

No. 17-449

IN THE
Supreme Court of the United States

AMERICAN TRIUMPH LLC AND
AMERICAN SEAFOODS COMPANY LLC,
Petitioners,

v.

ALLAN A. TABINGO,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Washington**

**BRIEF OF *AMICUS CURIAE*
COASTAL MARINE FUND
IN SUPPORT OF PETITIONER**

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**BRIEF FOR AMICUS CURIAE
COASTAL MARINE FUND
IN SUPPORT OF PETITIONERS**

Coastal Marine Fund submits this brief, *Amicus Curiae*, in support of American Triumph, LLC's and American Seafoods Company, LLC's Petition for Writ of Certiorari to review the judgment of the Supreme Court of Washington.¹

I. INTEREST OF THE AMICUS CURIAE

A. COASTAL MARINE FUND

Coastal Marine Fund is an unincorporated association licensed to do business in the State of Washington. The members of Coastal Marine Fund are approximately 350 fishing vessel owners. The fishing vessels owned by the members of Coastal Marine Fund are what are considered "traditional" fishing vessels, typically small in size (under 100 feet) and typically owned and operated by long-time fishing families. These vessels conduct their fishing operations in the states of Alaska, Washington, Oregon, California, and, to a lesser extent, on the East Coast. To the extent there are stereotypical commercial fishermen, Coastal Marine Fund's membership captures that concept.

The purpose of Coastal Marine Fund is to procure insurances for its members. Included among the insurances that Coastal Marine Fund obtains for its

¹ Counsels of Record for both Petitioner and Respondent received timely notice of the intent to file this brief and consent was granted by all parties. Counsel for Coastal Marine Fund authored this brief in whole. Coastal Marine Fund is the only monetary contributor to the preparation and submission of this brief. No counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

members is Protection and Indemnity insurance. Protection and Indemnity insurance, (“P&I”) is the insurance which historically insures vessel owners for claims related to personal injury and death. P&I insurance has its origins in the 17th Century in London where such insurances were placed at Edward Lloyd’s Coffee House. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 55 (Harry W. James eds., 2d ed. 1975). Lloyd’s Coffee House evolved to become what is now known as Lloyd’s of London.

Coastal Marine Fund carefully screens any application for membership to ensure that the vessels are sound, the owners properly maintain their vessels, and that the captains and crews are of the highest caliber. Because of its market power in procuring insurance for 350 vessels, Coastal Marine Fund is able to obtain favorable insurance rates for its members. That advantage would be lost if its members had loss records of the average vessel or below. For that reason, Coastal Marine Fund carefully conducts its screening of existing and new members.

The longtime manager of Coastal Marine Fund is Peter Evich. The undersigned’s law firm serves as general counsel to Coastal Marine Fund. All of the claims for personal injury or death under the Coastal Marine Fund placed policies are handled by Mr. Evich and/or the undersigned firm.

No responsible owner of a fishing vessel supports the notion that willful, wanton, or malicious acts giving rise to injury or death are an acceptable practice. On the surface, punitive damages as a deterrent and punishment for such actions may seem to be wise public policy, legal arguments aside. For the reasons set forth below, however, the mere threat of punitive damages in a claim of unseaworthiness so

fundamentally disrupts the normal scheme of compensating injured fishermen that it is an intolerable remedy.

B. THE WASHINGTON STATE COURT SYSTEM

The vast majority of seamen's injury claims are filed in the state courts of Washington under the Savings To Suitor's Clause which gives to the injured seaman the election to file either in federal or state courts. Washington is a notice pleading state. The undersigned's law firm represents many vessel owners and insurers, in addition to Coastal Marine Fund members. In the past three years, as the question of punitive damages for unseaworthiness claims became well known among plaintiff's bar, at least two-thirds of the complaints filed contained a claim and prayer for punitive damages based upon unseaworthiness. Many cases which involved "ordinary negligence" or "garden variety unseaworthiness" contained such claims and prayers.

C. THE INSURANCE OVERLAY

Punitive damages typically are excluded from insurance coverage through explicit policy provisions. A very common P&I policy provision excludes punitive damages as follows: "Any liability imposed on the Assured as punitive or exemplary damages howsoever described." *See* Appendix A with redacted identifying information. The vast majority of all policies for P&I contain some version of this language. In addition, some states have determined that punitive damages are not insurable as a matter of law. *See* Cal. Ins. Code § 533 (West 2017). The rationale behind the public policy precluding the insurability of punitive damages

is that punishment ceases to be punishment when an insurance company pays the judgment.

