment in favor of the United States was inappropriate. *Id.* at 320-21.

the Supreme Pilot's commands and truly test the seaworthiness of the clipper REASONABLE CARE.

II. BACKGROUND

In 1927, Congress enacted the Longshoremen and Harbor Workers' Compensation Act,[13] hereinafter referred to as LHWCA. As originally framed, the Act established workers compensation as the longshoreman's exclusive remedy against a stevedore;[14] however, the Act made no specific provision for a third-party tort action brought by a longshoreman against the vessel owner. During the period prior to 1972, the Supreme Court was left to fashion the form of recovery available to an injured longshoreman against a vessel and its owner. In *Seas Shipping Co. v. Sieracki*,[15] the Court extended a cause of action based upon unseaworthiness[16] to the longshoreman against the vessel owner. Unseaworthiness is a form of strict liability which had previously been reserved only to actions by seamen.

Ten years after *Sieracki*, in *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*,[17] the Court held that a vessel owner

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13. Act of Mar. 4, 1927, Pub. L. No. 69-803, §§1-51, 44 Stat. 1424, *as amended* 33 U.S.C. §§905-51 (1984).

14. 33 U.S.C. §905 (1970), *as amended*; 33 U.S.C. §905 (1984).

15. Seas Shipping Co. v. Sieracki, Inc., 328 U.S. 85 (1946). In *Sieracki*, the court extended to longshoremen the right given to seamen to recover against the shipowner, without the need of establishing negligence, for injuries caused by the unseaworthiness of the vessel. Sieracki was the employee of a stevedore and was injured when a shackle supporting a boom broke. Plaintiff sued the shipowner and two other parties whose negligence he alleged caused his injury. The district court, Sieracki v. Seas Shipping Co., 57 F.Supp. 724 (E.D. Pa. 1944), found that the condition of the shackle rendered the vessel unseaworthy; that there was no negligence on the part of the shipowner; that the two third-party defendants were negligent; and that recovery should be had only against those third parties. The court of appeals, Sieracki v. Seas Shipping Co., 149 F.2d 98 (3rd Cir. 1945), accepted the findings on unseaworthiness and negligence made by the district court, but concluded that Sieracki could recover against the shipowner on the ground of unseaworthiness, irrespective of the latter's lack of fault. Five justices of the Supreme Court approved the position taken by the court of appeals and affirmed Sieracki's recovery.

16. The warranty of seaworthiness was extended to seamen because of the special hazards of their work, the rigorous discipline to which they were subjected, and the special protection traditionally accorded them by admiralty courts. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). Since longshoremen were not considered "seamen," they did not have the benefit of the warranty of seaworthiness. However, they could bring an action against the shipowner for negligence, a remedy that was not available to seamen. The Osceola, 189 U.S. 158 (1903).

17. Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956).

could seek indemnity from the stevedore employer based upon a breach of the implied warranty of workmanlike performance.[18] Thus evolved the so-called *Sieracki-Ryan*[19] doctrine, effectively negating the stevedore's exclusive liability under former §905 of the LHWCA. The doctrine provided a circuitous action whereby the injured longshoreman recovered from the vessel owner, who could then obtain indemnity from the longshoreman's employer, the stevedore, who was statutorily liable for payment of compensation.[20]

In 1972, Congress responded to the *Sieracki-Ryan* dilemma and made a number of significant changes in the LHWCA through enactment of long-awaited amendments.[21] Among other things, the LHWCA Amendments broadened the scope of coverage while increasing compensation benefits.[22] A third-party ac-

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18. In *Ryan*, the court was faced with the question of whether a shipowner, who was forced to pay damages to a longshoreman injured by the unsafe storage of cargo, could recover indemnity from the stevedoring company for whom the longshoreman worked. Even in the absence of any indemnity provision, the court held that the stevedoring company was liable to the shipowner because it had promised to store the cargo safely. The court was not convinced by arguments that its result made the economic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the Longshoremen's and Harbor Workers' Act. Section 5 of the Act, before its present amendment, provided that the liability of an employer would be exclusive and in place of all other liability of such employer to the employee and its legal representatives and anyone otherwise entitled to recover damages from the employer at law or in admiralty on account of injury or death. The exception was where an employer had failed to secure the payment of compensation, in which event the person concerned could elect to claim compensation either under the Act or by way of a separate suit. *Id.* at 128-29.

19. The *Sieracki-Ryan* doctrine deprived the stevedore of its immunity from civil suit for damages stemming from the personal injury of its employees. Since the *Sieracki* doctrine of unseaworthiness was very broad, few injuries were outside its scope, and the federal courts were flooded with longshoremen's injury actions. *See* Deacon, *The Injured Longshoreman v. The Shipowner*, 28 HASTINGS L.J., 771, 776 (1977).

20. *Id.*

21. Among Congress' primary goals in amending the Longshoremen's and Harbor Workers' Compensation Act in 1972 were the improvement of the Act's benefit structure and the general safety of prevailing working conditions. *See* H.R. REP. No. 1441, 92d Cong., 2d Sess. 5-7, (1972) [hereinafter cited as Committee Report], which states:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this Bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

Id.

22. *See* Committee Report, *Id.* at 2-3.

tion against a negligent "vessel" was created by the addition of subsection (b) to § 905, and the unseaworthiness remedy, with respect to longshoremen, was nullified.[23]

As originally intended, the trade-off was a fair one. The injured longshoreman received tax free benefits which often equaled or exceeded pre-injury take-home pay.[24] The benefits were based on double the national average weekly wage with annual unlimited tax-free escalation.[25] The vessel interests were denied their indemnity action against the stevedore in exchange for the elimination of a longshoreman's recovery based upon the doctrine of unseaworthiness.[26] The stevedore regained its insulation from what was, in effect, the longshoreman's tort recovery against it.[27]

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23. 33 U.S.C. §905(b) (1984). The first sentence of §905(b) permits longshoremen and harbor workers to sue the vessel for negligence. The section states:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of §933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

Id.

33 U.S.C. §902(21) (1984), defines the term "vessel," as follows:

> The term vessel means any vessel upon which or in connection with which any person entitled to benefits under this Chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charterer, or bareboat charterer, master, officer, or crew member.

The last clause of §905(b) not only abolishes the *Ryan* implied warranty of workmanlike performance, but also provides that an employer cannot be held liable "directly or indirectly" for its employee's injuries. Contractual clauses purporting to shift this liability to the employer will be null and void. In the second and third sentences of §905(b), Congress appears to have overruled Reed v. The YAKA, 373 U.S. 410, 415-16 (1963). *See* GILMORE & BLACK, THE LAW OF ADMIRALTY, 444-45 (2d ed. 1975). [Hereinafter cited as GILMORE & BLACK.] The fourth sentence of §905(b) overrules *Sieracki*, and the last sentence prevents the development of a new strict liability theory by making negligence the exclusive basis for recovery against the shipowner.

For a general review of the amendments, see Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MARITIME L. & COMM., 1 (1974).

24. The compensation scheme, at a minimum, was double the compensation payments to most covered employees. *See* Committee Report, *supra*, note 21 at 3.

25. 33 U.S.C. §906(b) (1984).

26. *See* Committee Report, *supra*, note 21 at 4-8.

27. 33 U.S.C. §905(a) (1984).

Since §905(b) of the LHWCA does not define the standard of care which Congress intended vessels to exercise toward longshoremen,[28] numerous courts have taken various approaches in defining the vessel owner's standard of care and in interpreting the legislative history of the 1972 amendments with respect to open and obvious dangers on board the vessel.[29] The Court of Appeals for the Second, Fourth, and Fifth Circuits relied upon §§343 and 343A of the Restatement (Second) of Torts[30] in defin-

28. Section 905(b) merely provides the broad outlines of the third-party action, and it must be read in conjunction with the legislative history in order to discern congressional intent as to the applicable standard of care. The House Report sought a compromise position and rejected both proposals by the shipping industry that a third-party action by totally abolished and the longshoremen's proposal that the strict liability remedy be continued. *See* Committee Report, *supra*, note 21 at 4-5. The congressional reports reject the assumption that longshoremen encounter seamen's hazards and therefore should have seamen's remedies. *Id.* at 5-6. For example, in International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), the Supreme Court extended the Jones Act remedy, 48 U.S.C. §688 (1970), to longshoremen by holding that for purposes of the Jones Act, longshoremen were seamen. In response to the *Haverty* decision, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act within 6 months. *See* Act of Mar. 4, 1927, Pub. L. No. 69-803, §§1-51, 44 Stat. 1424, *as amended*, 33 U.S.C. §§901-51 (1984).

29. Congress, in failing to provide an adequate definition of negligence, left the courts the task of fashioning a uniform standard for determining the scope of the shipowner's duty of care towards longshoremen. As a result, a clear philosophical split arose among the circuits. For example, in Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2nd Cir, 1978), *cert. denied*, 439 U.S. 929 (1980), the Second Circuit stated that it would continue to adhere to the view that §343(a) of the *Restatement* (SECOND) *of Torts* was the appropriate standard for determining negligence under §905(b). That standard is that a vessel is not liable for injuries resulting from known or obvious dangers unless shipowner should anticipate the harm, despite the obviousness of the danger. See also Evans v. Transportation Maritima Mexicana, S.S., 639 F.2d 848, 855 (2nd Cir, 1981). The Fourth and Fifth Circuits, relying primarily on the legislative history of the Act, also consistently applied land-based principles of negligence as embodied in the *Restatement* (SECOND) *of Torts*, §§343, 343A. *See* Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 759 (4th Cir. 1976). *See also* Dunlap v. G. & C. Towing, Inc., 613 F.2d 493 (4th Cir. 1980), Chavis v. Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978), Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), and Hess v. Upper Mississippi Towing Corporation, 559 F.2d 1030 (5th Cir. 1977). However, the First, Third, and Ninth Circuits took the position that the shipowner's conduct could only be judged through the application of maritime principles of negligence. *See* Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 347 (1st Cir. 1980), Griffith v. Wheeling Pittsburg Steel Corp., 610 F.2d 116 (3rd Cir. 1979), Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), Lawson v. United States, 605 F.2d 448, 453 (9th Cir. 1979).

30. The Restatement sections state:

> §343. Dangerous Conditions Known to or Discoverable by Possessor
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> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an un-

ing the standard of care.[31] The First, Third, and Ninth Circuits, however, held that these sections should not apply in §905(b) suits, since they might bar a longshoreman from recovery if he was contributorily negligent, or if he voluntarily encountered a known or obvious risk, defenses which are not cognizable in admiralty.[32]

Finally, in 1981, the Supreme Court of the United States grappled with this issue in *Scindia Steam Navigation Co. v. De Los Santos*.[33] In *Scindia*, a longshoreman was injured when sacks of wheat fell from a pallet being lowered into a cargo hold by a longshoreman operating a ship's winch. The braking mechanism of the winch had been malfunctioning for two days prior to the longshoreman's injury. The United States District Court for the Western District of Washington[34] granted summary judgment for the vessel, holding that, under the negligence standards governing actions under §905(b), a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore is in exclusive control of the manner and the area of work, and the shipowner has no duty to warn the stevedore or its employees of open and obvious defects.[35]

The United States Court of Appeals for the Ninth Circuit reversed,[36] holding that a shipowner *may* be subject to liability

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reasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness. (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

31. *Id.*

32. *Id.*

33. 451 U.S. 156 (1981).

34. De Los Santos v. Scindia Steam Navigation Co., 1976 AMC 2583 (W.D. Wash. 1976).

35. *Id.* at 2585.

36. Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) (per

if it knows of, or by the exercise of reasonable care should discover, a defective condition on the vessel which involves an unreasonable risk of harm to the longshoremen and fails to exercise reasonable care to protect the longshoremen against the danger.[37]

On appeal to the United States Supreme Court, the Court disagreed with the Ninth Circuit's view of vessel liability and established a framework within which to determine the standard of care owed by the vessel owner to longshoremen, particularly with regard to open and obvious dangers arising *during* the cargo operation.[38] The court adopted the standard established in *Marine Terminals v. Burnside Shipping Co.*[39] with respect to obvious dangers existing prior to turning the vessel over to the stevedore.[40] It stated that the Restatement rule,[41] while relevant,

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Duniway, B.C.; the other panel members were Choy, H., and Grant, R.A., sitting by designation).

