



Committee On Marine Insurance and General Average NEWSLETTER

Spring 2021 | Committee Chair: Andrew D. Kehagiaras, Long Beach, CA | Editor: Julia M. Moore, New York, NY

The following articles, case notes and comments are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of the Maritime Law Association of the United States or the Committee on Marine Insurance and General Average.

In this Issue:

Case summaries related to the following issues:

Uberrimae Fidei

- First Circuit confirms uberrimae fidei is entrenched federal maritime law
- Doctrine of uberrimae fidei does not create an independent cause of action for a plaintiff

Practice and Procedure

- No jury trial in admiralty coverage action under Rule 9(h)
- Summary judgment granted on insured's claim that policy exclusion does not apply
- Choice of law provision enforced under federal maritime law

Editor's Comment:

While the pandemic changed many things about the practice of law and the work of the MLA, one of the things that did not change was the quality of the work done by our Members. As proof, this Newsletter highlights an excellent article by Alex DeGuilio and Hal Watson of Chaffe McCall on *uberrimae fidei* and the First Circuit's recent decision in *QBE Seguros v. Carlos A. Morales-Vázquez* which affirmed the doctrine. Happy Reading!

~~RECENT CASES OF INTEREST~~

UBERRIMAE FIDEI

- **First Circuit affirms the continued vitality of the principle in marine insurance**

QBE Seguros v. Carlos A. Morales-Vázquez, 986 F.3d 1 (1st Cir. 2021).

In *QBE Seguros v. Carlos A. Morales-Vázquez*, the United States Court of Appeals for the First Circuit declined to abandon the doctrine of uberrimae fidei in marine insurance, reasoning that such an action “would have rebarbative consequences, both upending settled law and disrupting an industry that has long been premised on insureds telling the whole truth to insurers.” *QBE Seguros v. Carlos A. Morales-Vázquez*, 986 F.3d 1, 7 (1st Cir. 2021). As discussed below, the defendant-appellant argued that recent developments in English law rendered the doctrine inapplicable in marine insurance. The court found this argument unpersuasive, reasoning that the actions of foreign legislatures do not bind federal courts in admiralty. Instead, the court reasoned that the peculiarities of marine insurance support the continued desirability of uberrimae fidei as an entrenched principle of maritime law. Lastly, the court held that in the First Circuit, materiality alone is sufficient for application of uberrimae fidei and a showing of actual reliance is not required.

Factual Background

In 2011, defendant-appellant Carlos Morales-Vázquez (“Morales”) applied for an insurance policy for his forty-foot Riviera yacht (the “Riviera Policy”). In the application, Morales did not provide any information when asked to describe his prior boating history and all accidents related to any vessel he owned, controlled, and/or operated. Optima Insurance Company, an entity later acquired by plaintiff-appellee QBE Seguros (“QBE”), issued the Riviera Policy. Morales renewed the Riviera Policy in 2012 and 2013.

In 2014, Morales submitted a separate application for an insurance policy for his forty-eight foot Cavileer yacht (the “Cavileer Policy”). The application required him to disclose accidents or losses sustained in connection with any vessel he owned, controlled, and/or operated. Morales identified an accident described as a “propeller strike” that occurred eleven years earlier; however, he did not identify a 2010 grounding that involved his forty-foot Riviera offshore yacht. The application also required Morales to recount his boat-ownership and operating history. Morales only listed two of the seven boats he previously owned or operated. Lastly, the Cavileer Policy application stated, “[i]f incorrect answers are provided (either by error, omission or neglect), I will be in breach of this warranty and the policy, if issued, will be void from inception.”

Morales submitted the Cavileer Policy application to an insurance broker, who contacted an underwriter at QBE. The broker informed the underwriter that the putative insured wanted to obtain a quote the same day. The underwriter at QBE testified at trial that she thoroughly evaluated the paperwork and relied on both the Riviera Policy and the Cavileer Policy applications. QBE’s underwriter approved the application thirty-six minutes after receiving it. As of March 7, 2014, QBE insured the Cavileer yacht.

On October 24, 2014, a fire damaged the Cavileer yacht and Morales reported the loss to QBE. Morales subsequently denied QBE’s settlement offer in December 2014. Negotiations continued until May 2015 when QBE became aware of the previously undisclosed 2010 grounding incident. Morales subsequently admitted, under oath, that he did not disclose the 2010 grounding and omitted his ownership/operation of five additional boats on the Cavileer Policy application.

