Buglass 50/30 years on: Still the Bible?
Chairman Address to Membership – Joseph G. Grasso, October 6, 2022

It has been a privilege and an honor to serve as your chairperson for the last year. I have taken exactly three official actions during that time: I presided over the members business meeting yesterday; and in December of last year and in May of this year I attended the annual meeting and dinner, of the UK Association in London. Of course, that is 2 more official actions than my predecessor, John Walker was able to take – I would like to thank John again for his service. The immediate past Chairman of the UK Association, Michiel Starmans, is with us here today, and I would like to thank him again for his superb hospitality. His Chairman's dinner at Manicomio (which I later learned is Italian for madman) Was truly enjoyable, as was the annual dinner at the Savoy, complete with live music from the waitstaff!

Knowing that I would be called upon to say a few words, I had kept in mind a story which I heard when I was in London. The story relates to the activities of the curator of a New York museum while in London with his wife on a vacation trip. They quite naturally wandered into antique and curio shops and in browsing found a quaint receipt dated 1640 covering the resoling of a pair of boots.

The price for the receipt was nominal so he bought it.

That evening in the hotel, his wife suggested that they visit the address of the shop to see what was there now.

Suppose, she suggested, the shop is still in business.

So, to their surprise they found this in fact was so. They entered and the curator presented his receipt of 1640 to the shopkeeper. After a little delay, the shopkeeper returned from the back room and informed his customer, "The boots will be ready next week".

Moving on to the topic of my talk, you may not be surprised to hear that it is legal in nature. I thought that this would be a good opportunity to discuss Leslie Buglass's seminal work on marine insurance. Before I launch into the topic, however, I'd like to thank my colleague Leah Mantei, for her assistance with this presentation.

Everyone here is doubtless familiar with Leslie Buglass, the author of the treatise titled *Marine Insurance and General Average in the United States: An Average Adjusters Viewpoint.* Buglass's treatise has been quite influential in marine insurance law in the U.S. and a source I have often relied on, so I thought I'd ask whether it is still relevant and persuasive today.

Before answering that question I'll start with a bit of background.

Leslie Buglass served as chairman of our Association from 1966 to 1967. I would note in passing that the topic for his address at the 1967 AGM was the Liner Negligence Clause, a subject still roundly discussed and debated today. A few years after serving as chairman of the Association, in 1973 he published the first edition of his treatise. Previously, in 1956 Buglass had published this small pamphlet, on the same subject, but by the time the third edition of his treatise was published in 1991 (following the second edition in 1981), it was a 900-page tome.

When the Third Edition was published in 1991, it was reviewed by Professor Evelyn Thomchick of Penn State. She had this to say about Buglass's book:

"The book includes thirteen chapters, preceded by sixteen pages of case citations and followed by eight appendices. In the introductory chapter, the author emphasizes that although American marine insurance had its origins in English common law, there are distinctions between American and British marine insurance. Throughout the book, the author uses the English Marine Insurance Act of 1906 as a source of reference and explains the differences with United States marine insurance law (which rests on common law and recognized commercial usage) when appropriate.

A considerable portion of the text (a very lengthy Chapter 6) is devoted to discussion of general average, an old and interesting natural law of the sea. The

author discusses the requirements for declaring general average, reviews interpretations and rulings regarding general average situations, and relates general average rules to international maritime rules and marine insurance laws of different countries.

In summary, Marine Insurance provides thorough coverage of marine insurance [I wonder if Professor Thomchick was aware of the pun when she wrote that], general average, and related topics. It is extensively documented with references to existing laws, conventions, and court rulings. One criticism of the book lies with its organization. Terms are sometimes used in the text before they have been defined or explained. A reader not familiar with the basics of marine insurance could therefore find the book a challenge. A glossary of marine insurance terms would be extremely helpful in this respect. Also, the nature of the material makes it difficult reading in places because of the legal and technical interpretations. It thus is not recommended for those who desire only a rudimentary introduction to marine insurance."

I think that was a fair review of Buglass's work.

Now on to some statistics and brief summaries of recent cases in which courts here in the US have cited Buglass's treatise. And a warning: you will hear very few additional references to "General Average" again in this presentation. Buglass's

treatise has been cited at least 75 times by federal courts in the US. While I am not aware any Supreme Court citations, Buglass has been cited in 27 Circuit Court cases, and 48 District Court cases.

One of the most recent cases we found in which the court cited Buglass was in 2017, in the case of *Certain Interested Underwriters at Lloyd's, London v. Bear, LLC*, 259 F. Supp. 3d 1050, 1053 (S.D. Cal. 2017). That case was in the US District Court for the Southern District of California and involved a marine insurance coverage dispute relating to the loss of a 102-foot yacht. The court analyzed whether a Maintenance and Repair Clause in the hull and machinery policy covering the vessel constituted a warranty or an exclusion. The clause required the owner to notify underwriters if the vessel was to undergo major repair or if the repairer required waiver of subrogation.

