MLA Committee On Marine Insurance and General Average NEWSLETTER

Fall 2021 | Committee Chair: William Fennell, New York NY | Editor: Julia M. Moore, New York, NY

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Editor's Comment:

First, a warm welcome to William Fennell as incoming chair of this committee. Congratulations, Will! No doubt this committee will be well-served by your leadership. I would also like to sincerely thank my able colleague Kevin Albertson, who took the laboring oar on the case summaries for this Newsletter. Thanks also to Tom Tisdale and Jamison Jedziniak for an excellent and interesting submission. As always, my thanks to Keith Heard and Dave Mazzaroli who are always reliable sources for interesting cases.

~~RECENT CASES OF INTEREST~~

EXPRESS MARINE WARRANTY

- **Eleventh Circuit finds that strict compliance with captain and crew warranties is not a matter of entrenched federal maritime precedent under *Wilburn Boat*. State law applies.**

***Travelers Property Casualty Co. of America v. Ocean Reef Charters LLC*, 996 F.3d 1161 (11th Cir. 2021).**

In May of this year, the Eleventh Circuit Court of Appeals issued its decision in *Travelers Property Casualty Co. of America v. Ocean Reef Charters LLC*, which held that there is no federally entrenched maritime rule governing captain or crew warranties in marine insurance policies. The Eleventh Circuit, which reversed the

district court's grant of summary judgment to Travelers, reviewed the history and context of *Wilburn Boat* and then set out to harmonize the conflicting interpretations of that case rendered by other courts, including prior panels of the Eleventh Circuit. Ultimately, the court concluded that a faithful interpretation of *Wilburn Boat* requires a determination of whether there is a uniform maritime rule with regard to the specific warranty at issue before requiring strict, or literal, compliance with the warranty terms. The court then canvassed past judicial decisions and scholarly treatises, before concluding that there was no general maritime rule with regard to captain and crew warranties making Florida state law and statutes applicable. The case was remanded to the District Court for further proceedings.

The decision arose out of the sinking of the M/Y MY LADY, a 92-foot Hatteras yacht owned by Ocean Reef and insured by Travelers, when hurricane Irma struck Florida in September of 2017. Prior to the storm, the yacht was moored without a captain or crew. Ocean Reef tried to move the yacht out of harm's way and contacted a former approved captain to sail the yacht to a more protected location. The captain then advised that there was no way to move the yacht safely and Ocean Reef sought permission from Travelers to move the yacht themselves. Traveler's agent told Ocean Reef not to move the yacht. Ocean Reef then did its best to secure the yacht with extra mooring lines and fenders, but when a year-old dock piling gave way, the yacht drifted, struck other pilings and the sea wall, and eventually sank. Immediately after the loss, Travelers filed suit against its insured asserting that Ocean Reef failed to strictly comply with two express warranties in the policy that required Ocean Reef to employ a "full time," "professional" captain who was approved by Travelers and that the yacht would be crewed by one "full time or part time professional crew." Ocean Reef argued that the absence of a captain and crew did not increase the risk of loss and contended that Florida's "anti-technical" statute applied. The statute states: "a breach . . . does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured." *See* Fla. Stat. § 627.409(2) (West 2021). Ultimately, the court agreed with Ocean Reef that state law would govern the parties' rights under the policy with regard to the warranties.

Starting from the position that *Wilburn Boat* has "sown confusion with respect to the treatment of warranties in marine insurance policies" for sixty-five years, the court then grappled with its holding and legacy, including the need for uniformity and clarity. Noting that *Wilburn Boat* has left lower courts "at sea without a rudder or compass," the court wrote that the district court's decision to grant summary judgment to Travelers was "understandable given the mess we have created." The court also suggested that a more evolved approach had been adopted in the UK that might impact the development of US law since the "harsh" English rule requiring literal performance of express warranties, which was in effect at the time *Wilburn Boat* was decided, had been amended by statute in 2015 so that "rescission is no longer the [automatic remedy]" in the UK. Finally, the court recognized diverging and confusing approaches to *Wilburn Boat* and it invited the Supreme Court to "wade in" and "let us know what it thinks of *Wilburn Boat* today."

Shortly after the decision in *Ocean Reef*, the Middle District of Florida issued a decision in ***Hanover Insurance Co. v. J&S Promotions, LLC,* No. 2:19-cv-835, 2021 WL 2661107 (M.D. Fla. June 29, 2021)**, in which Hanover (the insurer) sought to void coverage on the insured's non-compliance with a captain warranty. In this case, however, the district court found that the warranty should be enforced based on the plain language used in the clause itself:

> Looking at the specific warranty in this specific Policy, however, establishes that the Captain Warranty is clear and unambiguous as to the effect of a breach: "If any condition of this warranty is not fully complied with, the coverages provided by this policy are null and void. . . ."