Procedural History

QBE sought a declaratory judgment from the United States District Court for the District of Puerto Rico, seeking to void the Cavileer Policy. QBE argued that Morales breached his duty of utmost good faith (*uberrimae fidei*) and the warranty of truthfulness contained in the Cavileer Policy. Following a six-day bench trial, the district court reserved decision and entertained post-trial briefing. The court subsequently held that QBE was entitled to void the policy for two independently sufficient reasons: (1) Morales breached the duty of *uberrimae fidei* and (2) Morales breached the Cavileer Policy’s warranty of truthfulness.

On appeal, Morales asserted four arguments. First, Morales asked the court to hold the doctrine of *uberrimae fidei* inapplicable based on recent developments in English law. Second, he argued that even if the doctrine is applicable, he did not breach the duty because the district court failed to find that QBE actually relied on his omissions. Third, he argued that the district court erred in holding that he breached the duty of truthfulness. Fourth, he contended that his affirmative defenses trump any right to void the policy. The First Circuit ultimately upheld the decision of the district court.

Legal Analysis

Uberrimae Fidei in English and American Law

The First Circuit began its discussion by reviewing the evolution of the doctrine of *uberrimae fidei*. The court stated, “the doctrine requires parties to a marine insurance contract to disclose all known facts or circumstances material to an insurer’s risk.” *QBE*, 986 F.3d at 4 (citing *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 57 F.3d 50, 54-55 (1st Cir. 1995)). The court further stated, “an insurer may void a marine insurance policy if its insured fails to disclose ‘all circumstances known to [the insured] and unknown to the insurer’ that materially impact the insurer’s risk calculus.” *QBE*, 986 F.3d at 4 (quoting *Caitlin at Lloyd’s v. San Juan Towing & Marine Servs., Inc.*, 778 F.3d 69, 83 (1st Cir. 2015) (emphasis in original)).

The court acknowledged that the origins of the doctrine can be traced to English law, where it was applied to various insurance contracts across industries. The court referenced Lord Mansfield’s 1776 decision recognizing a “heightened duty of good faith to prevent a party from omitting or concealing facts that would induce the counterparty ‘into a bargain, from his ignorance.’” *QBE*, 986 F.3d at 4- 5 quoting *Carter v. Boehm* (1776) 97 Eng. Rep. 1162, 1164 (K.B.). The court reasoned that this requirement was rooted in practical wisdom, as the insurer lacked the ability to verify the insured’s representations before issuing the policy.

In the early nineteenth century, American courts first recognized *uberrimae fidei*. See *QBE*, 986 F.3d at 5 (citing *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 185 (1828); *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 510-11 (1883) (confirming a strict disclosure requirements that the doctrine imposed on the insured)). Thereafter, American and English law developed in parallel until Parliament codified the doctrine in the Marine Insurance Act of 1906. Meanwhile, Congress remained silent, permitting American courts to develop their own federal common law in admiralty. American jurisprudence incorporated *uberrimae fidei*. In 2015, Parliament passed the Insurance Act of 2015, amending the Marine Insurance Act of 1906 to preclude an insurer from voiding a policy under the doctrine of *uberrimae fidei*. The First Circuit noted that Congressional silence on the issue permitted action by the states and federal courts. *QBE*, 986 F.3d at 5-6 (citing *Willburn Boat Co. v. Fireman’s Fund Ins. C.*, 348 U.S. 310, 321 (1955)).

After recounting the history of *uberrimae fidei*, the court looked to Morales’ first argument, which as a question of law, engendered *de novo* review. As noted above, Morales argued that the federal courts should abandon the doctrine of *uberrimae fidei* because, in admiralty, federal common law should mirror developments in English law. In support of his argument, Morales cited three Supreme Court cases.¹ The First Circuit rejected this argument, reasoning that the cited excerpts are dictum and that the cases do not create a binding analytic framework. The court further reasoned that Morales did not identify any case law in which a court based a holding on English law.

The First Circuit reviewed each of the cases cited by Morales. The court noted that under *Standard Oil*, American courts are not bound by legal developments in the United Kingdom, reasoning that “although harmony between American and English admiralty law is desirable, ‘our practice is no more than to accord respect to established doctrines of English maritime law.’” *QBE*, 986 F.3d at 7 (quoting *Standard Oil*, 340 U.S. at 59). The First Circuit reasoned that this *respect* stems from the wisdom of a particular doctrine not from the act of parliament. Thus, “federal court’s tasked with hearing admiralty cases should take heed of developments in English law, but they are not obliged to change course merely because Parliament acts to alter a previously entrenched principle.” *QBE*, 986 F.3d at 7. The court offered clarification, stating that federal common law has the capacity to evolve but should not be captive to a foreign legislature, especially as here, where congress has been conspicuously silent on marine insurance.

