

# A Reexamination of *Glanzer v. Shepard*: Surveyors on the Tort-Contract Boundary

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*In international commodity transactions, intermediary certifiers of quantity and quality play a crucial role. Sometimes they err, and when they do, the aggrieved party can pursue remedies against the counterparty or against the intermediary, either in contract or tort. The remedy against the intermediary has depended, at least in part, on whether the plaintiff was in privity. Even absent privity, the aggrieved party could possibly recover in tort (or perhaps as a third-party beneficiary). So held Cardozo in the leading New York case *Glanzer v. Shepard*. Section I of this paper reviews the *Glanzer* litigation, with special emphasis on how the court suppressed many of the significant facts. Section II then turns to restitution by the principals. Section III explores the courts' general hostility to intermediaries' attempts to limit their liability by contract, and Section IV considers the judiciary's sporadic efforts to place extra-contractual limits on intermediaries' liability. Section V examines the surveyors' response.*

## INTRODUCTION

In international commodity transactions, intermediary certifiers of quantity and quality play a crucial role. Sometimes they err. When they do so, the aggrieved party can pursue remedies against the counterparty or against

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the intermediary, either in contract or tort. The Restatement of Restitution provides for compensation by the counterparty.<sup>1</sup> The remedy against the intermediary has depended, at least in part, on whether the plaintiff was in privity. Even absent privity, the aggrieved party could possibly recover in tort (or perhaps as a third-party beneficiary). So held Cardozo in the leading New York case *Glanzer v. Shepard*.<sup>2</sup> Cardozo was confronted with the claim of a buyer of beans (Glanzer) against a public weigher (Shepard) who had negligently weighed the beans, the buyer having paid for five percent more beans than it received. Cardozo found for the plaintiff, despite the fact that the weigher had been engaged by the seller.

*Glanzer's* prominence stems in large part from its juxtaposition with another Cardozo opinion, *Ultramares Corp. v. Touche, Niven & Co.*<sup>3</sup> In *Ultramares*, Cardozo held that an accountant would not be liable to an indeterminate class that might have relied upon the accountant's findings even though they had no contract. He distinguished *Ultramares* from *Glanzer* by noting that although Glanzer had had no contract with Shepard, his reliance on Shepard was obvious. In *Ultramares*, however, there were a potentially large number of people who might have made unfortunate decisions in reliance upon the accountant's faulty work; the accountant could not be expected to take the potential problems of this ill-defined class into account when performing, and he therefore held the accountant not liable for negligence.

Although Glanzer and Shepard had no contract, it would not have been difficult for them to allocate the risk of negligent weighing explicitly, either in their respective contracts with the seller or by contracting with each other. The costs of liability for certifiers of quantity or quality are ultimately borne by the parties. It is predictable that measurement errors will occur and buyers and sellers must determine how much effort should go into reducing the incidence of errors, given that error reduction has both costs and benefits. Thus, buyers and sellers have an incentive to economize by assigning the consequences for such errors to the party that can most efficiently bear them.

So it is a bit misleading to view *Glanzer* as a matter of tort. It is one piece of a default rule for the contractual triad, the first piece being recovery from the counterparty. Its bite depends on the damage measure and the ease with which the parties can contract around the default rule. American courts,

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1 Restatement (First) of Restitution § 20 (buyer overpaid) (1937); § 39 (buyer underpaid).

2 135 N.E. 275 (1922).

3 174 N.E. 441 (1931).

it turns out, have been rather liberal in allowing the principals to contract around the default rule (although not so liberal as their British counterparts), but less so for the intermediaries.

Public weighers are members of a broader category of surveyors who provide independent certification of quantity, quality, cleanliness, readiness, and so forth. In *Glanzer*, damages were easily measured as the product of the contract price and the difference between the measured and "true" weight. For other surveyors, the damage issue is more complicated. Suppose, for example, that a cargo of oil satisfied the contractual standard of a sulfur content less than 1.5%. If the certifier negligently found the content to be 1.52%, the buyer could reject the shipment as nonconforming and the seller would have to resell either to this buyer or to a new one at a lower price. The certifier could be held liable for the entire price difference or some lesser amount. The Restatement (Second) of Contracts allows the court to limit the magnitude of the certifier's liability in certain circumstances,<sup>4</sup> although the parameters of that default rule are ill-defined. Relying in part on *Glanzer*, the Second Circuit appears to have rejected that limitation in *International Ore & Fertilizer Corp. v. SGS Control Services*<sup>5</sup> (hereafter *Interore*), holding the certifier liable for the seller's entire loss.<sup>6</sup>

The paper is organized as follows. In Section I, I review the *Glanzer* litigation, with special emphasis on how the court suppressed many of the significant facts. In Section II, I then turn to the first piece of the default rule — restitution by the principals. Parties appear to routinely contract around the remedy, making the word of the intermediary "final and binding," and those clauses are generally (but not always) upheld. In Section III, I explore the courts' general hostility to intermediaries' attempts to limit their liability by contract. In Section IV, I consider the judiciary's sporadic efforts to place extra-contractual limits on intermediaries' liability. In Section V, I examine the surveyors' response.

## I. THE *GLANZER* PROCEEDINGS

The dispute arose over the sale of about one-hundred tons of Caballero beans from Chile by an importer, Bech, Van Siclen & Co., to a New York bean merchant, Glanzer Brothers. That agreement was not put in evidence,

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4 Restatement (Second) of Contracts § 351f (1981).

5 743 F. Supp. 250 (S.D.N.Y. 1990).

6 See *Interore* and text below at *infra* notes 84-97.

and there is some confusion as to when it was entered into — the Complaint alleging February 18, 1918,<sup>7</sup> while Glanzer's uncontradicted testimony put the contract date in June.<sup>8</sup> The beans were shipped from Chile in May and arrived in New York in late July. Bech then sent an engagement letter to Core & Herbert (a weighing firm in which Shepard was a partner) directing them to weigh the beans:

These beans have been sold to Glanzer Bros. ... and arrangements have been made for them to take delivery first thing Tuesday morning, July 23rd.

Kindly communicate with Glanzer Bros. on Monday afternoon, to see if it will be in order for your weighers to be on the pier first thing Tuesday morning to weigh these beans ... .<sup>9</sup>

Core & Herbert determined that the 905 bags weighed 228,380 pounds. Since that was in excess of the amount contracted for, the parties agreed that seventeen bags would remain with the seller. These bags were weighed, and their weight was subtracted from the total, so on net, Glanzer received 888 bags, which, according to the Core & Herbert weight certificates, weighed 224,086 pounds. On the basis of the weight certificates, Glanzer paid the contract price of 10.5 cents per pound to Bech, and the beans were then stored in a bonded warehouse. Glanzer sold the beans over the next five months, the last, and largest, transaction taking place at the end of January 1919. For each of these transactions, the beans were again weighed by Core & Herbert; after this last weighing, it was clear to Glanzer that the weight of the beans it had sold was about five percent less than the weight of the (same) beans it had bought.

Glanzer then sued Shepard for the difference, \$1,262.26. After a two-day trial, Judge Peter Schmuck gave a directed verdict for the plaintiff. The Supreme Court, Appellate Term, reversed unanimously, finding that the defendant owed no duty to the plaintiff to weigh the beans accurately; if the plaintiffs were to have any remedy, the Court held that it should be against the seller, Bech. This opinion was then unanimously reversed at Appellate Division, and Cardozo, writing for the Court of Appeals, affirmed.

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7 Record at 5-6.

8 *Id.* at 23. The Bech-Glanzer contract was not included in the record, although the invoice (dated August 13, 1918) was (Plaintiff's Exhibit 2, at 95-96).

9 Plaintiff's Exhibit 10, at 105.

Cardozo found that the weigher had a duty "imposed by law," so that it was unnecessary to deal with the issue of privity.

We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. Bech, Van Sicien & Co. ordered, but Glanzer Brothers were to use. The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed.<sup>10</sup>

The defendants, he held, "weighed and certified at the order of one with the very end and aim of shaping the conduct of another. Diligence was owing, not only to him who ordered, but to him also who relied."<sup>11</sup>

No direct evidence of the weigher's negligence was introduced. If the weights were off by five percent and if the defendant could not present a plausible alternative explanation of the discrepancy, the court would presume negligence. The plaintiffs introduced testimony from a federal customs agent and two bean merchants suggesting that shrinkage could not have been greater than one-half percent in a year.<sup>12</sup> Glanzer also testified (in a somewhat disjointed way) that the original bill of lading — which was not in evidence — was for about 12,000 less pounds than the weighing certificates.<sup>13</sup>

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10 *Glanzer v. Shepard*, 135 N.E. 275, 276 (1922).

11 *Id.* at 242.

12 Record at 30-31, 34, 38.

13 Glanzer testified:

Mr. Shepard was sitting at his desk. I showed him all the papers. He carefully looked at them. ... I said, "Here is a bill of lading which reads for itself; it shows the shipper has never shipped so much goods at all; where did you get it from? You have given us a weighing certificate nearly 12,000 pounds over; where did you get the goods from? The bill of lading reads there was never shipped that much."

*Id.* at 41-42.

