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2009

SUPREME COURT ALLOWS PUNITIVE DAMAGES FOR REFUSAL TO PAY SEAMAN MAINTENANCE AND CURE

In a ruling handed down on June 25, 2009, the Supreme Court, in a sharply divided 5-4 decision, opened the door to the granting of punitive damages in cases involving a maritime employer's refusal to pay maintenance and cure to an injured seaman. This appears to be an abrupt change of course and another headache for shipowners in these troubled times.

Under the Constitution, Congress can change common law and maritime law, including what damages may be recovered in tort and breach of contract cases. Congress has legislated extensively to protect seamen, who have always been considered wards of the court, including laws like the Jones Act which allows an injured seaman to sue his employer for negligence and to collect damages awarded by a jury, including pain and suffering. Most employees in the United States have to be satisfied with unemployment compensation and medical insurance provided by their employers.

A seaman's right to sue for "maintenance and cure" is unique because if a seaman is injured or becomes ill while in the service of the ship, he is entitled to collect even if the injury or illness was due to his own negligence. "Maintenance" includes food and lodging, and "Cure" includes medical services until the seaman attains

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A MASTER'S OR SEAFARER'S SIMPLE INATTENTION CAN RESULT IN MANSLAUGHTER CONVICTION AND JAIL TIME

Outdated Seaman's Manslaughter Act Being Resurrected by Prosecutors

Masters, Engineers and other crewmembers are becoming easy targets for criminal charges in U.S. courts since an obscure statute dating back to the early 1800s has been dusted off and resurrected by overzealous prosecutors in recent years. Seafarers are being criminally prosecuted for what are really civil offenses.

The Seaman's Manslaughter Act, 18 USC § 1115, is unique and unfair because it makes only seafarers liable for fatal accidents that result from simple misconduct or negligence or inattention. This low standard is not imposed upon employees of any other industry, and it makes ship's officers and other crewmembers easy targets in collisions, fires, explosions and other incidents that are likely to occur at sea and result in fatalities.

Section 115 reads in part: *"Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed...shall be fined under this title or imprisoned not more than ten years, or both."*

Another part of Section 115 makes "every owner, charterer, inspector, or

other public officer" similarly liable if he "knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law" which results in destroying the life of any person.

These provisions were used after the Staten Island Ferry incident of October 15, 2003, to prosecute not only a member of the crew, but also a shoreside official. The original statute was passed in 1838 to protect passengers aboard steamships, which were considered more dangerous than sail vessels. The law demanded "utmost vigilance of the crew by attaching criminal liability for fatal lapses.

This is the same statute that sent a foreign master, Capt. Wolfgang Schröder, to jail when the bow thruster failed and the bow of the Zim Mexico III struck a container crane that collapsed and killed an engineer at Mobile, Alabama in 2006.

The maximum jail time is ten years. Another section of the statute, Section 1112, defines "manslaughter" as the "unlawful killing of a human being without malice." It can be

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SUPREME COURT RULES PORT CANNOT TAX SHIPS ON THE BASIS OF TONNAGE

The Supreme Court ruled on June 15, 2009 that a personal property tax imposed by a city only on large vessels using its port violates the U.S. Constitution clause that bars any state from levying a duty on tonnage.

The court ruled that a municipality could not enact an ordinance that applied almost exclusively to large oil tankers because a tonnage-based tax is not “for services provided to the vessel.”

The decision is narrow and may be limited to its peculiar facts. It was based solely on the Tonnage Clause.

The splintered court explicitly declined to consider other questions raised by the petitioner that the tax also violated the Due Process and Commerce clauses. *Polar Tankers Inc. v. City of Valdez* (Supreme Ct., June 15, 2009).

PUNITIVE DAMAGES

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maximum cure.

However, punitive damages are not allowed under the Jones Act. What seamen really wanted was the right to a jury trial, and they got it. If an employer refuses to provide maintenance and cure, that is a tort or breach of contract, and the claim could be made under the Jones Act or under general maritime law.

