Notes

TOWARD A VESSEL OWNER'S INTERPRETATION OF DUAL CAPACITY: WHY FANETTI SHOULD BE DEEMED IMPLICITLY OVERRULED

I. Introduction

The modern world of maritime cargo transport has been fundamentally reshaped by two forces, the introduction of containerized cargo systems beginning in the late 1970s and a drastic increase in competition among the major vessel-owning corporations around the world.

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1. Containerization has been described as "one of the most important technological developments in the transportation of goods by sea since steam replaced sail." Seymour Simon, The Law of Shipping Containers, 5 J. Mar. L. & Com. 507, 507 (1973-1974).

Marine containers are large metal boxes used to transport cargo. They are usually 20 or 40 feet long, 8 feet wide, and 8 feet high. Chassis are frames and wheels designed to move containers to and from ports, in and around a port or dock area, and even, in the case of specially outfitted roll-on, roll-off vessels (so-called "ro-ro" vessels), onto the vessel.

Iтел Containers Int'l Corp. v. Atlanttrafik Express Serv., Ltd., 668 F. Supp. 225, 227 (S.D.N.Y. 1987) (citing Simon, supra, at 510). Over the course of the last several decades, the marine shipping business has drastically increased the employment of vessels designed to hold containers.

With containerization, a single reusable container holding many smaller packages can be delivered to the pier, put aside until the ship is ready, and loaded and unloaded, all without costly movement of the individual packages. The labor savings are substantial, damage to cargo is reduced, and ships and their crew spend less idle time in port.

Id. (citing Simon, supra, at 512). For surface transportation, these containers can be rapidly and efficiently transferred from the ship to railroads or can be individually towed by trucks to sites remote from rail lines. The newest innovations are completely integrated systems whereby a container can be loaded at the seller's place of business, hauled by truck to a rail head, then taken by train directly to the vessel which will carry the load overseas. By repeating this process at the destination, the goods can be transferred efficiently and without having to perform time consuming storage of each individual package. This integrated modular system has caused significant changes in the maritime field, particularly with respect to determining which of the several entities involved in transporting the goods should be held liable for damages. See Iтел Containers Int'l Corp. v. Atlanttrafik Express Serv., Ltd., 781 F. Supp. 975 (S.D.N.Y. 1991); Simon, supra, at 507-13.
world. Both of these developments have placed a premium on the efficient and rapid handling of cargo by the vessel owners, the stevedoring firms hired to load and unload vessels, and by the individual longshoremen who actually perform the work of unloading. The resulting pressure to move goods rapidly and at the least possible cost has led domestic shipping firms to consider alternative corporate forms in order to avoid the expense of hiring independent contractors. These stevedoring functions can be performed "in-house" by the shipping firms, either by directly conducting cargo operations themselves or by forming a separate subsidiary to perform those tasks.

This realignment of the traditional employment scheme among vessel owners, stevedores, and longshoremen was not envisioned when Congress originally passed the Longshore and Harbor Workers' Compensation Act (LHWCA) which provides longshoremen the benefit of a statutory remedy for injuries that occur during the course of employment. Likewise, in its seminal decision involving the decline of duties under the LHWCA, the Supreme Court in Scindia

2. "[S]hip operators have been involved since 1982 in the most severe rate competition that anyone in the industry can recall." Nancy Yoshihara, Ports: Traditional Ways Ebb as a New Wave of Intermodal Cargo Handling Rolls In, L.A. TIMES, Mar. 16, 1986, Business, at 1. See also Eric Stromberg, Shipping Interests Face Challenges, THE PORT OF HOUSTON MAGAZINE, Mar. 1993, at 6, 9 (declaring that the two most important trends in the shipping industry are "labor issues and increased competition").

3. A stevedore is a "workman employed either as overseer or labourer in loading and unloading the cargoes of merchant vessels." 16 THE OXFORD ENGLISH DICTIONARY 661 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). In the shipping trade, a stevedore is a company which contracts with vessels or its owners to load and unload cargo from the vessel. While in laymen's language the terms "longshoreman" and "stevedore" are frequently used interchangeably; in an admiralty context, the words are distinct. Generally, a stevedore is an independent contractor which hires longshoreman to unload a vessel owner's ship.

4. A longshoreman is one "engaged in loading and unloading cargoes ... along the shore." 8 THE OXFORD ENGLISH DICTIONARY 1137-38 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). This word is used to define the individual or individuals who physically participate in the unloading of vessels. They are generally organized by the stevedore into "gangs" consisting of enough longshore workers to handle the task of loading or unloading a given vessel. The longshoreman in charge of each gang, and acting as the representative of the stevedore is known as the "hatch boss."

Steam Navigation Co. v. De Los Santos,6 constructed a liability scheme which drew from the traditional wharfside arrangement where vessel owners hired independent stevedoring companies. These companies, in turn, arranged for individual longshoremen to handle the ship's cargo.

In response to these new economic relationships evolving on the waterfront, the federal courts of appeal have developed two distinct "dual capacity" doctrines to analyze the claims of injured longshoremen under the Scindia interpretation of the LHWCA liability scheme.8 The objective of this note is to trace the LHWCA liability scheme devised to protect injured longshoremen, compare the differing interpretations of the dual capacity doctrine enacted by the federal courts of appeals, and then to suggest affirmative defenses to liability inherent in the choice of corporate form. These defenses should be available to owners/stevedore under the better choice of the two proposed dual capacity doctrines. Otherwise, should American shipping firms find that reducing costs by combining ownership and stevedoring functions in-house only increases exposure to liability for longshoremen's injuries, they might well determine that the associated litigational costs are not worth the economic savings.9 This

7. The "dual capacity doctrine" is the judicial concept invoked to determine the scope of the duties owed by a vessel owner, operating as its own stevedore, to its longshoremen employees. See Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025, 1032 (5th Cir.), cert. denied, 474 U.S. 846 (1985). The debate which this note centers on is how dual capacity employers should be treated for the purposes of the LHWCA. One proposal is to treat the parent vessel owner, at all times, as a third party under the Act subject to negligence suits brought by longshoremen. The other approach utilizes a more discriminating test, one which seeks to determine whether the longshoreman was injured by an act which would normally have been the providence of the vessel owner or the stevedore. If it is that of the vessel owner, then under this second analysis a cause of action for negligence would lie. However, if the act is one which would normally be ascribed to the stevedore, then the liability limitations of the LHWCA would apply.
8. Compare Fanetti v. Hellenic Lines, 678 F.2d 424 (2d Cir. 1982), cert. denied, 463 U.S. 1206 (1983) (vessel owner acting as its own stevedore is not afforded the statutory protection of an employer under the LHWCA) with Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir.), cert. denied, 474 U.S. 846 (1985) (vessel owner acting as its own stevedore liable in tort for only those injuries to longshoremen sustained by a culpable act or omission committed by a vessel owner in its traditional ownership functions).
9. There is a strong sense in the American shipping industry that high domestic labor costs have contributed to a near-collapse of the industry. There is no denying that favorable tax, labor and regulatory policies of other countries were killing American shipping. The nation's two largest
heightened liability has the potential to force marginal domestic American shippers into liquidation, and may pose a serious deterrent for other shipping firms to retain their management operations in the United States.\textsuperscript{10}

II. BACKGROUND

The last ten years have brought many economic challenges and technological innovations to the burgeoning world-wide transportation industries. However, one constant factor in the international trade of goods has been that any sizable intercontinental movement of products must be accomplished by marine shipping firms. While the methods designed to handle maritime cargo have been rapidly evolving to integrated containerized systems, a fixed reality is that when goods of any size need to pass between continents they must do so aboard ships. Thus, while the modern transport of most non-mineral

liner shipping companies, American President Lines and Sea-Land, said this spring that without immediate relief they would lower the American flag beginning in 1995, eliminating the U.S. merchant fleet and with it the sealift capacity that was used extensively in the Persian Gulf War. Ken Miller, Finally, Optimism for U.S. Maritime Industry, Gannett News Serv., June 26, 1992. Along with containerization, increasing economic pressures on shippers and technological innovations occurring in cargo-handling equipment, labor costs have been identified as a major point of contention by shipowners and port authorities alike. "[L]abor issues pose the greatest challenge [and] 'many changes in labor-management practices' will be essential if productivity gains from automation and computerization are to be fully realized." See Stromberg, supra note 2, at 9 (quoting Mark Chadwin & Wayne K. Talley, Vessel and Port Technologies at the Turn of the Century, delivered at Transportation Research Board Meeting (Jan. 1993)).

10. In 1992, Transportation Secretary Andrew Card warned that under current policies, the number of seagoing vessels in the United States—currently 393 ships carrying 20 million tons—will shrink to 117 ships carrying less than 5.9 million tons. Miller, supra note 9, at 6. He states that ""[w]ithout reform of our archaic maritime laws, America's foreign trade merchant fleet may be virtually extinct by the year 2000."" Id. (quoting Transportation Secretary Andrew Card). Furthermore, John Snowe, chairman of CSX Corporation, echoed Card's statement by stating: ""We want to continue to be U.S.-flag carriers [b]ut to continue without reform puts the U.S.-flag fleet in serious peril."" Id. (quoting John Snowe, chairman of CSX Corporation).

While the industry favorably received the news that Congress and the Bush administration were planning to enact a bill addressing concerns of the shipping industry, the true effect of the legislation on labor costs was not expected to be great, as the bill would primarily target subsidies and American-flagged competition rather than labor rate problems. See id.
and non-liquid goods are handled in containers, those containers continue to be loaded, carried by, and off-loaded from sea going vessels especially adapted to facilitate their efficient transport. The discussion in this note involves two conflicting trends, one found in the U.S. shipping industry and one found in the federal admiralty courts. Although the international shipping industry continues to be active in importing and exporting goods through the ports of the United States, many shipping companies have attempted to meet the challenge of increased competition by seeking to reduce labor costs. The industry has determined that hiring independent contractors to load and unload the shipper's vessels can produce significant savings. In order to reduce these labor intensive costs,

11. According to the American Association of Port Authorities, "75% to 90% of the general cargo that goes through U.S. ports is shipped in containers . . . ." Yoshihara, supra note 2, at 1.

General cargo includes containerized goods, trailer loads of everything from shoes to sewing machines, socks to stereos, that can be lifted from a ship's hold and unloaded on a heavy-duty truck, or hooked up to a train for inland delivery.

General cargo also includes so-called break-bulk items—cars, loads of steel, various bundles and bags and other goods that require special care and preparation before they are sent to their final destinations. Warren Brown, Port In a Storm: Baltimore's Labor Wees Hurt Its Shipping Industry and Its Loss is Virginia's Gain, THE WASHINGTON POST, Jan. 29, 1990 (Financial), at F1.

Ships are required to transport goods of any real size between continents. The appetite of U.S. consumers for automobiles and other consumer goods produced abroad has combined with the importation of oil to create a new resurgence in U.S ports. See Stromberg, supra note 2, at 6.

The most current published data from the U.S. Bureau of Census shows that through September, U.S. waterborne commerce increased 1.7 percent by volume and 5.4 percent in value compared to the first nine months of 1991. Reversing the pattern of the past three years, exports edged downward, by half a percentage point, to 281.2 million tons, while imports increased by 3.6 percent, from 333.3 million to 345.3 million short tons.

