MLA Committee On Marine Insurance and General Average
NEWSLETTER

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In this Issue:

Case summaries related to the following issues:

Uberrimae Fidei

- Questions of fact preclude entry of judgment on *uberrimae fidei*
- Material misrepresentation voids coverage

Insurance Contract Construction

- Exclusion for theft – was a "joyride" operator a thief
- Removal of "As Owner Of" clause expanded coverage
- Owner's use of vessel as primary residence voids coverage
- Cooperation clause: claim for Loss of Hire due to engine failure denied for breach
- Additional insured added to primary and excess bumbershoot liability policies based on underlying contractual obligation to procure comprehensive general liability insurance

Practice and Procedure

- No jury trial in admiralty coverage action under Rule 9(h)
- Insurer has burden of proving coverage exclusion
- Statutory time bar applies superseding shorter policy contract time bar
- Louisiana Direct Action Statute inapplicable, insurer granted summary judgment
- Insurer good faith claims handling related to: (a) storm damage to yacht; (b) water intrusion due to collision

Subrogation

- "No coverage" exception

Warranty

- Status update on Captain/Crew Warranties in Eleventh Circuit
- Navigation Warranty: is a jetty "land"?

Editor's Comment:

I need to give credit where credit is due. This very robust edition of the Newsletter would not have been possible without the excellent writing and thoughtful analyses of contributors Kevin Albertson, Guillermo Cancio, Kristin Poling and our Chair, William Fennell. I also wish to thank Keith Heard and Hal Watson for sending cases and commentary my way whenever they see an interesting decision. I am so very grateful to each of them for sharing their time and talents with this Committee and the MLA. Special thanks (as always) to Will for his leadership.

~~RECENT CASES OF INTEREST~~

UBERRIMAE FIDEI

***Great Lakes Ins. SE v. SEA 21-21 LLC*, No. 20-22865-CIV, 2021 WL 6135127 (S.D. Fla. Oct. 18, 2021)**

The court denied a marine insurer summary judgment for the insured's alleged breach of the doctrine of *uberrimae fidei* based upon the court's finding that a genuine dispute of material fact existed surrounding misrepresentations of the insured's loss history and a renewal questionnaire pertaining to purported upgrades to, and the insured value of, the subject vessel.

The insurer tried to void cover from the inception of the policy based on purported misrepresentations on prior losses. Not surprisingly, the insurer submitted a declaration from its underwriter stating that had he known of the prior losses he would not have issued the policy. The court found that "[t]hese retrospective, self-serving statements of Great Lakes's insurance underwriter, alone, are inadequate to support the insurer's claim of materiality." However, the insurer also presented a manual with its underwriting practices that, according to the court, established the materiality of the insured's loss history. The insured's corporate representative told a different story, however, one of varying losses, but involving other claims than those involving the named insured or named operators. Their only link was the insured's involvement in the other corporate entities, but was not personally named on the claims. The court found a genuine despite of material fact precluding summary judgment on *uberrime fidei*.

Moving onto the next issue of the purported upgrades to the vessel, the insurer relied on a forensic accounting analysis and an expert report purporting to show the insured inaccurately represented the purchase price and repairs to the vessel on the renewal insurance questionnaire so as to get a higher insured value for the vessel. Once again, the insured's corporate representative told a different story by validating both receipts and work orders to establish the authenticity and accuracy of numerous receipts for repairs and, thus, the value of the vessel. The court, admitting the fact intensive nature of the inquiry of the claim, declined the insurer's motion for summary judgment finding an obvious dispute of a material fact.

***Great Lakes Ins. SE v. Borchert*, No. 3:20-CV-0029, 2022 WL 783723 (D.V.I. Mar. 15, 2022)**

Allison and Michael Borchert ("Borcherts") sought insurance for their sailboat Arwen ("Vessel"). As part of their application with Great Lakes Insurance SE ("Insurer"), the Borcherts were advised the policy was a named-operator only policy. The insurance application includes language stating that the application is a part of the policy and that any misrepresentation may render the coverage null and void. A policy was issued with an effective date of November 19, 2019, naming the Borcherts as operators and two others; and naming Ham & Cheese LLC as an additional insured. On or about February 14, 2020, the Insurer was placed on notice of a claim against the Borcherts, the Vessel, and others; for the death of a passenger on or about December 25, 2019, while the Vessel was bareboat chartered to Ham & Cheese LLC and operated by an unlisted operator. The Insurer filed a declaratory judgment action seeking confirmation that coverage did not apply to the aforementioned occurrence. All defendants failed to appear, and the court entered a default against them.

Applying the doctrine of *uberrimae fidei*, the court held the Bocherts' misrepresentations on the application of insurance were material, and the Insurer would not have issued the policy under the same terms and conditions had the facts been disclosed.

***Great Lakes Ins. SE v. Sunset Watersports, Inc.*, No. 20-CIV-61629-WPD, 2021 WL 5933708 (S.D. Fla. Nov. 8, 2021), *appeal dismissed*, No. 21-14270-DD, 2022 WL 758020 (11th Cir. Feb. 17, 2022)**

See, *infra*, p.12 for case summary.