> Accordingly, the Court determines that there is a case or controversy as to Count I and that Hanover is entitled to a declaratory judgment that there is no coverage under the Policy as to claims by third parties arising from the Grounding Incident because the failure to hire a full-time captain as required by the Policy renders the Policy null and void as to this occurrence.

The decision specifically cited to *Travelers v. Ocean Reef.*

CONTRACT CONSTRUCTION

- **Duty to defend or duty to indemnify the costs of defense under the policy**

***Starr Indemnity & Liability Co. v. AGCS Marine Insurance Co.*, No. 20-cv-5321, 2021 WL 3005840 (S.D.N.Y. July 14, 2021)**

In a recent decision from the Southern District of New York, Judge Katherine Polk Failla grappled with the issues of a P&I insurer's duty to defend an assured and, if not defend, indemnify the assured for the costs of defense as an indemnity obligation. In *Starr Indemnity & Liability Co. v. AGCS Marine Insurance Co.*, Defendant, AGCS Marine Insurance Co. ("AGCS"), moved to dismiss the Second Amended Complaint of Plaintiff, Starr Indemnity & Liability Co. ("Starr"), arguing that there was no duty for AGCS to defend their mutual assured, R.E. Staite ("Staite"). Starr had defended R.E. Staite in *Lerma v. R.E. Staite Engineering, Inc.*, Case No. 37-2017-00048669-CU-PO-CT (California) under its commercial marine liability policy ("CML"). While Starr was defending the matter under its CML policy, it tendered the claim to AGCS as the P&I insurer. AGCS denied the tender claiming the P&I policy was not triggered. Starr then sought reimbursement from AGCS for the costs it incurred in Staite's defense. In its Second Amended Complaint, Starr alleged that: (i) Mr. Lerma was "assisting in the repair of a crane on [a] barge … when he was struck by [the shoreside] crane's hoist drum which was being loaded onto the barge for replacement on the crane"; (ii) the barge on which Mr. Lerma stood was owned by Staite or one of its subsidiaries and was insured under the P&I Policy; (iii) the allegedly negligent spotter "was positioned on the barge under repair while the [shoreside] crane operator moved the barge crane's hoist drum to that barge as part of the crane repair"; and (iv) the barge under repair was also owned by Staite and insured under the P&I policy. AGCS argued that it had no obligation to defend under its P&I policy, and had no obligation to indemnify Staite, or Starr as its subrogated insurer, based on the facts of the case.

Neither the CML nor the P&I policies contained a choice of law provision. Relying on *Commercial Union Insurance. Co. v. Flagship Marine Services., Inc.*, 190 F.3d 26, 30 (2d Cir. 1999), the court determined that California law governed the dispute because there are no specific federal rules governing the construction of maritime insurance contracts. The main points of contact with respect to both policies pointed to the application of California law.

Citing numerous California cases on the issue, the court held that the existence of a duty to defend is a matter of contract. The court continued, concluding:

> P&I policies do not ordinarily create a duty to defend and are indemnity policies, not liability policies." *Gabarick v. Laurin Mar. (Am.), Inc.*, 650 F.3d 545, 552-53 (5th Cir. 2011); *see also Blair v. Suard Barge Servs., Inc.*, No. Civ. A. 03-909 (HGB), 2004 WL 325428, at *8 (E.D. La. Feb. 18, 2004) ("P&I policies do not obligate the underwriter to provide a defense to the assured, only to compensate him for loss.") *cf. Exec. Risk Indem., Inc. v. Jones*, 89 Cal Rptr. 3d 747, 758 (Cal. Ct. App. 2009) ("[U]nlike a standard comprehensive general

> liability policy, the policy before us is an indemnity-only policy that does not impose a duty to defend upon [the insurer].).