Most telling[,] however, were impressive gains in the liner trades, particularly the containerized component which soared in double digit increments from its 1990 and 1991 levels. Compared to 1991, containerized imports increased by 13.4 percent and exports by 9.2 percent.

Id.

12. See generally Simon, supra note 1 (examining the role of containerization in the context of liability for cargo damage and maritime liens).

13. The International Longshoremen's Association (ILA) currently has a contract negotiated in Philadelphia, whereby each worker, in addition to 16 paid holidays a year, "could receive health, welfare and pension benefits for up to 3 million hours they don't work. [Further, the] union . . . requires that its already overmanned loading gangs be serviced by a full-time 'water-boy,' who can earn up to $60,000
and forego the costs of "middlemen" independent stevedores, large American shipping firms have been forming their own stevedoring companies to directly provide for the handling of their vessels' cargo at selected U.S. ports. These shipping firms that hire, employ, direct, and control their own longshoremen, while also owning the vessel upon which the longshoremen work, are known as "dual capacity" employers.\(^1\)

The problem for these dual capacity vessel owners/stevedores has come with their treatment under the LHWCA. The Act, designed to provide scheduled compensation for injured longshoremen\(^2\) from their stevedore,\(^3\) allows a longshoreman to sue vessel owners for negligence if they can prove the vessel owner breached a duty it


\(^2\)"Handling . . . cargo is an expensive, labor-intensive task that provides jobs at the average rate of $18 an hour, albeit frequently at less than a 40-hour workweek." Brown, supra note 11, at F1.

Not only are vessel owning firms charged by the local port authorities for the expense of labor used on their vessels, but under many contracts negotiated by the International Longshoremen's Association, longshoremen are paid for hours they do not work. Under the contract between the Philadelphia Maritime Trade Association (PMTA) and the ILA:

[T]he PMTA has to pay about $13 an hour into the funds for a guaranteed 2.8 million "man-hours" a year. But for the last two years the workers have tallied only about 2.2 million man-hours.

That $13 per hour is in addition to the hourly wages and other benefit payments paid to the union member for working. A dockworker earns about $20 per hour in addition to the $13 per hour fund payment.

PMTA still had to pay for the entire number of guaranteed hours even if they are not worked. Officials at shippers and other companies said they had to raise their rates and impose additional fees to make up the difference.


\(^3\)A dual capacity employer is one who serves both in the capacity of vessel owner and stevedore. See Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025, 1032 (5th Cir.), cert. denied, 474 U.S. 846 (1985).

\(^4\)For a person employed to handle a ship's cargo to qualify under the terms of the LHWCA, that person must be an employee under the Act.

The term "employee" means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—. . . a master or member of a crew of any vessel; . . . or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.


owed the longshoreman. But in *Fanetti v. Hellenic Lines*, the Court of Appeals for the Second Circuit treated a dual capacity owner as having breached a maritime duty virtually whenever a longshoreman was injured. Under this holding, a vessel owner, acting as its own stevedore, would almost never have the insulation from tort liability that the LHWCA was intended to provide. This rule alone, if actively enforced, could dramatically affect the loss reserve requirements of an already marginalized industry.

If, however, the dual capacity doctrine developed by the Fifth Circuit in *Castorina v. Lykes Bros. Steamship Co.* was applied, vessel owning corporations, which engage in their own stevedoring operations, would have the choice of several corporate relationships between their vessel owning and stevedoring companies. This would serve to lessen the likelihood that longshoremen could bring negligence claims against the parent corporation outside of the scheduled benefits of the LHWCA. Thus, if the proper relationship between a parent and various subsidiaries was maintained, vessel owning

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18. See id. § 905(b).
20. For the purposes of the LHWCA, an “employer” is one “whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining . . . area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . .” 33 U.S.C. § 902(4) (1988). Thus, where a worker aboard a vessel is not employed as a crewmember, that worker is an employee under the LHWCA and his employer, whoever that might be, is a statutory employer under the Act. *Id.* A dual capacity employer is simply a vessel owner who also complies with the LHWCA definition of an employer under the Act.
22. “As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards.” *Scindia Steam Navigation Co.*, v. *De Los Santos*, 451 U.S. 156 (1981). The LHWCA was amended in 1984 to narrow the class of employees available to sue under the compensation scheme. This was done in order to mitigate “the hardship [the post-1972 LHWCA] has placed upon many of this nation’s basic industries, and because of the inclusion in the 1972 amendments of many workers who did not truly meet the intent of the original Act.” *Additional Views of Hon. Austin J. Murphy*, H.R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 81 (1983), reprinted in 1984 U.S.C.C.A.N. 2734, 2764.
concerns could reduce their litigational costs by allowing both their vessel owning and parent divisions to adopt a measure of the LHWCA protection, much as if they too were direct employers of the longshoremen. This measure of protection is one which could be used either by pre-existing maritime corporations or those anticipating an expansion into the area of stevedoring operations.

III. Evolution of Longshoremen's Compensation

The Longshore and Harbor Workers' Compensation Act (LHWCA) is the modern statutory source for monetary compensation, that an injured longshoreman is eligible to receive for injuries sustained during the course of his employment. The LHWCA was one of the first workers' compensation schemes enacted in the United States and has been the subject of numerous decisions by the U.S. Supreme Court regarding the constitutionality of such legislation.


25. 1A BENEDICT ON ADMIRALTIES § 91 (Elijah E. Jhirad & Ellen M. Flynn ed., 7th ed. 1990). Longshoremen have had a remedy at law against vessel owners when injured in the course of working aboard a vessel since before the turn of the century. The availability of this action has been recognized in a series of Supreme Court decisions, many of which predated the legislative mandate that federal workers' compensation be extended to longshoremen in 1927. See Leathers v. Blessing, 105 U.S. 626 (1882); Steamer Max Morris v. Curry, 137 U.S. 1 (1890); Kenward v. Admiral Peoples, 295 U.S. 649 (1935); Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1954). The existence of this remedy was, however, generally found insufficient to protect the longshoreman in an increasingly dangerous occupation. Since most longshoremen were employed directly by independent stevedores who were responsible for providing safety procedures, there was little incentive on the part of shipowners to exercise all reasonable care to provide a safe working environment to the stevedore. Negligence actions were deemed ineffective in prompting such diligence on the part of vessel owners because traditional admiralty standards employed by the courts in these cases made it almost impossible to prove a negligent breach of a duty that the vessel owner owed to its longshoremen. This was particularly true since most injuries were sustained as a result of fellow servant negligence, which acted as an automatic bar to recovery from a negligent third party. BENEDICT, supra, § 91, at 5-5.


26. BENEDICT, supra note 25, § 2, at 1-3. It was in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), that the Supreme Court held, in a 5-4 decision, that the Workmen's Compensation Law of the State of New York was not constitutionally applicable to a longshoreman killed in New York harbor on a steamer's gangway. The Court reasoned that application of state land-based law to an action arising
A consistently high rate of serious injuries occurs because of the nature of a longshoreman's duties. The shifting of cargo during a voyage renders the unloading and lifting of goods from the holds of vessels a potentially dangerous operation. The cargo may even collapse during unloading due to changes in its center of gravity. Likewise, the process of raising, lowering and stacking huge containers at high rates of speed is an invitation for disaster to humans dwarfed by the machinery involved. Congress, in recognition of these inherent dangers, passed the LHWCA in 1927 to provide workers' compensation.

at least partly aboard a navigable vessel would impermissibly blur the distinction between municipal and admiralty law, violating the principle that there should be only one, single version of admiralty law. See also Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917) (holding New York Workmen's Compensation Act unconstitutional in its application to a longshoreman injured aboard vessel). BENEDICT, supra note 25, § 2, at 1-4, 1-5.

In Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), the Supreme Court held that federal legislation to extend state workers' compensation benefits to maritime employees was unconstitutional as "Congress may not delegate to the states legislative power which the Constitution bestows on Congress and which is in its nature nondelegable." BENEDICT, supra note 25, § 3, at 1-5. Again, the Supreme Court held that the uniformity of maritime law demanded that state workers' compensation laws not apply to actions on navigable waters as this would be a violation of the federal rights over maritime actions.

In 1927, Congress again passed compensation legislation—this time taking into consideration the previous Supreme Court opinions on the subject. The new legislation targeted only longshoremen, abandoning the idea of attempting to cover both seamen and longshoremen under the same plan. This legislation became the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, 44 Stat. 1424 (1927) (codified as amended as the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1972)), and passed constitutional muster, finally, in Crowell v. Benson (Knudsen's Case), 285 U.S. 22 (1932). The Act may not have been deemed constitutional had the Supreme Court not articulated its "maritime but local" doctrine in Western Fuel Co. v. Garcia, 257 U.S. 233 (1921), which allowed the Court to assume that federal and state workers' compensation acts could overlap jurisdictions, yet remain separate in their applicability. This separately evolved doctrine answered the Court's concern over state infringement of maritime law, yet also allowed coverage of longshoremen under workers' compensation schemes no matter where the locus of the injury—be it dockside, on a gangway, or aboard the vessel itself. See BENEDICT, supra note 25, §§ 7-8.

For a more detailed outline of the history of the LHWCA, its subsequent amendments and modern interpretation, see Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981); Griffith, 521 F.2d at 38-41; BENEDICT, supra note 25, § 1, at 1-1 to -27.

27. Evans v. Transportation Maritime Mexicana, 639 F.2d 848, 851 (2d Cir. 1981). "At the time of the 1972 Amendments [to the LHWCA], longshoring was the second most dangerous industry (behind only coal mining)...." Id.
compensation remedies for longshoremen. Congress designed this statute to recompense an injured worker without the necessity of him first establishing stevedore or vessel owner fault. Under the 1972 revisions of that legislation, Congress structured the liability scheme of the Act so that an injured longshoreman could turn to his employer, the stevedore, for scheduled compensation without the necessity of court intervention or the burden of proving negligence by his employer.

28. See BENEDICT, supra note 25, § 1. See also supra note 26 (providing a brief review of the LHWCA's tangled legislative and judicial history).

29. The LHWCA was designed to provide an injured employee with definite benefits in lieu of possible common law claims that might take years to procure. Coverage under the LHWCA is not contractually based, nor dependent, upon the consent of the parties. When an employee begins to work under LHWCA provisions, "he is presumed to have consented to the Act's trade-off of possibly large common law damages for smaller but certain LHWCA benefits." Gaudet v. Exxon Corp., 562 F.2d 351, 356 (5th Cir. 1977), cert. denied, 436 U.S. 913 (1978).

30. Congress amended § 905 of the LHWCA in order to simplify the liability scheme of the Act. Vessel owners were made liable to injured longshore workers only by way of negligence actions.

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 section 933 of this title . . . .

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1988). This altered the previous LHWCA scheme whereby longshore workers sued the vessel under the strict liability action of unseaworthiness. See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Under the unseaworthiness regime, a vessel owner sued under the LHWCA would subrogate an independent stevedore for its share of the fault in an accident which injured the longshore worker. See id.

31. One of the purposes of the LHWCA was to provide a quid pro quo system in which the employer of longshoremen was protected from suit by his employees, in exchange for providing benefits, pursuant to the Act, to those injured in the course of conducting longshoring services and labor. See Taylor v. Bunge Corp., 845 F.2d 1323, 1326 (5th Cir. 1988).

