

Attachment 5
Protection and Indemnity Guidelines
August 17, 2009

In the event of litigation against the Government, the Vessel, the Contractor, or the Contractor's underwriters, the following guidelines must be followed:

(a) The Torts Branch, Civil Division, U.S. Department of Justice (hereafter "DOJ"), ensures the integrity of the Government's public vessel defense and other limitations on the Government's waiver of sovereign immunity. DOJ has firm policies, positions, and views concerning these defenses and cooperation between private P&I counsel (retained by the Contractor or its underwriters) and DOJ is essential to their preservation. This remains true even during the course of litigation which may not directly involve a public vessel.

(b) Upon receiving notice of a legal action, DOJ will assign a monitoring attorney to coordinate with P&I counsel. DOJ will decide whether to authorize private P&I counsel to defend the United States and sign pleadings as "Of Counsel to the United States." Private P&I counsel should call upon the DOJ monitoring attorney for advice and assistance as they see fit.

(c) DOJ generally does not intrude upon private counsel's handling of claims and litigation. It will not ordinarily deal directly with plaintiff's lawyers (except in the course of motion practice reserved by DOJ). At the outset of litigation, the DOJ monitoring attorney will ordinarily provide P&I counsel with written procedural and substantive instructions to coordinate the defense of the matter. P&I counsel must comply with these instructions.

(d) Plaintiffs generally enjoy the same substantive rights against the United States (in its capacity as shipowner) as they would against private shipowners. However, there are conditions to the waiver of sovereign immunity embodied by the Public Vessels Act, 46 U.S.C. App. §§781-790 (hereafter PVA) and the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752 (hereafter SAA) which limit the jurisdiction of courts to adjudicate those rights. Although seamen may bring suits for injuries arising on public vessels, those suits must be maintained in strict accordance with the PVA and the SAA.

(e) There are certain litigation advantages available in many cases to the Government and its counsel. Specific advice should be solicited from the monitoring DOJ attorney by private counsel, but such advantages in a particular case may include:

1. Sixty days within which to answer the complaint.
2. Venue must lie where the public vessel lies when suit is filed, if within the United States. If the public vessel is outside the United States, venue lies where any plaintiff resides. 46 U.S.C. App. § 782.
3. Limitations on the award of interest. 46 U.S.C. App. § 743 and § 782.

4. No right to a jury trial. 46 U.S.C. App. § 742.
5. Punitive damages or penalty wages may not be awarded against the United States.
6. In the context of a tort action, courts lack jurisdiction to review the discretionary functions of the Executive and Legislative branches of government. This could include such things as manning levels, ship design, personnel assignments, and scheduling.

DOJ reserves the right to and may directly handle any motion practice involving such issues. Also, whether appearing during a first screening of a complaint or by later developments, DOJ will determine whether it will handle directly, or will allow P&I counsel to handle dismissal of actions against any defendant other than the United States; "relation back" amendments to pleadings to substitute the United States out of time; dismissal of actions for punitive damages or penalties; dismissal of actions challenging discretionary functions of the Government; and jury demands. Until such issues appear, P&I counsel should handle all cases routinely from the outset. P&I counsel should also assume they will handle such issues that do arise until otherwise instructed by DOJ.

(f) P&I counsel will provide copies of the following in time to permit review by DOJ before filing:

- (1) Answers.
- (2) Motions involving jurisdictional issues.
- (3) Third party complaints, interventions, and joinders.
- (4) Proposed inspections of public vessels or depositions of Government witnesses.
- (5) Requests to bring Government witnesses to trial.

The purpose of this review is not to meddle editorially. It is to ensure consistency with DOJ's overall management of the PVA/SSA defense, and to offer the experience of DOJ in countering attempts to avoid the more restrictive provisions of the PVA. See *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976); *Blanco v. United States*, 775 F.2d 53 (2d Cir. 1985); *Blevins v. United States*, 769 F.2d 175 (4th Cir. 1985).

(g) In cases where P&I counsel have received a complaint and the answer is due in a short time, an appearance is expected to be made by the time provided by rule, either by answer, motion, or by stipulation for extension of time, in accordance with the local rules. Stipulations are expected to be kept current on the court records.

(h) P&I counsel must comply with the requirements of 28 C.F.R. Part 52 if given the choice of proceeding to trial before a U.S. Magistrate. The regulations require approval from the Assistant Attorney General of the Civil Division before P&I counsel may bind the United States to trial before a magistrate, or a direct appeal of the magistrate's decision to the District Court. If P&I counsel desires to proceed before a Magistrate, he or she must prepare a memorandum to DOJ setting forth the reasons for such request. The factors listed in the regulations may be used as guidelines for the request. DOJ will make every effort to expedite approval of such requests.

(i) Unlike trials, appeals in admiralty cases are not under the cognizance of the Torts Branch, Civil Division. Whether an appeal shall be authorized is the prerogative of the Solicitor General, and no appeal may be taken without his express authorization.

(j) Counsel should immediately send any adverse decision or any notice of appeal to USEPA and to the DOJ monitoring attorney for forwarding to the DOJ Appellate Staff. An appeal recommendation, including the recommendation that P&I counsel should brief and argue the appeal, should follow promptly to the monitoring attorney for forwarding to the Solicitor General. While private counsel may normally expect the Solicitor General to authorize an appeal or not according to their recommendation, the Solicitor General may assign the appeal to DOJ lawyers or decide not to appeal. Private counsel should expedite every stage of the process; DOJ will do the same.

(k) If at any point there appears any doubt of any nature that there is coverage of the United States for any liability in issue or if a conflict of any sort arises, private counsel is obliged to immediately advise the DOJ monitoring attorney with full particulars and to proceed no further save as unavoidably necessary pending DOJ's determination of how the United States will be represented.