The dissenting justices argued that since punitive damages have generally not been available under maritime law, the Jones Act, or the Death on the High Seas Act, things should be kept uniform and punitive damages not be available only for refusal to pay maintenance and cure. However, maintenance and cure has always received special attention as seamen are considered wards of the court.

The Supreme Court accepted the petition for appeal because the Circuit Courts of Appeal were split on the issue. *Atlantic Sounding Co., et al. v. Edgar L. Townsend* (Supreme Ct., June 26, 2009).

MEASURES OF DAMAGES MAY DIFFER IN CARGO CASES

Market Value Remediation or Even Consequential Damages May Apply Under COGSA

Under COGSA, a carrier is not liable for more than the amount of damage “actually sustained.” 46 U.S.C. § 1304(5). Generally, the measure of damages is the difference between the fair market value of the goods at their destination in the condition in which they should have arrived and the fair market value in the condition in which they actually did arrive. Nevertheless, the market discount theory is not the exclusive measure of damages and need not be applied if “circumstances suggest a more appropriate alternative.”

Remediation Costs

In applying an alternative measure of damages, remediation costs incurred may represent the proper measure of damages under the circumstances where a shipper-consignee did not immediately resell the damaged cargo, consisting of tin plates, but instead reconditioned the tin plates and manufactured them into oil cans. The consignee then sold its oil in the reconditioned cans. However, in the subsequent action for damages, it never was clearly established whether the consignee sold oil in the reconditioned cans at a discount from oil sold in the tin cans that had not been damaged. The Court held that only the costs of reconditioning were appropriate damages.

In another case, remediation measure of damages was held appropriate since the owner sold gasoline cargo at full market price. The cost incurred in blending gasoline to ameliorate the damage was the most accurate measure of damages.

In a later case, however, there simply was no occasion for the district court to apply remediation damages. The cargo owner did not recondition the cargo; instead, after its surveyors

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TORTFEASOR WHO SETTLES MARITIME PERSONAL INJURY CLAIM MAY NOT SUE THE NON-SETTLING TORTFEASORS

Where more than one tortfeasor may have caused a maritime personal injury or cargo loss, may the injured party settle with one of the tortfeasors before trial, and release it from liability by assigning to the settling tortfeasor the injured party’s claim? If so, can the settling party sue the other tortfeasor for indemnity or contribution?

There is little precedent under maritime law to answer these questions. In the absence of any direct authority, admiralty courts may look to common law for guidance.

That is what the Fifth Circuit Court of Appeals did recently in a case where a worker, employed as a cook by a caterer to work on a semi-submersible drilling rig, was injured and sued the rig owner but not her employer, although there was information suggesting that the employer shared liability for the cook’s injuries.

The caterer had a Master Service Agreement with the rig owner that required the caterer’s liability insurer to defend and indemnify the rig owner in such cases. The rig owner did not implead the caterer; instead, the underwriter settled with the cook and took (1) an assignment of all the cook’s claims against her employer, and (2) a release that did not name the caterer among the released parties. The rig owner’s underwriter, as assignee of the cook’s claims, then sued the caterer/employer, but the suit was dismissed as invalid on its face because it was based upon the assignment of an “unliquidated personal injury claim.”

Under common law and the law of most states, *personal injury claims* are not assignable absent a statute to the contrary, although *property damage claims* are usually assignable. Under maritime law, assignment of either type of claim present a special problem because of the “proportionate liability framework” for general maritime tort

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“MISDIRECTED ARROW CLAUSE” ADDED TO P&I POLICY WILL NOT SAVE EVERYONE

Have you ever heard of a “Misdirected Arrow Clause” in a Protection and Indemnity Policy?

Such a clause is included to cover situations where, for example, a claim is made against a concessionaire on a cruise ship where it should have been made against the shipowner or operator who is a member of the P&I Club. In such cases, the Club will take over the defense of the claim. But read carefully, it does not cover claims that are the responsibility of the concessionaire.

In a recent case, a food and drinks concessionaire on a cruise ship claimed it paid a time-charterer cruise operator over \$300,000 per year to procure liability coverage for the concessionaire under an indemnity policy issued by a P&I Club to its members, the cruise operator, and the shipowners.