INSURANCE CONTRACT CONSTRUCTION

- **Undefined policy exclusion for "theft" required some degree of criminal intent, but not that of common law larceny; therefore, whether joyrider's use of vessel was "theft" would be resolved by trial**

***Aspen Am. Ins. Co. v. Tasal, LLC*, 553 F. Supp. 3d 1127 (M.D. Fla. 2021)**

The court denied the dueling motions for summary judgment by the insured-owner of a vessel and insurer over the application of a theft exclusion in a yacht policy. The policy generally covered physical damage to the vessel while operated by the named operator. However, as stated in the policy, there was "[n]o coverage . . . when the insured vessel(s) is/are being operated by anyone other than those listed as operators." 553 F. Supp. 3d at 1129 n.1. An exception to the exclusion applied in the event of "theft." The loss giving rise to the dispute occurred when a non-listed operator took the boat for a "joyride" and "shipwrecked" the boat. The term "theft" was not defined in the policy and the "one dispositive fact question" was whether the joyrider had stolen the vessel such that the "theft" exception to the non-listed operator exclusion applied.

The insurer argued that the insured must establish the criminal intent element of common law larceny of the joyrider to obtain coverage. The court rejected the insurer's argument because it found that the insurer failed to define "theft" and, therefore, the court construed the term in favor of the insured. However, the court also rejected the insured's argument that New York law (which applied to the policy in the absence of established maritime law) did not require any criminal intent to establish a covered loss by theft. The court held that whether a "theft" had occurred presented a question of fact that would have to be resolved at trial.

- **Removal of "As Owner of" Clause in P&I Policy expanded cover**

***Badeaux v. Eymard Bros. Towing Co.*, No. CV 19-13427, 2021 WL 4949059 (E.D. La. Oct. 25, 2021)**

Plaintiff captain ("Plaintiff") brought an action against a vessel owner ("Eymard Brothers"), spar barge owner ("ARTCO"), and the spar barge's parent company ("ADM"). ADM and ARTCO tendered their defense and indemnity to Eymard Brothers under time charter agreement, but Eymard Brothers' insurer ("Stratford") denied cover. Stratford claimed: (a) ARTCO was not an additional assured under the protection and indemnity policy and (b) the loss was not a vessel-related liability.

Plaintiff, the Master of the M/V Pearl C. Eymard ("Vessel"), slipped and fell when stepping from an adjacent spar barge (owned by ARTCO) onto his vessel. He did not recall whether his foot ever touched the vessel. ARTCO time-chartered the Vessel to move ARTCO barges around ADM's grain elevators on the Mississippi River. A provision in charter required Eymard Brothers to procure and maintain protection and indemnity ("P&I") insurance on the Vessel. Further, ADM required any policy have the "As Owner Clause" removed from the policy to include cover for ARTCO as a charterer as well as any affiliated or related companies. Eymard Brothers procured the cover from Stratford adhering to the requirements of the charter. Stratford

declined cover for ADM and ARTCO, causing both to file a third-party declaratory action seeking cover. Both parties moved for summary judgment.

The court's threshold matter was a choice of law inquiry as the policy contained a New York choice of law provision. Through the analysis, the court declined to follow the choice of law clause due to a complete lack of contact with the parties involved. The court concluded Louisiana law applied because both the vessel was domiciled in Louisiana and the loss took place in Louisiana waters. Louisiana law governed the court's interpretation of the policy.

Contract analysis under Louisiana law requires the fact finder to determine the common intent of the parties, giving credence to the term's generally accepted meaning. If policy wording is clear and unambiguously evidences the parties' intent, the contract must be enforced as written. If there are ambiguities, it must be resolved by construing the policy as a whole to have the meaning that best conforms to the contract's subject matter. If, after applying these rules of interpretation, the ambiguity remains then the provisions are construed in favor of the insured (assuming there is an insurance contract).

The court quickly concluded both ADM and ARTCO qualified as additional insureds under the policy. The time charter agreement required Eymard Brothers to name ADM as an additional insured. The policy included affiliated entity language, granting those entities additional insured status as well. Since ARTCO was a wholly owned subsidiary of ADM, they too qualified as an additional insured. The court found Stratford's arguments unpersuasive. Mainly Stratford contended ATRCO was not an additional insured because they were not actually engaged or involved in the operations at the time of the loss. Focusing on the contract as a whole, the court found Stratford's argument unavailing. Cover is available for insureds whether directly or indirectly with operations at the time of the loss. Eymard Brothers moved ATRCO owned barges around the grain elevators, ATRCO was certainly either directly or indirectly involved in operations at the time of loss.

Stratford's removal of their "as owner of" clause in their policy, without any limiting language, effectively expanded cover under the P&I policy. These policies generally cover liabilities for an insured *as owners of a vessel* named in the policy. The Fifth Circuit requires some causal operational relation between the vessel and loss. However, removal of the "as owner of" clause from the policy expands cover under the policy as courts no longer apply the causal operational relation test. For example, a P&I policy provided cover for plaintiff's injury regardless of whether the liability incurred as a vessel owner or a platform operator. If the policy contained the "as owner" clause, cover would not exist in the latter. Here, neither party disputed the deletion, nor did Stratford include qualifying language to limit the effect of the deletion. Due to the deletion, the court concluded the Stratford policy provided cover for both ADM's and ARTCO's vessel-related liabilities.

The final issue for the court was whether the loss was sufficiently vessel related. The one constraint on cover for both ADM and ARTCO under the Stratford policy is the loss must be "in respect of the vessel." What made this tricky was Plaintiff did not recall if his foot ever touched the vessel. The court found no applicable case law interpreting the policy term, so it turned to state law. Looking at the dictionary definition and Louisiana case law, the term "in respect of" receives an expansive interpretation. Some going as far to define it as "being related to or associated with, but not the primary purpose of" the particular matter. The court determined no causal connection was required but ambiguity remained on the scope of cover and the proximity of the loss to the vessel. Faced with the ambiguity, the court construed the condition against Stratford finding cover for both additional insureds under the P&I policy for vessel related liabilities.