37. *Id.* at 485.

38. The Court summarized the vessel's duty once the independent contractor has begun operations:

> We are of the view that absent contract provision, positive law, or custom to the contrary—none of which has been cited to us in this case—the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or non-delegable duty. The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise cargo operations.

451 U.S. at 172.

The court further noted that:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. §941, requires the stevedore, the longshoreman's employer, to provide a 'reasonably safe place to work' and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

Id. at 170.

39. 394 U.S. 404 (1969).

40. The court stated:

was not controlling in establishing the shipowner's duty to longshoremen, at least under the facts of that case.[42] The court also recognized, and both parties agreed, that a vessel owner may subject itself to additional liability if it actively "involves" itself in the cargo operations and negligently injures a longshoreman, or if it fails to exercise due care in protecting longshoremen from hazards they may encounter in areas under the "active" control of the vessel owner.[43]

The Supreme Court held that there was a triable issue of fact in *Scindia* on whether the shipowner had actual knowledge of the failure of the winch's braking mechanism or could be charged with knowledge because the winch was defective from the outset. If Scindia was aware that the winch was malfunctioning to some degree, and if there was a jury question as to whether it was so unsafe that the stevedore decision to continue using it was "obviously improvident," then the jury could have found that the vessel owner should have intervened and stopped the loading operation until the winch was repaired.[44]

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work . . . The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedore operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to the longshoreman.

451 U.S. at 167.

41. RESTATEMENT (SECOND) OF TORTS §343, §343(a).

42. 451 U.S. at 168, n.14.

43. *Id.* at 167.

44. The court articulated the standard for the existence of a dangerous condition during stevedoring operations where such condition is known to the stevedore and may cause injury to its longshoremen. The court stated that the duty, within the framework

In his concurring opinion, Justice Powell (joined by Justice Rehnquist) emphasized the distinction between the Supreme Court's approach and the "general reasonableness" standard adopted by the Ninth Circuit.[45] In doing so, Justice Powell highlighted that portion of the opinion establishing the vessel's limited duty with respect to obvious hazards of which it is aware. The vessel owner, according to Justice Powell, need only act reasonably in relying on the stevedore to discover and avoid obvious hazards on the vessel. This standard promotes safety by placing responsibility on the party best able to protect the longshoremen.[46]

Since *Scindia*, the Ninth Circuit has had occasion to apply this case in at least six reported longshore decisions.[47] Various

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of the case was:

> [W]hether [the winch] could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance . . . Yet it is quite possible, it seems to us, that the stevedore's judgment was so obviously improvident that (the vessel) if it knew of this defect and that (the stevedore) was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and (the vessel) must be deemed to have been aware of its condition.

Id. at 175-76.

45. *Id.* at 181 (Powell, concurring).

46. Justice Powell stated:

> The difficulty with a more general reasonableness standard like that adopted by the court below is that it fails to deal with the problems of allocating responsibility between the stevedore and the shipowner. It may be that it is 'reasonable' for a shipowner to rely on the stevedore to discover and avoid most obvious hazards. But when, in a suit by a longshoreman, a jury is presented with the single question whether it was 'reasonable' for the shipowner to fail to take action concerning a particular obvious hazard, the jury will be quite likely to find liability. If such an outcome were to become the norm, negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments to the injured longshoreman. (Footnote omitted.) This would decrease significantly the incentives toward safety of the party in the best position to prevent injuries, and undercut the primary responsibility of that party for ensuring safety.

Id.

47. *See*, for example, Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982). These cases,

panels of the Ninth Circuit have issued opinions which appear divergent with respect to the vessel owner's standard of care in longshore claims.[48] Except for the *Bandeen* case,[49] the other five reported decisions have tended toward broadening the duty of care set out in *Scindia*.[50] Not surprisingly, one circuit judge au-

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while imposing a duty to warn on the shipowner, would require a warning only in regard to hidden (*Turner*) or non-obvious (*Subingsubing*) dangers. *See also* Davis v. Partenreederei M.S. NORMANNIA, 657 F.2d 1048 (9th Cir. 1981) (longshoreman injured by cargo discharged in close proximity to gangway held to have action for negligence based on shipowner's concurrent control of the gangway); Bueno v. United States, 687 F.2d 318 (9th Cir. 1982) (shipowner assumed affirmative duty by conducting regular safety inspections and should have noted and corrected danger created by a third-party sandblaster). Hedrick v. Pine Oak Shipping, 715 F.2d 1355 (9th Cir. 1983) (defective splice in vang pendant caused injury to longshoreman, jury question existed as to whether inspection by shipowner would have revealed defect prior to turning vessel over to stevedore); Bandeen v. United Carriers, 712 F.2d 1336 (9th Cir. 1983) (vessel owner held not liable where longshoreman was injured due to stevedore's failure to provide safety lines).

48. The panels of each post-*Scindia* decision are as follows:

Davis v. Partenreederei M.S. NORMANNIA, 657 F.2d 1048 (9th Cir. 1981) (per Grant, R.A., sitting by designation; the other panel members were Fletcher, B.B., and Ferguson, W.);

Turner v. Japan Lines, 651 F.2d 1300 (9th Cir. 1981) (per Fletcher, B.B.; the other panel members were Ferguson, W., and Grant, R.A., sitting by designation);

Hedrick v. Pine Oaks Shipping, 715 F.2d 1355 (9th Cir. 1983) (per Goodwin, A.T.; the other panel members were Pregerson, H., and Canby, W.);

Bueno v. United States, 687 F.2d 318 (9th Cir. 1982) (per Fletcher, B.B.; the other panel members were Pregerson, H., and Reinhardt, S.);

Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982) (per Fletcher, B.B.; the other panel members were Pregerson, H., and Reinhardt, S.);

Bandeen v. United Carriers, 712 F.2d 1336 (9th Cir. 1983) (per Goodwin, A.T.; the other panel members were Canby, W., and Pregerson, H., dissenting);

Ollestad v. Greenville Steamship Corp, 738 F.2d 1049 (9th Cir. 1984) (per Fletcher, B.B.; the other panel members were Wright, E., and Anderson, J.);

Taylor v. Moram Agencies, 739 F.2d 1384 (9th Cir. 1984) (per Anderson, J.B.; the other panel members were Skopil, O., and Ferguson, W., dissenting);

49. Bandeen v. United Carriers, 712 F.2d 1336 (9th Cir. 1983) (per Goodwin, A.T.; the other panel members were Canby, W., and Pregerson, H., dissenting). In *Bandeen*, a longshoreman was injured when he fell from a vessel while loading logs on deck. He alleged that defendants were negligent in not providing safety wires between stanchions. The district court granted defendant's motion for directed verdict on the ground that the stevedore is *solely* responsible for the longshoreman's safety. *Id.* at 1338-39. The Ninth Circuit affirmed, holding that the vessel owner had neither the duty to string safety lines nor the duty to intervene when the stevedore failed to do so. *Id.* at 1340. The dissent (Pregerson) emphasized that a vessel owner has a duty to intervene when the stevedore's conduct is obviously improvident and that a jury could have so found. *Id.* at 1341.

50. *See*, text accompanying notes 6, 7, 8, 14 *supra*. In Hedrick v. Pine Oaks Shipping, 715 F.2d 1355 (9th Cir. 1983) (per Goodwin, A.T.; the other panel members were Pregerson, H., and Canby, W.), a longshoreman was injured by a defective splice in a vang pendant (part of the ship's equipment). The trial court granted judgment N.O.V. to defendant shipowner, based on the lack of evidence showing knowledge of the defect by shipowner. *Id.* at 1356. The court of appeals reversed, holding that a shipowner has a

thored the majority opinion in three of those five cases, and she sat on the panel of one other.[51] Two other judges, alone or in tandem, were on the panels of all five and one submitted a dissenting opinion in *Bandeen*.[52]

It is within this framework that the *Taylor* and *Ollestad* cases came to the fore. Analysis of both decisions is illustrative of the divergent views in this Circuit regarding the vessel owner's standard of care.

III. THE TAYLOR AND OLLESTAD DECISIONS

A. *Taylor v. Moram Agencies*

In *Taylor v. Moram Agencies*,[53] a longshoreman, was injured on board the M/V NIKOLAY KARAMZIN owned by Far Eastern Steamship Company (FESCO) while that vessel was discharging cargo. Plaintiff alleged that he slipped on beans which had spilled on deck during the unloading process and sustained personal injuries.[54] This action was subsequently brought against the vessel owner FESCO and its agent under §905(b) of the Longshoremen's and Harbor Worker's Compensation Act, as amended in 1972.[55]

Plaintiff contended that FESCO breached its duty to provide a vessel and equipment in reasonably safe condition, given the presence of the torn sacks of mung beans, *before* cargo oper-

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duty to inspect its equipment before turning it over to the stevedore and a jury question existed whether a reasonable inspection would have revealed the defective splice. *Id.* at 1357.

51. Circuit Judge Betty Fletcher authored *Turner*, *Subingsubing*, and *Bueno*, and she sat on the panel in *Davis*.

52. Circuit Judge J. Pregerson sat on the panel in *Hedrick*, *Bueno*, *Subingsubing*, and *Bandeen* (dissenting); Circuit Judge W. J. Ferguson sat on the panel in *Davis* and *Turner*. It should be noted also, that Circuit Judge S. Reinhardt participated on the panels of *Bueno* and *Subingsubing*.

53. 739 F.2d 1384 (9th Cir. 1984) (per Anderson, J.B.; the other panel members were Skopil, O., and Ferguson, W., dissenting).

54. A portion of the cargo consisted of sacks of mung beans from Bangkok, which are hard, round, green beans the size of BB's. Some of the sacks were torn and leaking beans before the unloading operation began. As these sacks were hoisted out of the hold, beans spilled onto the main deck and were tracked around the vessel. Apparently, some of the beans were blown up onto the steel deck of the winch platform. On the morning of the second day of cargo unloading by the stevedore, Crescent Wharf and Warehouse, plaintiff lost his footing on the winch platform while taking the slack out of the midship guy wire, slipped on the beans and fell on his back and head. *Id.* at 1387.

55. *See* text accompanying note 23, *supra*.

ations began. Further, plaintiff alleged that FESCO assumed exclusive or concurrent control of the winch platform where the accident occurred by performing maintenance on the winch and by sweeping the deck *during* the cargo operation. By exercising such control, it was asserted that FESCO assumed additional duties with respect to these areas. Lastly, plaintiff contended that FESCO had knowledge of the presence of the dangerous condition on the winch platform, and had an obligation to intervene in the cargo operation to correct it.

In a bench trial, the United States District Court for the Northern District of California (William W. Schwarzer presiding) entered judgment in favor of defendant FESCO, concluding that the vessel owner complied with its responsibility to provide a vessel and equipment in reasonably safe condition and that there was no hidden danger of which the shipowner had a duty to warn the stevedore of. The trial court further held that the shipowner had not assumed exclusive or concurrent control of the platform where the accident occurred and had no duty to intervene in the cargo discharge operation.

The Ninth Circuit affirmed the lower court judgment, holding that the findings of fact rendered by the trial court were not "clearly erroneous" and that the lower court applied the proper standard of care applicable in its judgment for the shipowner. The court held that the torn sacks of beans lying in the hold posed no threat to the longshoremen and that it was not the torn sacks, but the stevedore's failure to take appropriate precautions, that created the danger.[56] Distinguishing the *Turner* and *Subingsubing* decisions, the court emphasized the obviousness of the damaged sacks of beans and the fact, well known

56. The court stated:

> The torn sacks of beans lying in the hold posed no threat; it was only when the cargo discharge began and the wind blew the leaking beans onto the deck and winch platform that a hazardous condition developed. Thus, it was not the torn sacks but the stevedore's subsequent failure to take appropriate precautions in the course of the operation that created the danger. Under the provisions of *Scindia*, a shipowner who has turned over a safe vessel and equipment has the right to rely on the stevedore to avoid exposing the longshoreman to hazards which develop within the confines of the cargo operation.