32. "An employer of such persons who secures the payment of compensation as required under the Act is absolutely immune from an action by the employee at law or in admiralty." BENEDICT, supra note 25, § 92, at 5-7.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for
The 1972 amendments further provided that the vessel owner could be sued in court as a third party, under a negligence theory, if the longshoreman was hurt aboard the owner's vessel by an owner's negligent act or omission. Thus, the LHWCA anticipated a fairly standard liability scheme whereby a longshoreman working aboard

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... damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.


33. The Act considers charterers of vessels to be third parties subject to suit under the terms of the LHWCA. See Balfer v. Mayronne Mud & Chem. Co., 762 F.2d 432 (5th Cir. 1985) (holding that without plaintiff showing some evidence that the defendant chartered, owned or controlled any of the vessels surrounding the work area where the plaintiff was injured, the defendant's motion for summary judgment will be upheld; further, there was no evidence of a negligent act committed by the defendant); Dougherty v. Navigazione San Paolo, S.P.A., 1985 A.M.C., 1481 (E.D. Pa. 1984) (holding that the LHWCA countenances charterers being sued as vessel owners under the Act, despite the ambiguity of the charterer definition in the legislation itself and the liability for such negligence as between the shipowner and the time charterer should be determined by contract and/or pursuant to any arbitration clause therein).

34. "The shipowner, however, may be sued as a third party for injury or death caused by its negligence." BENEDICT, supra note 25, § 92, at 5-7.

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 section 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. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services, and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness of a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

a vessel was to be considered an employee of the stevedore, making the stevedore primarily responsible for the workers' safety and from whom the longshoremen could collect statutory benefits in case of injury.35 If, however, the longshoreman could prove that the vessel owner had breached a duty of care it owed to the longshoreman, the owner could be sued under negligence principles for any amount of damage the longshoreman sustained which had not been satisfied by the compensation award he received pursuant to the LHWCA from his employer.36

IV. Duties Owed by a Vessel Owner to a Longshoreman

The standards of care applicable to a longshoreman’s claim of personal injury against a vessel owner37 were delineated by the U.S. Supreme Court in Scindia Steam Navigation Co. v. De Los Santos.38 The fundamental proposition articulated in Scindia was that the stevedore is primarily responsible for the safety of its longshoremen employees.39

36. Id. § 905(b).
37. Under § 905(b) of the Act, a longshoreman may sue in tort for the negligence of any "third party" who may be liable. This is expressly stated to include vessel owners.
39. The Supreme Court noted this primary obligation on the part of the stevedore in Scindia by stating that:

[a]s a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. . . . 33 U.S.C. § 941 [ ] requires the stevedore, the longshoremen'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. Furthermore, as our cases indicate, the stevedore normally warrants to discharge his duties in a workmanlike manner . . . .

Id. at 170 (footnotes omitted).

See Salvato v. Hakko Maritime Corp., 1989 A.M.C. 1014 (N.D. Cal. 1989). Once the loading or unloading operations commence, the duties owed by a vessel owner are far more limited. As the stevedore owes a longshoreman the primary duty to prevent accidents, courts will generally ascribe to the stevedore the responsibility to eliminate "customary hazards." In this case, where both the stevedore and longshoreman were familiar with the vessel in question and its sister ships, the court concluded that the existence of "padeyes" on the deck of the vessel, which were used to lash down cargo, presented an anticipatable risk of tripping of which the stevedore should have been aware, even though the padeyes were a functional part of the ship.
Accordingly, a vessel is not liable for the negligence of the stevedore unless bound by contract, custom, or positive law to the contrary. In *Scindia*, the Court set forth a bifurcated standard of care that a shipowner owed a longshoreman. The degree of care owed under this analysis depended upon the time that the allegedly dangerous or hazardous condition materialized. As subsequently interpreted, *Scindia* requires that two distinct categories of duties be recognized on the part of a vessel owner: (1) the duty to turn over the vessel to the stevedore in a condition reasonably safe for the cargo handling operations (the 'turnover duty'), and (2) the duty

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40. "'[A] vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act.'" *Scindia*, 451 U.S. at 168 n. 15 (quoting Crumady v. J.H. Fisser, 358 U.S. 423 (1978)).


42. Duplantis v. Zigler Shipyards, 692 F.2d 372 (5th Cir. 1982).


44. The *Scindia* Court took the view that:

[w]e are of the view that absent contract provision, positive law or custom to the contrary . . . 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 longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. *Scindia*, 451 U.S. at 172. See also Salvato v. Hakko Maritime Corp., 1989 A.M.C. 1014 (N.D. Cal. 1989) (discussing the application of custom to a vessel owner's continuing duty to intervene).

45. Spence v. Mariehamns R/S, 766 F.2d 1504 (11th Cir. 1985). While the *Scindia* liability scheme proposes different duties on the part of the vessel owner depending upon the phase of the operation, all longshoremen's claims against a vessel owner must be made in negligence. Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977); Solvik v. Maremar Companhia Naviera, S.A., 399 F. Supp. 712 (W.D. Wash. 1975).


49. See Celestine v. Lykes Bros., 729 F. Supp. 691 (N.D. Cal. 1989) (describing the "turnover duty of sale condition"); Kirsh v. Prekoopcanska Plovidba, No. 91-
to intervene if the owner knows of a particularly hazardous or hidden
defect in the ship's gear50 (the "duty to intervene").51 The only
exception to this scheme is the continuing duty that a vessel owner
owes a longshoreman, should the vessel's crew actively involve itself
in cargo operations after ostensibly turning the vessel over to the
stevedore.52

Under Scindia's first requirement, the turnover duty, a shipowner
must warn the stevedore of any dangerous conditions aboard his
vessel that existed prior to the commencement of the stevedoring
work53 and which were not obvious to, nor capable of being avoided
or remedied by the stevedore.54 Alternatively, instead of warning the
stevedore of the pre-existing hazardous condition, a vessel owner can
discharge its duty by eliminating the risk,55 although adequate warn-

1915, slip op. at 7 (3d Cir. July 30, 1992) (recognizing in Scindia "Justice White's
opinion for a unanimous Court recognized a shipowner's 'turnover duty'").
50. See Kirby v. OMI Corp., 1989 A.M.C. 1079 (Fla. Cir. Ct. 1989) (iden-
tifying the critical issues under Scindia as whether the vessel owner knew about the
dangerous condition and whether the owner also knew that the employer was not
properly protecting its employees at the time).
51. See Derr, 835 F.2d at 490.
52. Scindia, 451 U.S. at 172-76.
(holding that where a vessel owner was shown to have known of a collapse in a
grating, which occurred prior to the loading operation, the owner was found to
have violated the required standard of care and was on notice of the danger).
54. Scindia, 451 U.S. at 166-67 (citing Marine Terminals v. Burnside Shipping,
394 U.S. 404, 415, (1969)). The Court stated specifically that:
[t]his duty extends at least to exercising ordinary care under the circum-
stances to have the ship and its equipment in such condition that an
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
by the stevedore and would not be obvious to or anticipated by him if
reasonably competent in the performance of his work.
55. Scindia, 451 U.S. at 167.

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 stevedoring
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
ing to the stevedore is the usual course of action.\textsuperscript{56} The duty to warn or remedy runs to "the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations."\textsuperscript{57} The several circuits have differed as to the standard of care the vessel owner owes to the stevedore.\textsuperscript{58}

If the dangerous condition is found to have arisen only after the stevedore or longshoreman commenced work, the owner's duty is more limited.\textsuperscript{59} The second prong of the \textit{Scindia} scheme, the duty

\begin{enumerate}
\item[a] stevedore.
\item[Id.]
\item[56. See Roby v. Hyundai Merchant Marine, 700 F. Supp. 316 (E.D. La. 1988) (determining that any dangerous condition, of which the vessel owner is aware, will give rise to an affirmative duty on the part of the owner to warn its stevedore of the condition, and includes dangers of which the owner should reasonably have known). \textit{See also} Kirby v. OMI Corp., 1989 A.M.C. 1079 (Fla. Cir. Ct. 1989) (holding that vessel owner was not liable for injuries caused by the very problem that repairmen were required to cure).
\item[57. \textit{Scindia}, 451 U.S. at 167. \textit{See also} Hunter v. Intreprinderea De Exploatare A Floti Maritime Navrom, 868 F.2d 1386, 1387 (5th Cir. 1989) (affirming dismissal of action where court found, with all other factors being undisputed, that the shipowner was not liable, even if he knew of dangers created by stevedore's use of "spreadear bar," which did not constitute ship's gear and was not otherwise part of the vessel or the ship owner's personal property); Futo v. Lykes Bros., 742 F.2d 209 (5th Cir. 1984) (finding that a temporary structure, again not part of the ship's gear nor the property of the owner, will not be subject to the owner's duty to intervene in ongoing stevedoring operations, where the offending equipment was built and used entirely by the independent contractor who both owned and controlled it during the work being performed on the vessel).
\item[58. In Roby v. Hyundai Merchant Marine, 700 F. Supp. 316 (E.D. La. 1988), the court found a duty existed to exercise reasonable care to discover defects in the vessel's condition which arose prior to the commencement of stevedoring activity. However, while the court held that the general rule is one of non-liability for an owner which takes such reasonable steps, there may still be a triable issue of negligence where a longshore worker faces a hazardous condition and is forced, by the time constraints imposed by the vessel, to continue working despite the open or obvious nature of the hazard. \textit{Cf.} Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), \textit{cert. denied}, 486 U.S. 1007 (1988) (reasoning that a vessel owner, despite a reasonable attempt to identify any hazardous condition, may still be liable under intervention or constructive knowledge liability; however, the vessel owner has no liability to the longshoremen if the hazardous condition was open and obvious to that longshoreman). \textit{But cf.} Kirsh v. Prekookeanska Plovidba, No. 91-1915 (3d Cir. July 30, 1992) (holding that customary practice employed by longshoremen, together with a showing of the vessel's knowledge of that practice, may create a jury issue as to whether the vessel owner had a duty to intervene).
\item[59. The \textit{Scindia} Court could not "agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other faults of the stevedore." \textit{Scindia}, 451 U.S. at 168.]
\end{enumerate}
to intervene, states that after turning the vessel over to the stevedore in a reasonably safe condition, the owner has no duty to supervise or inspect the operation,\(^6\) nor is there even a duty to exercise reasonable care to discover dangerous conditions which arise in the course of the operation.\(^6\) Rather, only when a vessel owner has actual knowledge of a hazardous circumstance,\(^6\) or actually knows that the longshoremen are continuing to work despite an unreasonable risk of harm to themselves,\(^6\) and there is a reasonable expectation that the stevedore will not remedy the hazardous condition,\(^6\) will

\(^6\) ""[C]reation of a shipowner’s duty to oversee the stevedore’s activity and insure the safety of longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)’ [in 1972]"". Id. at 169 (quoting Hurst v. Triad Shipping Co., 554 F.2d 1237, 1249-50 n.35 (3d Cir. 1977). See also Evans, 639 F.2d at 855-56 (discussing LHWCA liability in the context of § 343A of the Restatement (Second) of Torts).

