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In re M/V DG HARMONY United States Court of Appeals for the Second Circuit 533 F.3d 83 (Decided March 3, 2008; Amended July 9, 2008)

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MANUFACTURER NOT HELD STRICTLY LIABLE FOR EXPLOSION CAUSED BY ITS PRODUCT, BUT IS LIABLE FOR BREACHING DUTY TO WARN.

The United States Court of Appeals for the Second Circuit declared that the manufacturer of calcium hypochlorite could not be held strictly liable for an explosion onboard a carrier ship. The court did, however, find that the manufacturer breached its duty to warn its customers and that the calcium hypochlorite was the cause of the explosion. The court remanded to the district court for a determination of whether a sufficient warning would have impacted method of the stowage of the calcium hypochlorite.

In re M/V DG HARMONY
United States Court of Appeals for the Second Circuit
533 F.3d 83
(Decided March 3, 2008; Amended July 9, 2008)[1]

On November 9, 1998 at approximately 7:20 a.m., an explosion ripped through the third hold of the M/V DG HARMONY container ship ("HARMONY"). The explosion led to the total destruction of both the vessel and its cargo. The HARMONY was registered in the Isle of Man, and owned by Navigator Shipping Ltd. ("Navigator"), a subsidiary of Safmarine and CMBT Lines N.V. ("SCL"). At the time of the explosion, the HARMONY was on charter to Di Gregorio Navegacao, Ltda., Cho Yang Shipping Co., and DSR-Senator Lines GmbH ("ship-owning interests").

The cargo of the HARMONY included ten containers, each containing approximately 16,000 kilograms of calcium hypochlorite ("calhypo"). Calhypo is an unstable substance, prone to "thermal runaway," a phenomenon in which heat produced by the calhypo heats the substance further, acting like a feedback loop. The reaction becomes so heated that it reaches a point of decomposition and a fire ensues. This point is known as its "critical ambient temperature" ("CAT"). The court found the CAT of the calhypo onboard the HARMONY to be below 41 degrees Celsius.

This chemical decomposition of calhypo is facilitated by the substance's exposure to a direct heat source, or by enclosing the substance within a container from which heat cannot escape. The International Maritime Organization ("IMO"), which lists dangerous substances in the International Maritime Dangerous Goods Code ("IMDG Code"), establishes general guidelines for the storage and transportation of dangerous substances. The IMDG Code warns that, in order to avoid decomposition of a dangerous substance, containers should be stowed away from radiant heat. The IMDG Code specifically lists calhypo as a Class 5.1 oxidizing substance and requires it to be kept away from sources of heat. The U.S. Department of Transportation regulations require similar care in the transport of dangerous substances.

Prior to its voyage, the Captain of the HARMONY received materials from the vessel's management company regarding recent industry warnings of the transportation and stowage of calhypo. The materials warned that the temperature of certain holds in container ships can reach the CAT of calhypo, and that calhypo should not be shipped in these holds, and if unavoidable that the containers be kept away from heat sources.

PPG Industries, Inc. ("PPG"), the manufacture of the substance, packaged the substance in large wooden drums, and shrinkwrapped the drums into bundles of four. PPG included a goods summary which identified the substance as calhypo and indicated its IMDG Code classification. A Material Safety Data Sheet was also included, which warned against stowing the containers near heat, sparks, or flames.

[1] As discussed below, the court amended the original decision, found at 518 F.3d 106 (2d Cir. 2008), and included therein a discussion of the cargo interests' potential claims under COGSA.

These containers were stowed in the port side of the HARMONY's third hold, adjacent to a heated port side bunker fuel tank.

After the explosion, numerous law suits were commenced in the Southern District of New York, though most were settled. The ship-owning and cargo interests declined to settle, and pursued legal recourse against PPG, alleging liability under theories of general negligence, negligent failure to warn, and strict liability. PPG argued that the ship-owning interests were themselves negligent in that the calhypo was stored adjacent to a heated bunker tank. The district court found that PPG was solely liable for the loss of the HARMONY under negligent failure to warn and strict liability theories. PPG appealed the decision.

The Second Circuit Court of Appeals first clarified that the district court had not ruled on a general negligence theory. The Court of Appeals then held that to the extent that the district court's opinion could be read as finding liability under a negligence theory, it was reversed.

The court next reviewed the claims under a strict liability theory. It reviewed the standards laid down in two previous opinions; *Senator Linie GMBH & Co. v. Sunway Line, Inc.*,[2] and *Contship Containerlines, Ltd. v. PPG Indus., Inc*[3] and the Carriage of Goods by Sea Act ("COGSA").[4] In *Senator Linie*, the court established strict liability for shippers of dangerous goods, where neither the shipper nor the carrier had knowledge of the goods. In *Contship*, the court declared that when both the shipper and carrier are aware of the risks of the goods being transported, the parties must litigate under a theory of negligence. Using the standard laid down in *Contship*, the Second Circuit noted that the ship-owning interests knew that calhypo was unstable, and still exposed the substance to heat. The ruling by the district court was reversed as to its finding of strict liability of PPG.

The court noted that although the cargo interests may seek to bring claims against PPG under COGSA as a third party, the ruling in *Contship* was not limited to carriers' knowledge. In fact, no party may bring claims of strict liability under COGSA which had any knowledge, actual or constructive, of the dangerous propensities of the substance.

The court next analyzed the parties' claims under a failure to warn theory. The court noted that in order for the plaintiffs to prevail, they must show that PPG failed to warn the carriers of the inherent dangers of the calhypo not reasonably foreseeable, and if a warning had been given the stowage would have been different.

Looking at whether PPG had a duty to warn, the court declared that the carrier may rely on what the shipper tells the carrier. The calhypo, indeed, posed a danger not reasonably foreseeable, thus invoking PPG's duty to warn. The court ruled that due to the poor packaging of the calhypo, the CAT was lowered, thus PPG had a duty to warn the carriers of not just the general risks of calhypo, but the specific risks involved with the calhypo as it was packaged. The court continued and ruled that the warnings PPG did give were inadequate and misleading, constituting a breaching its duty to warn.

The next inquiry involved whether PPG's breach of duty caused the explosion and subsequent destruction of the HARMONY. The court agreed with the district court's ruling that the calhypo caused the explosion. PPG argued that because the calhypo was stowed near the ship's bunker tank, the substance was exposed to heat, thus causing the fire. The Court was not pursuaded, and ruled that the district court's determination, which was based on a voluminous record, as well as testimony of witnesses, should not be reversed. The Court of Appeals declined to consider whether a warning, if given, would have prevented the explosion, or caused the containers to be stowed differently.

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[2] 291 F.3d 145 (2d Cir. 2002).
[3] 442 F.3d 74 (2d Cir. 2006).
[4] 46 U.S.C. § 30701.