739 F.2d at 1386.

to the stevedore, that loose beans cause longshoremen to fall.[57] Having turned over a safe vessel and equipment, FESCO had the right to rely on the stevedore to avoid exposing longshoremen to the hazards of spilled beans.[58]

Recognizing that a vessel's active involvement in the cargo operation could expose the vessel owner to increased liability,[59] the court held that the winch maintenance and sweeping of mung beans performed by the vessel's crew during cargo discharge were insufficient to create the type of involvement or control necessary to burden the owner with additional responsibilities toward the longshoremen.[60] The court further acknowledged that while primary responsibility for maintaining safe conditions during cargo operations rested with the stevedore, a limited exception exists which might require a vessel owner to intervene to correct a dangerous condition.[61] Here, however, the court held that even assuming FESCO's knowledge of the loose beans on the winch platform, there was no duty to intervene and sweep up the beans, since FESCO could reasonably expect the stevedore to do what was necessary to protect the longshoremen.[62] Neither the stevedore's contract nor the Chief Mate's agreement

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57. The court stated:

> Here, the damaged condition of the sacks was obvious to the stevedore when the hatch was opened. The difficulty with this type of cargo was well known to the experienced stevedore personnel . . . It was not clearly erroneous for the trial court to have found no hidden danger of which the shipowner had a duty to warn in the face of the evidence demonstrating that the stevedores were well aware of this particular problem and of the difficulties which were expected in cargo operations of this type.

739 F.2d at 1387.

58. *Id.* at 1386.

59. *Id.* at 1387.

60. The court stated: "The active control over the area or equipment utilized in the cargo operation is distinct from the casual use of the deck by the ship's crew for passage or activities undertaken by the crew at the specific request of stevedore personnel." *Id.*

61. The exception was specified in *Scindia* and the court stated it as follows:

> An exception to this rule is recognized where a shipowner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation. (Citations omitted)

Id. at 1387-88.

62. Testimony revealed that bean spillage during this type of operation was normal. *Id.* at 1388.

to take care of the problem was sufficient basis for the court to find shipowner liability.[63]

Circuit Judge Ferguson filed a dissenting opinion, which criticized the lower court for applying an incorrect legal standard in analyzing the facts.[64] The dissent viewed the facts as compelling a conclusion that FESCO had expressly assumed the duty of eliminating the hazard created by the loose beans and that the stevedore fulfilled its duty to maintain a safe environment when it reported the condition to the ship's mate.[65] Judge Ferguson concluded that finding FESCO not negligent was clearly erroneous.[66]

B. *Ollestad v. Greenville Steamship Corp.*

In *Ollestad v. Greenville Steamship Corp.*,[67] plaintiff injured his leg while working as a longshoreman on board defendant's vessel, the GREENFIELD. The longshoremen were engaged to load lumber on the vessel. Before the longshoremen came on board, however, the ship's crew removed the hatch covers and stacked them on the weather deck. They also left a boom rest[68] lying on the deck. The placement of the hatch covers and boom rest made it necessary for workers crossing the weather deck to either climb over the hatch covers or boom rest, or slide under the boom rest in order to get by.[69] Ollestad stepped on the boom

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63. With respect to the mate's promise to clean up the beans, the court stated:

> We find that by sweeping the deck, without it being made clear that he was also asked to clean the winch platform, the mate fulfilled any responsibility the vessel assumed by reason of the promise . . . By assuming the responsibility for cleaning up the original spillage on the deck, the vessel will not be obligated to a continuous duty to clean up additional spillage resulting from the stevedore's failure to properly discharge the cargo.

Id.

64. *Id.* at 1389.

65. *Id.* at 1391.

66. *Id.* at 1393.

67. Ollestad v. Greenville Steamship Corp., 738 F.2d 1049 (9th Cir. 1984) (per Fletcher, B.B.; the other panel members were Wright, E., and Anderson, J.).

68. A boom rest is used to support the boom of the vessel when not in use. *Id.* at 1050.

69. During the first day of loading, snow and ice built up on the deck creating a slippery condition. The plaintiff had crossed the weather deck several times during the morning, passing over the objects obstructing the passageway; however, after lunch, plaintiff stepped on the boom rest, slipped and fell, causing his leg injury. *Id.*

rest, slipped and fell, causing his leg injury.

Ollestad filed an action in the United States District Court for the District of Alaska against the vessel owners, alleging negligence pursuant to §905(b) of the Longshoremen and Harbor Worker's Compensation Act, as amended in 1972.[70] Plaintiff alleged that the shipowners were negligent both in positioning the hatch covers in a manner that left an inadequate passageway and in allowing the boom rest to obstruct that passageway.

The jury found negligence on the part of the shipowner in creating the conditions on the weather deck, and the trial court entered judgment accordingly. Defendants appealed the judgment, contending that the instructions given to the jury were erroneous in that they misstated the conditions under which an owner may be liable and that an owner has no duty to comply with Occupational Safety and Health Administration Longshoring Regulations.[71]

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70. *See* note 23 and accompanying text, *supra*.

71. The trial court, over defendant's objection, gave the jury the following instructions:

> A shipowner has no duty to inspect or to supervise cargo loading or unloading operations under the direction of a stevedore company, since it is by law the responsibility of the stevedore to provide longshoremen with a reasonably safe place to work, reasonably safe equipment and safe working conditions.
>
> A shipowner is liable to longshoremen for injuries caused by an unreasonable risk created by him or known by him or which should have been known by him which existed at the time the vessel was turned over to the stevedore for cargo operations. A shipowner is also liable to the longshoremen for injuries caused by an unreasonable risk of harm existing within work areas remaining under the direct control of the shipowner or by reason of a danger creating an unreasonable risk of harm which is known to the shipowner which the shipowner could not reasonably assume would be remedied by the stevedore but was within the power and control of the shipowner to remedy.
>
> In your consideration of whether a danger creating an unreasonable risk of harm to longshoremen existed at the time the shipowner turned over the vessel GREENFIELD to the stevedore for cargo loading or unloading operations, you may consider the following regulation as evidence along with all the other evidence on plaintiff's claims of negligence. 'Dunnage, hatch beams, tarplins, or gear not in use shall be stowed no closer than 3 feet to the port and starboard sides of the weather deck hatch coaming, except that a reasonable tolerance shall be permited where strict adherence is rendered impracticable due

The Ninth Circuit Court of Appeals held that the instructions given by the district court were proper, in light of the uncontested facts of the case.[72] While skirting the issue concerning the obviousness of the danger,[73] the court relied upon the fact that the ship's crew created the obstruction or the "risk" and that because placement of the hatch covers is work normally done by longshoremen, the ship's crew assumed the duty to exercise the same standard of care required of a stevedore.[74] In upholding the OSHA jury instruction, the court further held that these safety standards, normally applicable to the stevedore, imposed additional duties upon a vessel which undertakes work normally performed by longshoremen and are relevant in determining whether the shipowner exercised reasonable care.[75]

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to the circumstances.'

738 F.2d at 1050-52

The trial court rejected defendant's proposed instruction which read in part:

> If you find that the hazardous condition was open and obvious, and that it existed before control of the ship was handed over to the stevedore, the defendants had a duty to remedy the condition only if they had a reasonable belief that the stevedore would not remedy the hazard and that the condition presented an unreasonable risk of harm to the plaintiff.

Id. at 1051.

72. *Id.* at 1052.

73. The court noted that the Ninth Circuit has not decided whether the shipowner's knowledge or creation of an *obvious* dangerous condition that exists at the time the ship is turned over to longshoremen is, without more, sufficient to establish liability. *See, Turner*, 651 F.2d at 1304-05, (evidence sufficient to establish shipowner's liability to the longshoremen unloading cargo where crew should have known of dangerous, non-obvious condition created by foreign stevedore during loading). *Davis*, 657 F.2d at 1052-53, (evidence sufficient to establish shipowner's liability where ship's crew had placed gangway in dangerous position, had a continuing responsibility to correct its position, and was aware of the danger); *Subingsubing*, 682 F.2d at 782, (shipowner had duty of reasonable care to remove non-obvious tripping hazard before longshoremen come on board).

74. The court stated:

> The "risk" referred to in the challenged instruction was the obstruction of the weather deck caused by the position of the hatch covers and boom rest. This risk was undisputedly created by the ship in the course of doing work normally done by longshoremen. In doing such work, the ship's crew had the duty to exercise the same reasonable care required of a stevedore to protect workers who would be continuing longshore operations on board. (Citing Bueno v. United States, 687 F.2d at 320)

738 F.2d at 1052.

75. *Id.* at 1053.

IV. CRITIQUE

In *Scindia*, the Supreme Court of the United States clearly established the duty that a vessel owner owes to longshoremen with respect to open and obvious dangers existing prior to the commencement of cargo operations. The court adopted the standard of care approved in *Marine Terminals v. Burnside*,[76] which essentially is the implied contractual duty owed by a vessel owner to the stevedore. Ironically, the duty adopted by the Supreme Court was enunciated by the U.S. District Court for the Southern District of California in *Hugev v. Dampskisaktieselskabet International*.[77]

The district court in that case established that the shipowner owed a stevedore the following duty:

> (1) To exercise ordinary care under the circumstances to place the ship on which the stevedore work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedore contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able, by the exercise of ordinary care under the circumstances, to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and (2) To give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.[78]

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76. 394 U.S. 404 (1969). In *Marine Terminals*, the Supreme Court analyzed the duty owed to a stevedore by a vessel owner.

77. 170 F.Supp. 601 (S.D. Cal. 1959).

78. *Id.* at 610-11. That court indicated that these obligations also constituted the "duty of ordinary care imposed by law toward persons rightfully transacting business on

In adopting this standard, the Supreme Court has established that the contractual obligations set forth in *Hugev* constitute the duty of ordinary care owed by the shipowner to the stevedore and longshoreman with respect to dangers existing when the vessel is turned over to the stevedore.[79] In so doing, the Supreme Court has limited the longshoreman's recovery against a vessel owner for injuries resulting from hazards which are obvious to the stevedore or which the stevedore should reasonably expect to encounter only to those situations where the stevedore is acting in an "obviously improvident" manner with respect to those hazards.[80]

As described by Justice Powell, in his concurring opinion in *Scindia*,[81] there is a good reason why this standard, on its face, is seemingly easy on shipowners and unjust to the longshoreman. He states:

> Under 33 U.S.C. §905(b), the shipowner is liable

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ships." *Id.* at 610.

79. The Supreme Court, in *Scindia*, further stated:

> Furthermore . . . the stevedore normally warrants to discharge his duties in a workmanlike manner; and although the 1972 Amendments relieved the stevedore of his duty to indemnify the shipowner for damages paid to the longshoreman for injuries caused by the stevedore's breach of warranty, *they did not otherwise disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship.* (emphasis added)

451 U.S. 170.

80. In *Scindia*, the court stated:

> The malfunctioning being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition or was charged with the knowledge of it, it was nevertheless entitled to assume that Seattle, the specialist in loading and unloading, considered the equipment reasonably safe and was entitled to rely upon that judgment.
>
> Yet, it is quite possible . . . that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen and that in such circumstance it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.* (emphasis added)

Id. at 176.

81. *Id.* at 180 (Powell, J., joined by Rehnquist, J., concurring).

> in damages to the longshoreman if it was negligent, and it may not seek to recover any part of this liability from the stevedore. The longshoreman's recovery is not reduced to reflect the negligence of the stevedore. (Citations omitted) The stevedore—even if concurrently negligent—receives reimbursement for its statutory benefit payments to the longshoreman, up to the full amount of those payments. (Citations omitted) As a result of this automatic reimbursement, there is a danger that 'concurrently negligent stevedores will be insulated from the obligation to pay statutory workman's compensation benefits, and thus will have inadequate incentives to provide a safe working environment for their employees.' (Citations omitted) In cases involving obvious and avoidable hazards, this danger will be realized unless the shipowner's liability is limited to the unusual case in which it should be anticipated that the stevedore will fail to act reasonably. Any more stringent, or less defined, rule of shipowner liability will skew the statutory scheme in a way Congress could not have intended. (Citations omitted)[82]

In practice, the stevedore's compensation insurance carrier notices a lien in any action brought by a longshoreman against a vessel for injuries. The lien is usually in an amount equal to the total amount of compensation and medical payments made. If the longshoreman prevails, the award is reduced by the costs and attorney's fees incurred in bringing the action.[83] The compensation carrier extracts its entire lien amount from the award (regardless of any amount of stevedore negligence) and the longshoreman receives whatever is left. It is obvious that the compensation carriers are the entities who benefit most from a liberal interpretation of the vessel owners' standard of care. They receive insurance premiums from the stevedore, as well as prob-

82. *Id.* at 183, n. 2.