Glanzer further testified that he had another conversation with another employee of Core & Herbert:

He said, ... "We have weighed the goods and that settles it. We don't know anything about it. For instance," he says, "the man was in a hurry to ship these

The defendant did propose three alternative explanations: (1) there was more shrinkage in these beans than would generally have been the case because green (not dried) beans had been shipped; (2) the bags were not in very good shape and some beans were lost; and (3) the batch of beans weighed on arrival in August was different from the batch weighed on resale in January. The last argument was buttressed by the fact that the weight certificates in August rightly identified the ship carrying the beans as the Panama, while the January weight certificates erroneously identified the ship as the Totten Maru, a Japanese ship that had almost certainly never been to Chile. The trial judge apparently did not believe that these explanations deserved jury consideration (and given the evasiveness of the defense witnesses, he was most likely right).

No evidence was offered on the amount that Bech paid the weighers, nor did Cardozo comment on the absence of this evidence. This omission was rather odd since only a few years later, in *H.R. Moch Co. v. Rensselaer Water Co.*,<sup>14</sup> he was quite willing to infer that the rates charged by the negligent water company were so low that it could not have intended to bear the risk of liability.

The normal remedy for the buyer in this case would have been restitution from the seller. Indeed, the Restatement (First) of Restitution uses a variation on *Glanzer* as an example of a case in which restitution is the proper remedy.<sup>15</sup> The record was not entirely clear regarding Glanzer's claim vis-à-vis Bech. Glanzer did pay Bech; that much was certain.<sup>16</sup> There was no evidence as to whether Glanzer had attempted to recover the overpayment,<sup>17</sup> but one can infer that Bech never disgorged. The defense, in its opening statement, said that it would show that the sellers "were a large concern and were responsible,"

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goods, and he probably gave him five or six or seven thousand pounds too much," and I says, "For the lord's sake, is it possible that a shipper would ship five or six thousand more pounds than he should; where is the steamship? They would demand freight charges for it if they would, and they have showed a bill of lading only for 101,000 kilos.

*Id.* at 43.

14 159 N.E. 896 (1928).

15 Restatement (First) of Restitution § 39 illus. 4: "A agrees to deliver to B 10,000 bushels of wheat at sixty cents per bushel, the wheat to be measured by a third person. By mistake of the third person B receives 11,000 bushels. A is entitled to restitution of 1000 bushels or the value."

16 Mr. Hasselriis, of Bech, testified: "Q. Were you paid for those beans by Glanzer Brothers? A. I should say so." Record at 64, *Glanzer*.

17 Defense counsel asked Mr. Haselriis, "Was any demand ever made on you for the return of any of that money?" Plaintiff's objection to the question was sustained. Transcript at 64.

but Judge Schmuck upheld an objection to such testimony being admitted.<sup>18</sup> The defense did, however, raise the argument in its brief:

According to plaintiff's own story, through a mistake in fact, they have overpaid [Bech] \$1,262.31. Apparently [Bech] still holds this money and the plaintiffs have never demanded the same back or sued for its return. If the plaintiff's story is correct, the payment to [Bech] was a plain payment in mistake of fact, and recoverable. Plaintiffs have not shown why they have never demanded or sued for recovery from [Bech] or that [Bech] was insolvent. In fact, defendants offered to show [Bech] was solvent, but this was ruled out.<sup>19</sup>

The apparent lack of an effort to pursue redress against Bech remains a puzzle. It is possible that Bech was, indeed, insolvent. It also is conceivable that an importer might be beyond the reach of American courts, although the fact that a Bech executive testified for the defense casts doubt on that.<sup>20</sup> It also is possible that the Bech-Glanzer contract precluded Glanzer's recovery. That contract might, for example, have stated that the weigher's weights were "final and binding." As we shall see, many contracts do include such language and courts have often enforced them despite the fact that the weigher had erred. The unfortunate omission of this contract from the trial record prevents us from ascertaining whether the buyer and seller had allocated the risk of weigher error between themselves.<sup>21</sup>

If the default rule were that the weigher would be held liable for negligence, then the weigher could either accept the rule and set a price for its service that incorporates the implicit insurance of accuracy or it could contract out of liability. It could, that is, if the law did not constrain the weigher's freedom to do so. If public weighers were regulated entities, it is possible that the price of their services would be fixed by law or that their ability to alter contract terms would be restricted in some way. Indeed, if one looks in standard legal references like *Corpus Juris Secundum*, there is ample evidence that in some instances, parties identified as public weighers were subjected to considerable public regulation, including fixed

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18 Record at 16.

19 Defendant's Brief at 25.

20 In the initial Complaint, Bech is described as a foreign corporation. Record at 5.

21 According to the Complaint, the initial contract said "goods to be weighed by an official weigher, and to be paid for in accordance with the weight sheets to be furnished by said official weigher." Record at 6.

maximum prices.<sup>22</sup> Public weighers like Core & Herbert (Shepard) were almost certainly not subject to governmental regulation, but the trial court was decidedly unhelpful on this matter. Thus, Shepard's lawyer asked of him:

By what right are you a weigher?  
 Do you have any license to do weighing?  
 From whom do you get your license?  
 Who are the proper authorities to license you?<sup>23</sup>

The plaintiff's objection to all these questions was sustained. Shepard's deposition testimony is a bit more helpful:

A. Our firm is known as City weighers.  
 Q. State how appointed.  
 A. Business has been handed down for a long time.  
 Q. Is there a license issued to you?  
 A. There is a general agreement amongst the merchants that a disinterested party should do their weighing.  
 Q. There is no formal license issued to you, is there?  
 A. By the Exchange.  
 Q. By the Exchange you mean Coffee Exchange?  
 A. By the various Exchanges and their different rules.<sup>24</sup>

In its Reply Brief, the defense asserted that the public weighers were in no way regulated by any government:

At the outset let us correct a mistaken impression in reference to the nature of the business carried on by the defendants. There is no such thing in law as an official weigher. We have examined both federal and local laws as well as city charter and can find nowhere any official or public weigher. It is entirely a private enterprise. The defendants do not claim otherwise.

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If the plaintiffs had claimed that they were members of an exchange licensing the defendants, and claimed the benefit of the exchange rules, and had brought an action thereon, the case might be different, but no

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22 *Weights & Measures* § 6, 94 C.J.S. 552-53; *see also* *Weights and Measures* §§ 5, 6, 13, 19, 20, 21, 22, 79 Am. Jur.2d at 58-69.

23 *Record* at 45-46.

24 *Id.* at 84-85.



such claim was made, nor is there any proof [of] ... any rule making the defendants liable.<sup>25</sup>

That language is not entirely unambiguous, but a plausible interpretation is that if the beans in question had been coffee beans, the public weigher would have been subject to the rules of the Coffee Exchange, a private organization, with an elaborate set of rules governing transactions. However, since Glanzer's beans were not traded on any exchange, the only rules governing the parties and the public weighers was New York contract law. Apparently, there was no inclination to infer commercial practice by looking at the manner in which the formal Exchanges regulated the relationship between weighers and merchants.

Because damages were reckoned by looking to the contract price, there was almost no effort to introduce evidence on changing market conditions. If there had been a substantial price decline, it would not be terribly surprising to find Glanzer looking for some way to mitigate the losses arising from a bad deal. The defense, in its attempt to show that the beans might have been shipped green and therefore might have been subject to greater shrinkage, attempted to elicit testimony that beans were in great demand in June, but less so in July and August. However, the only testimony was that the demand was high in June and remained high until the first of the year (a month before Glanzer discovered the weighing error).<sup>26</sup> This seems plausible since the contract had been entered into while the war was still on and the bad news was revealed two months after Armistice; one might reasonably expect that the market price had collapsed in the interim. Surprisingly, the facts do not bear this out. Prices did not budge following the war's end.<sup>27</sup>

To sum up, processing the facts through the legal system left a number of large holes. We do not have the underlying contracts. We do not know whether the seller would have been legally obligated to make restitution. Nor do we know whether Shepard had attempted to contractually limit his liability in any way. Indeed, we do not even know for certain whether Shepard's behavior and responsibilities were delimited in any way by

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25 Defendant's Reply Brief at 6.

26 Record at 35.

27 Prices for marrow choice, New York beans listed in Bradstreet's, fell only modestly from June 1918 to the end of January 1919. Oddly, prices fell from January 1918 through June 1918 by about 14%; fell another 7% through September, and then stabilized through January 1919. Prices did fall another 15% in the two months following Glanzer's discovery of the error, but they then turned around, approaching the January price by the end of 1919. Apparently, food shortages in Europe helped put an upward pressure on food prices generally in the postwar period.

regulations of the state or of any commodity exchange, although we can be reasonably confident on this score. Cardozo's ambiguities are, in large part, a manifestation of the raw materials with which he was provided.

## II. RESISTING RESTITUTION

The Restatement of Restitution rule sounds simple enough. If, because the weigher had erred, Glanzer ended up with less beans than it had bargained for, then the seller should make him whole. Yet traders usually undo that result. Their contracts make the surveyor's certificate final and binding. And with good reason.

A typical clause for an international petroleum product contract reads:

The quantity and quality of the Oil shall be determined by an independent inspector at the discharge port, such independent inspector shall be appointed jointly and the cost of his services shall be shared equally by the parties. All determinations as to quantity and quality made in accordance with the provisions of this Section ... shall be conclusive and binding upon both parties.<sup>28</sup>

Notice, in passing, that the inspector is hired *jointly*, so that the privity question disappears. Neither buyer nor seller would be a third party like Glanzer.