The vessel had suffered a casualty and was towed to a nearby repair yard in southern California. Of course, the yard's standard contract contained a "red letter" clause requiring the owner of the vessel and its insurers to waive subrogation against the yard in the event of a casualty. The owner failed to notify the underwriters about the repairs or the yard's contract, and of course, a fire in the yard during the repairs destroyed the vessel. The court, citing Buglass's definition of "warranty" (as well as the holding by the Second Circuit Court of Appeals in the

case of *Commercial Union Insurance Co. v. Flagship Marine Services Inc.*, 190 F.3d 26, 31 (2d Cir. 1999), in which the court cited Buglass), concluded that the Clause was indeed a warranty, and not an exclusion or a forfeiture provision, as the insured had argued, which would have required closer scrutiny by the court. Ultimately, the court held that the warranty had been breached and that there was no coverage for the loss.

I also wanted to reference some other recent US court opinions that reflect deference to Buglass's views, and then I will note a couple of opinions in which the courts declined to follow Buglass's treatise as persuasive authority.

In 2013, in another case involving a warranty, *Nieto-Vicenty v. Valledor*, 984 F. Supp. 2d 17, 19 (D.P.R. 2013), the federal district court in Puerto Rico dealt with a coverage dispute under the liability portion of a policy covering the M/V Sea Watch, which sank on July 24, 2011. The vessel was carrying 28 passengers at the time of the sinking, thereby clearly violating a passenger limitation warranty in the policy, which provided that the vessel would take a maximum of 6 passengers. Perhaps not surprisingly, the court held that coverage was voided. In order to reach its conclusion, the court relied on a passage in Buglass's treatise defining "warranties" as "promise[s] 'by which the assured undertakes that some particular

thing shall or shall not be done. . .'" *Id*. at 20 (citing Leslie J. Buglass, *Marine Ins. & Gen. Average in the U.S.* 27 (2d ed. 1981)). And again, the court noted that that passage had been relied upon by the Second Circuit in the *Flagship Marine* case.

In 2010, the Fifth Circuit Court of Appeals faced a question as to what extent underwriters should have been credited with the value of a vessel after it sank during Hurricane Katrina. The case was *Danos Marine Inc. v. Certain Primary Protec. and Indem. Underwriters*, 613 F.3d 479, 485 (5th Cir. 2010), and it involved a dispute over the costs of wreck removal and the residual value of the vessel (or in this case, residual value of the wreck). The court found that the value of the property remaining after the sinking of vessel was zero, notwithstanding that the owners had agreed to sell the vessel for $4 million immediately before the Hurricane hit. The court cited Buglass, to "explain that credit is to be given for the value of any salvage recovered as a result of the removal." But in this case, the court found that value to be zero, and accordingly, the underwriters were stuck with the entire cost of removal of the wreck, with no credit for any residual value.

In a slightly less recent case from 1984 (*Antilles S.S. Co., Ltd. v. Members of Am. Hull Ins. Syndicate*, 733 F.2d 195, 197 (2d Cir. 1984)), the Second Circuit Court of Appeals addressed a claim for repairs to a vessel damaged by an explosion in a

cargo hold. The vessel (the aptly named ALCHEMIST) was carrying a cargo which included glacial acrylic acid (I think that's what was used for the slime in the movie Ghostbusters), when an explosion occurred, resulting in solidification of some of the cargo in the cargo tanks and void spaces. The court cited Buglass's description of the American adjusters' practice of allowing as repair costs only removal of cargo which adheres to the vessel's structure or which ends up in a place where cargo is not normally found (such as the engine room or void spaces), and concluded that "cargo debris in a cargo tank at the port of destination does not constitute 'damage to the vessel' within the parties' intended meaning of the 'Inchmaree' Clause".[1]

Moving back to the U.S. Gulf, in 2003 the US District Court for the Eastern District of Louisiana decided the case of *Ambraco, Inc. v. M/V PROJECT EUROPA, her engines, tackle, furniture, apparel, appurtenances, etc.*, CIV.A. 01-0227, 2003 WL 22462171, at *1 (E.D. La. Oct. 28, 2003), *aff'd sub nom. Ambraco, Inc. v. PROJECT EUROPA MV*, 119 Fed. Appx. 676 (5th Cir. 2005)(unpublished).

[1] If you're a fan of classic maritime poetry, the *Antilles* case also included a quote from J. Masefield's "Sea Fever," *reprinted in Twelve Centuries of English Poetry and Prose* 838 (rev. ed. 1928). (The court noted that "upon her departure from Antwerp without even having been permitted to open her cargo tanks, Masefield's evocative words might have been on the crew's mind: 'I must go down to the seas again, to the lonely sea and the sky.' More likely though—since on the run to Rotterdam the 'Alchemist' hoped to avoid the noxious odor by sailing against the wind—this later line from "Sea Fever" was offered as a fervent prayer: 'And all I ask is a windy day with the white clouds flying.'").