- **Owner's use of vessel as primary residence voids coverage**

***Progressive Garden State Ins. Co. v. Metius*, No. CV 18-2893, 2022 WL 214546 (D.N.J. Jan. 25, 2022)**

The District of New Jersey upheld an insurer's denial for third party liability coverage after finding that a pleasure craft was an insured's "primary residence," and not merely used for "pleasure use exclusively."

In this case, the defendant Erwin Metius purchased a 1988 Marine Trader motor yacht in August 2017 and obtained a personal watercraft policy from Progressive Insurance for same. That policy provided $300,000 in liability coverage. On his electronic application for insurance, Metius indicated that the vessel was for "pleasure use exclusively," despite having the option to select "primary residence" from a drop down menu. The policy that was issued contained an exclusion for "damage arising out of an accident while using a watercraft as a primary or permanent residence." A standard Fraud or Misrepresentation provision was also included the policy, which voided coverage *ab initio* for any misrepresentation of material facts or circumstances made by the insured. However, despite maintaining a lake house, Metius spent most of his time living aboard the vessel as it was an easier commute to work and nearby friends and family.

In December 2017, Metius caused an onboard electrical fire when he reversed his AC unit to operate as a heat source. The fire spread and burned a nearby boat down to its waterline. The marina dock was also damaged and an oil spill gave rise to a pollution claim. Metius was subsequently sued by the owner of the nearby boat and the marina. Metius sought defense and indemnity under his Progressive policy, but coverage was denied under the "primary residence" exclusion and fraud/misrepresentation clause.

Progressive initiated a declaratory judgment action in New Jersey federal court, wherein the court granted summary judgment in the insurer's favor. Despite that the phrase "primary residence" was not defined in the watercraft policy, the court determined that the term was not ambiguous. Applying a totality of the circumstances test, the court held that Metius was using the vessel as his "primary residence" because he "mostly stayed on the vessel" and "it is where the insured mainly physically resides." Indeed, Metius stated that he considered his lake house to be more of a weekend, "second" home, and was basically "homeless" as a result of the vessel fire. The court also found that Metius misrepresented the use of his vessel on his insurance policy, thereby voiding coverage *ab initio*. As a result, Progressive had no duty to defend or indemnify Metius for the third party liability claims.

- **Cooperation clause: insured's breach precluded cover for loss of hire due to engine failure**

***U.S. Fire Ins. Co. v. Icicle Seafoods, Inc.*, No: C20-00401-RSM, 2021 WL 5415306 (W.D. Wash. Nov. 19, 2021)**

Icicle Seafoods ("Icicle") pursued a loss of hire claim resulting from engine damage on or about December 2016 on the R.M. Thorstenson ("Vessel") from its insurers. Insurers adjusted the claim for approximately $970,000. Icicle demanded approximately $4 million based on its calculation. From 2018 until 2020 Icicle and its Insurers attempted to settle the loss of hire claim. Insurers filed a declaratory judgment action on March 13, 2020, seeking a declaration of Icicle's actual value of the loss of hire claim. Icicle counterclaimed in June 2020 with a number of state law causes of action. Ultimately, Icicle filed a motion for summary judgment seeking confirmation, in relevant part: (1) that Washington law applied to the dispute; (2) Icicle was entitled to a jury trial; and (3) the interpretation of the policy language.

The court concluded state law applied because there was no Federal statute or judicially created rule governing the interpretation of the policy's loss of hire provisions. Next, the court concluded jurisdiction falls within 28 U.S.C. § 1333 because no independent jurisdictional basis exists for counterclaims arising from the marine insurance policy subject to Insurers' initial complaint. Despite state law applying to the insurance policy interpretation, the court struck Icicle's demand for a jury trial.

Lastly, the court relying on state law, held Icicle did not comply with its duty to materially cooperate with its Insurers in investigating the claim. The court dismissed Icicle's arguments that Insurers' ability to adjust the claim was ultimately unaffected by its acts or omissions, concluding that state law treats extensive delays in or refusal to provide material documentation as potentially causing actual prejudice to insurers. Lastly, the court noted that an insured's failure to substantially comply with the insurer's investigations discharged an insurer's obligations under an insurance policy in Washington. Therefore, Icicle's failure to cooperate with its Insurers rendered its state law claims not actionable as a matter of law.

- **Additional insured added to primary and excess bumbershoot liability policies based on underlying contractual obligation to procure comprehensive general liability insurance**

***O'Brien's Response Mgmt., L.L.C. v. BP Expl. & Prod., Inc.*, 24 F.4th 422 (5th Cir. 2022)**

A dispute arose as to the party responsible for paying personal injury claims brought by employees of two contractors that BP Exploration & Production Inc. *et al.* ("BP") hired in connection with the Deepwater Horizon offshore explosion. Thousands of the contractors' employees filed personal injury lawsuits against BP, which were consolidated with the multidistrict litigation. BP settled a subset of the contractors' employees' claims, but many "Back-End Litigation Option" claims (the so called "BELO" claims) were subsequently brought against BP. BP sought indemnification from the contractors and their insurers for the BELO claims, as well as for suits by any employees that had opted out of the earlier settlement.