83. An attempt by a longshoreman to compel participation by the stevedore in his litigation expenses failed in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). The court held that the LHWCA and its legislative history did not provide for the reduction of the stevedore's lien by a percentage of the litigation expenses. To do so would be to impose a type of liability on the stevedore barred by the exclusive remedy provisions of that Act. *Id.* at 85.

able total recoupment of benefits, without having to incur attorney's fees.

The responsibility for providing a safe work place is and always has been with the stevedore.[84] As Justice Powell states in his concurring opinion, the vessel owner should only be liable in those unusual cases where it should be anticipated that the stevedore will fail to act reasonably. The focus in any analysis should be upon whether the shipowner could reasonably expect that an expert and experienced stevedore would not or could not provide a safe work environment for the longshoremen despite the alleged danger.

The Occupational Safety and Health Administration (OSHA) regulations pertaining to the longshoring industry,[85] promulgated by the Secretary of Labor, established the stevedore's duties with respect to the safety of longshoremen.[86] These safety regulations impress upon the stevedore a statutory standard of care upon which the vessel owner can reasonably rely.[87] Compliance is mandatory.[88]

A review of the Ninth Circuit cases dealing with the shipowner's duty of care to longshoremen indicates that certain panels of this circuit have failed to fully comprehend the practical realities described by Justice Powell in his concurring opinion in *Scindia*.[89] *Ollestad* is the most recent example of the

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84. 33 U.S.C. §941(a) states in relevant part:

> Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees.

85. Safety And Health Regulations For Longshoring, 29 C.F.R. §1918 (1984).

86. *Scindia*, 451 U.S. at 176.

87. *Id.* at 170.

88. 29 C.F.R. §1910.16, states in relevant part: Each employer *shall* protect the employment and places of employment of his employees engaged in a longshoring operation . . . by complying with the appropriate standards prescribed in this paragraph. (emphasis added)

89. *See* cases cited in note 47, *supra*.

Ninth Circuit's disregard of the principles established in *Scindia* by the U.S. Supreme Court. Judge Fletcher, as she has previously done in the *Subingsubing*[90] and *Bueno*[91] decisions, stretches the *Scindia* holding to new limits in order to find against the vessel owner.[92]

In *Ollestad*, Justice Powell's worst fears come true. By redefining the "risk"[93] and finding yet another affirmative duty to place upon the shipowner,[94] Judge Fletcher ignores the real question of the vessel owner's right to rely upon the stevedore to avoid obvious hazards and approves the use of a jury instruction which essentially compels vessel liability whenever the shipowner knew or should have known of an "unreasonable risk" onboard the vessel where that "risk" causes injury to a longshoreman.[95] The defendant's proposed instruction which more properly states the rule enunciated in *Scindia* was rejected by the court.[96]

Ironically, *Taylor* was decided just two months prior to *Ollestad*.[97] The court in that instance relied heavily upon the shipowners right to rely upon the stevedore to protect the longshoremen from hazards.[98] While the *Taylor* case dealt with cargo and not equipment of the vessel,[99] the logic remains the same: the

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90. 682 F.2d 779.

91. 687 F.2d 318.

92. *See* notes 46, 82 and accompanying text, *supra*.

93. *See* note 74, *supra*.

94. *Id.*

95. *See* note 71, *supra*.

96. *Id.*

97. Interestingly, Judge J. Blaine Anderson authored *Taylor* and sat on the panel in *Ollestad*.

98. *See* notes 56 and 57, *supra*.

99. The *Taylor* court stated: "The scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment—not the nature of the cargo." 739 F.2d at 1386.
The court later states, however:

> Even if the shipowner had knowledge of the beans' invasion of the winch platform (a part of the vessel) it would not necessarily follow . . . that the beans created a sufficiently high risk of harm to require intervention in the cargo operation by the shipowner. . . . In light of custom, regulation, and case law . . . it was reasonable for the shipowner to expect the stevedore to do what was necessary to maintain a safe place for the longshoremen to work.

Id. at 1388.

condition (be it a misplaced boom rest or torn sacks of beans) does not become an unreasonable risk and create a danger to longshoremen until the stevedore fails to take appropriate precautions in the course of the operation. It is only when the stevedore's actions or inaction become known to the vessel owner and are said to be "obviously improvident" is a duty to remedy the hazard placed upon the shipowner.[100]

In *Ollestad*, the "risk" was said to be the crews placement of the boomrest and hatch cover. The stevedore, however, obviously did not feel that the condition was an unreasonably dangerous one.[101] The longshore crew had used the weather deck the morning of the injury to get to and from their work areas and plaintiff himself had climbed over the boomrest several times prior to the accident. The accumulation of snow and ice on the deck during the loading operation contributed to the creation of an apparently hazardous condition. Nonetheless, unless the stevedore acted improvidently in proceeding with his work despite the existence of this hazard, and the vessel owner had knowledge that the stevedore would not or could not avoid the hazard, the vessel owner had no obligation to intervene and remedy the situation.

Judge Fletcher in *Ollestad* relies upon her *Bueno* decision to support the conclusion that the ships placement of the boom rest and hatch cover, prior to turning the vessel over, subjected them to the same duties and responsibilities owed by a stevedore to its longshore employees.[102] Under this rationale, the shipowner would be required, contrary to *Scindia*, to continually inspect and supervise the cargo operations and otherwise comply with OSHA Regulations.[103] Even in the *Bueno* decision, which also misapplies *Scindia*, the affirmative duty allegedly assumed by defendants included inspections *during* the sandblasting op-

100. This test is essentially the same test set out in *Scindia* for hazards arising during the cargo operation, except that where the condition exists from the commencement of the operation, knowledge of the condition is presumed. *See* note 80, *supra*.

101. In *Taylor*, by comparison, the testimony revealed that the stevedore superintendent had walked through the loose beans and did not consider them to be hazardous. 739 F.2d at 1388.

102. 738 F.2d at 1052.

103. In *Ollestad*, the court stated: "Where the ship undertakes work normally performed by a longshoreman, OSHA standards regulating such work are relevant to the jury's consideration of whether the ship exercised reasonable care." *Id.* at 1053.

eration in which the plaintiff was taking part. In *Ollestad* the condition existed at the time the vessel was turned over to the stevedore. It was an open and obvious condition which the shipowner could reasonably anticipate would be avoided by the experienced stevedore. Indeed, since it was thought to be a normal stevedore function to move the hatch cover and boom rest, it was within the stevedore's capability to relocate them if the safety of longshoremen required their relocation.[104]

It is well established that if a vessel owner exercises "active control" over the areas involved in the cargo operation or becomes "actively involved" in a loading or unloading process, the vessel may be subject to liability for its negligence.[105] Unless it can be maintained that there is some active involvement or control during the cargo operations, it would seem logical that the vessel owner cannot be saddled with additional affirmative duties.[106] The *Taylor* panel recognized this axiom and rejected its application when it held that the sweeping of the deck by the ship's crew did not rise to the type of "active control" required by *Scindia*.[107] It is hard to imagine how an activity performed by the vessel's crew *before* the vessel was turned over to the stevedore could create such active involvement, unless custom or contract so provide.[108]

Judge Fletcher distinguishes *Scindia* as being a case where the negligence arose *after* the cargo operations began.[109] This is simply not the case, for the triable issue of fact in *Scindia* was whether the shipowner had actual knowledge of the defect in the winch *or* was chargeable with knowledge because the winch was

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104. The court noted in *Ollestad* that: "Before the longshoremen came on board, the ship's crew uncovered the hatches and stacked the hatch covers on the weather deck, a job normally performed by longshoremen." *Id.* at 1050.

105. *Scindia*, 451 U.S. at 167.

106. For example, in *Taylor*, the court stated: "By assuming the responsibility for cleaning up the original spillage on the deck, the vessel will not be obligated to a continuous duty to clean up additional spillage resulting from the stevedore's failure to properly discharge the cargo." 739 F.2d at 1388.

107. In *Taylor*, the court held: "The active control over the area or equipment utilized in the cargo operation is distinct from the casual use of the deck by the ship's crew for passage or activities undertaken by the crew at the specific request of stevedore personnel." *Id.* at 1387.

108. The Supreme Court in *Scindia* indicated that contract, positive law, or custom could modify the vessel's duty. 451 U.S. at 172.

109. *Ollestad*, 738 F.2d at 1052.

defective from the outset.[110] The defendant in *Ollestad* was entitled to have its proposed jury instruction read to the jury. The legal duties placed on the stevedore and the vessel's justifiable expectations that these duties be performed are necessary considerations in determining if a shipowner has breached its duty to the longshoremen.[111]

The *Ollestad* decision not only ignores the vessel owner's right to rely on the stevedore to avoid exposing the longshoremen to obvious hazards but goes further to impress upon the shipowner the legal duties required of the stevedore by the Occupational Health and Safety Act. The stevedore is put in the envious position of being able to *rely upon the shipowner* to provide for the longshoremen's safety. This result thwarts the intent of the 1972 amendments to the LHWCA which were intended to encourage the safety of longshoremen.[112] Under any stretch of the law, the stevedore is primarily responsible for ensuring the safety of its employees since it is in the best position to remedy hazards.[113]

Courts in other circuits have taken more realistic approaches to preexisting obvious conditions on vessels which are more in line with the principles established in *Scindia*. For example, the Fourth Circuit in *Bonds v. Mortensen and Lange*,[114]

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110. 451 U.S. 178.

111. The court in *Scindia* stated:

> As we have indicated, the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court and, where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law.

451 U.S. at 176.

112. *See Scindia, Id.* at 163, n. 13.

113. *Id.* at 181 (Powell concurring).

114. 717 F.2d 123 (4th Cir. 1983) (per Field; other members of the panel were Russell and Ervin). In *Bonds*, a longshoreman was fatally injured when crushed by a moving gantry crane on board defendant's vessel. The warning bell on the gantry crane was either not working or was inaudible at the time of the accident, and the crane was so designed that the operator could not see anything in the vicinity of the crane legs. In a bench trial, the district court found both the longshoreman and the stevedore to be without fault, and adjudged the shipowner to be liable based on a conclusion that the malfunctioning bell and the ship's design, taken in tandem, constituted the proximate cause of the accident. The court of appeals reversed, holding that since the malfunctioning bell and ship's design were open and obvious, the shipowner was entitled to rely upon the stevedore's judgment that the cargo operations could safely be undertaken. The steve-

held that a malfunctioning gantry crane bell coupled with an alleged defect in ship's design, being open and obvious to all, entitled the vessel owner to rely upon the stevedore's judgment as to whether discharge operations could safely be undertaken.[115] That court concluded that it was only where the conduct of the stevedore or longshoremen, known to the shipowner, was obviously improvident that the vessel owner had a duty to intervene to protect the longshoremen.[116] While the lower court specifically found the stevedore and longshoremen acted reasonably in proceeding with cargo operations in light of the alleged hazard, the court stated that even if they found the longshoremen failed to act reasonably, the result would be the same since it was not a case where the shipowner should have anticipated that the stevedore could not avoid the dangerous condition.[117]

A recent district court decision in the Fifth Circuit interprets *Scindia* in a similar fashion.[118] In *Harrington v. U.S. Lines*,[119] the court held that the vessel owner may have a duty to

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dore's judgment in proceeding under the circumstances was not "obviously improvident," since the district court found it to be without fault. Therefore, the shipowner had no duty to intervene and stop the cargo operations. 717 F.2d at 128.

115. *Id.* at 127-28.

116. *Id.* at 128.

117. The court stated:

> Even assuming, contrary to the District Court's finding of fact, that Bonds and other longshoremen failed to exercise reasonable care by standing near the gantry crane legs during discharge operations, this is not a case in which the shipowner should have anticipated that the stevedore could not avoid the dangerous condition. (Citations omitted) This is not a situation, then, in which the longshoremen were precluded from performing their tasks except by a means that was inherently dangerous. (Citations omitted)

Id. at 128 n.5.