The virtues of final and binding clauses were nicely laid out by the plaintiff in a suit against a surveyor in *Vitol Trading S.A., Inc. v. SGS Control Services, Inc.*

Even when done erroneously, [the measurements] still were binding and either party had the right to act thereon. If this were not so, the Inspection clause in the contracts would be meaningless. Oil traders, and others who deal in the sale of commodities, need quick, definitive, prompt and binding results or else there would be chaos. Buyers would

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28 *Cities Serv. Co. v. Derby & Co.*, 654 F. Supp. 492, 493 (S.D.N.Y. 1987). In a British case, in which the contract included a final and binding clause, the court noted that the litigant "was content with the ... term relating to the load port inspector's certificate, ... which he regarded as virtually standard." *Baytur SA v. Ceminex SA, Q.B.* (Transcript: Marten Walsh Cherer) (Dec. 1, 1988).

shop around for results showing cargoes to be non-conforming and sellers would do the converse.<sup>29</sup>

In upholding a similar clause involving a domestic corn shipment, Judge Wisdom noted that

where an inspection by a third party is stipulated, it supersedes the buyer's right to inspect. ... The obvious purpose of that inspection at origin was to establish a certain, reliable, and objective standard at a fixed place and time to give the transaction certainty. It would serve little use to have this inspection, if the buyer were free to accept or reject the shipment after its arrival on the basis of its own inspection at destination.<sup>30</sup>

"To allow a mere mistake or error in decision of an umpire to nullify his decision," Wisdom concluded, "would make the chosen means of avoiding litigation — breed litigation."<sup>31</sup> In the absence of fraud, bad faith, or such gross mistake as amounts to fraud, the inspector's decision will be upheld.<sup>32</sup> That qualification leaves a window for overcoming final and binding clauses. American courts have proved more willing to exploit that opening than their British counterparts. Thus, the British court accepted the surveyor's certificate on quality (asphaltine content), despite the disappointed buyer's claim that the surveyor had not actually measured the content but had simply asked another oil company (which apparently had been in possession of the cargo prior to the disputed transaction).<sup>33</sup>

That final and binding clause might not have survived in an American court. A surveyor's certificate could be overridden if the error could support an inference of "fraud, bad faith or gross error." In one of the few litigated cases, this turned out to be a very low hurdle. In *Cities Service Co. v. Derby &*

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29 *Vitol Trading S.A., Inc. v. SGS Control Serv., Inc.*, 874 F.2d 76 (2d Cir. N.Y. 1989). Plaintiff's Brief at 36-37.

30 *Bartlett & Co., Grain v. Merchants Co.*, 323 F.2d 501, 506 (5th Cir. Miss. 1965).

31 *Id.* at 508.

32 *Id.* *Bartlett* is the rule in most American jurisdictions. See 7 A.L.R.3d 541 and cases collected there.

33 *Coastal (Bermuda) Ltd. v. Esso Petroleum Co. Ltd.*, [1984] 1 Lloyd's Rep. 11. For other British cases upholding final and binding clauses, see *Toepfer v. Continental Grain Co.*, [1974] 1 Lloyd's Rep. 11; *Rolimpex Centrala Handlu Zagranicznego v. Haji E. Dossa & Sons Ltd.*, [1971] 1 Lloyd's Rep. 380; *Berger & Co. Inc. v. Gill & Duffus S.A.*, [1984] A.C. 382; *Nidera Handelscompagnie S.V. v. Sociedad Iberica at Molturacion S.A.*, Transcript, July 5, 1988, 1986 FO 668 (Q.B.).

Co.,<sup>34</sup> Judge Kram's finding of bad faith was based both on her conclusion that the inspector's testing methods did not comply with the industry standard<sup>35</sup> and on the magnitude of the error. In an earlier decision, *Amoco Oil Co. v. H. Grunewald & Co.*,<sup>36</sup> the court had upheld a final and binding clause, holding that an error of 1.7% was not sufficient to conclude that there had been bad faith or gross error. She rejected the defendant's argument that an error of 2.4% should likewise be insufficient.

However, defendant's argument ignores that in the *Amoco* case the damages sought totaled \$42,181.80, while here damages of \$374,225.26 are sought. The magnitude of the loss here clearly is much greater than in *Amoco*. As a result, this Court finds it sufficient to justify such an inference of fraud, bad faith or gross error.<sup>37</sup>

In a few other instances, courts and arbitration panels have followed *Cities Service* in rejecting a final and binding clause.<sup>38</sup> Nonetheless, American courts in general have been kinder to these clauses than they have been to the disclaimers of the intermediary certifiers. To these I now turn.

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34 654 F. Supp. 492 (1987).

35 The contract included a lengthy clause describing in broad outline the types of tests that should be performed. Judge Kram found that the surveyor had failed to meet the standards and concluded that,

where a contract sets forth the standards or procedures to be followed by an independent third party to whom the determination of quantity, quality or value is entrusted, the failure of such independent third party to follow the standards or procedures prescribed in the contract will invalidate any certification or determination so made even if the contract makes such certification or determination conclusive and binding.

*Id.* at 501.

36 592 F.2d 745 (4th Cir. 1979).

37 654 F. Supp. at 503.

38 See the arbitration between Clarendon Marketing, Inc. & Toro Energy USA, Inc. (June 8, 1990) (inspector allowed the tests to be performed by the buyer's employees while it merely observed) (unpublished); In the Matter of the Arbitration between Amerada Hess Shipping Corp. & Overseas United Tankers, Inc., No. 2364 (Feb. 23, 1987) (unpublished); *Sociedade Portuguesa de Navios Tanques L.D.A. v. Amoco Transp. Co.*, 1984 AMC 2848 (S.D. Tex. 1984) (the person sent to do the survey was held to be unqualified); *Tesoro Crude v. Coastal States Trading Co.*, SMA 2587 (1989) (mutual mistake).

### III. DISCLAIMERS BY INTERMEDIARIES

Even if surveyors do perform in a substandard manner, they could avoid legal responsibility by including disclaimers or exculpatory clauses in their initial contracts. At least they could do so if courts were willing to enforce such clauses. There is hostility to the surveyor disclaiming liability for negligence that does not carry over to the corresponding disclaimer by the seller. The different legal treatment of final and binding clauses and surveyor's liability limitations or disclaimers is intriguing. A final and binding clause is, after all, a disclaimer of liability: X promises to deliver to Z goods of a certain quantity and quality as certified by Y. If, in fact, X delivers less than was certified by Y, it is not X's problem.

Courts will honor some disclaimers, but it is not something one should be confident about.<sup>39</sup> Since the validity of a disclaimer is questionable even when it appears in the contract between the surveyor and its customer (even a commercially sophisticated customer), the validity is even more problematic in *Glanzer*-type situations. The aggrieved party had not, after all, agreed to the liability limitation. The general suspicion of liability limitations coupled with the lack of privity makes avoiding the *Glanzer* rule a tricky problem.

In *Plata American Trading, Inc. v. Lancashire*,<sup>40</sup> the purchaser of tallow paid for 501 tons as per the bill of lading, but received only 375 tons because of fraud on the part of the seller. Payment was made "relying upon the weight certificate."<sup>41</sup> The quantity was to be measured as the tallow flowed from shore tanks to the ship. However, some of it was diverted back to the storage tanks after measurement, never reaching the ship. The court did not mention any suit against the seller, the perpetrator of the fraud, I suspect because the seller was judgment proof. The purchaser attempted to recover from the ship, the marine underwriter, and the cargo inspector. The action against the first two failed. Against the third, it was successful. Citing *Ultramares* and *Glanzer*, the court stated,

Marco diverted tallow from one of his tanks to another and it seems to me that Martin [the cargo inspector] negligently — grossly so — lent himself to the scheme. ... When Martin was retained by Marco he was told that the shipment was for the account of Plata and his

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39 See E. Allan Farnsworth, *Farnsworth on Contracts* § 429a (1990).

40 214 N.Y.S.2d 43 (1957).

41 *Id.* at 48. It is not clear whether there was a "final and binding" clause.

certificate recites that it was Plata that had delivered to it 501 tons. Martin's liability seems to me to be plain.<sup>42</sup>

It is not clear from the opinion why the court labeled Martin's negligence "gross" or whether that label mattered. In *Glanzer*, it was not necessary to prove gross negligence, and it is unlikely that the court was attempting to raise the standard of proof.<sup>43</sup> From my perspective, the most interesting piece of the opinion was the dog that did not bark. Nowhere did the court mention the possibility that Martin, the inspector, had attempted in any way to disclaim liability. The court continued to enforce *Glanzer*, and nearly four decades later, there is no hint that there was any attempt to contract around the *Glanzer* rule.

The silence could simply result from the court's ignoring the liability limitation — that appears to be what happened in some petroleum product disputes, as we shall see below. More likely, there was no disclaimer. This is speculative, but there are some pretty good reasons for reaching this conclusion. First, weighers at this time were typically small firms that would not be plausible deep pockets. Second, the losses from a weigher's error were not likely to result in significant dollar amounts. Disclaimers would be more likely today when surveyors (at least some of them) have become billion-dollar companies and when small errors could result in claims in excess of \$100,000. In fact, as we shall see, even where the surveyors are deep pockets and their exposure significant, the contracts do not all have disclaimers. But before getting to those, let us consider two classes of contracts that feature disclaimers and the courts' general indifference to them.

Consider first the treatment of the surveyors' close cousins, classification societies. Ship classification societies provide a variety of services to owners of ships. Hull and P&I insurers will refuse to insure a ship if it does not have the appropriate certification from a classification society. Sales of vessels, charter arrangements, and contracts with cargo owners are often contingent upon the society certifying that the vessel meets a certain quality standard (that it is "in class"). There are a handful of cases in which classification societies have been sued for performing their service in a negligent or unworkmanlike manner. If the classification society errs, a ship might sink, resulting in huge damage claims. Although the courts have rejected their

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42 *Id.* at 49.