This, however, did not end the inquiry. Looking to the policies and the facts as outlined in the Complaint (and accepting them as true in accordance with Federal Rule of Civil Procedure 12(b)(6)), the court held that while AGCS had no duty to defend Staite, AGCS could have a duty to indemnify the assured for the fees already incurred based on the facts and policy language. *See Gabarick v. Laurin Maritime (America), Inc.*, 650 F.3d 545, 553 (5th Cir. 2011)("With only a duty to pay covered claims and no duty to defend, reimbursement of defense costs must be footed on the indemnification[.]"); *Healy Tibbitts Construction Co. v. Foremost Insurance Co.*, 482 F. Supp. 830, 837 (N.D. Cal. 1979)("The policy does obligate the insurer to pay the reasonable costs incurred 'in defense against liabilities insured against hereunder.'"). The P&I policy, an SP-23 form, set conditions about when the insured may be reimbursed for the cost of defense. While this did not give rise to a duty to defend, it was sufficient to impose a duty to indemnify.

According to the court, the fact that the negligent operation of the shoreside crane allegedly occurred in the course of repairing an insured vessel differentiates this case from *Lanasse v. Travelers Insurance Co.*, 450 F.2d 580, 583-84 (5th Cir. 1971), in which the Fifth Circuit found that "the negligent operation of the crane — the proximate cause of the injury — . . . was not even remotely related to the operation, navigation or management of the [insured] vessel." Given the alleged nexus between Mr. Lerma's injury and actions to repair an insured barge, the court concluded that the underlying claim was potentially within the ambit of the P&I policy. *See Starr Indem. & Liab. Co.*, 2021 WL 3005840, at *8 (citing *St. Paul Ins. Co. v. Am. Fid. Ins. Co*., 105 F.3d 654 (5th Cir. 1996) (nonprecedential opinion pursuant to 5th Cir. R. 47.5) (explaining that "as owner" liability exists where there is a "causal connection between the action that gave rise to the liability and the ownership, operations, maintenance, or use of the vessel" (emphasis added) (citing *Lanasse*, 450 F.2d at 584)); *accord Tilcon N.Y., Inc. v. Indem. Ins. Co. of N. Am*., No. 3:14 Civ. 1296, 2017 WL 1948420, at *9 (D. Conn. May 10, 2017) (finding the injury at issue to be covered by a P&I policy "[u]nder either the 'causal operational relation' test of *Lanasse* or the more eclectic historical approach of the Second Circuit," where the injured party was handling cargo aboard an insured vessel and was struck by a cable used to maneuver the barge safely during cargo loading)).

Turning to the issue of unjust enrichment, under California law, the court held that a plaintiff can plead a breach of contract claim and an unjust enrichment claim in the alternative. The court relied upon the conditions set forth in the "Other Insurance" provision of the CML policy, specifically the term "loss." The court interpreted the term "loss" in the "Other Insurance" provision broadly, to include both damages and defense costs in litigating a claim. Accordingly, the court found AGCS received the benefit from Starr's defense of the claim, in that it did not need to pay the defense of the claim or the potential damages that could have resulted from the claim if it moved forward.

AGCS raised multiple affirmative defenses in its motion to dismiss, but the court noted that the facts raised by AGCS fell outside the confines of Starr Indemnity's Complaint and therefore were improper to raise on a motion to dismiss. The court denied AGCS's motion to dismiss, ruling that Starr had asserted viable claims for both breach of contract and unjust enrichment.

Submitted by: Thomas Tisdale and Jamison Jedziniak, Tisdale & Nast, LLC, New York, NY and Southport, CT.

- **All Risk and Civil Authority clauses did not provide cover for state-mandated lock down**

***Northwest Selecta, Inc. v. Guardian Insurance Co., Inc.*, No. 20-1745 , 2021 WL 2072613 (D.P.R. May 24, 2021)**

Plaintiff Northwestern is an importer and distributer of refrigerated goods, which arrive by ship from around the world to Puerto Rico. From there, plaintiff sells the product to local restaurants and distributors. To cover their risk, plaintiff purchased a Marine Cargo Stock Throughput Policy, which is an all-risk policy covering whenever the plaintiff bore the risk of loss. In March 2020, plaintiff imported more than $1,000,000 worth of frozen seafood (the "Product") and properly stored it. Shortly thereafter, the local government imposed a COVID lockdown order, which caused plaintiff's customers to either close or severely restrict operations. The Product eventually expired on the shelf in storage and lost its commercial value. Plaintiff contended two different provisions in its policy covered this loss; either a "Civil Authority" clause or an "All Risk" provision. Plaintiff filed an action in the United States District Court of Puerto Rico after the defendant insurer denied coverage. Defendant filed a motion to dismiss plaintiff's complaint.