That case involved a dispute as to whether cargo interests were required to contribute to general average expenditures incurred by the carrier, due to a fire, when the contract of carriage included a New Jason Clause. The New Jason Clause permits a vessel owner to recover in General Average even if the owner bears some responsibility for the casualty, as long as the owner is entitled to immunity from liability under the Carriage of Goods by Sea Act or any other applicable statute. The facts are as follows. The PROJECT EUROPA was chartered to carry bales of sisal twine from Brazil to New Orleans. Some of the pallets on which the cargo was loaded were damaged during loading, and in order to repair the damage, the stevedores at the loadport restacked the bales and applied pallet wrap heated by an open flame in order to shrink it around the twine and operate as shrink-wrap. The vessel then got under way, but a few days later, a crew member reported smoke coming from the main cargo hatch. After several failed attempts to extinguish the fire alternating between using water to cool the deck and pumping CO2 into the hold where the fire had broken out, the captain and ship owner decided to find a safe berth and continue fire-fighting. Approximately one week after the fire was discovered, and after the vessel had berthed at Curacao, the fire was successfully extinguished. The vessel then continued on her voyage with the damaged cargo and arrived at the intended destination of New Orleans, where the parties began the process of determining damages. It was determined that as a

result of the fire there was $3 million in damage to the cargo, and the ship owner had incurred approximately 600,000 Euros in general average expenses. Litigation between the cargo interests and vessel owner then ensued (that warms my heart), with the cargo interests seeking $3 million in damages. The cause of the fire was never established, and the court therefore held that the cargo interests failed on their claim. However, with respect to the vessel owner's counterclaim for a contribution to general average, the court relied on Buglass's treatise in holding that under the terms of the new Jason clause, the vessel owner was entitled to its claim for contribution to general average.

I see Michiel Starmans smiling, as his company was on the winning side of that case.

Now turning very briefly to two cases where the courts declined to follow Buglass:

In *National Casualty Company v. Lockheed Martin Corp*, a case involving a vessel named the SEA SLICE (which unfortunately reminds me of my golf game), the federal district court in Maryland was faced with competing arguments on the meaning of the term "want of due diligence". The case involved the scope of

coverage under the Liner Negligence Clause (you will recall that was the topic of Buglass's address in 1967), and specifically whether certain damage to a vessel was the result of want of due diligence by the owner. The underwriters argued that want of due diligence equated to negligence. The owner, citing Buglass, argued that want of due diligence required something more. The court sided with the underwriters, holding as follows:

"First, Lockheed contends that "want of due diligence" is properly limited to situations where "the vessel has been *flagrantly mismanaged* to such an extent as to render the vessel *grossly unseaworthy*". (The court citing Buglass's treatise.) However, neither Buglass nor Lockheed presents any case law in support of this position. Ordinarily, Buglass cites extensively to precedent in support of her restatements of the law (note that the court must have been under the mistaken impression that Leslie was a she), but the crucial paragraph cited by Lockheed is bereft of any legal foundation. Given that Buglass's recitation of the law is not grounded in precedent and given that the Court has identified case law that equates lack of due diligence with simple negligence, the Court declines Lockheed's invitation to follow Buglass's approach."

Ironically, the dispute arose in connection with instructions to the jury, and by the time the court rendered its decision, the jury had found in favor of the owner.

This is the only case we found in which a court was critical of Buglass.

There was one other case where a court declined to give weight to a party's citation to Buglass.

The case is *Duferco S.A. v. Ocean Wide Shipping Corp*. In that case, the federal district court in Manhattan faced a challenge to an arbitral award in which the panel held that the charterer was required to pay for restowage charges, rather than allowing the charges in GA. The charterer cited Buglass's general view on allowance of restowage charges in seeking to vacate the arbitral award.

The court addressed the charterer's argument as follows:

> [The Charterer] relies upon a passage from Buglass's Treatise, which states that when restowage is performed for the common safety, the allowance of such restowage in general average is not prohibited. However, as the Panel correctly pointed out, **"Buglass does not address the special circumstances of cases such as this, where the loading is carried out, not by the owner, but by the cargo interests."**

The court ultimately rejected the charterer's reliance on Buglass, but without criticizing or disagreeing with him.

So let us return to the question of whether Buglass is still relevant to practitioners of marine insurance law. I think the answer is "Yes", but there is a caveat. That is that it has now been over 30 years since the last edition was published. Which begs the question, "should an effort be made to produce a new edition?" Perhaps that could be a project for our Association in coordination with the MLA? Or has Google replaced the need for such a treatise?

Finally, in closing I'd like to reiterate a theme that has been discussed within our Association many times in recent years (and which came up again yesterday during the members meeting): our Association must be prepared to adapt to changing times. I heard from the Commandant of the Coast Guard earlier this week the same theme – that the pace of change is accelerating, and we must be prepared to adapt. In that regard, I'll leave you with a suggestion that we engage in strategic planning for the future of our Association, and that we consider closer and broader cooperation and coordination with the other marine insurance industry groups in the US and Canada.

Thank you for your attention.