43 Gross negligence was, however, one of the exceptions under *Ultramares*.

contractual disclaimers, the classification societies have defeated claims against them on other grounds.<sup>44</sup>

In *Great American Insurance Co. v. Bureau Veritas*,<sup>45</sup> a ship sank with the loss of the entire cargo and the lives of eleven crew members. The owner, charterer, and their respective insurance companies settled claims against them and then sought indemnification and subrogation from Bureau Veritas, the ship's classification society. Although he found in favor of the classification society, Judge Tyler ignored its disclaimer of liability asserting that it "is overbroad and unenforceable as contrary to public policy."<sup>46</sup> In another case involving a claim against a classification society for a more modest loss, the court denied the defense's motion for summary judgment because the non-prominence of the clauses in the contract "raise a question of fact as to the actual intention of the parties. Moreover, we are inclined, without the benefit of trial testimony as to the parties' intention, to agree with Judge Tyler's dictum."<sup>47</sup> One wonders what sort of trial testimony would help resolve this question.

Disclaimers did not survive in cases in which the surveyor's alleged negligence resulted in a cargo being lost. In *Royal Embassy of Saudi Arabia v. S.S. Ioannis Martinos*,<sup>48</sup> the surveyor certified that cargo was properly stowed on board. In the course of the voyage, eighty-seven containers stored on deck, with a value in excess of \$8 million, were lost at sea, and the surveying firm was among those sued for the loss. The magistrate refused to grant summary judgment to the surveyor, despite the disclaimers that appeared on the "Certificates of Readiness."<sup>49</sup> Exculpatory clauses would be honored so long as they do not increase the likelihood that negligence will occur. Concluding that it would in this context, the magistrate held the disclaimer void as against public policy.<sup>50</sup> In a similar case, *Bosnor, S.A. de C.V. v.*

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44 For a discussion of the problematic enforceability of disclaimers by maritime surveyors, see Claude L. Stuart, III & Evan T. Caffrey, *Liability of Marine Surveyors, Adjusters, and Claims Handlers*, 22 Tul. Mar. L.J. 1, 23-27 (1997).

45 338 F. Supp. 999 (S.D.N.Y. 1972).

46 *Id.* at 1010 n.6.

47 *Sundance Cruises v. Am. Bureau of Shipping*, 799 F. Supp. 363, 378 (D.N.J. 1992).

48 1986 AMC 769 (E.D.N.C. 1984).

49 [The surveyor] makes no warranty of any kind, either express or implied, including warranty of workmanlike service, respecting its work or services, and is not an insurer of cargo or other property or of the ship ... and disclaims all legal responsibility for any loss, damage, personal injury or death resulting from any act, default, omission, negligence, error or breach of any said warranties.

*Id.* at 787.

50 *Id.* at 788-89.

*Tug L.A. Barrios*,<sup>51</sup> the marine surveyor was one of many defendants in a comparative fault proceeding following the loss of a cargo worth over \$1 million. The survey report included this standard clause:

The surveyor agrees to use best efforts in behalf of those for whom this survey is made, however, this report is issued subject to the conditions that it is understood and agreed that neither this office nor any surveyor thereof will have any liability for any inaccuracy, errors or omissions, whether due to negligence or otherwise, in excess of the actual charge made for this survey, and that use of this report shall be construed to be an acceptance of the foregoing.<sup>52</sup>

The court, however, could find no evidence that the plaintiffs had "agreed to this limited liability clause. Clauses that purport to limit a party's legal responsibility are strictly construed and to be given legal effect must clearly express the intent of all parties whose liability is altered by the agreement."<sup>53</sup>

Limitations on liability are commonly used in petroleum transactions. In *Global Petroleum Corp. v. Torco Oil Co.*,<sup>54</sup> the court recognized that the surveyor, Saybolt, had attempted to limit liability, but still denied Saybolt's motion for partial summary judgment.

The basis for Saybolt's motion is straightforward. Saybolt, since at least 1983, has published a booklet entitled "Price Schedules and Terms, Conditions and Limitations of Services" (the "price booklet"). They claim that it has been their regular business practice since that time to send copies of this booklet to all of its regular customers and that it is customary for all independent testing laboratories to do so. Further, Saybolt maintains that it is industry custom for there to be

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51 796 F.2d 776 (5th Cir. Tex. 1986).

52 *Id.* at 781.

53 *Id.* For another example of a court holding an exculpatory clause unenforceable, see *Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp.*, 548 F. Supp. 691 (N.D.Cal. 1981). The clause in question was in remarkably plain English:

The Salvage Association London believes that the surveyor appointed by them is fully competent to carry out this survey but the resultant certificate will be issued on the express condition that neither the Salvage Association London nor the surveyor shall in any circumstances be responsible or liable to any person for any act or omission, default or negligence of the surveyor in the conduct of the survey or the contents of the certificate or for any situation or event which may occur subsequent to the issue of the certificate.

*Id.* at 694.

54 1988 WL 82239 (D. Mass.).



no formal written agreement between testing labs and their customers and for those customers to rely on information in the price booklet. In addition, Saybolt includes a notice in bold letters at the bottom of each of its invoices directing the reader to "Refer to our price list for terms, conditions and limitations of our services."<sup>55</sup>

The terms, conditions, and limitations included the following:

(a) Neither E.W. SAYBOLT & CO., INC. nor any of its employees, agents or sub-contractors shall be liable for any loss or damage arising out of E.W. SAYBOLT & CO., INC.'s performance or non-performance, whether by way of negligence or breach of contract, or otherwise, in any amount greater than twice the amount billed to the customer for the work leading to the claim of the customer. Said remedy shall be the sole and exclusive remedy against E.W. SAYBOLT & CO., INC. arising out of its work.

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(c) E.W. SAYBOLT & CO., INC. reports are submitted in writing and are for our customers only. Our customers are considered to be only those entities being billed for our services. Acquisition of an E.W. SAYBOLT & CO., INC. report by other than our customer does not constitute a representation of E.W. SAYBOLT & CO., INC. as to the accuracy of the contents thereof.

(d) In no event shall E.W. SAYBOLT & CO., INC., its employees, agents or sub-contractors be responsible for consequential or special damages of any kind or in any amount.<sup>56</sup>

Hence, Saybolt, and probably the other inspectors, had for some period of time expressly limited their liability for *Glanzer*-type damages. These terms and conditions were incorporated into the contract by the notice on the invoices. Or at least they would be as long as the principals did not have inconsistent language in their documents. In a battle of the forms, the disclaimer would likely lose.

In support of its motion, Saybolt produced an affidavit from someone who had worked in the petroleum testing industry for over thirty years, stating that he has

personal knowledge that it is customary in the petroleum testing industry for the parties to an agreement with an independent testing

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

laboratory to refer to the independent testing laboratory's schedule of services, prices, terms and conditions in determining the terms and conditions between the independent testing laboratory and the customer.<sup>57</sup>

However, the plaintiff's vice-president filed an affidavit in which he claimed that he has been involved in "hundreds of transactions" and has retained the services of independent testing laboratories, including third party defendant Saybolt on "hundreds of occasions"; that he knows of the custom of the industry in retaining testing laboratories, and that it is "not customary for a buyer and seller to refer to the testing laboratory's schedule ... in determining the terms and conditions."<sup>58</sup>

That apparently was enough to produce a triable issue of fact.

Despite the fact that Saybolt claimed to make its liability limitations known to all customers, three cases concerning alleged negligence on Saybolt's part were decided without reference to the disclaimers.<sup>59</sup> In only one instance did the court both mention the disclaimer and honor it.<sup>60</sup> Saybolt's negligence "did not rise to the level of gross negligence and certainly not to the level of reckless, wanton, or indifferent misconduct which would negate its limitation of liability."<sup>61</sup> Saybolt's limitation of liability as set forth in the standard terms and conditions in its 1986 schedule of services and prices limited liability to "Twice the amount billed to the customer leading to the claim of the customer." Since the fee for tank inspection was \$200, Saybolt's liability was limited to \$400.

The uneven treatment of the Saybolt liability limitation is partly due to the general hostility to disclaimers. It also reflects the manner in which Saybolt, and others, attempt to incorporate the limitations into their contracts. Did

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57 *Id.*

58 1988 WL 143135.

59 In *Marathon International Petroleum Supply Co. v. I.T.I. Shipping, S.A.*, 766 F. Supp. 130 (S.D.N.Y. 1991), the court ruled that had Saybolt's negligence caused the loss, it would have been liable, citing *Glanzer* and *Plata*. Saybolt avoided liability, however, because its negligence did not cause the harm. In *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 826 F.2d 424 (5th Cir. La. 1987), Saybolt avoided liability by showing that it was not negligent. In *Anschutz Petroleum Marketing Co. v. E.W. Saybolt & Co.*, No. 82 Civ. 4498-CSH (S.D.N.Y. 1985), Saybolt failed in an attempt to bring in a third-party defendant to reduce its liability by indemnity or contribution. The court took no position on whether Saybolt had, in fact, breached its obligation.

60 *Conoco v. Tank Barge Interstate*, 36 U.S.D.C. N.J. Civ. 87-2269 (1990).