II. ARGUMENT

THE PRACTICAL CONSEQUENCES OF THIS CONFLUENCE OF NOTICE PLEADING AND INSURANCE

Virtually every unseaworthiness case filed in the state of Washington is required to go through the mediation process before trial. Because punitive damages are almost always uninsured and/or uninsurable, small vessel owners such as Coastal Marine's members are faced with a Hobson's choice in those mediations and plaintiff's counsel are well aware of the leverage the mere specter of punitive damages provides. Plaintiff's counsel can demand settlements of substantially larger sums for the underlying claim than would normally be agreed upon because they hold the threat over the vessel owner's head of a large punitive damages claim which is uninsured. Plaintiff's counsel can, and do, demand settlements far in excess of what otherwise would be the case because vessel owners like Coastal Marine Fund's members cannot afford even the remote risk of a large uninsured punitive damages claim.

In addition to driving up the value of claims, this also drives up the cost of P&I insurance which is already four to five times higher than the cost of such insurance for foreign vessels. See Appendix B; U.S. Dep't of Transp., *Comparisons of U.S. and Foreign-Flag Operating Costs*, 8-9 (2011), https://www.maradot.gov/wp-content/uploads/pdf/Comparison_of_US_and_Foreign_Flag_Operating_Costs.pdf.

That the threat of punitive damages drives up the value of claims by their mere presence is recognized in

both a case and law review article cited by American Seafoods in support of its Petition for Certiorari. In *Lust v. Sealy*, 383 F.3d 580, 591 (7th Cir. 2004), the Seventh Circuit noted that large punitive damages claims could be “potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement.” In that same vein, *An Erie Obstacle to State Tort Reform* noted:

“the mere pleading of a large punitive damage request can force a defendant to settle the case quickly in unfavorable terms. This dynamic can rise regardless of the merits of the claim. It is a particularly strong dynamic when the defendant’s insurance company refuses to defend against punitive damages claims.”

Richard Henry Seamon, *An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89-90 (2006). This is precisely the dynamic set up by allowing punitive damages to append to an unseaworthiness claim “regardless of the merits of the claim.” *Id.* Indeed, since *Atlantic Sounding v. Townsend*², this Court’s decision allowing punitive damages appended to a maintenance and cure claim, the undersigned Counsel has spoken at seminars in the United Kingdom, Washington State, California, Alaska, Rhode Island, Massachusetts, and Florida pointing out this very real implication of uninsured claims for punitive damages. See Exhibit C, PowerPoint Slides from such seminars.

² 557 U.S. 404 (2009).

III. CONCLUSION

The harm caused to small vessel owners who are unable to bear the risk of a punitive damages claim is real and demonstrable. The mere threat of uninsured punitive damages is so grave that they force their insurance companies to settle injury claims for amounts in excess of what they otherwise would be worth and because they do not have the ability to withstand the risk of taking meritless cases to trial. Companies with a significant presence in the State of Washington will be faced with this intolerable risk until this Court resolves this issue.

On behalf of the members of Coastal Marine Fund, it is respectfully requested that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PROTECTION & INDEMNITY SPECIAL CLAUSES

Notwithstanding anything to the contrary contained in this Policy it is hereby understood and agreed that this Policy is subject to the following exclusions and that this Policy shall not apply to:

1. Any costs, liabilities and expenses arising from the insured vessel entering prohibited waters or engaging in unlawful fishing.

2. Any claims for loss of, or damage to, any nets and gear whatsoever of any vessel, including those of the insured vessel.

3. Any claims for loss of, damage to or liability in respect of any vessel, including the insured vessel caused by nets and gear of the insured vessel.

4. Any costs, liabilities and expenses for loss to, injury to, or illness of any person hired as a processor whether or not such person is legally entitled to the rights or remedies of a crew-member.

5. Any claim in connection with cargo and/or catch whatsoever whether or not on board the insured vessel.

6. Any claims for loss, damage, liability or expense arising directly or indirectly from pollution or contamination by any substance whatsoever but this exclusion shall not apply to the Assured's crew.

7. Any liability imposed on the Assured as punitive or exemplary damages howsoever described.

It is understood that liability hereunder in respect of loss, damage, costs, fees, expenses and/or claims arising out of or in consequence of any one occurrence is limited to the amount hereby insured.