The concessionaire paid medical bills (maintenance and cure) relating to the hospitalization of a crew member who was in its employment. It then sought reimbursement from the P&I Club. The Club declined to pay because the policy contained a “Misdirected Arrow Clause” which limited coverage afforded to the shipowner only to instances wherein a third party “may be found liable to pay in the first instance for loss or damage which is properly the responsibility of the shipowner.”

The Trial Court granted summary judgment to the Club, and the Court of Appeals in New York affirmed because the seaman was employed by the concessionaire and so maintenance and cure was its responsibility and not that of the cruise operator or shipowner.

The Circuit Court noted that its affirmance was without prejudice to whatever remedies the concessionaire may have against the cruise ship operator (time charterer) who allegedly received \$300,000. *Trident Int’l, Ltd. v. Am. S.S. Mut. Prot. & Indem. Ass’n*, 2009 U.S. App. LEXIS 13297 (2d Cir., June 22, 2009).

DAMAGES IN CARGO CASES

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appraised the damaged cargo, plaintiff resold the cargo to its customers at a discount. Therefore, the market discount test clearly was the appropriate measure of damages.

Consequential Damages

“Consequential damages” are those that the carrier did not have reason to foresee as ordinary, natural consequences of a breach at the time the contract was made. This would include economic damages, such as demurrage charges.

Under the well-established rule of an old English case, *Hadley v. Baxendale*, (1854), which has also been applied in maritime law, a carrier is not liable for consequential damages unless the carrier had notice of special circumstances.

Therefore, a carrier is liable for consequential damages caused by an unreasonable and unnecessary delay in the transportation of goods only if it has notice of the special circumstances leading to those damages. *See Texas A&M Research Found. v. Magna Transp.*, 338 F.3d 394, 404 (5th Cir., July 9, 2003).

TORTFEASOR WHO SETTLES

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law established by the U.S. Supreme Court in the 1994 *McDermott* decision.

Under that framework, a maritime tortfeasor is ultimately liable only for his proportionate share of fault. The Fifth Circuit explained that, “In the event of settlement, a settling tortfeasor is presumed to pay only for his proportionate liability, non-settling tortfeasors receive no credit for the amount paid by a settling tortfeasor.”

Therefore, the Fifth Circuit followed the rule for general maritime law that “the assignment of tort claims from an injured party to one tortfeasor permitting the settling defendant to proceed against a co-tortfeasor is invalid.” *Lexington Ins. Co. v. S.H.R.M. Catering Servs.* (5th Cir. May 4, 2009).

ARBITRATION CLAUSE MUST BE VERY CLEAR TO LIMIT PANEL’S POWER TO IMPOSE SANCTIONS

Arbitrators’ Inherent Authority Cited By Court Of Appeals

Arbitration agreements sometimes stipulate that each party will bear the cost of its own arbitrator and attorneys’ fees and share equally the cost of the third arbitrator. Others simply stipulate that each side will bear its own attorneys’ fees and the arbitrators’ fees will be equally divided. Are such contracts always binding on arbitrators?

Apparently not.

The Circuit Court of Appeals in New York recently ruled that a broad arbitration clause which provided that “any disputes or differences that could not be agreed by the parties shall be decided by arbitration” confers “inherent authority” on arbitrators to sanction a party that participates in the arbitration “in bad faith,” and that such a sanction may include an award for attorneys’ fees or arbitrators’ fees.

But what about the parties’ stipulation regarding attorneys fees and arbitration costs?

The Second Circuit ruled that an agreement that each party bears its own legal fees was not an adoption of the well-known “American Rule” that each litigant bears his own legal costs, and the parties’ agreement to limit the arbitrator’s power to impose attorneys’ fees was binding on the arbitration panel only in the context of good faith dealings.

In the case on appeal, there was clear evidence of bad faith by one of the parties.