61 *Id.* at 3.

the principals agree to incorporate the clause from the price list? A court could easily find that they had not. One anonymous industry source told me that after receiving the price lists, some oil traders send back letters rejecting the disclaimers. This suggests that rather than confronting the matter directly, the parties have chosen instead to jockey for position in the battle of the forms.<sup>62</sup> While the principals are quite at ease with final and binding clauses, there seems to be a lot more resistance to the surveyors' disclaimers. I will explore some of the reasons for that in Section V. First, however, I will examine the judicial treatment of damages in the absence of a contractual limitation on liability.

#### IV. EXTRA-CONTRACTUAL LIMITS ON SURVEYOR LIABILITY

If *Glanzer's* beans were misweighed, the potential liability would be easily ascertainable as the product of the contract price and the shortfall. Other failures by the surveyor intermediaries can have much more significant consequences. If a classification society messes up, people can die; ships and cargoes can be lost. Less dramatic, but still substantial, losses can result if the intermediary's failure enables the buyer to reject a cargo. A minor error in measuring quality could result in a million-dollar loss for the seller. If the surveyor's contract includes no liability limitation, or if the court chooses to ignore one, there remains the question: What is the extent of the surveyor's liability?

The Restatement (Second) of Contracts suggests that the surveyor's liability might be limited if the losses are grossly disproportionate to the price charged for the service.

There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability.<sup>63</sup>

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62 See Victor P. Goldberg, *The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule*, 76 Ore. L. Rev. 155 (1997).

63 Restatement (Second) of Contracts § 351f.

In demarcating the boundaries of tort liability under *Glanzer*, Cardozo invoked disproportionate liability in distinguishing *H.R. Moch Co. v. Rensselaer Water Co.*<sup>64</sup> He did not address the interplay between liability and insurance, a question that has surfaced in some of the more recent litigation.

### A. The Ship Classification Cases

While rejecting the contractual disclaimers, the courts have invariably shielded the classification societies from liability, either by invoking the disproportionate liability exception or suggesting that having the societies serve as insurers was impractical. In *Bureau Veritas*, Judge Tyler held that the defendant's acts were neither negligent nor unworkmanlike (no fault) and that even if they had been at fault, the owner and charterer were fully informed of the defects. (There was intervening fault, or alternatively, there was no reliance.) The finding of no fault made it unnecessary to deal with the general question of subjecting classification societies to liability for substandard performance. Although the issue had not been briefed, Tyler suggested that it would be unwise to hold the classification society liable, noting that liability would convert the classification society into a de facto insurer.

[T]his right of action would have the effect of making the classification society an absolute insurer of any vessel it surveys and certifies. Not only is this liability not commensurate with the amount of control that a classification society has over a vessel; it is also not in accord with the intent of the parties, the fees charged or the service performed. Further, by making classification societies the effective insurers of nearly all seagoing vessels, insurance companies such as those here involved, might be putting themselves out of business, a result they certainly did not contemplate by bringing this suit.<sup>65</sup>

In *Sundance Cruises Corp. v. The American Bureau of Shipping*,<sup>66</sup> the Bureau issued a safety certificate for a vessel, such certificates being required if a vessel is to obtain hull insurance and to operate in international trade. Fifteen days after the certificate was issued, the ship sank. The owner sought

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64 159 N.E. 896 (1928).

65 *Id.* at 1012.

66 799 F. Supp. 363 (S.D.N.Y. 1992).

compensatory damages of \$64 million and punitive damages of \$200 million. The court granted the defendant's motion for summary judgment.

[T]he disparity between the \$85,000 contract price paid and the more than \$64 million in damages claimed supported our conclusion that in issuing the certificates defendant had no intention of guaranteeing the vessel's seaworthiness or becoming the shipowner's insurer. ... [W]e inferred that the fees defendant charged here are comparable to those that any other of the classification societies nominated by the Bahamas to issue statutory safety certificates on its behalf would have charged. It thus appeared to us that accepted classification society practice with respect to fees indicates that such societies do not assume the risk of acting as insurer.<sup>67</sup>

Thus, as in *Bureau Veritas*, the court relied in part on an inference from the magnitude of the fees to conclude that the classification society could not have meant to act as an insurer.

We are left then with the odd picture of a court inferring the content of a contract, while, at the same time, rejecting the explicit language (the disclaimers) of the contract. What makes that rejection especially odd is that the *Sundance* court emphatically rejected two of the primary grounds for not enforcing exculpatory clauses. The plaintiff was a large, sophisticated business entity with the capacity to negotiate terms for itself, and the ship certification business itself is highly competitive. "[T]he Agreement into which plaintiff ultimately entered could not be found to be the result of anything but arms-length bargaining."<sup>68</sup> Granted that, what function could be served by substituting the inference from the apparent inadequacy of an \$85,000 fee for explicit contract language?

The House of Lords came to the same result without invoking disproportionate liability, relying instead on intuitions about the interaction between liability and insurance in *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (The Nicholas H)*.<sup>69</sup> It would be wasteful, the Lords suggested, for the society to act as an insurer. After the ship went down, the cargo owners collected \$500,000 from the ship owner, the statutory maximum (a tonnage limitation) and then sued the classification society for the balance of their claim, \$5.7 million. Assuming for purposes of the

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67 *Id.* at 376. The granting of summary judgment was justified on other grounds as well, including a finding that under the applicable law (Bahamian), the defendant was an agent of the state and therefore immune.

68 *Id.* at 383.

69 [1996] 1 A.C. 211.

litigation that the society had been careless and that the consequences of the lack of care had been foreseeable, the Lords held that the shipowners had a non-delegable contractual duty and that it would not be "fair, just, and reasonable" to impose through tort a duty of care upon the classification society. The owner's contractual duty was circumscribed by an elaborate set of legal rules (the Hague Rules on tonnage limitations<sup>70</sup>) that "create an intricate blend of responsibilities and liabilities, rights and immunities, limitations on the amount of damages recoverable, time bars, evidential provisions, indemnities and liberties;" holding the defendant liable "would add an identical or virtually identical duty owed by the classification society to that owed by the shipowners, but without any of these balancing factors, which are internationally recognised and accepted."<sup>71</sup>

Lord Steyn for the majority suggested that imposing liability might have unfortunate effects on the classification society's incentives.<sup>72</sup> He further suggested that the costs of liability would ultimately be passed on to shipowners, either in higher fees for classification services (to cover increased insurance costs) or in indemnification arrangements, which, in effect, would allow an end-run around the statutory limitations on recovery against the owner.<sup>73</sup> Allowing a claim of this sort would add considerable deadweight costs to the process of settling claims between cargo and ship.

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70 6 Benedict on Admiralty chs. I-V (7th ed. rev. 1996) (Chapter I: Carriage of Goods by Sea Unification of Certain Rules of Law Relating to Bills of Lading, Visby Amendments, Feb. 23, 1968); the tonnage limitations are from section 503 of the English Merchant Shipping Act of 1894, reenacted as section 185 of and Schedule 7 to the Merchant Shipping Act of 1995.

71 [1996] 1 A.C. at 238 (*citing* *Marc Rich & Co. v. Bishop Rock Marine. Co. Ltd.*, [1994] 3 All E.R. 686, 1080).

72 [T]he question is whether ... classification societies ... would be able to carry out their functions as efficiently if they become the ready alternative target of cargo owners, who already have contractual claims against shipowners. ... In my judgment there must be some apprehension that the classification societies would adopt, to the detriment of their traditional role, a more defensive position. [1996] 1 A.C. at 241.

If such a duty is recognised, there is a risk that classification societies might be unwilling from time to time to survey the very vessels which most urgently require independent examination. It will also divert men and resources from the prime function of classification societies, namely to save life and ships at sea.

*Id.*

73 In a different context, product liability suits with indemnification against the owner have allowed injured workers to collect damages from employers in excess of those mandated in workers' compensation statutes.

At present, the system of settling cargo claims against shipowners is a relatively simple one. The claims are settled between the two sets of insurers. If the claims are not settled, they are resolved in arbitration or court proceedings. If a duty is held to exist in this case as between the classification society and cargo owners, classification societies will become potential defendants in many cases. An extra layer of insurance will become involved. The settlement process will inevitably become more complicated and expensive. Arbitration proceedings and court proceedings will often involve an additional party. And often-similar issues will have to be canvassed in separate proceedings since the classification societies will not be bound by arbitration clauses in the contracts of carriage.<sup>74</sup>

In dissent, Lord Lloyd of Berwick questioned the majority's arguments regarding insurance. There was, he noted, no evidence on the costs of insurance or on whether the costs would be passed on.<sup>75</sup> Regarding the claim that liability would entail a wasteful extra layer of insurance, he argued that traditionally, courts have treated the availability of insurance as irrelevant. Even if it were to be given some weight, in this particular case no evidence had been introduced. He continued:

[T]he court should be wary of expressing any view on the insurance position without any evidence on the point, and should not speculate as to the effect, if any, of an extra layer of insurance on the cost of settling claims. For what it may be worth, I would for my part doubt whether it would make much difference. More generally, I suspect that a decision in favour of the cargo owners would be welcomed by members of the shipping community at large, who are increasingly concerned by the proliferation of sub-standard classification societies.<sup>76</sup>

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74 [1996] 1 A.C. at 241.

75 *Id.* at 222.