APPENDIX B

U.S. Department of Transportation
Maritime Administration

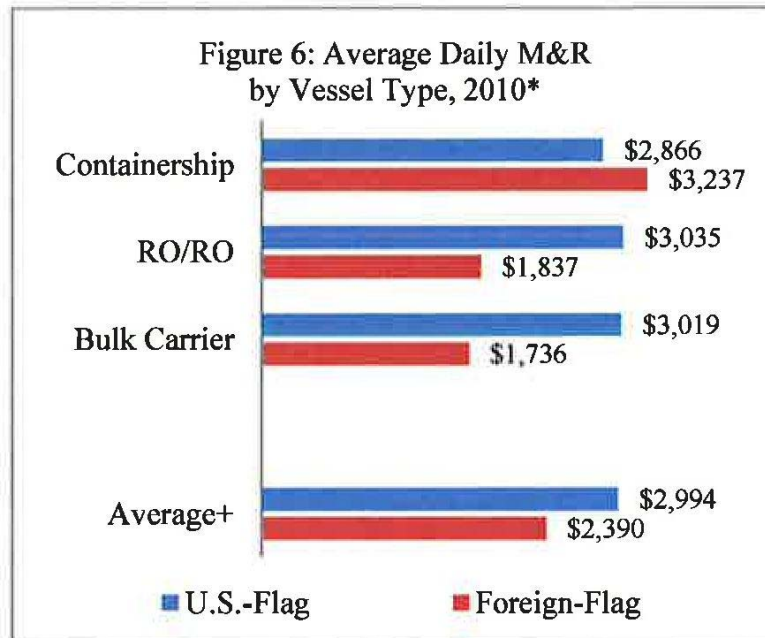
COMPARISON OF U.S. AND FOREIGN-FLAG
OPERATING COSTS
SEPTEMBER 2011

Photo Credits: Maersk Line

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(in addition to the duty), such as: (1) scheduling; (2) vessel placement; and (3) yard availability, among others.



*US-flag costs are weighted by the number of vessels in each operator's U.S.-flag fleet.

+Tanker costs omitted to protect operator confidentiality.

Carriers participating in the PwC survey rated maintenance, repair, and shipyard costs as the second biggest driver of higher U.S.-flag operating costs (behind crew costs). Eighty-nine percent of survey participants indicated that the ad valorem duty negatively impacts their decision to flag under the U.S. registry. In fact, the carriers stated that foreign shipyards are still used for American-flag ship repairs since the cost of having repairs performed overseas and paying the duty is often lower than the cost of having the repairs performed in U.S. shipyards.

Seventy-eight percent of carriers participating in the PwC survey also revealed that restrictions on foreign riding gangs have a negative impact on decisions to flag U.S.¹⁶ The carriers felt that the regulations requiring vessel repairs be performed in a shipyard prove costly and time consuming when compared to completing repairs during the course of normal operations.

In 2010, M&R costs represented roughly 15 percent of total U.S.-flag operating costs (significantly higher U.S.-flag crewing costs tend to diminish the importance and impact of M&R costs on U.S.-flag vessels). While M&R costs for foreign-flag vessels accounted for 32 percent of their total operating costs, U.S.-flag M&R costs were roughly 1.3 times higher. Figure 6 provides a further breakdown of M&R costs by vessel type.

Although the results in Figure 6 showing higher U.S.-flag costs are generally in keeping with the perceptions of carriers participating in the roundtable discussions and surveys, M&R costs for U.S.-flag containerships were actually less than their foreign-flag counterparts. Furthermore, for 2010, cost data submitted by U.S.-flag carriers indicated a 25 percent decline in M&R costs from 2009. More investigation is therefore needed to determine if this finding is attributable to the particular accounting practices of some U.S.-flag carriers or to operating cost data issues. Carriers typically accrue large M&R costs across the life of the repair or service. However, some carriers appear to have reported accrued or annualized estimates of M&R costs, while other carriers