Although the case addresses multiple contractual issues, for present purposes we note that BP argued that it was an additional insured to one of the contractor's (O'Brien's Response Management, LLC) primary and excess bumbershoot liability policies, which provided marine umbrella insurance of $10 million and $90 million, respectively. The insurer argued that BP was an additional insured under its policies only to the extent the contractor was "obligated by virtue of a written contract or agreement to provide insurance as is afforded by [the insurer's] policy." The written contract between the contractor and BP obligated the contractor to add BP as an additional insured to "comprehensive general liability insurance," which was to be "endorsed to cover marine operations." According to the insurer, the contractor had satisfied its obligation to procure "comprehensive general liability insurance" by obtaining a marine general liability policy and a contractor's operations and professional services environmental insurance policy from different underwriters. According to the insurer, the contractor was not obligated to procure primary and excess bumbershoot liability policies and, therefore, BP was not an additional insured under the primary and excess bumbershoot liability policies. The insurer distinguished its bumbershoot policies from the CGL coverage referenced in BP's contract with the contractor and the CGL-type coverage afforded by the marine general liability policy and the contractor's operations and professional services environmental insurance policy.

The court rejected the insurer's argument and held that BP was an additional insured. The court reasoned that the primary and excess bumbershoot policies were excess to, and followed the form of, the underlying marine general liability policy. The differences between CGL and bumbershoot policies "writ large" were unpersuasive in the particular context of the case. The overlap of coverage between the marine general liability policy and the primary and excess bumbershoot policies, together with the direct reference to the marine general

liability policy in the bumbershoot policies "refute[d] any meaningful distinction" in this case. "The bumbershoot policies provide CGL-type coverage, so they are best understood as CGL policies under the BP-O'Brien's Contract, and BP is an additional assured." 24 F.4th at 429-30.

The court also rejected BP's argument that it was entitled to the full coverage limit of $100 million under the primary and excess bumbershoot policies. Rather, the court relied upon its prior holding in *Ironshore Specialty Insurance Co. v. Aspen Underwriting, Ltd.*, 788 F.3d 456, 461-63(5th Cir. 2015), and held that BP was covered as an additional assured "only to the minimum obliged by the parties' contract and not the maximum obtained by the named insured." 24 F.4th at 431. The fact the BP contract required the contractor to procure coverage with "minimum limits" of $2 million still acted as a limit on the insurance the contractor was obligated to procure. Therefore, the court held that the "BP-O'Brien's Contract, read in full, adopts the $2 million minimum CGL coverage as the maximum required to be furnished by each party for the benefit of the other and that [the insurer's] bumbershoot policies incorporated the limit of the contractual obligation." 24 F.4th at 433.

PRACTICE AND PROCEDURE

- **No jury trial in admiralty coverage action under Rule 9(h)**

***Great Lakes Ins., S.E. v. Gray Grp. Invs., LLC*, No. CV 20-2795, 2021 WL 5907710 (E.D. La. Dec. 14, 2021)**

The Eastern District of Louisiana reiterated a longstanding rule in this case: there is no right to a jury trial when a case is designated under admiralty jurisdiction.

The 66-foot yacht HELLO DOLLY VI was moored in Pensacola, Florida when a Category 2 hurricane struck the Gulf coast. The yacht was severely damaged from the storm and sunk at its mooring. The insured yacht owner filed a claim for the total loss of the vessel. The insurer denied coverage for an alleged breach of certain warranties contained in the policy, and the insurance carrier brought a declaratory judgment action in Louisiana federal court, invoking admiralty jurisdiction. The insured answered and filed its own counter-claims, alleging violation of Louisiana state insurance laws. In its responsive pleading, the insured asserted diversity as a separate basis of jurisdiction and demanded a jury trial.

The insurer moved to strike the insured's jury demand, arguing that there is no right to a jury trial under admiralty law. The federal court granted the insurer's motion, holding that the insured is not entitled to a jury trial because the case was initially designated in admiralty and no separate basis of jurisdiction was stated in the complaint. The federal court explained that "the facts which established admiralty jurisdiction for the plaintiff's original claim also form the basis for the . . . counter-claim." Citing to Eastern District of Louisiana precedent, the federal court noted "a defendant may not emasculate the election given to the plaintiff by Rule 9(h) simply by bringing counter-claims or third party actions." Thus, the insured was denied a trial by jury on all claims and the action was ordered to proceed to a bench trial.

***Great Lakes Ins. SE v. Crabtree*, No. 20-81544-CIV, 2022 WL 110686 (S.D. Fla. Jan. 12, 2022)**

Great Lakes Insurance SE ("Insurer") issued a hull policy on the S/V Brandison ("Vessel") for $250,000.00. The Insureds ("Crabtrees") filed a claim for a total loss to the Vessel due to fire damage while laid up at a boatyard in Riviera Beach, Florida. The Insurer denied coverage and filed suit against the Crabtrees in Montana federal court under 28 U.S.C. § 1333 seeking declaratory relief for failure to satisfy insurance requirements and material misrepresentations on their insurance application. In turn, the Crabtrees filed suit in the Florida State

Circuit Court in Miami-Dade County and demanded a jury trial. The Montana action was transferred to the Southern District of Florida, where the court asked the parties to address whether the Crabtrees were entitled to a jury trial for their counterclaims.

The Crabtrees advanced six arguments to overturn the settled Eleventh Circuit precedent that "in admiralty cases there is no right to a jury trial." Unmoved by the Crabtrees' arguments to the contrary, the court granted the Insurer's motion for a bench trial because all claims arose from the insuring agreement, which was undisputedly a maritime contract.

- **Insurer has burden of proving coverage exclusion**

***Clear Spring Prop. & Cas. Co. v. WLT LLC*, No. 3:21-CV-527 GCM, 2022 WL 323996 (W.D.N.C. Feb. 1. 2022)**

An insurer issued a policy to WLT for the vessel "EL JEFE" with a Hull and Machinery Limit of $925,000.00. The policy included a choice of law clause calling for the application of New York law when entrenched Federal admiralty law and practice do not exist. WLT filed a claim during the policy term. After an investigation, the insurer declined coverage based on (1) wear and tear, (2) manufacturing defects, and (3) lack of evidence showing an accidental external event caused the loss. The insurer filed a declaratory judgment action seeking confirmation of their declination. WLT declined to answer the suit, and the court entered a default against it.