61. The Scindia Court stated:
It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. Scindia, 451 U.S. at 168-69.

62. Kecle v. Oxford Shipping Co., 553 F. Supp. 994 (D.C. Or. 1983). See Helair v. Mobil Oil Co., 709 F.2d 1031 (5th Cir. 1983) (holding that a ship owner must have actual knowledge of the hazard along with actual knowledge that the stevedore will not remedy the hazard before the owner may have liability imposed against it); LaGrega v. Farrell Lines, Inc., 1990 A.M.C. 649 (N.Y. App. Div. 1989) (finding that where there was testimony that the vessel owner’s officer of the deck knew of the cargo’s unsafe loading, his knowledge, as well as his subsequent failure to inform the stevedore, should defeat the vessel owner’s motion for summary judgment under the Scindia’s liability scheme).

63. Gay v. Barge 266, 915 F.2d 1007 (5th Cir. 1990) (holding that a vessel owner is liable when it has actual knowledge of the hazard and where longshoremen work despite that danger); Mitchell v. Sea-Land Servs., 1987 A.M.C. 1698 (D.C. Md. 1987) (stating the primacy of the stevedore’s duty regarding liability for alleged defect in plain view to longshoremen, who nonetheless continued to work while exposed to the hazard).

64. In Scindia, the Court relied upon a 1977 case from the Third Circuit, Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977). Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156, 169 (1981). In Hurst, the Court held that the district court below had "rightly concluded that no evidence had been introduced" showing that the vessel's chief officer had actual knowledge of an alleged defect with a ship’s hook used in the cargo operations. Hurst, 554 F.2d at 1253. See, e.g., Robertson v. Tokai Shosen K.K., 655 F. Supp. 152, 155 (E.D. Pa. 1987) ("[I]f the vessel has actual knowledge of an unreasonable hazard in stowage or otherwise, it has a duty to inform the stevedore, especially if the hazard is latent . . . .".")
the shipowner be required to intervene in the stevedoring operation. 65

If, however, a shipowner chooses to involve himself in cargo handling operations, he will continue to owe a duty of care throughout the stevedoring procedure. This "active involvement" duty was articulated in Scindia where the Court held:

that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas . . . under the active control of the vessel during the stevedoring operation. 66

Thus, in order to incur an ongoing duty as to hazards the vessel owner was unaware of, the owner must have maintained active control of its own work space in order to be liable for any negligent act which injures a longshoreman. 67

When a vessel owner directs the stevedoring operations, two types of liability are envisioned. The first occurs where a longshoreman is hurt following the instruction of the vessel owner. 63 The other occurs as a result of a failure to remove or warn of the hazards the longshoreman might encounter. 69

Therefore, under the bifurcated scheme of liability set forth in Scindia, a vessel owner has a primary duty to turn his vessel over to the stevedore in a reasonably fit condition. Any additional duties would arise out of his actual knowledge of dangerous conditions or his involvement in the cargo operations. This scheme flows from the fundamental proposition that the stevedore is the entity that owes

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65. Compare Hodges v. Evisa Maritime Co., S/A, 801 F.2d 678 (4th Cir. 1986) (holding that under Scindia, a vessel owner only had a duty to intervene where: (1) it was aware of the danger, and (2) the stevedore was imprudently disregarding dangerous conditions that arose during the cargo operations) with Hunter v. Intreprinderea De Explotare A Floti Maritime Navrom, 868 F.2d 1386 (5th Cir. 1989) (adopting the analysis in Casaceli v. Martech Int'l, Inc., 774 F.2d 1322 (5th Cir. 1985), cert. denied, 475 U.S. 1108 (1986)) (stating that if the hazard is open and obvious, created by the stevedore, and related to the gear and equipment of the independent operator, even knowledge by the shipowner of the danger will not give rise to a finding of liability).
68. Id.
69. Cook v. Exxon Shipping Co., 762 F.2d 750 (9th Cir. 1985), amended on petition for rehe'g, 773 F.2d 1001 (9th Cir. 1985), cert. denied, 475 U.S. 1047 (1986).
the longshoreman the primary duty of safeguarding his work place, in this case, the holds and decks of the vessel.\textsuperscript{70}

V. INSULATING A DUAL CAPACITY EMPLOYER

The clearly defined duties owed respectively by a stevedore and a vessel owner under the LHWCA \textit{Scindia} scheme\textsuperscript{71} begin to blur when one corporation engages in both activities. The question left for lower courts to consider was whether the \textit{Scindia} bifurcated liability scheme would apply where related organizations served as both stevedore and vessel owner.\textsuperscript{72}

This issue becomes critical for a dual capacity employer, both because it determines to what extent an injured longshoreman will be limited for compensation payments under the LHWCA from the employer's stevedoring branch, and to what extent that employee will retain a right to sue the vessel owner in tort.\textsuperscript{73} Since the Court in \textit{Scindia} clearly defined the duties of stevedores and vessel owners in the context of a relationship between an independent stevedore and vessel owner,\textsuperscript{74} the problem remained how to determine whether \textit{Scindia} could logically be construed as applicable to dual capacity employers. The vessel owner will want to claim that because the LHWCA envisioned a stevedore providing an owner with an amount of insulation from tort liability, an owner should still be entitled to receive that liability shield where he elects to operate in a dual capacity.\textsuperscript{75}

\textsuperscript{73} Id. at 1033.
\textsuperscript{74} Id.
\textsuperscript{75} This derives primarily from \$ 941 of the LHWCA where Congress instructs every employer (here the stevedore) to provide "places of employment which shall be reasonably safe . . . ." 33 U.S.C. \$ 941(a) (1988). Interpreting this language, the Supreme Court held that the vessel owner has a "rightful expectation" that the stevedore will perform its task professionally and safely. \textit{Scindia}, 451 U.S. at 170. The Court also noted an alternative basis for this expectation in the stevedore's contractual warranty "to discharge his duties in a workmanlike manner . . . ." Id. These warranties and expectations will properly run between the business entities of independent vessel owners and stevedores. Id. However, the question becomes whether this warranty, or expectation, should run between separate subsidiary firms of a parent organization, or between separate branches of the same organization.
A. The Second Circuit and Fanetti

The Second Circuit faced this issue in Fanetti v. Hellenic Lines.\(^76\) The defendant in that case had acted as both the employer of the vessel's crew as well as the stevedore-employer of the longshoremen handling the cargo aboard ship. The case arose as a result of injuries a longshoreman suffered when he slipped on oil left upon the deck of the vessel.\(^77\) Following a jury verdict in favor of the plaintiff longshoreman, the defendant vessel owner appealed to the Second Circuit. The defendant argued that the trial court had erred in failing to charge the jury on the Scindia scheme of duties, which he believed should apply where a shipowner hires an independent contracting stevedore. Specifically, the defendant shipowner in Fanetti sought a charge from the trial court indicating that "the stevedore bears the primary responsibility to correct dangerous conditions, and that the shipowner will often rely on the stevedore to do so."\(^78\) The defendant was attempting to maintain that hiring a stevedore, even one the vessel owner owned, was a recognized means under the LHWCA of relieving itself of the consequences of the stevedore's negligence in providing a safe work place for the longshoremen.\(^79\)

The Second Circuit discussed whether a dual capacity employer was entitled to the same type of protection afforded a vessel owner under the traditional LHWCA Scindia scheme of bifurcated liabilities—where an independent stevedore provides a vessel owner with certain immunities from suit.\(^80\) The conclusion of the court was that there was no ability for a vessel owner to rely upon the workmanship of a stevedore where the owner was itself operating in both capacities.\(^81\) The court stated that:

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\(^76\) 678 F.2d 424 (2d Cir. 1982), cert. denied, 463 U.S. 1206 (1983).

\(^77\) The evidence indicated that the vessel's crew, in the course of performing "owner" related activity (the storing of ship's gear used to lash equipment on the deck), placed oily and greasy lashing gear in an area of the deck which had to be traversed by the longshoremen. As a result, additional portions of the deck became oily and greasy, causing the plaintiff longshoreman's fall. Thus, Fanetti presented a case where a condition on deck dangerous to longshoremen who had to work on such surface, was created during the performance of work on behalf of the vessel which was "unrelated to the longshoremen's loading of cargo . . . ." Id. at 426.

\(^78\) Id. at 427.

\(^79\) See id. at 426-30.

\(^80\) The precise question to be resolved, as articulated by the Second Circuit, was "[w]hether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded." Id. at 428.

\(^81\) Id.
[a] shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumably it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in this field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But the shipowner cannot save the premium and still claim the protection.82

The Second Circuit held that its decision did not conflict with the Supreme Court’s articulation of the duties owed variously by the vessel owner and stevedore under Scindia.83 In support of its holding, the Court stated that “[i]mplicit in that analysis is the existence of an independent, expert stevedore upon whom the shipowner’s ‘justifiable expectations’ may reasonably fall.”84 It therefore concluded that a failure on its part to recognize the distinction between a dual capacity employer and the premise of independent stevedoring insulation found in Scindia would essentially substitute “illusion” for “reality,” and that it would be “schizophrenic” to instruct a jury regarding a shipowner’s right to rely upon an expert contractor which, in fact, did not exist.85 Absent that independent judgement and responsibility in this case, insulation from tort liability would not flow from the stevedore to the vessel owner.86

A second motivating factor in the Second Circuit’s decision was its reading of the intent of Congress in passing the LHWCA amend-

82. Id.
84. Fanetti, 678 F.2d at 430.
85. Id. “The concept is schizophrenic and the predictable effect upon the jury one of bafflement.” Id.
86. See Fanetti, where the court, adopting the language of Judge Friendly, stated:
“Where . . . there is no independent contractor, it is part of the ship’s duty to exercise reasonable care to inspect its own workers’ work place, to remove grease spills, etc. In such a case there is no ‘independent contractor’ with primary responsibility upon whom the ship may properly rely . . . [.] Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the work place.”
Id. at 428 (quoting Canizzo v. Farrell Lines, 579 F.2d 682, 689-90 (2d Cir. 1978) (Friendly, J., dissenting)).
ments in 1972.87 The Fanetti court took to heart the direction of the House of Representatives that a longshoreman’s remedy should not vary merely because his employer is a maritime vessel owner rather than an independent stevedore.88 The Fanetti decision implemented this Congressional goal by allowing a longshoreman to sue the vessel owner if he was injured while working for a dual capacity employer, regardless of whether the negligent act was committed by the owner or its stevedore.89 This view indicated a preference for allowing longshoremen to sue in situations where the Seindia duties of an owner or stevedore might be unclear.90

The interpretation of the Second Circuit, therefore, provides that whenever a dual capacity employer owes a duty to the longshoreman employee, that duty will expose the employer to tort liability sounding in negligence, whether acquired by virtue of its capacity as stevedore or as vessel owner.91 Apparently, the court reasoned that because the vessel owner and the stevedore were part of the same corporate family, the duties owed by, and breaches chargeable to, one branch were owed by all branches. This effectively abrogated

87. Id. at 430.
88. The House Committee report on the 1972 amendments stated:

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S.S. Yaka, 373 U.S. 410 (1963) and Jackson v. Lykes Bros. [S.S.] Co., 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoreman or ship builders or repairmen as apply when an independent contractor employs such persons.

