

No Class Act: A bad survey lands a classification society in hot water

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Classification societies are independently operated, vessel survey organizations that publish sets of rules and standards for various classes of watercraft. When hired, they dispatch specialized surveyors to look over ships in the context of their designs and proposed operations, then issue certificates proclaiming boats fit for duty or in need of specified attention.

Having operated (in one form or another) for centuries, classification societies serve the ocean shipping industry's various sectors. Banks and vessel finance concerns, insurers and P&I clubs, vessel buyers, charterers, and others usually rely on a classification society's seal of approval in conducting their maritime transactions. In fact, the blessings of a recognized society (there are only a handful of well-regarded ones) often are requisite to salty contracts.

A number of federal court decisions have addressed classification society liability. What happens when a society's glossy certificate, beaming a ship's unambiguous endorsement for operations, is based on an erroneous survey? Does the society have to pay for repair of deficiencies it should have discovered and warned about? The answer isn't entirely clear, and may depend on what part of the country you live in. The U.S. Court of Appeals for the Fifth Circuit (comprised of the south central states) recently took a look at what it deems the "novel but not entirely uncharted territory" of classification society liability.

Otto Candies bought Diamond Ferry Co.'s high speed passenger vessel *Speeder*. The two companies shook hands over a memorandum of agreement providing that the sales terms were contingent on classification society Nippon Kaiji Kyokai Corp (NKK) issuing a clean bill of health to *Speeder's* hull and engines. NKK, copy of the Otto Candies-Diamond Ferries memo in hand, sent its surveyors to the Japan-flagged vessel. The society issued its Class Maintenance Certificate, saluting *Speeder* as well-suited for coastal passenger ferry service. NKK even had a few chats with Otto Candies along the way.

When the vessel was looked over stateside, a panoply of vessel deficiencies were readily apparent to the surveyors of another classification society, the American Bureau of Shipping (engaged to facilitate hoisting of the Stars and Stripes over *Speeder*). There was some pretty serious stuff wrong with the ferry, dealing with its hull integrity and sensitive equipment, that shouldn't have escaped NKK's detection. Otto Candies forked over some 328 grand in repair costs to make the vessel seaworthy. It promptly looked to NKK for reimbursement, alleging negligent misrepresentation of *Speeder's* seaworthiness. The lawsuit wound its way to the Fifth Circuit.

Some courts, most notably those in the Second Circuit (which encompasses the northeast states, including New York), don't recognize such liability theories against classification societies. A precept of maritime law is that ship owners bear a nondelegable duty to run only seaworthy vessels, and the ability to deflect liability onto a survey organization's shoulders might encourage lackadaisical attitudes about the issue. Classification societies might be reluctant to inspect and bless older or inherently risky vessels if significant liability might attach to a slip-up. Lastly, a survey shouldn't be taken as a "guarantee" that a vessel's innards are hunky-dory; they're just an inspector's best opinion after a once over.

Moreover, the elements of negligent misrepresentation usually aren't satisfied in classification society cases. That's because only a "limited group of persons" can avail themselves of the legal principle, i.e., those "for whose benefit and guidance the defendant either intends to supply the information or knows that the recipient intends to supply it." Societies typically don't know all details of why an inspection has been ordered, so they rarely have "misrepresented" anything to the aggrieved party.

In this case, however, NKK knew exactly what was afoot, having communicated with Otto Candies and been copied on the sales memo. The court also seemed particularly moved by how obvious and egregious *Speeder's* mechanical and structural shortcomings were. Concluding Otto Candies wouldn't have gone through with the deal absent an NKK certificate, the court ordered the society to pay all costs incurred for repair of the undisclosed vessel deficiencies.

Revisiting the "novel" nature of this legal territory, the Fifth Circuit hastened to emphasize that classification society liability "should be strictly and carefully limited" for much the same reasons as the Second Circuit and other courts have cold-shouldered the concept altogether.

Oh, shippers and forwarders? Don't get your hopes too high about pegging a classification society for your lost/damaged cargo. The court spoke about one instance when a shipper tried that route (unsuccessfully), and recognized the unlikelihood a cargo owner could show sufficient reliance on a classification society's certificate to substantiate negligent misrepresentation. Just asking for a copy isn't enough; the society pretty much has to have advance notice it's doing a job for someone in addition to the ship owner that hired it. Charterers might have better luck, as the court pointed out, when the survey organization issues specialized documentation for the charter.

But classification societies should recognize that documentation they're provided in support of a requested survey might bring potential plaintiffs into the loop. A vessel's owner stands first in the liability line when it comes to vessel seaworthiness. However, other affected players might seek recourse against anyone with deep enough pockets.

Ref: Otto Candies v. Nippon Kaiji Kyokai Corp., 2003 WL 22137861 (5th Cir. 2003)