118. Harrington v. U.S. Lines, Inc., 587 F.Supp. 239 (M.D. Fla. 1984) (Black, S., District Judge).

119. In *Harrington*, the longshoreman was injured when he fell while descending into a hatch on defendant's vessel while attempting to close the doors on a cargo container. The open doors had prevented the stevedore from removing the container from the hatch. The district court, finding that the condition was one which arose prior to the vessel being turned over to the stevedore, held that the unsecured container door was not a defect subjecting the defendant to liability. Unsecured container doors are commonly encountered in cargo operations and are to be anticipated by the stevedore. The court further held that even if the unsecured doors were a defect, there would be no duty to warn the stevedore of this condition, since it was obvious or to be anticipated by him. Since the vessel owner is in the least effective position to intervene and correct the defect, it is entitled to rely upon the stevedore to do so. *Id.* at 241.

correct a defect or condition he knows exists at the commencement of the cargo operation when the defect creates an unreasonable risk of harm to the longshoremen *and* he knows that he cannot rely on the stevedore to protect the longshoremen from that risk.[120] The existence of an unsecured container door in that case did not constitute a "risk" or "hazard" to the longshoremen beyond that normally encountered in the unloading of a vessel.[121] Even if they did constitute a defect, the court stated that the shipowner would not be responsible for warning the stevedore and longshoremen since unsecured container doors are a common occurrence and were to be anticipated by the stevedore.[122] Further, the condition did not create an "unreasonable risk of harm" requiring shipowner intervention because of the stevedore and longshoremen's awareness of these conditions.[123]

Certainly, the fact that a condition is "open and obvious" does not in and of itself relieve the vessel owner from liability.[124] It does, however, serve to establish that the stevedore is aware or should be aware of the condition. As such, it goes to establish the reasonableness of the shipowners reliance on the stevedore to protect the longshoremen against the danger and eliminate any need for the shipowner to warn the longshoremen of the danger. There will be situations where the danger will be such that the shipowner could not reasonably expect the stevedore to correct or avoid the danger to the longshoremen or where the stevedores decision to proceed in light of the condition known to the shipowner is so unreasonable as to require intervention. In those circumstances the vessel owner has a duty to remedy the condition.

The theory of limited vessel owner liability enunciated in *Scindia*, recognizes the justifiable expectations of the vessel that the stevedore will perform with reasonable competence and see to the safety of the cargo operations. Merely finding both the vessel and the stevedore concurrently negligent in various per-

120. *Id.* at 242.
121. *Id.* at 245.
122. *Id.*
123. *Id.*
124. A shipowner cannot defend on the grounds that the longshoreman should have refused to work in the face of an obviously dangerous condition. See *Scindia*, 451 U.S. at 176, n. 22.

centages is of no practical effect,[125] and negates the vessel's right to rely upon the stevedore. It cannot be argued that this standard of care incorporates concepts of assumption of the risk or contributory negligence on the part of the longshoremen which was the dispute with the Restatement §343 standard.[126] While it does necessarily impute concepts of contributory negligence on the part of the stevedore,[127] the focus is not upon the longshoreman's negligence. In fact, the focus is not even upon the stevedore's negligence (although negligence would probably be present if the longshoreman was injured because of the stevedores failure to avoid the hazard) but rather upon the *vessel's reasonableness* in relying upon an expert stevedore. To that extent, the issue can probably be decided through expert witnesses and the use of OSHA regulations. In most cases, bifurcation might be appropriate,[128] where questions of fact preclude summary judgment.

VI. CONCLUSION

Judge Fletcher's decision in *Ollestad* reflects the continuing desire of various panels of the Ninth Circuit to subject the shipowner to liability for the stevedore's negligence. In enacting the 1972 amendments to the LHWCA, Congress clearly intended to terminate the vessel's automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore.[129] Vessel liability is said to be the exception and not the rule.[130] The longshoremen have legislatively lost the benefit of liberal judgments against vessel owners in return for the higher compensation benefits incorporated into the 1972 amendments.

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125. *See* text accompanying note 82, *supra*.

126. *See*, for example, Gallardo v. Westfal-Larsen & Co., A/S, 435 F.Supp. 484, 493-95 (N.D. Cal. 1977).

127. Applying the concept of "superceding causation" to the stevedore's negligence is attractive in this instance. *See* Stultz v. Benson Lumber Co., 6 C.2d 688 (1936). This theory, however, would not apply when the stevedore's negligence reaches the point where it becomes obviously improvident, and a vessel owner with knowledge has a duty to intervene.

128. Bifurcation under FRCP 42(b) would seem appropriate in this instance, since this single issue could be dispositive of the vessel's liability and would undoubtedly avoid prejudice to a "deep pocket" shipowner.

129. *Scindia*, 451 U.S. at 165, n. 12.

130. In *Bandeen v. United Carriers*, the court stated: "It is the exceptional case under *Scindia* that the shipowner remains liable as a "deep pocket" defendant, when it turns the vessel over to the stevedore." 712 F.2d at 1341.

The Ninth Circuit in *Ollestad*, however, persists in expanding vessel liability contrary to the intent of the 1972 amendments and the guidelines set down in *Scindia*. Certain panels in this Circuit have refused to recognize that the Supreme Court, while affirming the reversal of summary judgment in *Scindia* by the Ninth Circuit, *disapproved* of its "general reasonableness" standard.[131] The court in *Taylor*, however, appears to reestablish the significance of the shipowners right to rely upon the stevedore and the limited scope of the shipowners duty to longshoremen for obvious hazards on board the vessel.

Taylor represents only the second reported decision of the Ninth Circuit which in any way limits the vessel owners duty to longshoremen, subsequent to the *Scindia* decision.[132] It is the only reported decision since *Scindia* in this Circuit which emphasizes the shipowner's right to rely upon the stevedore with respect to open and obvious hazards. It is hoped that *Taylor* is indicative of a shift away from the direction previously taken by the Ninth Circuit. The change in course is welcomed and hopefully will result in a more consistent and uniform application of the principles established in *Scindia*.

131. In Dugas v. C. Brower, 85 D.A.R. 828 (March 5, 1985), a California appellate court's holding exemplifies the confusion engendered by the Ninth Circuit's conflicting opinions. Relying on *Subingsubing*, the court erroneously observed that a negligent shipowners liability may be reduced but not eliminated by the negligence of the stevedore or longshoreman.

132. *See* also *Bandeen*, 712 F.2d 1336.

CHEVRON U.S.A. v. HAMMOND: STATE CONTROL OF OIL TANKER DEBALLASTING

I. INTRODUCTION

In *Chevron U.S.A., Inc., v. Hammond*,[1] the Ninth Circuit held that Alaska's deballasting statute[2] was not preempted by the Ports and Waterways Safety Act[3] nor by the Coast Guard

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1. 726 F.2d 483 (9th Cir. 1984) (per Pregerson, J.; the other panel members were Alarcon, J. and Nelson, J.).

2. The statute provides, in pertinent part, as follows:

> (a) Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.
>
> (b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel.

ALASKA STAT. § 46.03.750(e) (1976), *amended by* ALASKA STAT. § 46.03.750(a)-(b) (1980), hereinafter cited as Alaska Statute.

3. Title II of the Ports and Waterways Safety Act of 1972, as *amended by* the Ports and Tanker Safety Act of 1978 (PWSA/PTSA), in pertinent part, is as follows:

> (a) The Secretary shall prescribe regulations for design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. . .Regulations prescribed under this subsection shall include requirements about—
>
> (7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.

46 U.S.C. § 3703 (1983). (Formerly 46 U.S.C. § 391a(6)(A)).

> (b)(1) An existing crude oil tanker of at least 40,000 deadweight tons shall be equipped with—
>
> (A) segregated ballast tanks; or
>
> (B) a crude oil washing system.

46 U.S.C. § 3705 (1983). (Formerly 46 U.S.C. § 391a(7)(D)).

regulations[4] authorized by the Act.[5]

Chevron U.S.A., Inc., brought suit in U.S. district court[6] challenging the constitutionality of the Alaska Tanker Act.[7] The

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The court interpreted the pre-1983 codification of the PWSA/PTSA § 391a. In August of 1983 Congress revised portions of Title 46, including § 391a, which was repealed and superseded by Revised Title 46 (Supp. 1984). *See* Title 46 Shipping Laws Partial Revision Pamphlet (1983). The new sections have retained most of the same wording found in the old sections.

The purpose of the partial revision of Title 46 was to make the law easier to administer, less cumbersome to use, and more understandable for everyone. H.R. REP. No. 98-338, 98th Cong., 1st Sess., *reprinted in* 1983 U.S. CODE CONG. & AD NEWS 924, 925.

4. The PWSA/PTSA gives the Coast Guard, through the Secretary of Transportation, the authority to regulate deballasting. 46 U.S.C. § 3703(a)(7)(1983). The Coast Guard has exercised this authority by promulgating regulations; see 33 C.F.R. §§ 157.03(e), 157.09, 157.10, 157.11(a)-(c), 157.25 - 157.49.

> (a)Not later than June 1, 1981, except as allowed in paragraph (b) [70,000 deadweight tons or more with a certain construction] of this section, existing vessel of 40,000 DWT [deadweight tons] or more that carries crude oil and a new vessel of 40,000 DWT or more but less than 70,000 DWT that carries crude oil must have
>
> (1) Segregated ballast tanks . . .; or
>
> (2) A crude oil washing system that meets the design, equipment, and installation requirements of Subpart D of this part.

33 C.F.R. § 157.10a (1980).

> (a) Except as required in paragraph (b) of this section, a tank vessel may discharge into the sea an oily mixture from a cargo tank . . .if the vessel
>
> (1) Is more than 50 nautical miles from nearest land;
>
> (2) Is proceeding en route;
>
> (3) Is discharging at an instantaneous rate of oil content not exceeding 60 liters per nautical mile;
>
> (4) Is an existing vessel and the total quantity of oil discharged into the sea does not exceed 1/15,000 of the total quantity of the cargo that the discharge formed a part, or is a new vessel and the total quantity of oil discharged into the sea does not exceed 1/30,000 of the total quantity of the cargo that the discharge formed a part . . . .

33 C.F.R. § 157.37.

"(a) Clean ballast may be discharged in accordance with § 157.37(a)(6)." 33 C.F.R. § 157.43 (1976).

5. 46 U.S.C. § 3703(a) (1983) (Formerly 46 U.S.C. § 391a (6)(A)), *supra* note 3; 726 F.2d 483, 501.

6. The action originated in the District Court for the District of Alaska. In December of 1977, Intercontinental Bulktank, et al., intervened. In December of 1981, Cordova Fisheries Union, et al., were joined in the action as defendants - intervenors.

7. *Supra* note 2. The Alaska Tanker Laws include the deballasting statute as well as other tanker design and operational provisions. *Id.* During the litigation and after the Supreme Court held that the PWSA/PTSA preempted state laws concerning design and construction of tankers, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), appellants

district court held that the statute was invalid because it was preempted by Coast Guard regulations promulgated pursuant to the Ports and Waterways Safety Act of 1972 and its amendments.[8]

Defendants appealed to the Ninth Circuit arguing that the state law was not preempted because Congress had no intent to occupy the entire field of water pollution caused by oil tanker deballasting and the statute was consistent with the federal statutory scheme and related international conventions to which the United States was a party.[9]

II. BACKGROUND

A. The PWSA/PTSA

Congress enacted the Ports and Waterways Safety Act (PWSA) in 1972 in an effort to control the environmental hazards of oil tanker navigation in U.S. waters.[10] The Act contains provisions which set minimum standards for tanker design, safety, operation, traffic control, and pollution.[11]

The Ports and Tanker Safety Act (PTSA) was enacted in 1978 to amend the PWSA.[12] The amendment was adopted because there was a need for more stringent design controls and operating standards than originally were required by the PWSA.[13]

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stipulated to the invalidity of most of the provisions of the Alaska Tanker Act, and appealed only the decision concerning ALASKA STAT. § 46.03.750(e) and its amendments. (Appellants Brief at 1-4, Chevron U.S.A., Inc. v. Hamond, 726 F.2d 483.).

8. 726 F.2d at 485.

9. *See generally*, Appellants Brief, Chevron U.S.A., Inc. v.Hamond, 726 F.2d 483.

10. Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340 §§ 101, 102, 86 Stat. 424-31 (1972) (Prior to 1978 Amendments of the PTSA).

11. *Id.* Title I of the Act focuses on traffic control and Title II of the Act focuses on vessel safety and protection of the marine environment through vessel design, construction, and operational requirements. *See also* Ray v. Atlantic Richfield Co., 435 U.S. 151, 161 (1978).