89. Fanetti, 678 F.2d at 427-30.
90. Id. The Fanetti decision appears to give less weight to “[t]he Committee's intent . . . that the same principles should apply in determining liability of the vessel which employs its own longshoreman or ship builders or repairmen as apply when an independent contractor employs such persons.” H.R. Rep. No. 1441, 92d Cong., 2d Sess. 118 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4705.
91. Fanetti, 678 F.2d at 430.
any and all of the safeguards from liability, under the LHWCA,\textsuperscript{92} which might have been invoked by a dual capacity vessel owner who relied upon his in-house stevedoring operation to look after the safety of the longshoremen’s work place.\textsuperscript{93}

\textbf{B. The Fifth Circuit and Castorina}

Contrary to the result reached in \textit{Fanetti}, the Fifth Circuit Court of Appeals has upheld the distinct nature of the duties owed by a stevedore and an owner in dual capacity cases. In \textit{Castorina v. Lykes Brothers Steamship Co.},\textsuperscript{94} the court held that the liability scheme proposed in \textit{Scindia} depended upon the existence of an explicit separation between the functions of a stevedore and a vessel owner and that the duty owed by a vessel owner is “neither heightened nor diminished when the longshoreman is employed directly by the vessel owner.”\textsuperscript{95}

In \textit{Castorina}, a longshoreman who developed asbestosis after working aboard a dual capacity owner’s vessel, brought suit to recover damages under the LHWCA.\textsuperscript{96} The Fifth Circuit chose to rely on the dicta\textsuperscript{97} of an earlier Supreme Court decision, \textit{Jones & Laughlin Steel Corp. v. Pfeifer},\textsuperscript{98} in order to apply the bifurcated standard of liability found in \textit{Scindia} to a dual capacity employer.\textsuperscript{99} The Fifth

\begin{itemize}
  \item \textsuperscript{92} 33 U.S.C. § 905(b).
  \item \textsuperscript{93}  \textit{Fanetti}, 678 F.2d at 428.
  \item \textsuperscript{94} 758 F.2d 1025 (5th Cir. 1985), cert. denied, 474 U.S. 846 (1985).
  \item \textsuperscript{95}  Id. at 1033. To quote more fully:

  [The] specific separation of duties and remedies, detailed in the Act, does not change simply because the shipowner directly employs its own stevedoring personnel. In this situation, the stevedore’s knowledge of dangerous conditions that may have arisen during the cargo operations should not be imputed to the shipowner, nor should the shipowner be deemed to know that the stevedore’s actions in dealing with such dangers are obviously improvident. To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of sections 905(a) & (b). This result is contrary to the language and the purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under section 905(b) is that established by \textit{Scindia} and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

  \textit{Id.} at 1033.
  \item \textsuperscript{96}  \textit{Id.} at 1027-28.
  \item \textsuperscript{98}  462 U.S. 523 (1983).
  \item \textsuperscript{99}  \textit{Castorina}, 758 F.2d at 1031-32.
\end{itemize}
Circuit held that, where a dual capacity vessel owner has negligently breached a duty owed to a longshoreman under the *Scindia* scheme, it may be sued in tort because:

“[s]uch a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner.” Under section 905(b), however, “a vessel owner acting as its own stevedore is liable only for negligence in its ‘owner’ capacity, not for negligence in its ‘stevedore’ capacity.”

The Fifth Circuit, therefore, adopted a standard that sought to classify the type of activity that injured the longshoreman in order to determine if tort remedies, or mere compensation, were available. “This scheme of compensation requires us to separate the negligence of the shipowner and that of the stevedore, even when the shipowner performs its own stevedoring activities.”

In holding that a longshoreman must prove he was injured by the dual capacity employer through an act of ownership negligence in order to maintain a tort action, the Fifth Circuit also looked to the intent Congress had in passing the 1972 amendments to the

100. *Id.* (quoting *Pfeifer*, 462 U.S. at 530, 531 n.6 (citations omitted)).
101. *Castorina*, 758 F.2d at 1033.
102. The court in *Castorina* cited H.R. Rep. No. 1441, 92d Cong., 2d Sess. 118 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4705, for the proposition that: the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services .... The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen as apply when an independent contractor employs such persons.

*Id.* See also the Supreme Court's adoption of this Congressional intent in *Pfeifer*, 462 U.S. at 531-32:

The Committee has also recognized the need of special provisions to deal with a case where a longshoreman, shipbuilder or repairman is employed directly by the vessel .... The Committee believes that the rights of an injured longshoreman, or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor .... The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons.

LHWCA. Specifically, the court held merely because the stevedore had knowledge of a dangerous condition, this knowledge should not be immediately imputed to the owner. To do this would violate the primary duty of safety the stevedore owes to his employees. Even where the management of a vessel owner and stevedore are related, as in a dual capacity employer, the stevedore’s employees are still the best trained judges of the necessary safeguards of cargo handling operations. Failure to recognize the differing expertise of a stevedore and the crew of the vessel, acting as the owner’s agents, is to misconstrue the relationship of longshoremen and sailors. As Congress recognized, the stevedore has the primary responsibility and liability for the work place safety aboard a vessel during cargo operations. Additionally, the Castorina court felt that it should approach the issue of a dual capacity employer’s Scindia duties from the standpoint of the Congressional intent not to alter the imposition of tort remedies merely because the owner chose to invoke a particular type of corporate structure.

The emphasis of the liability question in a dual capacity situation under the Castorina approach, therefore, shifts from determining merely

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103. That intent was characterized by the Castorina court with the following: In adopting the 1972 amendments to the LHWCA, Congress recognized the need for special provisions to deal with cases in which a longshoreman was employed directly by the vessel. The legislative history of the amendments clearly expresses Congress’s intent that an injured longshoreman’s remedy be the same whether he is employed directly by the vessel or by an independent stevedore.

Castorina, 758 F.2d at 1032-33.

104. Id. at 1033.

105. Id.

This specific separation of duties and remedies, detailed in the Act, does not change simply because the shipowner directly employs its own stevedoring personnel. In this situation, the stevedore’s knowledge of dangerous conditions that may have arisen during the cargo operations should not be imputed to the shipowner, nor should the shipowner be deemed to know that the stevedore’s actions in dealing with such dangers are obviously improvident. To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of sections 905(a) & (b). This result is contrary to the language and purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under section 905(b) is that established by Scindia and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

Id.

if the dual capacity function exists and whether there was in fact an injury, as is the case in Fanetti, to the issue of whether the injury suffered by the longshoreman was a result of an act committed in the dual capacity employer’s “ownership” or “stevedoring” function. The Castorina and Fanetti decisions, therefore, offer two conflicting methods of handling dual capacity employers’ liability under the Scindia interpretation of the LHWCA.

C. Determining an Employee’s Status Under Castorina

The Castorina decision left to subsequent courts the job of articulating how a court, when faced with a dual capacity employer, should distinguish between negligence committed in an ownership role and negligence in a stevedoring function. The leading case in this area, ironically, is the Second Circuit’s opinion in Smith v. Eastern Seaboard Pile Driving, Inc., which predates the Scindia decision and the advent of this test’s application to Scindia’s scheme for longshoremen’s injuries. In Smith, the court addressed the issue of whether the wife of a repair worker, who was killed while employed by a dual capacity employer, was barred from her action against the vessel owner because her husband’s death was caused by the negligence of fellow employees. The dual capacity employer offered the defense that where all of the employees are engaged in a common “single mission” of repairing the vessel, all employees are to be considered part of the same stevedoring function. The court rejected

107. Fanetti, 678 F.2d at 428.
109. Authorities have noted both the difficulty of drawing this distinction and its importance:
A distinction between the functions being performed by employees hired by the vessel owner—vessel-oriented as opposed to contractor-employer operations—may be unclear . . . . Recognition of a distinction in function performed at the time of injury can obviously have significant implications with respect to the extent of shipowner liability.
Benedict, supra note 25, § 92, at 5-10 to -10.1 (footnote omitted).
110. 604 F.2d 789 (2d Cir. 1979).
111. Repair workers are expressly covered under the terms of the LHWCA, and for the purposes of liability analysis the shipyard-repair worker relationship is interchangeable with that of the stevedore-longshoreman. “The term ‘employee’ means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker . . . .” 33 U.S.C. § 902(3).
112. Smith, 604 F.2d at 792-93.
113. Id. at 795-96.
this contention, however, holding that such an analysis "did not entail sufficient scrutiny" of the alleged negligent acts.\textsuperscript{114} Instead, the Second Circuit turned to a determination of which of the two entities the negligent person would have belonged, had the vessel owner actually hired an independent stevedore.\textsuperscript{115} The relevant test constructed by the court was "whether they were working at the same task such that both would have been employed by an intermediary employer had the shipowner chosen to contract out the work."\textsuperscript{116} If the court concluded that both the injured longshoreman and the negligent person causing the injuries would normally be co-employees of an independent stevedore, the employer would only be liable for LHWCA compensation payments.\textsuperscript{117} If, however, the longshoreman and the negligent employee were employees of different organizations under a traditional scheme, the injured worker should be able to pursue his tort rights at law.\textsuperscript{118} Thus, where the president of the dual capacity company in \textit{Smith} was alleged to have been negligent, the court concluded that the president would normally have been identified with functions of the shipping firm, not those of the stevedore.\textsuperscript{119} Therefore, reasoned the court, under normal circumstances any negligent act committed by the president in his capacity as head of the vessel owner would have given the longshoreman tort remedies.\textsuperscript{120} The court viewed the Congressional intent, identified with the passing of the 1972 amendments to the LHWCA as demanding that an employee's rights under the Act not arbitrarily depend on the employment arrangement devised by a dual capacity employer.\textsuperscript{121} This finding gives an employee, who would have been able to state a cause of action under traditional industry organization,

\textsuperscript{114} \textit{Id.} at 796.

\textsuperscript{115} \textit{See also id.} at 797 (stating that the same function must have been performed for the \$ 905(b) exemption to apply); \textit{Cooper v. N.E.I. Parsons, Ltd.,} 1986 A.M.C. 462 (S.D. Ga. 1984) (showing that the court, following \textit{Smith}, engaged in a same function-based "hypothetical case" analysis).

\textsuperscript{116} \textit{Smith}, 604 F.2d at 796 n.7.

\textsuperscript{117} \textit{Id.} at 796.


\textsuperscript{119} \textit{Smith}, 604 F.2d at 797.


\textsuperscript{121} \textit{Smith}, 604 F.2d at 795 (citing \textit{Griffith}, 521 F.2d at 43). This same rationale reappeared three years later in \textit{Fanetti}, where it was used to vitiate the insulation from the liability that a stevedore gives a vessel owner in dual capacity LHWCA cases. \textit{Fanetti}, 678 F.2d at 430.
the same right where his employer has chosen to organize in a dual capacity arrangement, thereby effectuating the Congressional intent behind the LHWCA.

D. The Implications of Fanetti for Related Causes of Action

The ramifications of the Fanetti court's expansive reading of the LHWCA liability scheme do not, however, end with the duties owed by the stevedore and vessel owner to a longshoreman. In altering the nature of the dual capacity owner's liability relative to that of the stevedore, Fanetti poses a risk that third parties will use the altered liability format to reach the vessel owner where only the stevedore should be liable.

Within months of holding in Castorina that a dual capacity employer is only liable in tort for the negligence it commits in its vessel owning capacity, the Fifth Circuit decided Tran v. Manitowoc Engineering Co., which exposed an area of critical difference between Fanetti and Castorina. In Tran, the question before the court was whether a dual capacity employer's ownership entity is liable for damages awarded to a longshoreman for negligence that was attributable to both the vessel owner and an independent third party.