¹ See *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-443 (1953); *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54, 59 (1950); *Queen Ins. Co. of Am. v. Globe and Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

Peculiarities of Marine Insurance and the Continued Desirability of Uberrimae Fidei

The First Circuit declined to abandon the doctrine of uberrimae fidei in marine insurance. The court reasoned that its holding finds support in the unequal access (between marine insurers and their insureds) to necessary information required to make underwriting decisions and set premiums. The court reasoned that while the availability of information has improved drastically in recent times, the unequal access to information is as true now as it was in Lord Mansfield's time.

The court stated that peculiarities of marine insurance support the continued desirability of uberrimae fidei. For example, time is nearly always critical, the insured vessel is often located far from the insurer, and the calculation of premiums must take into account the vessel's history or particularities and the maritime experience of the owner and/or operator. These peculiarities require the full and frank cooperation of the insured. Moreover, the fact that Morales obtained the Cavileer Policy within thirty-six minutes of submission evidences that the burden of disclosure allowed him to obtain insurance quickly despite the peculiarities of marine insurance.

Uberrimae fidei also supports economic efficiency within marine insurance. In the absence of uberrimae fidei, asymmetry in the availability of information would require an insurer to ascertain difficult to find information, thus imposing cost on the industry. The insurer would likely pass this cost to policyholders in the form of higher premiums. This increased cost is avoided by placing the burden of disclosure on the insured.

Actual Reliance and Materiality

The court next turned to Morales' second argument, that QBE was required to show actual reliance on his omissions. The court reasoned:

we have never held that actual reliance is a necessary prerequisite for an insurer to void a marine insurance policy under the doctrine of uberrimae fidei. Rather, we have held that the materiality of a false statement or an omission, without more, provides a sufficient ground for voiding such a policy.

The First Circuit noted that other courts of appeals and legal commenters agree that the majority rule does not require actual reliance. Morales argued that the Eleventh, Second, and Eighth Circuits have required a showing of actual reliance. The court discredited Morales' argument regarding the Eleventh Circuit. However, the court acknowledged that the Second and Eighth Circuit may require actual reliance and the cited case law may support Morales' position. However, the First Circuit ultimately concluded that Morales' argument was unpersuasive.

The First Circuit reasoned that binding precedent does not require actual reliance. Importantly, the "Supreme Court has only used a materiality test – without any mention of actual reliance – in describing the preconditions for application of uberrimae fidei in marine insurance cases." *QBE*, 986 F.3d at 9 (citing *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 510-11 (1883)). Thus, the court held that in the First Circuit, materiality alone is sufficient for application of uberrimae fidei and a showing of actual reliance is not required. *QBE*, 986 F.3d at 9-10. The First Circuit acknowledged that QBE argues that actual reliance occurred; however, the court reasoned that it had no need to reach that issue, as it is not required under the law.

Policy Language

Lastly, the court addressed Morales' arguments that the Cavileer Policy language modified the traditional duty of uberrimae fidei and incorporated actual reliance into the contract. The court disagreed and reasoned that the cited language was nothing more than boilerplate contract terms that did not modify the duty of utmost good faith inherent in marine insurance contracts. Instead, the court cited other policy language, which the court reasoned, clearly demonstrated that the parties did not intend to diminish the duty of uberrimae fidei, but rather intended to permit the insurer to void the policy for false statements, misrepresentations, and/or concealment or misrepresentation of material facts or circumstances relating to the insurance. In short, the court held that the contractual language did not offer any justification to move away from the doctrine of uberrimae fidei.

Moreover, despite Morales' affirmative defense argument, the court reasoned that he did not develop his argument on appeal that the affirmative defenses applied against the doctrine of uberrimae fidei. The court acknowledged that the omitted facts must be material in order to provide an avenue for the insurer to void the policy under the doctrine; however, the court noted that the district court had held that Morales' incomplete accident history was material. Given the finding of materiality and Morales' lack of challenge thereto, the district court was correct in applying the doctrine of uberrimae fidei. Lastly, the court stated "[g]iven our conclusion that the district court did not err in ruling that Morales breached the duty of uberrimae fidei, we have no occasion to reach the parties' arguments concerning breach of the warranty of truthfulness, waiver, and estoppel." *QBE*, 986 F.3d at FN4.