Plaintiff contended the Civil Authority clause provided cover because the Product had to be destroyed when the government shut down Puerto Rico's economy. Conversely, the defendant maintained the plain terms of the policy did not provide coverage for implications of the state-mandated lockdown. Further, even if there was a covered loss under the policy, any action by a civil authority was not the proximate cause of the loss. Using the dictionary definitions of the terms "damage" and "destruction," the court held plaintiff adequately pleaded destruction as a result of an action taken by a civil authority. However, the court went on to conclude that, while the lockdown order and the destruction of the product may be two events causally related, such a nexus did not rise to the requisite relationship required under the policy. The operative word — "by" — in the civil authority clause required a civil authority to take direct action against the Product to trigger coverage. The court noted this its analysis might be different if defendant had used the words "caused by," which is a bit broader in scope according to the court.

Plaintiff's second argument in support of coverage was under the "All Risk" provision in the Institute Cargo Clauses (A), which covered losses from when the Product first moved for the commencement of transit until the goods complete their transit. Defendant contended that no fortuitous event occurred to trigger cover, but even if there were such an event, the exclusions for inherent vice and delay would exclude the loss from cover. The court found it unnecessary to hold whether the goods completed transit because "[t]he proximate cause of the loss is not examined when a clause like 4.5 [i.e., the delay exclusion] unambiguously states that there is no coverage for 'loss damage or expense caused by delay, even though the delay be caused by a risk insured against.'" Therefore, the court held that both the inherent vice and delay exclusions applied. Judgment entered for defendant.

- **Household exclusions applied to marine policy covering vessel owned by married couple**

***Godfrey v. State Farm Fire & Casualty Co.*, 11 F.4th 601 (8th Cir. 2021), *reh'g en banc denied*, Oct. 6, 2021**

Plaintiff Courtney Godfrey was seriously injured when she was thrown from her husband's boat. The couple had primary and umbrella coverage on the vessel with State Farm and GEICO, respectively. However, both policies contained "household exclusions," which excluded coverage for injuries to the insured and members of the insured's household. There was no dispute that the exclusion would apply because the plaintiff and boat

owner were married, but rather the plaintiff argued that the household exclusion should be invalidated as a matter of public policy under Minnesota law (which the parties agreed applied). The Court of Appeals for the Eighth Circuit rejected the argument, and also declined to certify the question to the Minnesota Supreme Court.

The court held that the law on the point was settled and Minnesota courts consistently enforce household exclusions that comply with the controlling state statutes. The district court's grant of summary judgment was affirmed.

UBERRIMAE FIDEI

- **Failure to disclose fraud conviction grounds to void cover**

***Shoreline Foundation Inc. v. New York Marine & General Insurance Co.*, No. 20-60191, 2021 WL 4393082 (S.D. Fla. Aug. 23, 2021)**

Shoreline Foundation brought a breach of contract claim in the United States District Court for the Southern District of Florida against its insurer for an alleged failure to pay losses incurred by the sinking of a 120-foot unmanned deck barge. In response the defendant-insurer contended, via a motion for summary judgment, that the policy was void from inception under the doctrine of *uberrimae fidei*. The breach occurred when the insured failed to disclose a fraud conviction in connection with its intangible property (i.e., a USCG demolition contract) on a renewal questionnaire expressly inquiring on the same for the insured's "property."

In December of 2018, Shoreline completed a renewal questionnaire that specifically inquired whether "any applicant had been indicted or convicted of any degree of the crime of fraud, bribery, arson, or any other arson-related crime in connection with this or any other property." Shoreline answered the question in the negative (by marking an "N"). In fact, just a month earlier, Shoreline had signed a proffer pleading guilty to fraud in connection with a contract with the USCG. The proffer stated that Shoreline had submitted an invoice to the USCG certifying that its work had been performed in accordance with the specifications in their contract, but in fact Shoreline had not performed required pre-demolition surveys.

Shoreline contented that its omission was not a material misrepresentation because the proffer was not related to Shoreline's "property." In support of it motion for summary judgment, the insurer submitted a declaration executed by the underwriter unequivocally stating he would have not renewed the account if the conviction had been disclosed at renewal. The underwriter, via the declaration, opined that because Shoreline was a small company, it was more likely than not that senior management had some role in the fraud, however small a role. The court gave the declaration significant weight in its decision, particularly how clear and unequivocal the declaration was regarding how the omission would have factored into the underwriting analysis. The court concluded that even if Shoreline interpreted the term "property" in the questionnaire to exclude intangible property, it should have been on notice that a month-old conviction was relevant and material to the insurance application. Summary judgment to the insurer was granted.