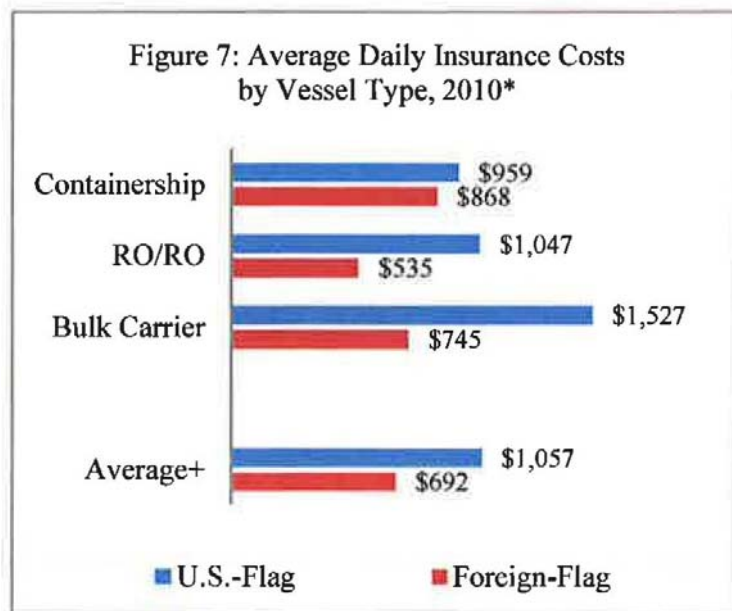
¹⁶ Riding gangs perform maintenance and repair work on the vessel while at sea.

appear to have reported M&R cash outlays for the specific calendar year in question. Reporting cash outlays for a specific calendar year will tend to significantly overstate the M&R costs for that particular year, while underestimating costs in other years.

Insurance Costs

While likely to vary from ship to ship based on a number of factors, insurance costs are typically divided into two groups: Hull and Machinery (H&M), and Protection and Indemnity (P&I). H&M protects the owner of the vessel against physical loss or damage. P&I, also known as “third party insurance,” provides coverage against third party liabilities such as injury or death of crew members and/or passengers, pilferage or damage to cargo, collision damage, pollution, and other matters that cannot be covered in the open insurance market. Other emerging types of voluntary insurance include war risk insurance and kidnap/ransom coverage.

Carriers participating in the PwC survey revealed that insurance costs in the U.S. can be four to five times higher than vessel insurance costs under foreign registries, with protection and indemnity insurance premiums the major contributor to this difference. In the opinion of the carriers, high carrier insurance premiums compared to foreign carriers reflect the increased liability costs associated with mariner personal injury for U.S. carriers and the higher insurance costs can discourage carriers from flagging under the U.S. registry.



*US-flag costs are weighted by the number of vessels in each operator's U.S.-flag fleet.

+Tanker costs omitted to protect operator confidentiality.

While the level of insurance is often influenced by a number of variables, including the individual owner's claims record, overall U.S.-flag vessel insurance costs were roughly 1.5 times higher than foreign-flag vessels in 2010.¹⁷ This amount is somewhat less than expected based on carrier perspectives revealed in the PwC survey. Insurance cost differentials were highest for U.S.-flag RO/ROs and bulk carriers at about 2.0 and 2.1 times higher than foreign-flag vessels, respectively (Figure 7).

¹⁷ Detailed cost data available to the Maritime Administration does not provide H&M and P&I costs separately. Further research is needed to determine the extent each impacts U.S. and foreign-flag insurance costs.

Overhead Costs

Included in this category of “general” costs are:

- 1) Shore-Based Administrative – Accounting, legal, communications, marketing, policy and planning, etc.
- 2) Shore-based Management – Ship operations/functions, procurement needs, employment/chartering decisions, etc.
- 3) Flag Registration Fees

In 2010, overhead costs for U.S.-flag vessels were roughly 1.7 times higher than foreign-flag vessels. The extent of the variation individual carriers’ overhead will depend on the type and scale of vessel operations. For example, a small tramping company operating two or three vessels will have relatively minimal overhead, whereas a large liner company will carry a much more substantial administrative overhead due in large part to additional shore-based staff. In general, overhead costs are subject to significant variability between carriers, even within the U.S.-flag fleet. As a result, caution should be exercised when attempting to draw conclusions based on a comparison of overhead costs between vessel types and flag registries. Moreover, the magnitude of these costs as a barrier to U.S.-flag vessel registry is uncertain and requires further research to determine the extent they impact flag registry decisions.

While not specifically related to operating costs, some carriers interviewed for the PwC survey reported that the scrapping approval process required by the U.S. can be more costly when compared to processes adopted by foreign registries due to the additional U.S. environmental regulations. They also reported that

* * *

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APPENDIX C

Slide 1:

Punitive Damages in Maritime Claims

Slide 2:

Hole in deck

- Vessel owner knew it was there
- Plaintiffs counsel will settle \$100k case for \$500k and waive punitive claim
 - These are not hypothetical