Conclusion

Thus, the United States Court of Appeals for the First Circuit held that the doctrine of uberrimae fidei had been breached and that the policy issued to Morales was void.

Submitted by: Alexander DeGuilio and Harold Watson, Chaffe McCall

UBERRIMAE FIDEI – Duty of Utmost Good Faith Does Not Create an Independent Cause of Action for a Plaintiff.

***Perry v. Hanover Insurance Group, Inc.*, slip op. 1:20 cv 301 LEW (February 8, 2021 D. Me)**

In an unusual twist, the Plaintiff in this case asserted that the doctrine of uberrimae fidei created an independent cause of action against Hanover Insurance Group ("Hanover") which denied Plaintiff's claim for the total loss of his \$800,000 commercial fishing vessel due to fire. Hanover filed a motion to dismiss the claim, arguing that the doctrine of uberrimae fidei "creates a duty for the insured, not the insurer" and, therefore, the cause of action should be dismissed. The court agreed. Curiously, this decision was handed down after the decision in *QBE Seguros v. Carlos A. Morales-Vázquez*, 986 F.3d 1 (1st Cir. 2021) yet fails to mention it.

POLICY CONTRACT CONSTRUCTION

- **Insurer Fails to Prove Policy Exclusion Applies to "Harvey" claims for damage to Boat Slips**

***Playa Vista Conroe v. Insurance Company of the West*, slip op. 20-20307 5th Cir. March 5, 2021.**

After a Texas condo association suffered property damage during Hurricane Harvey, it filed a property-damage claim against its insurer. When the insurer refused to pay, the association filed suit for breach of its insurance contracts. The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the association, holding the insurer liable. Applying de novo review, the court held that the association established coverage and

that the insurer failed to prove that an exclusion applies. In this case, the association met its burden to show that its boat slips are covered in the absence of an applicable exclusion. Furthermore, in the face of an affidavit tending to establish that the boat slips were not destroyed by a "flood," the insurer could not carry its legal burden to prove one of the "flood" exclusions by submitting nothing. The court explained that this is particularly true where the policy exclusions on their face do not apply to the loss of the association's boat slips. Finally, the insurer conceded in the district court that the association's boat slips are covered by the storage provision, and the insurer cannot rely on the governmental-body exclusion.

Submitted by: Keith W. Heard, Lennon, Murphy & Phillips LLC

PRACTICE AND PROCEDURE

- **Insured Not Entitled to Jury Trial on Counter-claim Against Insurer**

***New York Marine and General Insurance Company v. Boss Interior Contractors, Inc.* slip op. 20 cv 23777 (April 16, 2021 S.D. Fla.)**

Defendant Boss Interior Contractors ("Boss") obtained a first-party marine insurance policy from Plaintiff New York Marine and General Insurance Company ("NYMAGIC") to insure a barge which sank one month after the inception of the policy. After investigating the loss, NYMAGIC filed a declaratory judgment action in admiralty, invoking Rule 9(h), seeking to avoid cover based on Boss's alleged failed to maintain the vessel's seaworthiness and claiming that Boss made misrepresentations and/or failed to disclose material facts regarding the condition of the barge, the impossibility of access to the barge's interior and the purchase price. Boss counterclaimed for coverage and demanded a jury trial. NYMAGIC moved to strike the jury demand arguing that when a plaintiff marine insurer files a declaratory judgment action premised on admiralty jurisdiction and demands a bench trial, its election cannot be undone by a defendant's counterclaim invoking a different jurisdictional basis. The court agreed.

NYMAGIC relied upon the 11th Circuit decision in *St. Paul Fire & Marine Insurance Co.*, 561 F.3d 1181 (11 Cir. 2009) which held that a plaintiff's election to proceed in admiralty under Rule 9(h) precludes a defendant from exercising its right to a jury trial. Boss argued that jurisdiction was proper under the "savings to suitors" clause of 28 USC §1333 and urged the court to follow the Fourth and Ninth Circuits which have ruled differently. Plaintiff urged that the split of authority created a good faith basis for a clarification or change of the law in the 11th Circuit. However, the court was not persuaded.

The Plaintiff also argued, without any legal authority cited, that it should not lose the right to a jury trial because NYMAGIC "raced" to the courthouse. Noting the absence of any legal authority cited by Boss, the court followed another 11th Circuit decision which holds that a litigant "forfeits the point" when it fails to provide proper support for a position as "the court will not do his research for him."