Upon the insurer's motion for default against its insured, and applying federal law and noting New York law concurs, the court held the insurer bears the burden of proving the facts that trigger an exclusion to coverage.

- **Statutory time bar applies superseding shorter policy contract time bar**

***Bar Harbor Bank & Tr. v. Hanover Ins. Grp., Inc.*, No. 1:21-CV-00201-LEW, 2021 WL 5237229 (D. Me. Nov. 10, 2021)**

The case involves an insured vessel that caught fire and was a constructive total loss. The defendant-insurer declined to cover the loss of the vessel as a result of its investigation, which determined the owner had caused the fire in order to collect on the insurance policy (albeit, which the owner disputed). The mortgagee of the vessel, who claimed the right to the insurance proceeds as a loss payee under the policy because the owner had ceased mortgage payments, sued the defendant-insurer. The mortgagee argued that nothing in the policy prevented a loss payee from recovering for losses intentionally caused by the insured. The defendant-insurer moved to dismiss the suit as untimely under the terms and conditions of the policy.

The laws of Maine, where the loss took place, prohibit insurers from issuing policies that provide less than two years to commence a suit to recover under the policy. The mortgagee relied upon the Maine Insurance Code (Me. Rev. Stat. Ann. tit. 24-A, § 3002 (2022)), which requires provisions in fire policies to provide a minimum of two years to bring suits on claims. The policy at issue in this case, however, was not a standard fire policy. The policy covered a myriad of losses, including fire, making it a marine insurance policy, not a fire policy. However, the court noted that the Maine Insurance Code also recognizes "combination" policies, "which insure against fire while also providing 'substantial coverage against other perils.'" The court held that such "combination" policies must also provide a minimum of two years to bring suits on claims.

The defendant-insurer contended the Maine Insurance Code removed "wet marine" insurance contracts from the otherwise obligatory two-year suit-time minimum. The court found the defendant-insurer's reading of the Maine Insurance Code unpersuasive, noting the Maine legislature intended the insurance provisions to apply broadly. The one-year limitation period in the policy was rendered inapplicable and the statutory two-year limitation period applied. The court denied the defendant-insurer's motion.

- **Louisiana Direct Action Statute inapplicable, insurer granted summary judgment**

***Marriner v. Talos Petroleum, LLC*, No. CV 20-615, 2021 WL 7081076 (E.D. La. Dec. 21, 2021)**

Plaintiff, a diver employed by Epic Diving & Marine Services, LLC ("Epic") sustained injury to his right hand when attempting to plug a well on the Outer Continental Shelf of the Gulf of Mexico. He filed suit against several companies, including Epic and Defendant Travelers Syndicate Management Ltd. ("Travelers"). Travelers issued from London a protection and indemnity policy to Epic in Texas. Plaintiff sued Travelers under the Louisiana Direct Action statute because, in part, Epic had filed for bankruptcy.

Travelers filed a dispositive motion arguing Plaintiff failed to state a claim because the policy and loss bore no connection with Louisiana, which was a requirement under the Direct Action statute. Plaintiff responded that admiralty law authorized the court to fashion a remedy for plaintiff because, without it, plaintiff's remedy was otherwise incomplete, inconvenient, or unavailable. Specifically, plaintiff pointed to Epic's bankruptcy petition, and argued the Traveler's policy may be the only source of financial compensation.

Federal admiralty law provides no general right to sue a tortfeasor's insurer directly. The Louisiana Direct Action Statute provides such a right for insurance policies that are: (a) issued in Louisiana; (b) delivered in Louisiana; or (c) that cover a loss that occurred in Louisiana. The court noted one case almost on point with Plaintiff, an offshore injury, with a policy written in London and delivered in Texas. That court, while noting a policy argument that an insurer with significant contacts with a state be able to evade the direct action statute, precluded recovery as the accident occurred offshore on the Outer Continental Shelf. In dicta, the court suggested such a policy argument should be directed to other political branches, not the courts. The Louisiana Direct Action Statute was inapplicable to Plaintiff's claim.

Plaintiff did not contest their lack of a procedural right to sue under the Direct Action Statute. Rather their argument was that such an action should be permitted under federal admiralty law when their remedy is incomplete, inconvenient or unavailable. Again, noting Epic's bankruptcy proceedings likely making the Traveler's policy the only source available to compensate Plaintiff for their loss. Under *Wilburn Boat,* there is a two-step process for deciding whether to apply federal or state law to a particular admiralty dispute. "The first step is to determine whether the dispute is governed by an established federal statutory or judicially created rule. If not established federal rule governs the dispute, the second step is to decide whether the court should fashion one." *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).

As a first step in the analysis, the court noted federal courts are unanimous that no federal rule exists authorizing a third party's right to sue an insurance company. The next step under *Wilburn Boat* is whether the court should craft a new rule of admiralty law. Specifically, Plaintiff wanted the ability to sue insurers directly when the tortfeasor is insolvent so as to not leave seaman without a complete remedy. There is a circuit split on the issue. The Sixth Circuit allowed such an action for a class of seafarers in asbestos litigation since seaman are entitled to special treatment as wards of the admiralty court. Conversely, the Nineth and Eleventh Circuits declined to recognize such a rule for case specific facts and national interest in state insurance, respectively.