76 *Id.* at 229. In *Carbotrade S.p.A. v. Bureau Veritas*, 901 F. Supp. 737 (S.D.N.Y. 1995), the charterer obtained a default judgment against the owner of a sunken vessel in an arbitration. The charterer could not recover from the owner or from the owner's insurer (who claimed that the coverage was voided by the owner's violation of manning requirements). The charterer's insurer paid a \$1.25 million claim to the owner of the cargo. Pursuant to their settlement agreement, the charterer, its insurer, and the cargo owner were to divvy up any recovery they could get from the classification society for an allegedly inadequate performance of its duties. Applying British law, the court concluded that *The Nicholas H* was apposite, and it granted summary judgment for the defense. It would also grant summary judgment if federal maritime law applied. Concluding that the case was more like *Ultramares* than *Glanzer* (with respect to the "ends and aim of the transaction"), the court held

## B. The Surveyor Cases

The disproportionate liability question arose in two cases involving SGS, one of the major surveyors. In the first, *Vitol Trading S.A., Inc. v. SGS Control Services, Inc.*,<sup>77</sup> it was merely *dictum*, as the court decided the case on other grounds. In the second, *Interore*,<sup>78</sup> the Court of Appeals reversed the trial court's finding on the issue despite the fact that the issue had not even been argued by the plaintiff.

Vitol sold naphtha to Sun Oil; SGS was jointly hired to test the contents to assure that they met the specifications. The market value of the cargo was about \$11 million, and when SGS's tests showed that the cargo failed to meet specifications, Sun rejected the cargo. It then purchased the same cargo from Vitol at distress prices. Vitol sued SGS for its losses (around \$475,000), which consisted primarily of the price differential.

SGS, the court found, had breached its duty of workmanlike performance. However, since the facts suggested that Vitol had tendered nonconforming cargo, the breach did not cause the harm. Vitol's remedy was therefore limited to return of its share of the fee SGS had received for performing the particular test — \$220. But what if SGS's failure had caused Vitol's loss?<sup>79</sup> In *dicta*, the court suggested that Vitol would not have been entitled to recover for these special damages. Given the modest compensation, it was not reasonable to infer that SGS had assumed this risk.

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that since the survey was performed for the owner, no duty of care was owed by the surveyor to either the charterer or the cargo. Even if it did owe such a duty, there was no evidence that the plaintiffs had relied on the classification certificates. The defendant had, in this instance, identified the defects, but had arguably not put sufficient weight upon them when determining that the ship could safely make its next voyage. On appeal, the court held that Greek law applied and that a trial on the issue of negligence was required. At a bench trial, the court concluded that there was no negligence, and that result was upheld on appeal. *Carbotrade, S.p.A. v. Bureau Veritas*, 99 F.3d 86 (2d Cir. N.Y. 1996); *Carbotrade S.p.A. v. Bureau Veritas*, 216 F.3d 1071 (2d Cir. N.Y. 2000) (unpublished opinion).

77 874 F.2d 76 (2d Cir. N.Y. 1989).

78 743 F. Supp. 250 (1990).

79 The plaintiff's brief included a strong hint that there had been no disclaimers: SGS argues that Vitol's loss was not foreseeable because SGS's inspection fee was so low. There is no case law to the effect that the liability of a provider of services is somewhat limited by the amount charged. ... If SGS wanted to limit liability it simply could have inserted such a provision in its rates and tariffs so that a potential customer would have knowledge of any limitation before deciding whether to utilize such services.

Plaintiff's Brief at 40.



This enormous disparity between the fee SGS charged Vitol and the damage liability SGS allegedly assumed is persuasive evidence that assumption of that risk was not within SGS's contemplation at the time it agreed to perform the testing ... If, as a rational economic actor, SGS intended to assume that risk, plainly it would have charged substantially more for its testing services. Or it might have turned down Vitol's request altogether rather than risking so large a liability for a pittance.<sup>80</sup>

Ironically, the evidence of the disparity was not introduced at trial. In papers filed after the decision, the plaintiff observed, "[T]here is no proof as to what SGS charged because SGS did not submit any during the trial as its charges and fees were not in issue at any time. The only part of the record that contains any mention of the fees is in SGS' Answer."<sup>81</sup> The \$220 fee was the charge for a single test, which had been performed negligently (by a subcontractor); the charges for the entire SGS service were \$13,556.36, half of which was assessed to Vitol and half to Sun.<sup>82</sup> That, arguably, is not a pittance.

Petroleum shipments are large enough so that even fairly modest errors in the measurement of quantity can translate into significant dollar amounts. Nonetheless, as in *Vitol*, the surveyors' significant exposure comes from cases where the error allows the buyer to reject delivery. That was also the case in *Interore*. The underlying transaction was a \$4 million contract for the sale of fertilizer by Interore to buyers in New Zealand. Part of the cargo was picked up in Sweden, and the remainder in Florida. The contract required Interore to secure the services of a "hold inspector" to certify that the ship's hold was clean prior to loading. SGS, which had provided such a service to Interore hundreds of times in the past, agreed to do so for \$50 per hold, \$150 in total.<sup>83</sup> The inspection failed to detect some barley

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80 *Vitol*, 874 F.2d at 81 (citations omitted). The court cited the Restatement (Second) of Contracts section 351: "The fact that price [charged] is relatively small suggests that it was not intended to cover the risk of such liability." *Id.* at 81. Judge Cardamone, writing for the panel, also attempted to distinguish the case from *Glanzer* by arguing that the public weigher had had more notice of the consequences of its error than had SGS. In his concurrence, Judge Pratt disputed this, arguing that SGS's knowledge of the Sun-Vitol contract put it squarely within the *Glanzer* exception. The third member of the panel, Judge Feinberg, felt it unnecessary to choose sides.

81 Plaintiff's Petition for Rehearing at 12.

82 *Id.*

83 SGS performed other services (supervising the loading, chemical analysis of the fertilizer) for an additional \$1,860. 743 F. Supp. at 252.

left over from a prior voyage. When the cargo arrived in New Zealand, it was contaminated with barley, and the Ministry of Agriculture denied it entry. The cargo was ultimately rejected and resold in Europe for less than the contract price. While the contamination was the ostensible ground for rejection, the buyer's refusal to accept the fertilizer was more likely based on the facts that the market price for fertilizer had fallen considerably prior to delivery and New Zealand's currency had been devalued. There was some testimony from those in the trade that rejection of a contaminated cargo of fertilizer was unprecedented, the normal remedy being a price adjustment;<sup>84</sup> however, the court did not find this significant.

The seller brought suit in the United States against SGS for its failure to perform its inspection in a workmanlike manner. It did not sue the Swedish inspector (another SGS company), even though the holds loaded in Sweden also had been contaminated (perhaps because the Swedish inspector included a liability limitation in its contract). The seller's suit against SGS was a small piece of the litigation pie, with the primary litigation taking place in New Zealand involving the buyer, seller, vessel, and cargo insurers.<sup>85</sup> The buyer, East Coast, ultimately paid \$400,000 to Interore to settle the New Zealand claim. However, the parties designated the settlement as pertaining only to the Swedish portion of the cargo, thereby allowing Interore to pursue its claim for the American damages against SGS.<sup>86</sup>

Unlike its Swedish counterpart, SGS did not attempt to disclaim liability. The following legend, in capital letters, appeared at the bottom of its Certificate of Readiness, a preprinted form: "All inspections are carried out to the best of our knowledge and ability and our responsibility is limited to the exercise of reasonable care."<sup>87</sup> The court interpreted this to mean that the service was to be performed in a workmanlike manner. The defense, in its post-trial motions, did not attempt to deny that SGS would be responsible for negligent performance; rather, it attempted to show that the performance was reasonable, even though the outcome was unfortunate. "Plaintiff knew from

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84 Defendant's Brief at 42-43.

85 *Int'l Ore & Fertilizer Corp. v. East Coast Fertilizer Co. Ltd.*, [1986] 1 N.Z.L.R. 9, 13. In *Glanzer*, the lawsuit was filed by the buyer, who was not party to the weighing contract; here, in the American case, the plaintiff was in privity. In fact, the fertilizer contract was a cost and freight ("c&f") contract, so title should have passed when the ship was loaded. The buyer should have borne the risk of contamination, and SGS should have been defending against the buyer, making the case more directly parallel to *Glanzer*.

86 Plaintiff's Brief at 34-35.

87 *Int'l Ore & Fertilizer Corp. v. SGS Control Serv. Inc.*, 743 F. Supp. 250, 254 (1990).

extensive prior experience what the inspections they requested would entail. If they wished to alter the nature or scope of the duties to be performed under the inspection contract they were free to do so at any time."<sup>88</sup> After cataloging a number of things that SGS could have done, the defense argued, "All of these services could have been arranged ... and all of these would have found the barley. None of them would have been performed at the price or within the parameters of the service that had previously been routinely requested by and performed for plaintiff."<sup>89</sup> The argument failed, with the court holding the performance inadequate. That left the question of damages.

Citing the Restatement (Second) of Contracts section 351, comment f, and *Vitol*, the trial court held that it would be unreasonable to hold SGS liable for foreseeable damage. The informal nature of the dealings, including absence of a detailed written contract, indicated that there had been no careful attempt to allocate risks. Because of the extreme disparity between the loss and the price charged — the contract was for \$150 and the damages requested were \$2.4 million — the court inferred that the parties had not meant to allocate this risk to SGS.<sup>90</sup>

What the court gave in the name of contract, it took away under tort. SGS, said the court, was liable for negligent misrepresentation since it had made a representation that someone had relied on. It should have recognized that if it were to issue a certificate, the plaintiff would take no further precautions. At the same time, the plaintiff was also negligent because it had not brought home to SGS how important it was that the inspection be performed with great care. Had it been so informed, SGS might have performed a more careful inspection. Therefore, each was partly at fault. Holding them equally responsible, the court held SGS liable for 50% of the damage.