PRACTICE & PROCEDURE

- **Federal court action stayed in favor of insured's later-filed state court action pursuant to *Brillhart* abstention doctrine**

***GEICO Marine Insurance Co. v. Linares*, No. 20-24041, 2021 WL 2433705 (S.D. Fla. May 17, 2021)**

The defendant-insured, Luis Linares, submitted an application for insurance for a 2016 21-foot Pronautica Slam in which he identified himself as the owner and was financed and subject to a note held by Open Sea. Based on the defendant's representations, GEICO issued a marine policy. In May 2020, the vessel sank at berth, so GEICO initiated an investigation into the loss. During the investigation, GEICO discovered that the defendant was not the registered owner and Open Sea was not the lien holder. In fact, the vessel was registered to a third-party and the lien holder was an entity known as ALAC. The insurer determined that the defendant could not obtain financing on his own to purchase the vessel, so he had a third-party file an application.

Once GEICO learned of this information, it filed an action in the United States District Court for the Southern District of Florida (the "Federal Court Action") seeking a declaration voiding the policy from inception under the doctrine of *uberrimae fidei*. ALAC then filed an action against GEICO, the Linares, and Open Sea in Florida state court (the "State Court Action") on a number of state law claims involving the promissory note and general negligence against the GEICO. ALAC then moved to dismiss the Federal Court Action as not ripe for review or, in the alternative, to dismiss or stay the matter pursuant to the *Brillhart* abstention doctrine. *See generally Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

The court granted ALAC's motion to stay GEICO's Federal Court Action noting the similarity of issues between both cases. That is, whether there was a covered loss, and if so, to whom GEICO owed the insurance proceeds from the loss as well as whether the policy was void from inception. The only issue in the Federal Court Action not shared by the State Court Action was the duty to indemnify, one that might never materialize if the State Court Action determined that there no covered loss occurred or GEICO's insured was not liable for the loss. For this reason, the court granted ALAC's motion to stay the Federal Court Action.

- **Action against marine broker time-barred**

***Cosmopolitan Shipping Co. v. Marsh USA, Inc.*, No. 18 Civ. 3167, 2021 WL 3173800 (S.D.N.Y. July 27, 2021)**

Plaintiff Cosmopolitan Shipping Co. filed suit against insurer Continental Insurance Co. ("CIC") and Marsh USA seeking coverage from CIC for certain seaman's asbestos claims and damages from Marsh for alleged negligent advice provided in connection with that coverage. Cosmopolitan claimed that Marsh breached its duty in locating policies of insurance that might provide Cosmopolitan with cover for asbestosis claims, including the CIC policy that was in effect in 1946-47. On a motion for summary judgment, the district court noted that there was no dispute that Cosmopolitan was placed on notice of the potential claim against Marsh prior to the expiration of the statute of limitations and that Cosmopolitan provided no reason or evidence why it waited so long to assert the claim. Although Cosmopolitan raised the question of whether New York or New Jersey law applied, the court decided that Marsh failed to timely file under either state's statute.

The court further stated in a footnote that summary judgment was granted to Marsh on the additional ground that no reasonable jury could find that Marsh had a duty to Cosmopolitan or that the breach of any such duty

caused Cosmopolitan harm. Apparently, these determinations did not warrant a full discussion in the opinion given the strength of the primary holding that the claim was time-barred.

UPDATE ON PREVIOUSLY REPORTED CASE

CHOICE OF LAW – Policy Contract Provision Enforced
PRACTICE & PROCEDURE – Late amendment to add cause of action denied

***Great Lakes Insurance SE v. Andersson*, No. 4:20-40020, 2021 WL 2542489 (D. Mass. June 21, 2021)**
& *Great Lakes Insurance SE v. Andersson*, 338 F.R.D. 424 (D. Mass. July 20, 2021)

Great Lakes Insurance SE ("GLI") filed a declaratory judgment action in admiralty 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. In June of 2021, the District Court held that the New York choice-of-law provision in GLI's policy applied to extra-contractual claims and that Massachusetts law did not render that provision unenforceable even though New York law did not provide for a bad faith claim.

A month later, following the insured's deposition, GLI moved to amend the complaint and add a new cause of action for avoiding cover on the basis of a breach of the Named Operator Warranty. Despite claiming that it acted with utmost diligence in seeking to add the claim after the deposition was concluded, the court determined that GLI had good reason to suspect that grounds existed for the cause of action prior to that time based on Andersson's written discovery responses, which suggested the breach. The court found that the amendment would result in prejudice to Andersson and would further delay the case.

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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