The broad arbitrators clause needed to be clear and unambiguous to limit inherent powers of the arbitrators even in bad faith situations. *Relia Star Life Ins. Co. v. EMC Nat’l Life Co.*, 564 F.3d 81 (2d Cir., Apr. 9, 2009).

CONGRESS MAY PROVIDE LEGAL PROTECTION FOR U.S. VESSELS AND MARINERS WHO FIGHT PIRATES

Heavily armed pirates in speedboats continue to chase and shoot at merchant vessels, which are then held for ransom. The large vessels try to increase speed and make evasive maneuvers in attempts to wiggle out of the danger, but, as everyone knows, numerous ships have fallen into the hands of these modern-day Blackbeards operating off the coast of Somalia or the Gulf of Aden. With no small arms on board, such merchant vessels are often easy prey for pirates. But even if armed security personnel are made part of the crew, what if they fired at someone they mistake for a pirate or innocent party?

Two bills have been introduced in Congress to provide legal protection for shipowners, time charterers, and individual crewmembers who take steps in good faith to defend their vessels against attacks by pirates, H.R. 2984, and H.R. 3376, both named the "United States Mariner and Vessel Protection Act of 2009."

H.R. 2984, proposed amendments to Title 46, would allow trained crewmembers to defend U.S. vessels in international waters against pirate attacks. It provides that an "owner, operator, time charterer, or master of vessel" shall not be liable for any damages in an action brought in a federal or state court arising out of use of force (including lethal force) in defense of a vessel against piracy. The same defenses are afforded an individual "unless the individual is grossly negligent or engages in willful misconduct."

The proposed law would apply only if the individual who uses force authorized under the regulations is a licensed officer or documented merchant mariner who has completed training certified by the Coast Guard for use of firearms aboard vessels. Meanwhile, the USCG issued an Advisory for U.S. flagged vessels.

Further, H.R. 2964 would apply only to a certified U.S. vessel operating in waters designated by the Secretary of Defense as "high risk waters."

H.R. 3376 is simpler and flatly provides that "owners, charterers, operators, Masters and mariners shall not be liable for any injury or death caused by such force to any person participating in the act of piracy."

A third bill, already passed by the House, the National Defense Authorization Act, H.R. 2647, would require the Department of Defense to protect U.S.-flagged ships in high risk waters, supplying military security teams to ride U.S. commercial vessels as they transit dangerous waters would be authorized by this bill.

Editor's Note: See page 5 for Coast Guard Advisory issued while waiting for Congress to act.

MANSLAUGHTER

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special maritime and territorial jurisdiction of the United States," a conviction for voluntary manslaughter can result in a fine or imprisonment of not more than 15 years, or both.

Involuntary manslaughter calls for a fine or imprisonment of eight years, or both. Section 1112, is aimed at "whoever is guilty" within maritime jurisdiction so it MAY not apply solely to seamen.

The Manslaughter section, § 1112, applies only within the maritime and territorial jurisdiction of the United States, so it applies only to U.S. waters. The two sections appear to overlap, and involuntary manslaughter includes the commission of a lawful act "without due caution and circumspection" which might produce death.

Thus, the "misconduct, negligence, or inattention" of § 1115 could also result in a charge of involuntary manslaughter under § 1112.

All the prosecutor might have to provide to obtain a manslaughter conviction is that a death was caused by



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"misconduct, negligence or inattention" of duties of the defendant "without due caution and circumspection."

Unlike manslaughter statutes applicable to all other persons, "motive or intent" on the part of the seafarer need not be proven, nor does the misconduct, negligence or inattention of the seaman have to be "willful" or "gross."

Failure to hold a fire or lifeboat drill is all it takes if later in the voyage some relevant fatality occurs. An inadequate attempt to rescue someone who fell overboard might also be sufficient.

Where the owner or charterer is a corporation, its executive officers in control may be held liable, but only if he or she "knowingly and willfully" allowed the negligence or misconduct.

The Council of American Master Mariners is making efforts to have the unfair statute amended.

Meanwhile, a simple navigation mistake or "inattention" to some duty that causes death could land a mariner in prison for a long time. For many years, the obviously unfair statute was allowed to gather dust, until now.