12. Pub. L. No. 95-474, 92 Stat. 1471 (1978) (Codified at 46 U.S.C. § § 391a, repealed and superseded by Revised Title 46 (Supp. 1984). *See* Title 46 Shipping Laws Partial Revision Pamphlet (1983)).

13. Pub. L. 95-474, 92 Stat. 1471, 1481 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3270, 3270-71. The PWSA's standards for vessel design and safety needed to be more stringent and comprehensive to mitigate the hazards to life, property, and the marine environment. *Id.*

The PWSA/PTSA authorized the Coast Guard to regulate deballasting.[14] Under 33 C.F.R. §§ 157.37, et. seq., tankers are prohibited from deballasting oil cargo tanks within fifty miles of shore. However, under certain circumstances "clean ballast" may be discharged.[15]

The PWSA/PTSA and the accompanying Coast Guard regulations are based upon the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL) and the 1978 Protocol entitled International Conference on Tanker Safety and Pollution Prevention (MARPOL Protocol).[16]

The goal of MARPOL was to completely eliminate international pollution of the marine environment by oil and to minimize the incidents of accidental oil discharges.[17] Approximately 2.5 million tons of oil per year pollute the oceans of the world because of maritime accidents and vessel operational discharges.[18] Deballasting is an operational discharge. After unload-

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14. 46 U.S.C. § 3703(a), *supra* note 3. The PWSA/PTSA authorizes the Secretary to issue appropriate regulations to implement the policies of the Act. Pursuant to this authority, Coast Guard regulations were promulgated at 33 C.F.R. §§ 157.03-157.49.

15. 33 C.F.R. § 157.43(a); *supra* note 4. Clean ballast is defined as ballast that:

> (e) . . .if discharged from a vessel that is stationary into clean, calm water on a clear day, would not -
>
> (1) Produce visible traces of oil on the surface of the water or on adjoining shorelines; or
>
> (2) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

33 C.F.R. § 157.03 (1980). The "clean ballast" exception is based upon the 1969 Amendments to the 1954 International Convention for Prevention of Pollution of the Sea by Oil, codified at 33 U.S.C. §§ 1002, 1004 (1976). Though this section was repealed and superseded by 33 U.S.C. §§ 1901-1911 (1982) (enabling legislation of the MARPOL the exception survived and was incorporated into 33 C.F.R. § 157.03(e).

16. H.R. REP. No. 1224, 96th Cong., 2d Sess. 3-5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4849, 4850-51. Though the 1973 Convention (MARPOL) was never ratified by the United States, the Protocol of 1978 incorporated many provisions of the earlier Convention, including the prohibition of discharge of oily mixtures within 50 miles of the nearest land. This provision is incorporated in the Coast Guard regulations under the PWSA/PTSA; 33 C.F.R. § 157.37(a). The 1973 Convention was based in large part upon the 1954 International Convention for the Prevention of Pollution of the Sea by Oil and its amendments. *Id.*

17. H.R. REP. No. 1224, 96th Cong., 2d Sess. 3-5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4849, 4850-51. *See also*, Mensah, *International Environmental Law: International Conventions Concerning Oil Pollution at Sea*, 8 CASE W. R. J. INT'L L. 110, 117 (1976) (citing fourth preambular paragraph of MARPOL, I.M.C.O. Doc. MP/CONF./WP. 35 (Nov. 2, 1973), *reprinted in*, 12 INT'L LEGAL MATERIALS 1319 (1973)).

18. Kindt, *Marine Pollution and Hydrocarbons: The Goal of Minimizing Damage to the Marine Environment*, 14 CALIF. W. INT'L L.J. 238, 246 (1984). Approximately 50%

ing, tankers must take on ballast to guarantee the vessel's stability in navigation. In the case of oil tankers, the ballast is stored in the vessel's oil compartments. As a result, the ballast mixes with the oil residue and upon deballasting, the oily mixture is discharged into the sea.[19] The 1973 Convention, MARPOL, addressed this problem by requiring certain sizes of new tankers to be equipped with segregated ballast tanks[20] and by requiring the increased use of on-shore reception facilities for ballast discharges.[21] MARPOL incorporated many provisions of the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 and its amendments, such as the prohibition of oily mixture discharges within 50 miles of shore and the "clean ballast" exception now found in the Coast Guard regulations of the PWSA/PTSA.[22]

After a series of tanker accidents in or near the waters of the United States during 1976-77,[23] the 1978 Protocol, modifying MARPOL safety and pollution standards for oil tankers, was adopted by Congress.[24] The Protocol recognized the need for

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of all oil consumed in the world is transported by sea. One-tenth of one percent of this oil enters the ocean each year. In 1970, five million tons of oil entered the ocean. In 1975, that number increased to six million tons. Out of approximately 2.5 million tons of oil per year entering the ocean, vessel operational discharges or deballasting make up 85% of this figure. *See*, H.R. REP. No. 1224, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4849, 4851.

19. H.R. REP. No. 1224, 96th Cong., 2d Sess. 4-5, *reprinted in* 1980 U.S. CODE CONG. & AD NEWS 4849, 4851. Ballast is seawater used to fill the empty cargo tanks of a vessel for stabilization purposes. "Ballasting" is the term generally used to describe the process by which a vessel takes on this seawater.

20. 8 CASE W. RES. J. INT'L L. 110, 118, (1976). New tankers of between 40,000 - 70,000 deadweight tons (DWT) were required to be built with segregated ballast tanks. This provision is now incorporated in 33 C.F.R. § 157.10a(a). *See supra* note 4.

21. MARPOL, I.M.C.O. Doc. MP/CONF/WP. 35 (Nov. 2, 1973), *reprinted in* 12 INT'L LEGAL MATERIALS 1319 (1973).

22. *See supra* note 15; *See also*, 8 CASE W. RES. J. INT'L L. 110, 118 (1976). The 1954 Convention and its amendments are codified at 33 U.S.C. §§ 1001-1006, repealed and superseded by 33 U.S.C. §§ 1901-1911 (the enabling legislation for the MARPOL Protocol of 1978).

23. Pub. L. 95-474, 92 Stat. 1471 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3270, 3274-75. As oil importing and tanker movement in U.S. waters increased, ship accidents increased. In 1976 there was a rash of tanker accidents. For example, in December of 1976, the Sansinena, a Liberian tank vessel, had an explosion and fire while taking on ballast and fuel oil at an oil terminal in the Los Angeles Harbor. Eight people were killed and fifty others injured. The vessel suffered a total loss and the harbor was polluted with fuel oil. *Id.*

24. H.R. REP. No. 1224, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CONG. & AD. NEWS 4849, 4850-52; 33 U.S.C. §§ 1901-1911 (enabling legislation for the 1978 MARPOL

abating or minimizing oil pollution from ships. The federal legislation enacting the Protocol incorporated and superseded the Oil Pollution Act Amendments (OPAA) of 1973[25] which itself had adopted and modified the tanker safety and design standards outlined in the 1954 Convention and its amendments.[26] The 1978 PTSA envisions goals similar to those in the 1978 Protocol.[27]

B. The CZMA And The FWPCA

The Coastal Zone Management Act[28] (CZMA) enacted in 1972, deals with marine environmental protection within the coastal waters of states.[29] The purpose of the Act is to give federal assistance to states for development programs that preserve and restore the resources of the coastal zone.[30] Many states have utilized federal funds through the CZMA to create such programs in the areas of wetland and beach preservation and management of floodplains; the states having complete authority over the control of these programs and the use of their territorial waters.[31]

Legislation dealing specifically with water pollution is the Federal Water Pollution Control Act[32] (FWPCA). The intent of the FWPCA was to protect our nation's waters from pollution.[33]

Protocol). While MARPOL was never ratified, the Protocol was. *Id.*

25. Pub. L. NO. 93-119, §§ 2(1)-(7), 87 Stat. 424, 424-26 (codified at 33 U.S.C. §§ 1001-1006, repealed and superseded by 33 U.S.C. §§ 1901-1911 (1982) (enabling legislation for the MARPOL Protocol)).

26. H.R. REP. No. 1224, 96th Cong., 2d Sess. 3-4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4849, 4849-50; *See supra* note 22.

27. Compare H.R. REP. No. 1224, 96th Cong., 2d Sess. 3-4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4849 with the purposes of the PWSA as set out in Pub. L. 92-340, 86 Stat. 424 (1972) and the PTSA codified at 46 U.S.C. § 391a, repealed and superseded by Revised Title 46 (Supp. 1984). *See supra* note 12.

28. 16 U.S.C. §§ 1451-1464 (1982).

29. *Id.*

30. S. REP. No. 753, 92nd Cong., 2d Sess.____, *reprinted in* U.S. CODE CONG. & AD. NEWS 4776, 4776 "[The] main purpose is the encouragement and assistance of states in preparing and implementing management programs to preserve, protect, develop and wherever possible restore the resources of the coastal zone of the United States." *Id.*

31. *Id.* The Senate reported: "There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." *Id. See also* Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 628-29, note 17.

32. 33 U.S.C. §§ 1241-1376 (1982) (commonly know as the Clean Water Act (CWA)).

33. S. REP. No. 414, 92nd Cong., 2d Sess.____, *reprinted in* 1972 U.S. CODE CONG. &

The Act was amended in 1948[34] and again substantially in 1972 to create more cooperation between the federal government and the states in developing a national program for water pollution control and abatement.[35] The 1972 amendments to the Act called for elimination of the discharge of pollutants into navigable waters by 1985,[36] and more federal-state balance in the permit system.[37] The amendments completely restructured the previous standards set out in earlier amendments[38] and place primary responsibility on the states for administering the water pollution program in compliance with the federal guidelines set by the Environmental Protection Agency (EPA).[39]

The 1972 amendments to the FWPCA incorporated provisions of the Water Quality Improvement Act of 1970[40] (WQIA)

AD. NEWS 3668, 3669. Previously there had been little effort to control water pollution on a national level. *Id.*

34. *Id.*

35. 33 U.S.C. §§ 1251-1376 (1982)(FWPCA). The 1956 amendments to the Act called for a federal-state partnership in fighting water pollution and authorized federal grants to assist states in their water pollution plans and to build treatment facilities. The FWPCA of 1965 required states to develop standards for water pollution control within their borders but only pertaining to interstate navigable waters. S. REP. No. 414, 92nd Cong., 2d Sess.____, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3669. The 1972 amendments called for the restoration of a federal-state effort in abating or controlling water pollution; "It is the Committee's intent to restore the balance of Federal-State effort in the program as contemplated by the 1965 and 1966 Acts." *Id.* at 3675.

36. S. REP No. 414, 92nd Cong., 2d Sess.____, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3674. The Committee believed that a total elimination of water pollution was essential to restore the "natural chemical, physical, and biological integrity of the Nation's waters." *Id. See also* the enabling legislation to the FWPCA, 33 U.S.C. § 1251(a)(1). "Navigable waters" is defined as, "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1982).

37. S. REP. No. 414, 92nd Cong., 2d Sess.____, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3675. "It is the Committee's intent to restore the balance of Federal-State effort in the program as contemplated by the 1965 and 1966 Acts. . .particularly. . .in the discharge permit system . . ." *Id.*

38. Water Pollution Control Act Amendments, 1 Leg. History 349-50, comments of Chairman Blatnik. Compare the 1956 amendments with 33 U.S.C. §§ 1251-1376 (1982).

39. *Id.* at 359, comments of Rep. Jones: "[T]his legislation places primary responsibility for administering the water pollution program within the separate states, with the firm stipulation that each State must comply with the. . .guidelines set by the Environmental Protection Agency." *Id.* The enabling legislation to the FWPCA also contains this reference: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. § 1251(b). States may set more stringent standards than the federal law but not standards below the federal minimum. 33 U.S.C. § 1370.