The action in Tran arose out of a longshoreman's claim under section 905(b) of the LHWCA for injuries he received when he was struck by pilings being loaded aboard a barge owned by his dual capacity employer. The longshoreman filed his action against the crane dealer who had been responsible for the maintenance of the crane. The crane dealer then filed a third-party claim against the barge owner, seeking contribution for the dual capacity employer's negligence in operating the crane.

The court began its analysis by restating that a dual capacity employer is only liable in tort for vessel owner negligence, and not

124. 767 F.2d 223 (5th Cir. 1985).
125. Castorina was decided on April 15, 1985, while Tran was handed down on August 8 of the same year. Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir.), cert. denied, 474 U.S. 846 (1985); Tran v. Manitowoc Eng'g Co., 767 F.2d 223 (5th Cir. 1985).
126. Tran, 767 F.2d at 224.
127. Id.
128. Id.
129. Id.
for that of its stevedoring function. The court then concluded that
where, as in this case, a third party seeks contribution from a vessel
owner for a longshoreman’s injuries occurring because of the com-
bined fault of the third party and the dual capacity employer acting
in his vessel owner faculty, the dual capacity employer will be liable
for contribution where the longshoreman could have directly named
the vessel owner in his suit under the Castorina liability scheme.
This decision flowed from a finding by the Supreme Court that contribution is available in admiralty law among joint tortfeasor cases which do not involve vessel collisions. In the Tran case, the dual capacity employer was negligent as an owner and the longshoreman could have maintained an action directly against his employer. Thus, the court could find no viable reason why the dual capacity employer should not be liable for contribution.

The effect of Tran, in light of Scindia, seems to be consistent. It simply makes a vessel owner who is negligent in an ownership capacity contribute to the amount awarded to an injured longshore-
man against a co-tortfeasor third party. The rationale behind the Fifth Circuit’s extension of the owner’s liability to third parties was that the vessel owner still had the protection of its Scindia defenses, being that it could only be liable for negligence it committed in its vessel owning capacity. Thus, under the Tran decision, implementing the Castorina holding, the burden lies upon the third party plaintiff to establish that the vessel owner acted negligently in its vessel owning capacity before a right to contribution will arise.

130. Id. at 226 (citing Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983)).
131. Id. at 227 (reasoning that where the longshoreman could have instituted an action against the vessel owner for negligence, it would be illogical for the vessel owner to assert a protection against a third party it did not have against its employee).
133. Tran, 767 F.2d at 227. See also Simeon v. T. Smith & Son, Inc., 1989 A.M.C. 2144, 2154-57 (5th Cir. 1988) (holding that maritime law countenances joint tort feasor liability, even over contributory negligence by the plaintiff).
134. The court stated that:
[we] can think of no policy which would be furthered by making liability for vessel owner negligence dependent on whether or not the injured employee chooses to name his employer as a defendant. Accordingly, we hold that a third party claim for joint tort feasor [sic] contribution against a vessel owner/stevedore employer for negligent acts as vessel owner is not barred by the LHWCA.

Tran, 767 F.2d at 227.
135. Id. at 226-27.
136. Id. at 227.
However, while the *Tran* analysis might make perfect sense in a *Castorina* jurisdiction, the contribution provision could have unintended effects in a district that acknowledges the *Fanetti* rule. *Fanetti*'s elimination of any distinction between stevedoring negligence and vessel owner negligence would give third parties the right to seek contribution from a longshoreman's employer even where the employer had acted negligently as a stevedore; a capacity normally covered under the LHWCA's exclusivity of compensation scheme.\(^{137}\) By holding that a vessel owner is subject to actions in tort when either his vessel owning or stevedoring functions are negligent, *Fanetti* has left the dual capacity employer subject to contribution where his stevedore is negligent in conjunction with the act of a third party. Thus, the dual capacity employer would be exposed to suits filed against it alternatively by the longshoreman and a third party tortfeasor, instead of having the immunity from suit he would receive as a stevedore under the LHWCA. This surely flies in the face of the Congressional intent that a shipowner's liability remain constant regardless of the corporate form through which he chooses to conduct his business.\(^{138}\)

**E. Analysis**

If, therefore, a dual capacity employer finds himself in a jurisdiction which imposes the *Fanetti* rule, he will not have the immunity from tort liability that the LHWCA was designed to provide.\(^{139}\) However, if the dual capacity employer finds himself in a *Castorina* jurisdiction, he will have the protection of the stevedoring versus vessel owning distinction, but he will find that the courts have generally construed the terms and policies of the LHWCA to allow an employee to maintain any suit against the dual capacity employer that a hypothetical longshoreman could maintain against a hypothetical owner operating in the traditional scheme of business.\(^{140}\)

There are several important reasons why the better of the two rules is that laid out in *Castorina*, with the implicit approval of the Supreme Court in *Pfeifer*. First, the negligent act committed in *Fanetti*
stemmed from the actions of one of the vessel’s crew members, a fact that would have provided for a tort action even under the more discriminating test of Castorina. Second, even in a dual capacity case, the employees handling the cargo operations are still expert stevedores and longshoremen; they are not members of the crew performing duties for which they are unprepared. This furthers the intent of the LHWCA that the duty to provide a safe work place is placed upon those best able to identify possible hazards. Most importantly, only Castorina’s approach is able to implement both prongs of the intent Congress had in passing the 1972 amendments to the LHWCA. Where the House of Representatives declared it did not wish a longshoreman’s remedies to vary merely because a vessel owner chose one particular form of organization over another, Castorina retains the action a longshoreman would have under Scindia where he is injured by the vessel owner’s negligence. Further, the Third Circuit promotes Congress’ stated intention that “the same principles should apply in determining [the] liability of [a] vessel which employs its own longshoremen.” Castorina, however, invokes all of the Scindia duties against a dual capacity employer’s vessel owning function, yet maintains the vessel owner’s insulation from stevedore negligence likewise found in Scindia. In contrast, Fanetti alters both the liability of the vessel owner by making it culpable for the negligence of its stevedore. It also alters the rights of a longshoreman who can sue in negligence against a dual capacity employer where he could not have stated a cause of action under a traditional Scindia analysis. Further, the weight of subsequent interpretation seems to favor the adoption of Castorina’s bifurcated liability standard, as suggested by the Supreme Court in Pfeifer.

It would appear, therefore, that Castorina offers the better resolution to the issue of negligence stemming from a longshoreman’s injury under a dual capacity employer. The Fifth Circuit test effec-

142. While an earlier Second Circuit decision, Albergo v. Hellenic Lines, 658 F.2d 66 (2d Cir. 1981), “could be read as recognizing the shipowner/stevedore dichotomy, the context was entirely different. Unlike the case at bar, Albergo did not involve injury to a longshoreman resulting from a hazardous condition created by crew negligence.” Fanetti, 678 F.2d at 430-31 n.4.
144. Accord Allied Towing Corp. v. Tatem, 580 F.2d 702, 704 (4th Cir. 1978); Richardson, 479 F. Supp. at 259, aff’d, 621 F.2d at 634.
tuates the goals of Congress, incorporates the implied position of the Supreme Court, and maintains an effective mechanism for allowing suit against a negligent owner in tort. To the extent that Fanetti continues to be cited in dual capacity cases, it should give way to the Castorina liability scheme.\textsuperscript{145}

VI. AFFIRMATIVE DEFENSES TO THE PROBLEM OF DUAL CAPACITY LIABILITY

Under the Castorina scheme of owner negligence in dual capacity cases, a vessel owner remains exposed to tort liability for any breach of its Scindia duties committed in its vessel owning capacity.\textsuperscript{146} In response, vessel owners have employed several arguments to limit this liability based upon the special corporate structure found in the dual capacity scheme. The common goal shared by these defensive tactics is the classification of both the stevedoring and ownership branches of the dual capacity employer as the single statutory “employer” under the Act.\textsuperscript{147} This can be accomplished either by reclassifying the status of the employee or by asserting a special relationship between the stevedoring and ownership entities. A successful reclassification of both branches of the dual capacity entity as the statutory employer for the purpose of the Act will provide an effective shield to tort actions by limiting the liability of the organization to scheduled compensation payments under the LHWCA.\textsuperscript{148}

Typically, dual capacity employers take one of two forms: the parent-subsidiary or the single vessel owner which directly hires longshoremen to handle its cargo operations. The parent-subsidiary arrangement has two corporate form, affirmative defenses available under the LHWCA: the borrowed servant rule and joint venture immunity. However, the single corporate form defense available to a vessel owner who directly hires his own longshoremen has been rejected by the Supreme Court.


\textsuperscript{148} Id.
A. Dual Capacity Employers and the Fellow Servant Defense

Under the provisions of section 905(b) of the LHWCA, no action against a vessel owner "shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." Shipowners have attempted to argue that this language defeats any negligence action a longshoreman might have against a vessel owner who directly hired the longshoreman, since any negligent act by the vessel owner was necessarily performed by a fellow servant of the injured longshoreman. Hence, the owner-employers have attempted to escape costly negligence actions by asserting that the plain language of the statute demonstrates that a vessel owner cannot be liable for torts committed by the injured longshoreman's fellow employees. The crux of the owner’s argument here is that because the vessel owner was also the stevedore that directly employed the longshoremen, any negligent act committed by an employee or agent of the vessel owner was, by necessity, committed by a fellow servant of the longshoreman. As such, the bar against tort actions based on fellow servant negligence operates to limit the longshoreman's recovery to statutory LHWCA benefits.

This attempt to use the clear language of section 905(b) to shield a dual capacity employer from suit by an injured longshoreman received little attention from the Supreme Court. In Edmons v. Compagnie Generale Transatlantique, the Court held that a longshoreman, who was injured by a dual capacity employer, could sue the owner of the vessel for damages even though section 905(b) stated that fellow servant negligence was not allowed against a dual capacity employer.

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150. Id. See, e.g., Cavalier v. T. Smith & Son, Inc., 668 F.2d 861 (5th Cir. 1982).
151. As a general proposition, the LHWCA does not allow an employee covered by the act to sue his employer in tort for injuries sustained during the scope of the longshoreman's employment. This matter, decided in 1979 by the Supreme Court in Edmons v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), has been litigated mostly before the Fifth Circuit Court of Appeals. They have consistently implemented the holding that where a longshoreman is employed by a dual capacity owner-stevedore, the clear language of the Act shall be subsumed to carry out the Congressional intent of providing negligence actions to the injured worker against third-party vessel owners. See Taylor v. Bunge Corp., 845 F.2d 1323, 1327-28 (5th Cir. 1988); Tran v. Manitowoc Eng’g Co., 767 F.2d 223 (5th Cir. 1985).
152. Pichoff v. Bisso Towboat Co., 748 F.2d 300 (5th Cir. 1984).
employer under the Act.\footnote{155} The Court noted that the legislative intent of Congress, when passing the 1972 amendments,\footnote{156} was to put a longshoreman, who was employed by a dual capacity owner-employer, in the same position as a longshoreman employed by an independent stevedore.\footnote{157} In order to accomplish those ends, the Court reasoned that a longshoreman must be able to maintain a suit against the negligent vessel owner.