“DISCRETIONARY FUNCTION EXCEPTION” GETS COAST GUARD OFF THE HOOK

Vessel Stability Test was Only “Recommended”, Not Directed, By Marine Safety Manual

The Court of Appeals for the Fourth Circuit has ruled that the U.S. Coast Guard is not liable for a mistake made by its inspector during inspection to test a vessel for stability because the testing error fell within the “discretionary function exception” to the government’s waiver of sovereign immunity under the Federal Tort Claims Act and the Suits in Admiralty Act, which allow suits to be brought against the government for negligence.

Lady D, a 36-foot pontoon vessel authorized to carry up to 25 persons capsized in Baltimore Harbor in a storm on March 6, 2004. There were 23 passengers and 2 crew members on board. Five persons perished and numerous others were injured.

The owner settled all claims and then sued the government. The *Lady D* had not been inspected for stability when she was built in 1995. The Coast Guard inspector waived a stability test because a sister vessel, the *Raven*, had been certified. The *Raven*’s certification had, in turn, relied on an earlier stability test of a third sister vessel, the *Fells Point Princess*. After the *Lady D* tragedy, the *Fells Point Princess* was tested again and it was found she could only qualify to carry no more than 15 persons.

The error made in examining the twin-pontoons *Fells Point Princess* in 1992 was that the inspector did a test for monohull instead of a pontoon vessel. The Marine Safety Manual, followed by Coast Guard inspectors “recommended” a stability proof test was to be used on vessels with only two pontoons. The Coast Guard inspector testified and admitted he made a “mistake” in not shifting the weight to the extreme outboard position in testing the stability of the *Fells Point Princess*.

COAST GUARD ISSUES ADVISORY ON USING FORCE TO DEFEND AGAINST ATTACKS BY PIRATES

The U.S. Coast Guard issued a Port Security Advisory on June 18, 2009, providing guidance on employment of force for self-defense of U.S. flagged commercial vessels operating in high risk waters. It is meant to aid U.S. shipowners in developing vessel security plans for operating in high risk waters.

33 U.S.C. §383 already provides authority for U.S. masters and crew to respond to piratical attack, and authorizes mariners to “oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel....” The guidance says “deadly force” in self-defense or defense of others may be used “when an individual has the reasonable belief that [the persons attacking him] poses an imminent danger of death or great bodily harm,” i.e., life is at stake.

“Non-deadly force” may be used in the defense of the vessel or property, and would include maneuvers by the vessel to avoid capture, fire hoses, sonic blasts, disabling fire by trained personnel, or even retreat (e.g., to a safe room) may be appropriate but is not required. Defense of the vessel alone does not justify deadly force.

The Circuit Court ruled that since the procedure was only “recommended” by the Manual, the final decision was left to the inspector’s discretion or judgment as a matter of policy and this “is the type of policy decision the discretionary function exception is designed to protect,” according to the court.

If the Manual had ordered or directed that the test be made, failure to make the stability test on the small vessel would have made the government liable. *Indem. Ins. Co. of N.A., et al. v. United States*, 569 F.3d 175 (4th Cir., June 25, 2009).

THE UNITED NATION’S NEW “2009 ROTTERDAM RULES” WILL BE SIGNED SEPTEMBER 23

The General Assembly of the U.N. has adopted what will become known as the 2009 Rotterdam Rules, and they will be open for signing in Rotterdam on 23 September 2009. **Vincent M. DeOrchis**, who has been an advisor to the U.S. State Department on development of the Rules, will attend the signing. Officially, the Rules were designated as the “Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.”

The Rotterdam Rules have been in the works since 2002, when first proposed by UNCITRAL. The task of reaching an agreement on the final wording has been almost overwhelming, and maritime law experts, such as **Mr. DeOrchis**, volunteered many hours of work, here and abroad, advising the U.S. delegates as the international agreement was negotiated.

The Convention needs the signatures of twenty countries in order to achieve ratification. Even if the U.S. signs, it will need the advice and consent of the Senate and the signature of the President to become U.S. law.