The court sympathized with Plaintiff's predicament, but the Supreme Court in *Wilburn Boat* instructed regulation of marine insurance should be left to the states. Plaintiff did not demonstrate a compelling need boarder than the subject fact pattern to supplant the Louisiana state legislature on direct actions. The court declined to form a new rule of admiralty law that contravenes the state statute. The court granted Traveler's motion for summary judgment.

- **Insurer good faith claims handling**

***Cincinnati Ins. Co. v. Fish*, RDB-19-3355, 2022 WL 562644 (D.M.D. Feb. 24, 2022)**

Fish filed a claim with Cincinnati Insurance Co. ("Insurer") for damage to his yacht arising from a storm while docked at a marina in Kent Island, Maryland, on or about July 23, 2017. The Insurer declined to survey the vessel until after Fish presented his claim on October 18, 2018, for $220,000.00.

After inspection of the vessel on November 1, 2018, the Insurer determined exterior damage was consistent with storm debris, and interior water and mold damage was consistent with lack of maintenance over time. Consequently, on November 17, 2018, the Insurer issued partial payment for damages attributable to the storm for $18,625.00 and denied coverage for water and mold damage. The coverage part of the claim was submitted to appraisal resulting in an additional payment of $24,652.00. During a joint survey after repairs commenced, Fish's surveyor pointed out that the water damage was attributable to a leaky wire chase from the bridge to the engine. As a result, the Insurer conducted an electrical inspection and reiterated its denial of coverage to Fish.

The Insurer filed a declaratory judgment action in federal court under 28 U.S.C. § 1333 to determine any remaining monetary liability to Fish. Ultimately, Fish filed an amended multicount counterclaim including a (1) declaratory action that the Insurer should pay policy limits or repair the yacht, (2) breach of contract, (3) first-party lack of good faith, and (counts 4, 5, 6, and 7) unfair claim settlement practices. Applying Maryland law, the court denied Fish's motion for summary judgment on counts 1 and 2, noting there is an issue of material fact as to the cause and origin of the interior water damage. Furthermore, the court granted the Insurer's motion on counts 3, 4, 5, 6, and 7, noting the Insurer complied with all statutory requirements of good faith and fair dealing, fair claims settlement practices, and covenant of good faith and fair dealing.

The case is ongoing as to the Insurer's declaratory judgment and the Fish's counter declaratory judgment claim and breach of contract claim.

***Vollandt v. Axis Ins. Co.*, No. 4:19-cv-311-KPJ, 2022 WL 822020 (E.D. Tex. Mar. 17, 2022)**

Axis Insurance Company ("Insurer") offers policies for pleasure boats. To purchase insurance from Insurer, customers fill out an online application, and supporting documentation is not required. If the application is accepted, Insurer issues a quote. Insurer proceeds to issue a policy to their customer once the premium is paid. Ralf Vollandt ("Vollandt") purchased a pleasure boat ("Boat") in June 2016 at auction for $7000. In March 2017, Vollandt submitted an online application with the Insurer and declared the Boat's value as $36,500.00. Supporting documentation for the Boat's value was not provided during the application. Two weeks after the policy was issued, on March 25, 2017, Vollandt submitted a claim for water intrusion into the vessel due to collision/allision in Lake Lewisville, Texas.

The Insurer's appointed surveyor observed no evidence that the Boat was involved in a collision or allision. The only explanation for the Boat taking on water was a broken plastic elbow fitting in the deck drain system. Beginning on April 5, 2017, the Insurer sought supporting documentation from Vollandt regarding his insurable

interest in the vessel and its value. By May 2017, after receiving no response to queries, the Insurer appointed counsel to conduct an examination under oath ("EUO") of Vollandt. Vollandt appeared for the examination under oath on November 13, 2018. During his EUO, Vollandt provided documentation of his ownership and documentation of $20,000.00 in cash payment on September 2, 2016, for a new engine. Furthermore, Vollandt stated he spent another $9,000.00 in cash for other upgrades/repairs to the vessel for which he had no receipts. On March 21, 2019, Vollandt filed suit in state court against the Insurer alleging multiple state law claims: (1) breach of contract, (2) violations of Texas Insurance code, (3) breach of duty of good faith and fair dealing; and (4) breach of fiduciary duty. The Insurer removed to the U.S. District Court for the Eastern District of Texas subject to 28 U.S.C. § 1332. Insurer moved for summary judgment on multiple grounds.

Applying Texas law, the court declined summary judgment on counts one and five because the record was unclear as to whether (1) Vollandt's actions constituted a material break or prejudiced the Insurer as a matter of law, and (5) the Insurer complied with the statutory requirements of the duty of good faith and fair dealing. As to count one, the court relied on the adjuster's claim file notes that contradicted the claim Voldstadt's actions prejudiced the Insurer from conducting a claims investigation. Furthermore, the court noted the Insurer's motion requires assessing the probative value of the documentation and testimony provided by Vollandt, which is outside of the scope of an evaluation of a summary judgment. As to count five, the Court added that whether the delays in taking the EUO constitute bad faith also requires weighing evidence.

The court granted summary judgment on counts two, three, and four, concluding; (2) the insurance policy is a maritime insurance policy and therefore not subject to the Texas Insurance code prompt payment requirements, (3) no private cause of action exists under the Unfair Settlement Practices Act, and (4) a Texas insurer does not have a fiduciary duty to its policyholders.