40. Pub. L. NO. 92-500, 86 Stat. 816, 862 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982). "The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the

prohibiting the discharge of oil into navigable waters and adjoining shorelines.[41] As the WQIA prescribed, the FWPCA now imposes strict liability for clean-up costs after an oil spill when there are found to be acts of negligence or willful misconduct.[42]

In *EPA v. California State Water Resources Control Board*,[43] the Supreme Court held that the EPA has authority over states to issue permits under the FWPCA and to approve a state's permit program.[44] The court, however, noted that the FWPCA allows states to set higher standards for water pollution than what may have been set by the EPA pursuant to federal law.[45]

In *Pacific Legal Foundation v. Costle*,[46] the Ninth Circuit held that while the FWPCA extended permitting authority primarily to the states, only the EPA administrator has authority to grant permits for pollutant discharges into the area *beyond* the territorial seas.[47] However, the court stated that Congress supported a federal-state coordinated effort to effect the goals of the FWPCA,[48] and that this was a sensible way to deal with the jurisdictional problems created by the Act's permitting authority.[49]

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navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone. . . ." 33 U.S.C. § 1321(b)(1).

41. 33 U.S.C. §§ 1321(b)(1), 1362(7) (1982).

42. 33 U.S.C. § 1321(f)(1) (1982). *See also* Guss, *Interaction of the Federal Water Pollution Control Act with the Limitation of Liability Act and the General Maritime Law*, 6 MAR. LAW 199, 201 (1981).

43. 426 U.S. 200 (1976).

44. *Id.* at 214-15.

45. *Id.* at 218-20.

46. 586 F.2d 650 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980).

47. *Id.* at 655. The court supports its holding by referring to the FWPCA, 33 U.S.C. § 1342(b) which says in part, "[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters *within its jurisdiction* may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact . . . ." [emphasis added]. Since the definition of navigable waters excludes the contiguous zone and the ocean, 33 U.S.C. § 1362(7) (1982) (*supra* note 36) the Administrator under the FWPCA must have exclusive permitting authority over areas within U.S. jurisdiction but *beyond* the territorial seas.

48. 586 F.2d at 657.

49. *Id.* The jurisdictional problems created by the FWPCA are stated by the court to be the divided jurisdiction of permitting authority. The state has authority to grant permits for pollutant discharges within its territorial seas while the Administrator has exclusive authority beyond the states' territorial seas. *Id. See also supra* note 47.

C. *Preemption Doctirne*

When the state and federal government both regulate a particular subject matter a question may arise as to whether the state law is preempted by virtue of the Supremacy Clause in the United States Constitution.[50]

In *Hines v. Davidowitz*,[51] the Supreme Court held that the Pennsylvania Alien Registration Act of 1939 was void because it conflicted with the less stringent rules of the Federal Alien Registration Act of 1940.[52] In concluding that the federal law conflicted with the Pennsylvania Act,[53] the Court stated that an exclusive federal scheme of regulation existed with which states could not interfere.[54] The Court's test for determining interference was whether or not a state law could be viewed as an "obstacle" to the full accomplishment of congressional objectives.[55]

The Court upheld the *Hines* analysis in *Rice v. Santa Fe Elevator Corp.*,[56] when provisions of the Illinois Public Utilities Act were found to be preempted by the United States Warehouse Act.[57] The Court noted that Congress expressly intended

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50. The Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, clause 2.

51. 312 U.S. 52 (1941). The Pennsylvania Alien Registration Act required aliens who did not intend to become citizens of the U.S. to register with the state. The law was enacted to obtain information about aliens within the state territory. *Id.*

52. *Id.* at 74. The Pennsylvania Act made the failure to register as an alien a criminal offense while the Federal Act only imposed a criminal penalty upon aliens who willfully failed to register. *Id.* at 60-61.

53. *Id.* at 74.

54. *Id.* at 66-67. The Court found that Congress' Federal Alien Registration Act was enacted pursuant to its constitutional duty "[t]o establish an Uniform Rule of Naturalization." *Id.* at 66. The Act, being comprehensive in nature, was superior to state laws which regulated the area.

55. *Id.* at 67.

56. 331 U.S. 218, 230 (1947). Rice brought an action against Santa Fe Elevator Corporation alleging violations of the Illinois Public Utilities Act of 1945. Santa Fe Elevator Corporation defended on the ground that the United States Warehouse Act, under which the Corporation's activities were lawful, superseded the state regulation. *Id.*

57. *Id.* at 236. The Illinois Public Utilities Act of 1945 related to warehouse licensing. The U.S. Warehouse Act as amended in 1931 preempted the Illinois Act. For an

that the federal law would apply exclusively to the area of warehouse licensing.[58]

However, in *Florida Lime & Avocado Growers, Inc. v. Paul*,[59] the Court applied a harsher preemption test by requiring a finding either of an unmistakable congressional intent to preempt or, that the compliance with both laws would be a "physical impossibility."[60]

This test was further modified in *New York Department of Social Services v. Dublino*.[61] The Court refused to find preemption absent a *clear and manifest* congressional intent.[62] The Court reasoned that the comprehensive nature of the federal law in issue is not conclusive evidence of congressional intent[63] and that preemption should not readily be found where federal-state cooperation would help to effect the congressional purpose of the law.[64]

In *Ray v. Atlantic Richfield Co.*,[65] and *Silkwood v. Kerr-*

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interpretation of *Rice* and related decisions, from the perspective of how the Supreme Court determines congressional intent and whether a field is "occupied" by federal legislation, *see* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 625 (1975).

58. *Rice*, 331 U.S. at 224, 235-36.

59. 373 U.S. 132 (1963). Florida Lime & Avocado Growers, Inc. was involved in interstate commerce and sought to enjoin California from enforcing a state statute which regulated the transportation and sale of avocados in California because the Federal Agricultural Marketing Agreement of 1937 preempted the more stringent state law.

60. *Id.* at 142-43. The Court decided that congressional intent to preempt could be determined from the nature of the subject matter regulated or an express declaration of Congress. Determining congressional design is not required when following both the state and federal laws would be a physical impossibility. *Id.*

61. 413 U.S. 405 (1973). Dublino challenged provisions of the New York Social Welfare Law which required individuals to accept employment before the state would allow applicants to receive federally funded aid to families with dependant children. The Federal Work Incentive Program (WIN) allocates federal funds for state programs which provide aid to families with dependent children. *Id.*

62. *Id.* at 413, 417.

63. *Id.* at 415. The federal law in issue was the Federal Work Incentive Program (WIN) adopted in the 1967 amendments to the Social Security Act. States were required to incorporate WIN into their Aid to Families With Dependent Children Programs (AFDC - Programs). The state laws sought to be preempted were the 1971 provisions of the N.Y. Social Welfare Law or *New York Work Rules.*

64. *Id.* at 418-20. The Court found that WIN was not a complete and comprehensive program but really envisioned the states providing supplementary rules to effect the goals of the federal program.

65. 435 U.S. 151 (1978). *Ray* is the only case to date decided by the Supreme Court which interprets the PWSA/PTSA. The case was brought when Atlantic Richfield Co.

McGee Corp.,[66] the Supreme Court applied a two-part test to determine whether federal regulations preempted state law: (1) whether Congress "occupied" a field of law to the extent that state law preemption was warranted and, if not, (2) whether the state law was invalid because it "conflicted" with the federal law.[67]

In *Ray*, the Court held that provisions of the Washington State Tanker Law were preempted by the PWSA/PTSA because Congress intended the federal law to completely "occupy" the field of tanker design and construction due to the need for uniform national standards.[68] However, the provisions of the Washington Law concerning tug escorts[69] were not "design specifications" requiring uniform national standards and therefore not preempted by the PWSA/PTSA.[70]

In *Silkwood*, the Court held that the state's remedy for tortious conduct in the area of nuclear safety was not preempted by the Atomic Energy Act because there was no evidence that Congress intended to "occupy" the field or to bar states from establishing remedies for injuries suffered from exposure to hazardous substances.[71] In both cases where the particular area of state law passed the "occupied" test, the Court found no existing "conflict."[72]

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challenged the Washington Tanker Laws which regulated tanker design and construction for tankers entering Puget Sound. WASH. REV. CODE § 88.16.170-88.16.190 (1974).

66. ___U.S.___, 104 S.Ct. 615 (1984). Silkwood's estate brought an action against the Kerr-McGee Corporation on behalf of the deceased Karen Silkwood, to recover personal injury damages for radiation exposure to Ms. Silkwood when she worked in the Corporation's plant in Oklahoma. *Id.*

67. *Id.* at 621; *Ray*, 435 U.S. at 157-58.

68. 435 U.S. at 158-63. 1975, Wash. Laws, 1st Extr. Sess., WASH. REV. CODE § 88.16.170 *et seq.* (1974)(Tanker Law). The Court distinguished Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) which held that a municipal law regulating air pollution from ships entering its ports was not preempted by federal vessel licensing laws even though complying with the Detroit ordinance would require ships to be equipped with smoke abatement devices not otherwise mandated by federal law. The *Ray* Court held that the *Huron* decision was based on the finding that the federal and municipal laws did not "overlap" in purpose or scope whereas here, the Washington laws were enacted with the same purposes in mind and regulated the same areas as the PWSA/PTSA. *See* 435 U.S. at 165.

69. *Wash. Rev. Code* § 88.16.190 (1974).

70. *Ray*, 435 U.S. at 179-80.

71. ___U.S.___, 104 S.Ct. at 622-24.

72. *Id.* at 626; *Ray*, 435 U.S. at 173.

The Supreme Court, as well as the Ninth Circuit, has been reluctant to apply the preemption doctrine when the possibility of conflict between the state and federal laws is only speculative.[73] For example, in *Exxon Corp. v. Governor of Maryland*,[74] it was argued that a Maryland statute prohibiting oil producers and refiners from operating retail service stations and regulating temporary price reductions was invalid because it "conflicted" with the Clayton Act as amended by the Robinson-Patman Act.[75] The Court denied the existence of any conflict between the statutes and noted that the potential for conflict was too speculative to warrant a finding of preemption.[76]

Similarly, the Ninth Circuit narrowly construed the preemption doctrine in *Morseburg v. Balyon*,[77] when it held that the California Resale Royalties Act was not preempted by the 1909 Copyright Act.[78] The court reasoned that "occupation" and "conflict" are more easily found "when the emphasis is to protect and strengthen national power."[79] The court found the cru-

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73. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130-31 (1978) (A Maryland statute prohibiting oil producers and refiners from entering the retail gas sales market was not in conflict with the Robinson-Patman Act and the potential for conflict in different situations was too speculative to find preemption; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 491-92 (1974) (Ohio's trade secret laws were not preempted by federal patent laws since there was no great possibility that the state law would conflict with federal policy in the patent law area; William Inglis & Sons Baking Co. v. I.T.T. Continental Baking Co., 668 F.2d 1014, 1049 (9th Cir. 1981) (The possibility that the California Unfair Practices Act may proscribe conduct that federal antitrust laws permit was not sufficient to apply preemption).

74. 435 U.S. 117 (1978).

75. *Id.* at 122, note 5, 129. Exxon argued that the Maryland statute conflicted with § 2(b) of the Clayton act, 15 U.S.C. § 12 (1982), as amended by the Robinson-Patman Act, which is a goodfaith defense to voluntary allowance of price reductions. However, the Court held that the § 2(b) defense was not applicable to a situation where the oil company gives its own retailer a reduced price to help the retailer lower prices to meet the competition. *Id.* at 129-30. Exxon also argued that state law should be held invalid because it was a violation of the Due Process clause and created an undue burden on interstate commerce. These claims were rejected by the Court. *Id.* at 131.

76. *Id.* at 131.

77. 621 F.2d 972, 976-78 (9th Cir. 1980). Morseburg, an art dealer, was required to pay royalties on paintings he sold pursuant to the California Resale Royalties Act. CAL. CIV. CODE § 986 (Deering's Supp. 1984). Morseburg argued that the California Act was preempted by the 1909 Copyright Act because the California Act impaired his ability to sell his "work of fine art" within the meaning of the 1909 Copyright Act. *Morseburg*, 621 F.2d at 975.

78. *Id.* at 978. The 1909 Act does not provide for a resale royalty. The court also found that a requirement to pay such a royalty does not "impermissibly restrict" the owner's ability to resell his/her art. *Id.*

79. *Id.* at 976. *See also* Note, *The Preemption Doctrine: Shifting Perspectives on*

cial inquiry to be whether the two laws function "harmoniously rather than discordantly."[80]

III. THE COURT'S ANALYSIS

The Ninth Circuit applied the two-part *Silkwood* test[81] in determining that Alaska's deballasting statute was not preempted by the PWSA/PTSA.[82] Considering the first part of the test, whether Congress intended to "occupy" the field of deballasting, the court found no express congressional intent to do so within the federal legislation,[83] and proceeded to determine whether such a legislative intent could be implied.