The Rotterdam Rules (already being abbreviated to “RR”) specifically exclude charterparties and slot charters, but will include bills of lading and electronic contracts of carriage.

The RR will seek to provide much needed predictability and uniformity when there is both land and sea transport under through bills of lading. The Convention omits the error in navigation defense and increases the package limit to 3SDRs/kg or 875 SDRs per package.

On the other hand, the RR allows for apportionment of damages due to multiple causes; strengthens the duty on shippers to make their goods cargo-worthy; extends its obligations to stevedores and other maritime performing parties, and makes provision for volume contracts.

States desiring to sign the Convention can do so at Rotterdam on September 23, or thereafter at the U.N. Headquarters in New York.

CORDONED OFF JET SKI AREA QUALIFIES AS NEXUS FOR ADMIRALTY JURISDICTION

Maritime Activity Need Not Be A Commercial One

An old tradition of maritime law is that a shipowner or operator can limit its liability in a disaster to the value of his vessel after the accident plus any freight that is owed. However, the ship must be operating in “maritime waters” for admiralty jurisdiction to apply. The ancient law applies to all vessels, even a rowboat.

The parties did not dispute that the jet ski qualified as a “vessel” in the appeal.

The difficult issue raised in an appeal in the Ninth Circuit was whether the water in which the jet ski was operating fell within admiralty jurisdiction. The attorney for two women who were seriously injured when thrown off a jet-propelled personal water craft operating in an area of San Diego’s Mission Bay argued that both the location and the activity had no relation to “traditional maritime activity.” The trial court agreed. The Court of Appeals did not.

A party seeking to invoke admiralty jurisdiction must satisfy both a “location” test and connection to “traditional maritime acting” test. The connection test raises two issues. A court must determine (1) whether the incident has a “potentially disruptive impact on maritime commerce,” and (2) whether the activity has a “substantial relationship to traditional maritime activity.”

The area where the accident happened was cordoned off by a row of buoys and was limited to personal water craft. Nevertheless, the Ninth circuit ruled that “in tidal waters, the ebb and flow of the tides” remains the standard test, and therefore the reserved area, several hundred feet wide and only 8 to 10 feet deep, met the definition of “navigable waters.”

As for the “connection” or “nexus”

to maritime commerce test, the appeals court ruled that “the wrong must have a significant relationship with traditional *maritime* activity, but that maritime activity need not be a commercial one.” *In re Mission Bay Jet Sports*, 2009 U.S. App. LEXIS 13529 (9th Cir., June 24, 2009).

DEVIATION DOCTRINE IS LIMITED UNDER U.S. COGSA

Limited to Geographic Breach Or On Deck Stowage

It is well settled that a “deviation” from a maritime contract of carriage will deprive the carrier of the \$500 package limitation as well as all other defenses provided by the contract or the Carriage of Goods by Sea Act. “It strips the ship of all excuses.”

However, the Maritime Doctrine of Deviation is limited to two situations: geographic deviation and unauthorized on-deck carriage. A “clean” bill of lading implies that the cargo will be carried under deck, unless custom or usage allows certain cargoes to be carried on deck, e.g., containerized cargo.

U.S. COGSA permits deviation for the purpose of saving life at sea and even allows “any reasonable deviation.” But deviating for the purpose of loading or unloading cargo or passengers is *prima facie* regarded as unreasonable. 46 U.S.C. §1304. A reasonable departure would be calling at an unscheduled port for repairs.

Because of the harshness of the doctrine, U.S. courts are reluctant to find deviation where a geographic or on deck violation is not involved.

For example, a carrier's corrupt or criminal misdelivery of cargo has been held not to be a deviation which voided the package limitation. Negligent stowage is not and could not constitute a deviation. Stowage which greatly exceeded weight limitation of flatrack container and safe capacity of cargo cranes and related equipment has also been held not to constitute deviation.



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ANNOUNCING THE OPENING OF OUR RHODE ISLAND OFFICE

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This Client Alert is not to be considered a legal opinion. It is an advertisement and contains information of general interest for clients and friends of the Firm.

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