SUBROGATION

- **Pennsylvania Supreme Court recognizes "no-coverage exception" to general rule prohibiting an insurer from subrogating against its own insured for benefits paid under commercial hull policy**

***Arlet v. Workers' Comp. Appeal Bd.*, 270 A.3d 434 (Pa. 2022)**

While in the course of his employment, the plaintiff, a land-based shipwright, slipped and fell on the icy sidewalk of the premises of his employer. The employer's insurer paid maintenance and cure to the plaintiff under a commercial hull policy issued to the plaintiff's employer. The plaintiff also sought workers' compensation benefits, which gave rise to multiple proceedings before lower tribunals. The "foundational determinations" from those lower tribunal proceedings included the finding that the plaintiff was not a seaman for purposes of the Jones Act and, therefore, not covered under his employer's commercial hull policy. *See* 270 A.3d at 439-40. Further, the plaintiff's exclusive remedy lay with the workers' compensation act. *See id.* The Pennsylvania Supreme Court did not revisit those findings on appeal. Rather, the court considered "the narrower issue" of the right of the commercial hull insurer to seek subrogation against the plaintiff's employer (i.e., the insured) for the benefits the insurer paid on a risk that the insurer did not cover.

The insurer's claim of subrogation against its own insured (the Plaintiff's employer) "implicate[d] the general equitable rule recognized by the Commonwealth Court that '[i]t is well settled that an insurer cannot subrogate against its own insured.'" 270 A.3d at 442. According to the court, the general rule served two purposes: "(1) it prevents the insurer from passing the loss back to its insured, an act that would avoid the coverage that the

insured had purchased; and (2) it guards against conflicts of interest that might affect the insurer's incentive to provide a vigorous defense for its insured." 270 A.3d at 443 (internal quotation marks omitted).

However, the Pennsylvania Supreme Court reasoned that neither purpose was furthered where the insurer's policy did not cover the loss for which the insurer paid out under the policy. Accordingly, the court adopted the "no-coverage exception" recognized in other jurisdictions, including California, Colorado, and New York. Thus, court held that the insurer could "seek[] subrogation against its insured for payment it made on a loss it did not cover." 270 A.3d at 444. The court further held that the fact "that Insurer voluntarily made timely payments under its policy pending a determination of whether [Plaintiff] was in fact covered under the policy does not alter the rationale of either the general rule or the no-coverage exception."

WARRANTY

- **Status update on Captain/Crew Warranties in Eleventh Circuit**

***Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, LLC*, No. 18-CIV-81270-RAR, 2021 WL 4989927 (S.D. Fla. Oct. 26, 2021)**

The case concerned whether the plaintiff-insurer was justified in denying the defendant-vessel owner's insurance claim under a $2 million insurance policy covering defendant-vessel owner's yacht, which sank during Hurricane Irma without a captain or crew. During the initial proceedings, the district court found for the plaintiff-insurer interpreting caselaw as establishing a firm rule in the Eleventh Circuit that required strict compliance with captain/crew warranties. *See Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, LLC*, 396 F. Supp. 3d 1170, 1176, (S.D. Fla. 2019). On appeal, however, the Eleventh Circuit reversed, holding that no such established maritime rule existed, and required the district court to apply Florida state law. *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1162 (11th Cir. 2021).

On remand, the district court held that Florida law requires a causal connection to prove a breach of a warranty increased the hazard that caused the loss. The defendant-vessel owner, as the moving party for summary judgment, had to demonstrate the absence of a material fact. The defendant-vessel owner offered the opinion of its expert witness, who opined that storm preparations met the requisite standard of care and the absence of a captain/crew did not increase the risk to the vessel during the storm. In response, the plaintiff-insurer tried to offer expert opining to the contrary, but earlier in the litigation the court struck the plaintiff-insurer's expert rebuttal report for evidentiary reasons. Beyond expert testimony, the plaintiff-insurer submitted factual witness testimony, but none of the witnesses were licensed mariners or qualified to opine on the adequacy of the insured's preparations. Accordingly, the court found that the breach of the captain warranties did not have the requisite connection with the loss to preclude coverage under the policy and, therefore, the court entered summary judgment for the defendant-vessel owner. The plaintiff-insurer has appealed.

- **Navigation Warranty: is a jetty "land"?**

***Great Lakes Ins. SE v. Sunset Watersports, Inc.*, No. 20-CIV-61629-WPD, 2021 WL 5933708 (S.D. Fla. Nov. 8, 2021), *appeal dismissed*, No. 21-14270-DD, 2022 WL 758020 (11th Cir. Feb. 17, 2022)**

Plaintiff insurer, Great Lakes, filed a declaratory action asserting *uberrimae fidei* requesting the court void the policy from inception, or, in the alternative, preclude cover under the policy's exclusions. There are three losses. First, the Sunset Party Cat claim, where two individuals passed from injuries sustained while parasailing

when a cord snapped. Second, the Sunset Watersports claim, where a patron slipped and fell attempting to board the vessel. The third claim, the Parasail V claim, asserted physical and mental injuries from two patrons who witnessed the Sunset Party Cat claim. Prior to the claims, Defendant Sunset Watersports had one policy covering all vessels, but since split them out to individual policies.

The parties contested the applicability of *uberrimae fidei* to the policies. Defendants argued it did not apply due to the losses being more closely related to watersports tourism, noting the Eleventh Circuit has not applied the doctrine in the marine commercial liability context. In response, Great Lakes argue the doctrine applies since the cover is marine insurance generally, more specifically marine hull coverage. Plaintiff further argued the Eleventh Circuit did not explicitly preclude the doctrine's application in the protection and indemnity context. Noting other circuits extended the doctrine to pollution policies, the court held the doctrine applies with the subject policy being sufficiently marine in nature.