On appeal,<sup>91</sup> the only thing that survived was the outcome. Judge Winter, agreeing with SGS that its only duty to Interore arose from contract, threw out the tort claim. Despite the fact that Interore had not appealed the treatment of its contract claim and that neither party had briefed the issue, Judge Winter held that *Vitol* was merely *dictum* and that Interore could recover its consequential damages.<sup>92</sup> The *Vitol* reasoning "cannot be reconciled with the controlling

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88 Defendant's Post Trial Brief at 4.

89 *Id.*

90 This was a bifurcated trial with damages to be determined later, so the \$2.4 million figure's relationship to "the damages" is looser than usual. In the damage phase of the trial, the damage was reckoned at \$480,000 plus prejudgment interest. Report and Recommendation of the Magistrate, Mar. 31, 1993.

91 *Int'l Ore & Fertilizer Corp. v. SGS Control Serv., Inc.*, 38 F.3d 1279 (2d Cir. N.Y. 1994). I worked briefly (and without compensation) for SGS prior to oral argument.

92 The trial court reduced the damages by 50% because of the plaintiff's contributory

New York case *Glanzer v. Shepard*.<sup>93</sup> This is a peculiar reading of *Glanzer*, both because of the difference in the nature of damage in the two cases and because in *Moch*, Cardozo himself had drawn an inference regarding the defendant's assumption of liability from the magnitude of the fees. Moreover, Cardozo's decision in *Glanzer* concerned only the existence of liability, not the financial consequences of a defendant's failure.

Judge Winter distinguished, unconvincingly, the court's *Sundance* decision.

Our recent decision in *Sundance* ... is not to the contrary. *Sundance* was an action for damages on a contract for the classification for insurance purposes of an ocean-going passenger vessel. The court held that the disparity between the fee charged on the contract and damages sought disclosed that the parties did not foresee the risk of such liability. However, the purpose of the contractual obligation of the ship classification society in *Sundance* contrasts markedly with that of the inspector in *Vitol* and in the present case. ... In *Sundance*, the court therefore concluded that "the purpose of the classification certificate is not to guarantee safety, but merely to permit [the ship owner] to take advantage of the insurance rates available to a classed vessel." The purpose of the inspection in this case, however, was precisely to guarantee the condition of the hold so as to insure the preservation of the cargo. There is no other reason to perform such an inspection and no other reason to pay for one, whatever the amount.<sup>94</sup>

That is a non sequitur. Regardless of the reason for undertaking the contractual obligation, the question remains: What is the promisor's liability if it fails to perform? Should it be liable for all the consequential damages, and can we infer anything from the disparity between the fee and the damage? The *Sundance* court concluded that the disparity between the asserted damage and the fee suggested that the parties did not intend to assign this risk to the provider of the service. The court might well have been wrong — the argument has a certain circularity — but it is, nonetheless, the argument on which the trial court in *Interore* relied.

Judge Winter seems to have distinguished the cases on the ground that the classification of society's task is ancillary to the purchase of insurance.

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negligence. Judge Winter would have given *Interore* all the consequential damages, but held that its failure to appeal the contract claim precluded his increasing the award.

93 38 F.3d at 1284.

94 *Id.* at 1285.

But if Interore had wanted assurance, it did not have to purchase it from the inspector. It could have purchased insurance from third parties, and the availability of that insurance would have been contingent upon Interore's obtaining various inspection certificates. In its defense, SGS noted the commercial availability of insurance against the adverse consequences of its failure to find the barley:

Plaintiff's suggestion that Control Services [SGS] should have exercised a level of care commensurate with Interore's potential losses ... is flawed on two grounds. First, Control Services was not in this instance an insurer. It is possible to purchase — for a premium — insurance that will guarantee either or both of the quantity and quality of goods on arrival. It is also possible — again for a premium — to obtain so-called "full rejection coverage," insuring against rejection of a cargo for any reason.<sup>95</sup>

Had Interore purchased either form of insurance, the insurer would have almost certainly required inspection to cope with the inevitable moral hazard and adverse selection problems. Had it purchased the insurance, would Judge Winter have let SGS off the hook? Should liability depend on whether Interore purchased insurance or self-insured? Holding the surveyor liable for the losses arising from its negligence (or less-than-workmanlike performance) converts it into an insurer. If disclaimers will not be honored, then the surveyors are providing compulsory insurance with neither deductibles nor copayments nor any of the other devices that insurers use to limit their exposure.

There is nothing wrong, in principle, with a party having multiple sources of recovery against the same risk. Subrogation is, after all, common, and insurance rates will reflect the insurance company's expected net recovery from others. Their Lordships danced around that issue in *The Nicholas H.*<sup>96</sup> Still, other things equal, if compulsory insurance for surveyors would result in a system of costly transfers between insurers, that ought to make surveyor liability a less attractive policy. So, holding surveyors liable for consequential damage comes down to the effects of insurance that is both mandatory and duplicative.

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<sup>95</sup> Defendant's Post-Trial Brief at 21.

<sup>96</sup> See text accompanying *supra* notes 69-76.

## V. THE EVIDENCE FROM PRACTICE

If measurement errors are random, traders should expect that in the long run, the errors will balance out. Holding surveyors liable means that they in effect provide a form of insurance that is triggered by a finding of fault. If surveyors as a class are potentially liable for errors, their revenues must be sufficient to cover the costs of providing this insurance — their potential liability and the legal fees. With liability, then, the traders will pay a small amount in each transaction to cover the expected damages and legal fees and, on occasion, will receive compensation for a loss arising from the mismeasurement. The question is whether the gains to traders as a group from the incremental deterrence effect of legal liability exceed the net costs (essentially the litigation costs).

A trader might be involved in hundreds of transactions in a given year, purchasing surveying services from a small number of companies. The surveyor has a substantial incentive to take care even if there is no legal liability, since it must worry about its reputation and good will with the particular trader and with the trade itself. So, even absent liability, the surveyor has a powerful incentive to perform in a competent manner. Moreover, any incentive arising from the liability exposure is blunted by the surveyor's "errors and omissions" policies, which will cover at least some of its exposure. Of course, if the E&O policy were experience-rated, then the liability exposure would have more impact on the surveyor's behavior. To further complicate the picture, the trader's direct insurance might well cover this contingency as well, in which case its direct insurer would, via subrogation, attempt to recover its payments from the surveyor's insurer.

Shifting the losses around in this way looks like a reasonably expensive proposition with little to show for it in the way of deterrence. My instinct is that the costs to traders as a class of holding surveyors liable exceed the benefits. If the surveyors are small firms with shallow pockets and if the amounts in dispute are likely to be small, it would not be surprising to observe the parties accepting any default rule, including the *Glanzer*-rule. In those instances in which surveyors are reasonably large entities with deep pockets and potential liability is large, I would expect that the common interest of the parties would best be served by limiting the liability of the surveyors to a modest multiple of their fee. While the first point seems to be confirmed in practice, the evidence on the latter is mixed.

### A. Beans

If *Glanzer* were relitigated today, the contract would not present a hurdle to the buyer's recovery. Public weighers have not inserted liability limitations in their contracts. This suggests a nice, easy conclusion: Cardozo had it right. Weighers would pay compensation if they have erred, and buyers and sellers would find it in their mutual interest to have the weighers provide this limited insurance. In fact, the picture is more complicated than this. True, the weighers have not revised their contracts. But this observation is vitiated by two facts. First, their contracts are oral, not written. The absence of disclaimers and similar clauses in an oral contract is hardly noteworthy. Indeed, it could hardly be otherwise. Of course, if the issue mattered that much, the parties could have found it in their mutual interest to reduce at least one aspect of their relationship to writing. So, it is possible that they would have preferred a regime in which weighers were not legally responsible for errors, but the costs of putting it (and the rest of the agreement) in writing exceeded the benefits. Second, no one seems to care. I spoke with some industry veterans (one of whom had been a public weigher for forty years), and no one could recall a public weigher being sued for negligent weighing. The *Glanzer*-rule, right or wrong, did not seem to matter.

### B. Coffee Beans

Many international coffee transactions are under standardized contracts published by the Green Coffee Association. Buyers and sellers agree that if a dispute arises, their only recourse will be to arbitration under the Association's rules. The arbitration clause encompasses all controversies "involving the principals, agents, brokers, or others who actually subscribe hereto," the final term including public weighers. The arbitration and the remedies are governed by New York law, except that consequential damages cannot be awarded. That is somewhat ambiguous, since *Glanzer* is still New York law and the damages could be deemed consequential. If the issue were to arise, I suspect that the arbitrators would find that the limitation on consequential damages applies only to the buyer and seller, so that the *Glanzer*-rule would apply.

The beans are weighed both at the load port and discharge port. Since these weights might differ, the contracts must specify a mechanism for determining the transaction weight. The standardized contract provides for two options — delivered weights and shipping weights. The former is straightforward. The latter is qualified: "Coffee covered by this contract is sold on shipping weights. Any loss in weight exceeding \_\_\_ percent at port

of discharge is for the account of Seller at contract price."<sup>97</sup> The blank term can be negotiated and is typically one percent or less. So, if the weight on arrival is within one percent of the invoice weight, the seller pays on the basis of the shipping weight. If the invoice weight exceeds the destination weight by more than one percent, the payment to seller will be adjusted downward.<sup>98</sup> Regardless of which option is chosen, the contracts require that the coffee be weighed within fifteen days of delivery.<sup>99</sup> The expenses of weighing are assigned to one party, usually, but not always, the buyer. The weigher's lack of privity with one of the parties, a feature of the *Glanzer* contract, continues to this day.