Subsequently, the Supreme Court explicitly stated in Jones \& Laughlin Steel Corp. \textit{v. Pfeifer}\footnote{158} that the plain language of section 5(a) of the LHWCA,\footnote{159} which limits actions against an employer where a fellow servant’s negligence was a cause of the injury, actually vitiates the intent Congress had in passing the LHWCA legislation. “If [section] 5(a) [had] been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence in [section] 5(b) barring suits against owner-employers for injuries caused by fellow servants.”\footnote{160} In \textit{Pfeifer}, the Court held that a dual capacity owner-employer can be held liable both for the compensatory damages normally afforded a longshoreman by his independent stevedore and for negligence damages which are the responsibility of the vessel owner.\footnote{161}'

Thus, the Court determined that where a dual capacity employer causes injury to a longshoreman employee, that employee may maintain

\begin{thebibliography}{99}
\bibitem{foot155} Id. at 259.
\bibitem{foot156} See \textit{supra} note 88.
\bibitem{foot158} In \textit{Edmonds}, we observed that under the post-1972 Act, “all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.”
\bibitem{foot159} \textit{Pfeifer}, 462 U.S. at 532 (citation omitted).
\bibitem{foot160} 462 U.S. 523 (1983).
\bibitem{foot161} 33 U.S.C. § 905(a) (1988).
\bibitem{foot162} \textit{Pfeifer}, 462 U.S. at 530-31. Thus, the Supreme Court’s holding that: [i]n \textit{Edmonds v. Compagnie Generale Transatlantique}, we observed that under the post-1972 Act, “all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.” If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel. Id. at 532 (citation omitted).
\bibitem{foot163} Id. at 532.
\end{thebibliography}
tain an action against his employer in tort. In the arena of fellow servant defense, therefore, the invocation of dual capacity status will not afford the employer security from suit under the LHWCA, despite the language of the second sentence in section 905(b) of the Act.\textsuperscript{162}

\textbf{B. The Borrowed Servant Defense}

Another method that dual capacity employers may employ to pull both themselves and their longshoremen employees within the scope of the LHWCA is the borrowed servant defense. Here, the employer alleges that where his corporate structure has two separate entities, the stevedoring branch and the vessel owning branch, any longshoreman who is injured while providing services to a vessel was in fact a servant borrowed by the vessel owning corporation from that of the stevedoring corporation. This seeks to invoke the rule developed under the LHWCA,\textsuperscript{163} and stated in \textit{Liberty Mutual Insurance Co. v. Gulf Oil Corp.},\textsuperscript{164} that borrowing and lending employers will both be treated as the longshoreman’s statutory employer under the LHWCA, thus insulating both branches of the dual capacity employer from suit.\textsuperscript{165}

The LHWCA was designed to provide an injured employee with definite benefits \textit{in lieu} of possible common law claims that may take years to procure.\textsuperscript{166} Coverage under the Act is not contractually based, nor dependent upon the consent of the parties.\textsuperscript{167} When an employee begins to work under the LHWCA provisions, he is assumed to have consented to the Act’s trade-off between possible common law rewards and smaller but certain LHWCA benefits.\textsuperscript{168} A determination that the servant had been borrowed by one company from another would shield both the borrowing and the lending employer from liability outside of the LHWCA provisions.\textsuperscript{169}

\textsuperscript{162} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Gaudet v. Exxon Corp., 562 F.2d 351, 356 (5th Cir. 1977), cert. denied, 436 U.S. 913 (1978).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
In *Gaudet v. Exxon Corp.*

170 the Fifth Circuit created a fact-specific, nine-part test to determine when an employee was to be considered a borrowed servant for the purposes of the LHWCA.

The court noted that in examining the nine criteria, neither the traditional borrowed servant requisite of control, nor any other single criterion would be solely determinative of the relationship between employer and employee.

Rather, the test should take into account a totality of the circumstances.

However, "while the courts do not . . . decide the issue based on one factor, the courts place the most emphasis on the first factor, control over the employee." Factors which courts have considered to determine whether or not the employee was controlled by a borrowing employer at the time of the accident have included whether the employee was subject to assignments handed out by the borrowing employer, whether the borrowing employer gave the employee a supervisor, whether verbal commands were issued to the employee by the borrowing employer, whether the employee received instructions from the direct employer, and deposition testimony of

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171. Id. at 355. The test is comprised of examining the following criteria:
(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
(2) Whose work is being performed?
(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
(4) Did the employee acquiesce in the new work situation?
(5) Did the original employer terminate his relationship with the employee?
(6) Who furnished tools and place for performance?
(7) Was the new employment over a considerable length of time?
(8) Who had the right to discharge the employee?
(9) Who had the obligation to pay the employee?

*Gaudet*, 562 F.2d at 355. See also *Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 617 (5th Cir. 1986) (expanding on the policies behind the criteria for the test’s elements).

172. *Capps*, 784 F.2d at 617.
174. *Capps*, 784 F.2d at 617. See also *Hebron v. Union Oil Co. of Cal.*, 634 F.2d 245, 247 (5th Cir. 1981) (per curiam) (finding control and direction over employee’s working conditions the most important criteria, among others).
176. Id.
178. *Capps*, 784 F.2d at 617.
the supervisors and management personnel detailing the level of day-to-day control over the injured longshoreman's conduct. 179

The other critical prong to the nine-part test under Gaudet is whether the employee acquiesced to the borrowed servant working arrangement. 180 The Gaudet court pointed out that the policy behind the determination of employee acquiescence was to allow the employee to retain his common law rights against third parties, until he had worked under his new conditions long enough to determine that the risks inherent in his 'borrowed' position were acceptable. 181 However, the court recognized that at some point the employee must be deemed to have accepted his new working conditions and that he and his borrowing employer should stand as employer and employee under the LHWCA. 182 Thus, under a typical dual capacity scheme where a parent vessel-owning corporation sets up a subsidiary in order to facilitate the cargo handling operations of the parent, a borrowed servant defense can be of great utility. 183 By showing, among other things, the elements of parental control over the longshoremen and the acquiescence of those workers to the employment relationship, a parent can effectively eliminate a longshoreman's action brought directly against the vessel.

C. The Joint Venture Defense

Under the provisions of the LHWCA, individual corporate members to a judicially recognized joint venture 184 have been held to

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180. Gaudet, 562 F.2d at 357.
181. Id.
182. "But if an employee continues working in a new location, there must come a time when policy dictates the LHWCA should apply, and the new employer and new co-employees should no longer be considered third parties but a true employer and true co-employees, liable only under the LHWCA." Id.
183. But see Cooper, 1986 A.M.C. at 468 (finding that while the longshoreman was a borrowed employee of the dual capacity employer, the longshoreman was borrowed by the stevedoring arm of the dual capacity owner). Thus, the court allowed the plaintiff to pursue a tort remedy against the ownership branch of the dual capacity employer for negligence alleged to have been committed by the vessel's crew. Id.
qualify as a single entity in the statutory compensation scheme.\textsuperscript{183} Accordingly, if an employee is injured while furthering the purposes of the joint venture, all of the corporate members of that venture will be deemed to be the statutory employer of the worker and thus only liable for scheduled LHWCA benefits costs.\textsuperscript{185} This applies even to a joint venture between a parent corporation and its wholly owned subsidiary.\textsuperscript{187} The LHWCA provides the exclusive remedy for an injured employee against an employer who complies with the Act.\textsuperscript{183} Consequently, the individual members of a joint venture will be free of any common law suit for negligence.\textsuperscript{189}

1. The History of Joint Ventures and the LHWCA

The principle of extending federal workers' compensation statutes\textsuperscript{190} to cover all members of a joint venture was first developed in \textit{Bertrand v. Forest Oil Corp.}\textsuperscript{191} In that case, an injured worker sued the non-operator owners of an offshore oil platform in tort for injuries sustained while he was an employee of the operator. At trial, the district court concluded that the operator and non-operator owners were parties to an agreement that established a joint partnership. In applying the Louisiana law of partnerships and joint ventures, the Fifth Circuit upheld the district court's finding and expressly stated, that as joint partners, each individual corporation was shielded from common law torts, just as the direct employer was protected under the Act.\textsuperscript{192}


\textsuperscript{185} Davidson v. Enstar Corp., 848 F.2d 574 (5th Cir. 1988), \textit{rev'd in reap't on other grounds}, 860 F.2d 167 (5th Cir. 1988); Taylor, 637 F. Supp. at 888.

\textsuperscript{187} Haas, 425 F. Supp. at 1316-17.


\textsuperscript{189} Haas, 425 F. Supp. at 1315-16.

\textsuperscript{190} The statute at issue here was the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1953).

\textsuperscript{191} 441 F.2d 809 (5th Cir. 1971).

\textsuperscript{192} Id. at 811.
Reviewing its Bertrand decision in a subsequent case, the Fifth Circuit defined the elements needed to establish a judicially acceptable joint venture. In order to have all members of the venture shielded under the provisions of the LHWCA, the following standards must be met:

1. the operator and non-operator must be engaged in a partnership or joint venture as a matter of law;
2. the employee must be on the payroll of a partner to the joint venture; and if both those conditions exist,
3. then the non-operating members of the joint venture are entitled to immunity from tort liability provided by the LHWCA.

Again, in Heavin v. Mobil Oil Exploration & Producing Southeast, Inc., the court expressly held "that each member of such a joint venture attains LHWCA tort immunity against the employees of the joint venture." The policy behind the extension of compensation coverage to all members of a common venture was explained, by the United States Court for the Eastern District of Pennsylvania, as stemming from the manner in which the joint venture acts much like its own separate business:

A joint venture... is, in a sense, a separate entity. The joint venture may employ its own workers, pay their social security taxes and withhold taxes from their pay. The participants in the joint venture may be held jointly and severally liable for the debts of the joint venture. For many purposes, a joint venture is treated in the same manner as a partnership.

The court further recognized that the joint operators were shielded by the LHWCA even where the non-operating party was not paying for the workers' compensation insurance.

194. Id. at 168.
195. 913 F.2d 178 (5th Cir. 1990).
196. Id. at 180.
198. Id. at 1316 (citation omitted).
199. Id. at 1316-17. The court stated:
The separate entity, the joint venture, is the de facto employer of the workers carrying out the purposes of the venture, even though technically the workers may be on the payroll of only one of the venturers and that particular venturer may provide the workmen's compensation coverage. We hold that the joint venture and, derivatively, the participants in the
2. The Choice of Laws Issue

At this time, there is conflicting authority as to whether the state definition of what constitutes a joint venture or the understanding of joint ventures Congress had when passing the LHWCA should be used in order to determine if such a venture does, in fact, exist. The predominant rule has been that state law should be examined in order to determine whether the parties alleging to have operated in a joint venture have met the qualifications for such status. However, in order to examine the issue, this note will take

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venture, are thus the worker's "employer" for purposes of the [LHWCA] and thus enjoy the protection of the exclusive remedy provision...

Although here the [workmen's compensation] insurance was obtained by one member of the assumed joint venture, the same policy considerations apply.

In \textit{Heavin}, 913 F.2d at 180, the court further noted that, even where one joint venturer provided for all of the injured plaintiff's tools, supervision, wages, benefits, and quarters, the injured plaintiff still qualified as an employee of the joint venture and not just of the individual corporation that was his direct employer. The evidence tending to show that the plaintiff had only been an employee of one member was held by the court merely to indicate that there was a permissible division of labor within the joint venture. This conclusion was bolstered by a showing that the individual direct employer charged the expenses of the injured worker's labor to the joint operational account.

200. The determination of whether a joint venture existed at all is a matter to be decided by the finder of fact. \textit{See Bueno,} 687 F.2d at 321.