With the doctrine of *uberrimae fidei* applying, a classic battle of the experts ensued on whether misrepresentations on policy applications and renewal questionnaires rose to the level of material. Plaintiff argued nearly twenty losses over the past ten years were material to underwriting the risk. In support, Plaintiff's proffered underwriter testimony that had these losses been disclosed, Plaintiff would not have accepted the risk. The court considered whether an underwriter's testimony is sufficient to prove materiality and found that it may in some circumstances. In response, Defendants offered their expert opining that a reasonable insurer would only look at a five-year loss history as compared to the ten-year that Plaintiff considered. Further, the incidents Plaintiff referred to involved entities or operators that were not insured by Great Lakes. Noting while the frequency and severity of the losses could be material, the court found reasonable minds could differ holding a dispute of a material fact existed. The court moved onto whether Great Lake's policy precluded cover based on the exclusions in the policy.

(i) Sunset Party Cat Claim — Use of Vessel

Plaintiff contended their policy excluded cover for the Sunset Party Cat claim because the loss allegedly did not relate to the "ownership or operation" of a scheduled vessel, or, in the alternative, excluded under a navigational warranty. Plaintiff boarded the "M/V Party Cat" to transit out to the parasailing area. Once on location, they transferred to the "M/V Parasail V" to parasail when a cord snapped while they were in the air. Both individuals parasailing at the time eventually passed from the injuries sustained from hitting the water from such a height.

Plaintiff contended its policy did not cover the claim because the injuries were not a result of the ownership or operation of a scheduled vessel. The "Party Cat" was a scheduled vessel but the Parasail V was not. Plaintiff urged the court to employ a New York (controlling law under the policy) based test for whether a sufficient nexus exists between an automobile and an injury. It is a three-factor test: (1) the accident must have risen out of the inherent nature of the automobile; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading or unloading, must not have been terminated; and (3) the automobile must not merely contribute to cause the condition which produces the injury, but must, itself produce the injury. *U.S. Oil Ref. & Mtg. Corp. v. Aetna Cas. & Sur. Co.*, 181 A.D.2d 768, 581 N.Y.S.2d 822, 823-24 (N.Y. App. Div. 1992). So, the vessel itself need not be the proximate cause of the loss, but negligence in use of the vessel must be shown, which must be *a* cause of the injury. Conversely, Defendants contended no court applied this test in the maritime context. However, the court found the caselaw cited by Defendants unpersuasive.

Applying the New York test to the Sunset Party Claim, the injuries sustained by the claimant in that action did not meet any of the prongs. Indeed, the claimant in the Sunset Party Cat claim did not allege the Party Cat was

the cause of their injuries. In fact, the Parasail V was more than four nautical miles from the Party Cat when the parasailing cord snapped. Plaintiffs merely alleged the entity's involvement in the negligence that precipitated their loss, not negligence in the use of the vessel itself. For that reason, Plaintiff's policy did not provide cover for the Sunset Party Cat claim.

(ii) Sunset Party Cat Claim — Navigational Warranty

Plaintiff's policy also contained a navigational warranty for all three scheduled vessels, that no scheduled vessel may go more than one nautical mile from shore. Great Lakes' claim guidance clarified this means such distance offshore is the furthest the vessel must be from land. The court noted federal maritime law requires strict or absolute enforcement of express navigational warranties. Defendants did not contest the warranty as ambiguous or if coverage should be void from inception. In fact, the only item contested was whether Sunset Watersports was more than one nautical mile from land at the time of loss.

Plaintiffs contend the loss took more than one mile from the nearest shoreline, thereby violating the navigational warranty. In support, they relied on expert testimony on the location of the loss relative to the nearest shoreline. Interestingly, the expert noted a jetty extending out into the water opining that it was not land or an extension thereof, but rather an obstruction to navigation. Defendants, also relying on expert testimony, could not raise a genuine dispute of a material fact. Defendant's expert could not articulate at deposition what "land" means or if the subject jetty should be considered land. Therefore, Defendants did not effectively contest whether the jetty was or was not "land," so the court found the policy was void from inception due to a breach of the navigational warranty.

(iii) Sunset Party Cat Claim — Equitable Estoppel

Though Defendants did not spend too much time contesting whether the jetty constituted "land," they did contest that Plaintiff was barred from disclaiming under the doctrine of equitable estoppel. To succeed, Defendants must show prejudice by the insurer's actions and that they relied on some conduct to their detriment. As evidence, Defendants submitted three different price quotations claiming cover extended to over ten nautical miles offshore. Conversely, Plaintiff argued it was just a mistake, which was corrected for the binder and final policy provided to Defendant's insurance agent.

Estoppel cannot create coverage where none exists. The exception exists for the insurer who unreasonable delays disclaiming coverage and the insured suffers prejudice from that delay. Defendants did not argue Plaintiff delayed in disclaiming cover or and prejudice resulting therefrom. All of the cases cited by Defendants revolved around insurers and their conduct after the policy was final. Here, the allegations concern an insurer's conduct pre-policy issuance. The court held no such exception exists and Plaintiff were not barred from relying on the navigation warranty to void the policy.

(iv) Remaining Claims

The court found no coverage for the remaining two claims, either the Sunset Watersports or the Parasail V claims. The Sunset Watersports claim was excluded from cover due to Defendant's failure to have claimants sign a release prior to boarding the vessel. The Parasail V claims arose from the Sunset Party Cat claim, just with different claimants. The court again held for Plaintiff as it held earlier in the decision that Sunset Watersports violated the navigational warranty in the policy. No cover for either claim existed under the Great Lakes policy.

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