The court first distinguished *Ray*[84] by finding that there were significant differences between the subject matter regulated in *Ray* and that regulated by the Alaska Tanker Act. The Washington Law regulated tanker design characteristics, while the Alaska Law challenged on appeal regulated ocean pollutant discharges.[85] The court stated that the *Ray* holding should be limited to preemption of state laws regulating tanker design and construction.[86]

Applying the *Rice*[87] decision, the court analyzed the legislative intent of the PWSA/PTSA's pollution control provisions and noted that a state's police powers should not be superseded by federal legislation unless there is clear congressional intent to do so.[88] Since the legislative record of the PWSA/PTSA was void of any congressional intent to occupy the entire field of pollutant discharges,[89] the court compared it to other federal marine environmental protection statutes[90] to determine

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Federalism and the Burger Court, 75 COLUM L. REV. 623 (1975).

80. *Morseburg*, 621 F.2d at 978.

81. ___U.S.___, 104 S.Ct. 615.

82. 726 F.2d at 501.

83. *Id.* at 486.

84. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

85. *Id.* at 487-88.

86. *Id.*

87. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

88. 726 F.2d at 488 (citing *Rice*, 331 U.S. at 230).

89. *Id.* at 489.

90. The court cites the FWPCA, 33 U.S.C. §§ 1251-1376 (1982) and the Marine Protection, Research & Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1982)(MPRSA). MPRSA regulates pollution dumping beyond the 3 mile territorial seas. The court also cites other federal acts, including the Deep Water Port Act, 33 U.S.C. §§ 1501-1524 (1982), giving

whether it could find an implied intent.[91]

The court analyzed the FWPCA and found it to be evidence of a congressional policy supporting more stringent state regulation for the protection of the local marine environment.[92] Based upon this evidence, the court determined that there was no compelling need for uniform national standards in the area of pollutant discharges,[93] unlike the area of tanker design and construction where uniformity is necessary to alleviate conflict among various ports.[94]

The court buttressed their argument by analogizing the PWSA/PTSA with the OPAA.[95] The OPAA approved the 1969 amendments to the 1954 International Convention for Prevention of Pollution of the Sea by Oil,[96] which prohibited certain oily mixture discharges within 50 miles of shore.[97] Since the OPAA contemplated stricter standards being set by states under the FWPCA,[98] the analogy between the PWSA/PTSA and the OPAA lead the court to conclude that Congress intended stricter state standards for oil pollution be enforced within three miles of shore in addition to the Coast Guard regulations issued under the PWSA/PTSA.[99]

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the Coast Guard authority over ports *beyond* the 3 mile territorial seas, and the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464 (1982), which provides assistance for states' Coastal Zone Management Plans. 726 F.2d at 489. *See supra* note 30, 31.

91. 726 F.2d at 489.

92. *Id.* at 491. The court found that under the FWPCA states maintain control for limiting pollution within their jurisdictions. The court stated: "Thus, in the CWA [FWPCA] Congress has clearly expressed its intent to allow the states to take an active role in abating water pollution." *Id.* at 489 (citing Pacific Legal Foundation v. Costle, 586 F.2d 650 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980).

93. *Chevron U.S.A., Inc.*, 726 F.2d at 491.

94. *Id.* at 492. Relying on *Dublino*, 413 U.S. at 415, the court rejected the argument that the comprehensive nature of the PWSA/PTSA evinces federal intent to occupy the entire field of water pollution discharges and noted that "the legislative history [of the PWSA/PTSA]. . .may stand equally for the proposition that the problem of tanker caused pollution is complex, must be approached from many angles, and requires a diversity of solutions." *Id.*

95. *Chevron U.S.A., Inc.*, 726 F.2d at 495; Pub. L. 93-119, 87 Stat. 424, codified at 33 U.S.C. §§ 1001-1006 (1982), repealed and superseded by MARPOL Protocol, *supra* note 29. The PTSA is based upon the Protocol, *supra* note 17, hence the analogy.

96. The U.S. ratified the 1954 Convention and implementing legislation was passed in 1961. Pub. L. 87-167, 75 Stat. 402 (1961).

97. *Supra* note 22.

98. 726 F.2d at 494-95 (citing 119 Cong. Rec. 14,588, 14,590 (1973)).

99. *Id.* at 495.

Under the second part of the *Silkwood* test, the court considered whether the Alaska Statute, on its face or in its purpose, conflicted with the PWSA/PTSA.[100] The court noted that rather than conflict, the statutes' objectives are compatible.[101] Following *Exxon*,[102] the court concluded that where separate legislative schemes reflect the same goals, courts should be reluctant to infer preemption.[103]

Finally, the court rejected the argument posited by Chevron that following the state law was a harsh economic burden not contemplated by the Federal Act because Alaska's required use of its on-shore reception facilities was imposed in addition to the federal requirement that tankers maintain crude oil washing systems. It found that the crude oil washing system was still necessary in ports that did not have on-shore reception facilities for deballasting.[104] The court also held that the economic burden did not convert the state requirement into an indirect design feature which, following *Ray*, would require preemption.[105]

IV. CRITIQUE

The Ninth Circuit is the first court to consider whether the PWSA/PTSA preempts state law in the area of tanker pollutant discharges within a state's territorial waters. In holding that the Federal Act does not preempt state regulations, the court follows a trend not to find preemption absent clear congressional intent, and where state and federal laws can function harmoniously. The court may also be establishing a new trend not to preempt where uniform national standards are not required based upon the nature of the activity regulated.

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100. *Id.* at 495-501.

101. *Id.* at 496.

102. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

103. 726 F.2d at 497 (citing *Exxon*, 437 U.S. at 132).

104. 726 F.2d at 499-501. Appellees argued that since the usual practice of tankers is to deballast beyond 50 miles, clean the tanks with the crude oil washing systems on the vessel, take on new ballast, and then discharge this "clean ballast" in the port, requiring tankers to use a port's reception facilities to deballast would make the crude oil washing systems required by the PWSA/PTSA superfluous and would create a harsh economic burden. *Id.*

105. *Id.* at 500. The court stated: "While this requirement [use of on-shore reception facilities for deballasting] may impose some financial burden on the regulated vessels and require their owners to make some economic choices in order to comply, such a burden neither converts the discharge prohibition into a design feature nor justifies a finding of federal preemption." *See also supra* note 70.

The recent trend to not find preemption where state and federal law can function concurrently is evidenced by the *Dublino*,[106] *Exxon*,[107] and *Morseburg*[108] decisions. In all of these cases the courts looked at the objectives and compatibility of the state law with the purposes of the federal law.[109] The court correctly utilized these decisions to bolster its argument that preemption should not easily be found where the statutes at issue do not actually conflict and where the goals of both laws are the same.[110]

The Ninth Circuit not only finds the federal and state statutes have similar goals in the area of pollutant discharges,[111] but, by looking into the federal statutory scheme of water pollution control, advances the theory that Congress believed that a federal-state partnership is the best means for controlling water pollution within a state's territorial waters.[112]

The court properly bases its conclusion of congressional intent upon federal law and international agreements in the area of water pollution abatement. For example, the Alaska Statute's requirement that oil tankers utilize on-shore reception facilities to deballast,[113] was the type of requirement contemplated by the International Convention for the Prevention of Pollution of the Sea by Oil of 1954,[114] and the Convention for the Prevention of Pollution from Ships of 1973,[115] supported by the United

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106. *See Dublino*, 413 U.S. at 418-20. For an analysis of the trend set by *Dublino* and other cases *see* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM L. REV. 623, 650-53 (1975).

107. *Exxon*, 437 U.S. at 132.

108. *Morseburg*, 621 F.2d at 977.

109. *See Dublino*, 413 U.S. at 418-20, *Exxon*, 437 U.S. at 132, and *Morseburg*, 621 F.2d at 977.

110. 726 F.2d at 487, 496-98.

111. *Id.* at 496-97.

112. *Id.* at 489-91, 494-95.

113. *See supra* note 2.

114. Opened for signature May 12, 1954 [1961] 1 U.S.T. 2987, T.I.A.S. NO. 4900, 324 U.N.T.S. 3, art. 18 VIII, *reprinted in* Mensah, *Environmental Law: International Conventions Concerning Oil Pollution at Sea*, 8 CASE W. RES. J. INT'L L. 110, 114 (1976). The Convention provides that, "States parties to it shall ensure the provision in their ports of facilities adequate for reception without causing undue delay to ships, of such residues from oily ballast and tank washing . . ." *Id.*

115. Regulation 15, The 1973 International Convention for the Prevention of Pollution from Ships, I.M.C.O. Doc. MP/CONF/WP. 35 (Nov. 2, 1973), *reprinted in* 12 INT'L LEGAL MATERIALS 1319 (1973).

States.[116] Additionally, the FWPCA provisions relating to the prohibition of oil discharge into U.S. navigable waters and adjoining shorelines[117] overlap with the goals and policy of the PWSA/PTSA.[118]

Though cited briefly by the court in a footnote, the Coastal Zone Management Act of 1972[119] (CZMA) is persuasive evidence supporting the proposition that Congress has deferred control and management of the coastal zone to the states. The main purpose of the Act is to give assistance to states to develop and implement coastal zone management programs.[120] The intent of Congress was not to preempt, but to support, state regulation of the coastal zone.[121]

It may be argued that since Congress expressly stated it did not intend to preempt state regulation in the CZMA, yet failed to express that same intent directly in the language of the PWSA/PTSA, Congress must have intended to preempt state regulation of oil pollution under the PWSA/PTSA.

However, when both Acts are properly read together, it is clear that what Congress did not express in the PWSA/PTSA is expressed by Congress in the CZMA and the FWPCA by the authority given to the states over their territorial waters.

Finally, the court may be establishing a new trend to not find preemption where the nature of the activity regulated is such that uniform national standards are not required. The Supreme Court recently advanced this proposition in *Ray* when it held that Washington's tug escort provisions did not regulate activity demanding of national standards, and therefore did not warrant preemption.[122]

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116. *Supra* notes 108 and 109.

117. 33 U.S.C. § 1321(b)(1) (1982).

118. Compare 46 U.S.C. § 391a, repealed and superceded by Revised Title 46 (Supp. 1984). *See supra* note 12) with 33 U.S.C. § 1251 (1982).

119. 726 F.2d at 489, note 7. *See supra* note 86 (citing 16 U.S.C. §§ 1451-1464 (1982)).

120. S. REP. No. 753, 92nd Cong., 2d Sess.____, *reprinted in* U.S. CODE CONG. & AD. NEWS 4776, 4776.

121. *Id. See also supra* note 31.

122. 435 U.S. at 179 (citing Cooley v. Board of Wardens, 12 HOW. 299 (1852)).

At least within the confines of the PWSA/PTSA, the Ninth Circuit correctly expanded this proposition to hold that oil pollutant discharges within state territorial waters is not the kind of activity which requires uniform national standards.[123] It is not a "design characteristic" which the *Ray* court said requires uniform national treatment,[124] but is more akin to a tug escort provision amenable to state regulation where otherwise not in conflict with the Coast Guard regulations.[125]

V. CONCLUSION

In order to arrive at its decision, the Ninth Circuit interpreted various federal laws and international agreements regarding ocean pollution control that together comprise a federal statutory scheme providing for federal-state coordination in marine environmental protection.

In the future, courts should adhere to the Ninth Circuit's opinion and view marine environmental protection as an area in need of federal-state partnership. Members of industry, state, and federal government should work together in seeking solutions to the problem of oil pollution.

*Michelle T. Leighton**

123. 726 F.2d at 491.

124. 435 U.S. at 171.

125. 435 U.S. at 179-80. "[A] tug escort provision is not a design requirement, such as is promulgated under Title II [of the PWSA/PTSA]. It is more akin to an operating rule arising from the peculiarities of local waters. . .clearly within the reach of the Secretary's authority under [Title I]. . .[which] merely authorizes and does not require the Secretary to issue regulations . . . ." *Id.* at 171. The *Ray* Court found that there was no exercise of that authority and therefore held valid the tug escort provisions of the Washington statute. *Id.*

* Golden Gate University School of Law, Class of 1986.