My industry informants suggest that the contract language is not taken seriously in arbitrations.<sup>100</sup> Regardless of who hired the weigher, the weigher is viewed as an agent of both the seller and buyer. Further, errors discovered outside the fifteen-day window will often be corrected despite the clear language. A five-month gap, as in *Glanzer*, however, would almost certainly be too long. The weigher would, under *Glanzer*, be liable to a disappointed buyer. However, the buyer's first recourse would, in practice, be against the seller. Only if the seller were to become judgment-proof in the brief interval between the initial weighing and the correct weighing or if it were no longer subject to reputational sanctions would it be necessary to pursue a remedy against the weigher. Industry veterans could not recall an instance of a weigher being asked to make up the quantity difference. If, however, the buyer believes that it has been short-weighted, even after the fifteen days have passed, it would expect the weigher to pay for the reweighing, despite a lack of contract language to that effect.

For coffee traded on the Coffee, Sugar & Cocoa Exchange, the rules are quite different. Weighers and other intermediaries (master samplers and graders) are licensed by the Exchange. If the weigher fails to comply with

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97 C&F Contract of the Green Coffee Assoc. of New York City, Inc., effective Feb. 1, 1989 (on file with author) [hereinafter C&F Contract].

98 Weighing errors at the port of origin are likely to be skewed in favor of sellers, because of fears of corruption. If the beans weigh more at the destination than at origin (probably because of a weighing error at the origin), the buyer gets a break.

99 "Coffee is to be weighed at the port of destination within fifteen calendar days after discharge from the vessel ... . Weighing expenses, if any, for account of Buyer." C&F Contract, *supra* note 97. The contract also requires that quality claims be made within fifteen days.

100 Compare with Lisa Bernstein's findings that for the commodities she has examined, the arbitrators take the contract language extremely seriously. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999).



the appropriate procedures, it is subject to fines and penalties. Nothing in the Exchange rules suggests that the fines or penalties will be related to the market value of the shortfall or that the buyer will have any recourse against the weigher. The Exchange disclaims any liability to coffee traders for errors:

The Exchange, its officers, committee members, or employees, whether or not negligent, shall not be liable: (i) in any way by reason of the fact that coffee delivered under Coffee "C" contracts was not sampled, graded, weighed, or certified in accordance with the Rules; or (ii) for the authenticity validity, or accuracy of documents or any other information or data prepared by third parties (including samplers, weighers, and warehouses) not in the employ of the Exchange, notwithstanding the fact that the Exchange might select or license such third parties to take certain actions in accordance with the Rules, unless it is established that the Exchange, its officers, committee members, or employees acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused any loss.<sup>101</sup>

So, the Exchange, the one deep-pocket intermediary in the coffee business, contracted around the *Glanzer*-rule. It is not liable to the contracting parties, barring some egregious behavior on its part. The weighers themselves are subject to discipline for failure to follow proper procedures, not for erroneous weighing; that discipline does not include making the buyer whole. That outcome conforms to my expectations.

### C. Petroleum Products

I would have expected that contracts for the international shipments of petroleum products would limit the surveyor's liability. The surveyor is hired by buyer and seller, so there is no privity issue. The traders typically engage in a large number of transactions, and the number of surveyors serving this market is small. The surveyors tend to be large firms with reasonably deep pockets, and the potential damage is substantial. All of these factors suggest that the liability issue is important enough to warrant the attention of the parties. The fact that most, if not all, surveyors include liability limitations in their terms and conditions — recall the discussion of

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101 Coffee, Sugar & Cocoa Exchange, Coffee "C" Rules, Rule 8.10 (e) ¶ 4828 (1990).

Saybolt's contract<sup>102</sup> — seems to confirm this. However, the truth appears to be a bit more complex.

While it is true that the surveyors include the disclaimers on their price lists, the oil traders are not entirely happy about it. Their *ex post* discontent would not be noteworthy. We would expect that a firm that has suffered a \$500,000 loss as a result of a surveyor's error would be upset. There appears to be *ex ante* resistance as well. Industry sources indicated that one response the traders make when they receive the price lists is to send back acknowledgment letters that state that the liability limitations are not accepted. In the remainder of this Section, I will propose a number of explanations for the traders' apparent opposition to liability limitations, even if such limitations might be in their interests. Of course, even if the oil traders willingly accepted the terms *ex ante*, the courts' hostility to the disclaimers could trump even if the traders unambiguously gave their consent.

One possible explanation might be a variant on the free-rider problem. Suppose one oil trader accepts the disclaimer, while others do not. If the surveyor cannot charge a higher price for its services for the clients who refuse the disclaimer, then this trader will bear the costs of liability to others, but not reap the benefits. This explanation has an obvious problem. What prevents the surveyor from setting a higher price for the subset of customers who insist upon maintaining their right to sue? A standard response to this question is the invocation of adverse selection. Those sellers of surveying services who would insist upon a disclaimer might be systematically inferior to those who would not; or those oil traders who would insist upon maintaining their right to a legal remedy might deal in cargoes that have a greater likelihood for disputes or they might be vulnerable to greater damage claims in the event of a surveying error. By haggling over the disclaimer, the party reveals unfavorable information about itself. This seems highly unlikely for the oil traders since their repeated dealings would dampen any problems that could arise from such information asymmetries. Could negotiation over a disclaimer reveal much new information about either the surveyor or the oil trader, given a history of hundreds of similar transactions? I am skeptical.

The free-rider explanation might be salvaged in another way. Lawyers have learned how to game the battle of the forms.<sup>103</sup> Rather than negotiating the terms either one-on-one or collectively, they state their terms unilaterally

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102 See text at *supra* notes 54-61.

103 See text at *supra* note 62.

and hope that their terms will be the ones honored by the courts if the dispute ends up in litigation. If the surveyors do not object to an acknowledgment letter rejecting the liability limitation, perhaps because no one in authority read the letter, then the trader gets the *ex ante* benefit of being treated like everyone else and the *ex post* benefit of preserving the right to sue. The oil traders are likely emboldened by the judicial hostility to liability limitations.

A second response is what Hanson and Logue<sup>104</sup> label the first-party insurance externality. If the surveyors have broad protection under an errors and omissions policy, they might not reap much of a benefit from cutting their exposure. The gains accrue to their insurer, which might not fine-tune rates enough to make the no-liability policy sufficiently attractive. However, the insurance typically is experience-rated so that it amounts to temporally spreading the surveyor's liability costs; this externality, therefore, tends to disappear.

A third explanation relies on the peculiar nature of the marine insurance market, particularly the prominence of Lloyds in that market. If something goes wrong with a shipment, in many cases, the costs will be borne by an insurer and that insurer will have a right of subrogation against whoever caused the shipment to go awry. Within Lloyds, the risks are borne by individual syndicates that are at least as concerned with their own liability as they are with the total costs to Lloyds. It is possible that the distributional issue — where the losses ultimately fall — dominates the efficiency issue. Lloyds, unlike the Coffee Exchange, cannot or will not prevent the additional round of litigation. If this raises the costs of insuring through Lloyds, it need not hurt Lloyds insurers competitively if their way of doing business defines how competitors must do business as well. In effect, this argument relies on path dependency: traders are willing to pay additional costs for assigning legal fault in their dealings with surveyors, because their insurers are willing to pay the additional costs for assigning fault and the historical development of the insurance market was such that the behavior remains shielded from potentially lower cost competition.

Of course, the simplest explanation is that my instincts are just wrong. The benefits to oil traders of holding surveyors liable for their negligence could, indeed, outweigh the costs. I would feel more comfortable with that conclusion if the courts were to routinely honor liability limitations in B2B transactions and the gamesmanship in the battle of the forms were properly constrained.

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104 Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification of Enterprise Liability*, 76 Cornell L. Rev. 123 (1990).

### CONCLUDING REMARKS

*Glanzer* and *Ultramares* taken together suggest a somewhat unusual tort rule. Cardozo did not pay much attention to how the rule that comes out of these two decisions interacts with contract. In effect, the rule is: if it is easy to contract out, hold them liable; if it is difficult to contract out, do not. In the case of the negligent accountant, the ease of contracting is not symmetrical. It is hard for the accountant to contract specifically with the many people who might come across his report. If a disclaimer against the world is not enforceable, then he cannot protect himself from suits by plaintiffs who used his faulty work without paying for the privilege. If the default rule were no liability, then any potential user who wanted the accountant to provide some form of insurance could purchase it directly from the accountant.

For *Glanzer* and other traders, contracting out was relatively easy; indeed, oil traders usually were in privity. In some instances, reaching the potential claimants before performance would not be so easy; for example, a hold inspector in Florida might find it inconvenient to contract with a buyer in New Zealand.<sup>105</sup> The greater hurdles to a contractual solution were judicial hostility to liability limitations and the traders' ability to game the battle of the forms.

Because the barriers to contracting are generally low for surveyors, it would seem the most sensible rule would be: no contract, no liability. If contracting were easy, there would be no need for tort. If, however, tort law were to define the default rule, then the barriers to contracting out should be lowered, particularly the hostility to disclaimers.

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<sup>105</sup> It would not be terribly difficult to insist upon indemnification from the seller if the seller were to fail to extract acceptance of a disclaimer from the buyer.