As a final point, the court also rejected Boss's request for an advisory jury as it would not assist the court nor would it be in the interests of judicial economy.

***Great Lakes Insurance SE v. Martin Andersson*, slip op. 4:20-40020-TSH (March 10, 2021 D. Mass.)**

Great Lakes Insurance SE ("GLI") filed a declaratory judgment action in admiralty under /rule 9(h) against its insured Martin Andersson ("Andersson") seeking to avoid coverage for the salvage or repair of Andersson's catamaran. GLI contended that Andersson breached his warranty to maintain the catamaran in seaworthy

condition and that the loss occurred outside the navigational limits of the policy. Andersson counterclaimed for coverage and contended that GLI was estopped from disclaiming cover because it took possession of the catamaran's chart plotter, which would have showed that the vessel was inside the navigation limits, and lost it. Noting that the claims were inextricably intertwined and that separate jury and non-jury trials would not further judicial economy and might lead to inconsistent results on the same facts, the court held that GLI's election to proceed in admiralty would prevail and all claims would be tried to the bench.

***Leopard 34M, LLC v. National Union Fire Insurance Co. of Pittsburgh, PA*, slip op. 20-22518 (April 2, 2021 S.D. Fla, Miami Division)**

This decision arose out of a claim by Plaintiff Leopard 34M, LLC ("Leopard") for damage to its vessel due to an overheated engine in June 2019. Leopard failed to submit the claim until October 2019, which defendant National Union then denied, asserting that the passage of time allowed for spoliation of evidence. Leopard filed suit against National Union invoking both diversity jurisdiction and admiralty jurisdiction under Rule 9(h). Defendant sought to strike the jury demand arguing that the facts did not support jurisdiction based on diversity and that Plaintiff's explicit election to proceed in admiralty under Rule 9(h) controlled. After reviewing the Complaint, the court found that the Plaintiff had failed to properly plead facts which supported jurisdiction based on diversity of citizenship and that the Plaintiff could not make a showing of good cause that would justify allowing an amendment to the Complaint at "this advanced point in the litigation." The motion to strike the jury demand was granted.

CHOICE OF LAW – Policy Contract Provision Enforced

***GREAT LAKES INSURANCE SE v. RAIDERS RETREAT REALTY CO., LLC*, slip op. 19-04466 (February 22, 2021 E.D.Pa)**

Plaintiff Great Lakes Insurance SE ("GLI") issued a policy of marine insurance for a vessel owned by Defendant Raiders Retreat Realty Co., LLC ("Raiders"). The vessel ran aground and sustained substantial damage due to a resulting fire. Raiders filed a claim for coverage, which GLI denied, asserting that the vessel's fire-fighting/suppression equipment was missing or inoperable. GLI then filed a declaratory judgment action asserting that the policy affords no coverage due to Raiders' alleged misrepresentations and breach of an express warranty. Raiders asserts counterclaims against GLI for: (I) breach of contract, (II) breach of implied covenant of good faith and fair dealing, (III) breach of fiduciary duty, (IV) bad faith liability, in violation of 42 Pa. Cons. Stat. § 8371, and (V) violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

GLI filed an Answer to the counterclaims and now moves for judgment on the pleadings with respect to Counts III, IV, and V of the counterclaims. GLI contends that the policy contains a choice-of-law provision designating federal maritime law and, in its absence, New York law as the applicable law of the case. Raiders contends that the choice-of-law provision here is unenforceable and that therefore Pennsylvania law, the law of the forum in which the suit is pending, applies. Finding that the policy contract choice-of-law provision bars the counterclaims at issue, the Court dismissed Counts III, IV, and V of the counterclaims.

Noting that contractual choice of law provisions are generally recognized as valid and enforceable under federal maritime law, the court reiterated settled law that: "The parties' choice of law clause in an admiralty case will govern unless the [chosen] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law." Raiders proceeded to try and convince the court that the clause, in this case, met the standard of "unreasonable and unjust" and that it violated the public policy of

the state in which the action was filed. The court rejected this argument after concluding that the public policy of a state where a case was filed cannot override the presumptive validity, under federal maritime choice-of-law principles, of a provision in a marine insurance contract where the chosen forum has a substantial relationship to the parties or the transaction.

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

Julia M. Moore, Esq.
Thomas Miller (Americas) Inc.
Harborside 5
185 Hudson Street, Suite 2700
Jersey City, New Jersey 07311
Phone: (201) 557-7300
Direct Dial: (201) 557-7433
E-mail: Julia.Moore@thomasmiller.com