202. In the two cases which deviated from state law and applied Congressional understanding of joint ventures at the time the LHWCA was passed, the courts of the Fifth Circuit faced a troublesome situation unique to their jurisdiction. In both \textit{Davidson} and in \textit{Heavin}, the courts were attempting to avoid application of a 1980 revision of Louisiana corporate law, which significantly limited the operations of joint ventures. Davidson v. Enstar Corp., 848 F.2d 574 (5th Cir.), \textit{rev'd in rel'g on other grounds,} 860 F.2d 167 (5th Cir. 1988); \textit{Heavin,} 697 F. Supp. at 1411 n.1. Thus, the more usual course of looking to the forum state's definition of joint ventures should be applicable outside the Fifth Circuit, which had to contend with the Louisiana Civil Codes and their modifications. The supremacy of state law in this field can be analogized by reference to the provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1953). OCSLA incorporated the workers' compensation remedies of the LHWCA and applied them to injuries occurring during the search for minerals on the outer continental shelf. In interpreting the provisions of OCSLA, the court in \textit{Johnson,} 679 F. Supp. at 607, held that
up the "understanding of Congress" approach as discussed by the Fifth Circuit since this test is derived from the same general principles as most state statutes.\(^\text{203}\)

In proposing the Congressional intent standard for determining when a joint venture exists, the Fifth Circuit acknowledged that the existence of a joint venture is a matter of fact which must be decided according to the particular facts of each case.\(^\text{204}\) The court concluded in Davidson v. Enstar Corp.\(^\text{205}\) that "Congress intended that 'joint ventures,' as that term was generally understood in 1927, were entitled to the shield from tort liability if they employed workers covered by the LHWCA."\(^\text{206}\)

In examining the evidence to support a finding of joint venture status under the Congressional understanding analysis, the Fifth Circuit has held that "the ultimate criterion is whether the parties intended to enter into a joint venture, and to make that determination the Court must view the totality of evidence."\(^\text{207}\)

\("[u]nder OCMLA, state law should be applied to determine whether a joint venture should be treated like a partnership." Id. (citing 43 U.S.C. § 1333(a)(2)(A) (1990)). The court then proceeded to quote from Louisiana state cases in order to determine the standard for joint ventures to be applied in the OCMLA claim before the court. Thus, it would seem reasonable to suggest that the same standard should be used to evaluate liability under the LHWCA, from where the OCMLA liability scheme originated.

203. While analogous, each jurisdiction's own law should be examined in conjunction with a joint venture defense. One example of the differences that may be wrought by the nuances of each statute is found in comparing the "Congressional intent" standard to that of New Jersey's joint venture law. No joint venture has yet been found under the "Congressional intent" standard without a formal writing between the parties to evidence their intent to be treated as a joint venture. See Davidson v. Enstar Corp., 848 F.2d 574 (5th Cir.), rev'd in reh'g on other grounds, 860 F.2d 167 (5th Cir. 1988); Heavin, 697 F. Supp. at 1411. Yet under the New Jersey standard, a joint venture can exist without a formal writing evidencing the parties' intent to be considered a joint venture. Evidence tending to show this intent is acceptable. See Kozlowski v. Kozlowski, 395 A.2d 913, 917 (N.J. Super. Ct. Ch. Div. 1978); Hellenic Lines v. Commodities Bagging & Shipping, Process Supply Co., 611 F. Supp. 665, 679 (D.N.J. 1985) (applying New Jersey law).

204. Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204, 1208 (5th Cir. 1978).

205. 848 F.2d 574 (5th Cir. 1989).

206. Id. at 577-78. Thus, while the test relies upon a common law definition of joint ventures, it is unclear whether the courts under the Congressional intent standard would be willing to include exceptions to the joint venture requirement which have evolved since 1927. This issue has as yet not been addressed by the courts.

In order to determine whether the parties intended to establish a joint venture, the courts have turned to four well-used principles of corporate law.\textsuperscript{208} The court in Davidson listed the standard as: "(1) whether the parties intended to form a partnership or joint venture; (2) whether the parties share a common interest in the subject matter of the venture; (3) whether the parties share profits and losses from the venture; [and] (4) whether the parties have joint control over the venture."\textsuperscript{209} Yet, reaffirming the ultimate reliance upon indices of intent, no matter what the source, courts have held that "Davidson does not require that all four of these aforementioned criteria be met in order to have an LHWCA-recognized joint venture."\textsuperscript{210} Analyzing the existence of a joint venture is a flexible operation.\textsuperscript{211} The four prongs of the test are treated more as indices of intent than a bright line test.\textsuperscript{212}

Despite the pronouncement of a totality test, all of the business ventures thus far addressed by courts applying the 1927 standard have had a written instrument that defined the relationship the parties intended to create. Courts have held, however, that the parties themselves cannot determine by contract the nature of their relationships, but that this determination is left for judicial review.\textsuperscript{213} Thus, where there is an agreement between the parties the actual conduct of those parties will control over their declarations.\textsuperscript{214} The negative implication of this rule is that a written agreement is not necessary to the legal standing of a LHWCA joint venture.

Thus, under the Davidson test of a joint venture based upon the understanding of Congress in 1927, a written agreement has been

\textsuperscript{208} See Fletcher, supra note 184, § 2520.

\textsuperscript{209} Davidson, 848 F.2d at 577.

\textsuperscript{210} Heavin, 697 F. Supp. at 1411.


\textsuperscript{212} Heavin, 697 F. Supp. at 1411; Haas, 425 F. Supp. at 1315-16.

\textsuperscript{213} Taylor, 637 F. Supp. at 889.

The legal relationship of the parties is not governed exclusively by the terms used by the parties to designate the relationship. When the parties make an agreement defined by law as a partnership or joint venture, it is a partnership joint venture even though the parties did not intend that their agreement should be so called.

\textit{Id.} (citations omitted).

\textsuperscript{214} However, the corollary question of whether, absent an agreement, the conduct of the parties will control the determination of joint venture status is left unanswered with respect to the Congressional intent analysis of the LHWCA liability. See Hellenic Lines, 611 F. Supp. at 655.
found to create a joint venture that shields its participants from liability for negligence under the LHWCA.\textsuperscript{215} There would be room to analogize that a written agreement is not critical for this purpose,\textsuperscript{216} either under a federal or state standard, as it is apparently the intent of the parties which controls.\textsuperscript{217} However, sanctuary under the LHWCA using the "1927 test" has not as yet been tested on the grounds of implied contract as it has under state law on joint ventures.\textsuperscript{218}

D. Applicability of Affirmative Defenses

A parent organization, which acts as its own stevedore through the use of a subsidiary has room to maintain that, in effect, its intent in establishing the stevedoring operation was to engage in a joint venture for the purpose of cargo transportation. Under this analysis, the vessel owning and stevedoring functions are merely confederates in an operation large enough to qualify for treatment under the law of joint ventures.\textsuperscript{219} Since there is room to argue that a joint venture exists even without a formal document to that effect, the dual capacity employer can attempt to bring both phases of his operation under the scope of the LHWCA's compensation protection.

This method of extending the LHWCA blanket of tort immunity to both the subsidiary and the parent is, in effect, exactly the opposite of the borrowed servant defense. Using its corporate structure as a shield from tort liability in the joint venture analysis depends upon a showing of a common mission in which the two related corporate entities are engaged. In contrast, the borrowed servant defense requires the dual capacity employer to exhibit two separate business entities engaged in a labor exchange, thus, the parent must emphasize the distinct nature of each firm. Depending upon the factual particulars of any given parent corporation acting as a dual capacity employer, one of the two defenses to tort liability should be within reach. If the parent and subsidiary have a remote relationship, the borrowed servant analysis would be preferable. However, if there is an intimate exchange between the two organizations and there is

\begin{footnotes}
\item[215] See Davidson v. Enstar Corp., 848 F.2d 574 (5th Cir.), rev'd in re'h'g on other grounds, 860 F.2d 167 (5th Cir. 1988).
\item[216] Fletcher, supra note 184, § 2520 nn.29-30.
\item[217] See Hyman v. Regenstein, 258 F.2d 502, 513 (5th Cir. 1958); Fletcher, supra note 184, § 2520 n.31.
\item[218] Haas, 425 F. Supp. at 1315-16.
\item[219] See id. at 1310-11; Fletcher, supra note 184, § 2520.
\end{footnotes}
some regularity of activity, the joint venture defense may be available.

A corporation planning the creation of a subsidiary company to handle its stevedoring work would be well advised to take into account the benefits of the various affirmative defenses to liability under section 905(b) of the LHWCA when structuring the relationship of the new subsidiary to that of the parent and other pre-existing subsidiaries. For while Congress expressly declared that remedies to which longshoremen are entitled should not depend alone upon the corporate form chosen by their employer, the parent, through proper structuring of its subsidiaries, can greatly reduce the opportunity for longshoremen to improperly reach the deeper pockets of either itself, or its other subsidiaries, outside of the LHWCA's compensation scheme.

Perhaps the only type of dual capacity employer which would be precluded from effectively using its corporate form as a defense to tort liability under the LHWCA, is the vessel owner who directly hires his own longshoremen. In that case, only a fellow servant defense would be available to the employer, and under the Supreme Court's construction of sections 5(a) and 5(b) of the Act, that defense has been vitiated.220

VII. Conclusion

This note proposes that in dual capacity employer cases, the liability scheme of the LHWCA, as articulated by the Supreme Court in Scindia, is best implemented through the use of the Fifth Circuit's Castorina test. Castorina shows a greater sensitivity to the stated Congressional intent behind the 1972 amendments to the LHWCA, maintains the bifurcated liability scheme the Supreme Court delineated in Scindia, and yet preserves the right of a longshoreman to sue a negligent vessel owner in tort.

Under the Castorina test, a vessel owner will continue to have the partial insulation from tort liability that a stevedore traditionally affords. The vessel-owning corporation is then free to explore the defensive options to negligence liability provided by its corporate form. The co-existence of the borrowed servant and joint venture defenses under the LHWCA provide an opportunity for both loosely joined and intimately connected vessel owning and stevedoring cor-

orporations to significantly reduce their tort exposure, and for other corporations to anticipate defenses to liability when structuring their corporate arrangements.

On the other hand, Fanetti acts to destroy the nature of the separated Scindia duties, imposing tort liability upon a dual capacity owner for any longshoreman’s injury that occurs aboard his vessel. In altering the liability scheme articulated by the Supreme Court, Fanetti also goes against the Congressional intent that a shipowner’s right to be shielded from negligence actions not be affected by his choice of business arrangement. But most importantly, when Fanetti is combined with the right to contribution provisions of Tran, it becomes possible for third parties to use the liability scheme of the LHWCA to reach the “deep pockets” of a vessel owner. This is a misuse of the LHWCA’s provisions which are intended to financially protect longshoremen from hazards of their trade, not subsidize the negligence of third parties.

Because Fanetti upsets the Scindia liability scheme, runs counter to Congressional intent, and unjustifiably increases the liability of vessel owners, it should be deemed impliedly overruled, especially in light of the dicta of the Supreme Court in Pfeifer.221 There, the Court favorably referred to a Castorina scheme of bifurcated liability in the dual capacity context, discriminating between the duties owed in an employer’s stevedoring and ownership functions.222 Castorina provides the more faithful approach to the articulated division of liability in longshoremen’s actions against dual capacity employers.

_Frazor T. Edmondson_

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221. 462 U.S. at 531 n.6.