MLA Committee On Marine Insurance and General Average
NEWSLETTER

Spring 2024 | Committee Chair: William Fennell, New York NY | Editor: Julia M. Moore, New York, NY

In this Issue:

In February, the Supreme Court issued the highly anticipated decision in *Great Lakes Insurance SE v. Raiders Retreat Realty Co.* Timothy McGovern and Rowland Edwards have provided their commentary on the decision in their article, Steadying the Ship: Supreme Court Reinforces Choice-of-Law Provisions in Maritime Contracts.

Rod Fonda, the Chair of the Subcommittee on General Average, notes that General Average, however antiquated a legal concept it may be, remains in force. As with the M/V EVER GIVEN, announcement of the declaration of General Average after the M/V DALI struck the Francis Scott Key Bridge in Baltimore has brought mention of General Average in the media (along with the inevitable questions about why General Average remains as a viable legal concept). On the subject of General Average, Jonathan Spencer, provides his commentary on a recent English case holding that the York-Antwerp Rules 2016 applied to a general average adjustment under a contract providing for "York-Antwerp Rules 1994, or any subsequent modification thereof."

Also included in this issue are case summaries related to the following issues:

- Insurance Contract Construction
- *Uberrimae Fidei*/Utmost Good Faith
- Practice & Procedure
- Express & Implied Warranties
- Bad Faith
- General Average

Editor's Comment:

As in the past, significant contributions to this edition of the Newsletter were made by my colleagues at Thomas Miller (Americas), Inc.: Kevin Albertson, Guillermo Cancio, and Kristin Poling. Each of them has my sincere gratitude as this Newsletter would not have happened without them. Thanks also to Tim McGovern and Roland Edwards for their excellent contribution on the latest Supreme Court ruling impacting marine insurance. Congratulations and thanks to contributor Evan Goldschlag, who recently graduated from law school and will be joining Giuliano McDonnell & Perrone, LLP. Last but not least, Keith Heard, David Mazaroli and Andrew Wilson have always been reliable contributors and sources for Newsletter cases over the years. My sincere appreciation and thanks to each of you.

Finally, this is my last Newsletter as Editor. I have genuinely enjoyed working with Will and all of the Committee Chairs I served over the years. I was honored to be a small part of the work this Committee does for the MLA. Going forward, Kevin Albertson will take the helm of the Newsletter and it will be in very skilled and capable hands. I would be remiss if I did not also acknowledge that, as of this week, Kevin joined the West of England Protection & Indemnity Club. Congratulations Kevin! I wish you much success in both endeavors.

Great Lakes Insurance SE v. Raiders Retreat Realty Co.: Steadying the Ship: Supreme Court Reinforces Choice-of-Law Provisions in Maritime Contracts

By
Timothy S. McGovern, Esq.
& Rowland Edwards, Esq.

On February 21, 2024, the U.S. Supreme Court delivered a decisive opinion in *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* 601 U.S. 65 (2024), upholding the enforceability of choice-of-law provisions, marking a significant development in maritime law.

The case involved a dispute over an insurance claim for a damaged vessel, which evolved into a complex legal analysis of contractual agreements and pinning state versus federal law. The following sections detail the factual background, judicial proceedings, and broader implications of this case, shedding light on its impact on maritime commerce and legal practices.

Facts

In 2019, a vessel owned by Raiders ran aground, sustaining damages estimated at over $300,000. Subsequent investigations by Great Lakes revealed that the vessel's fire extinguishing equipment had not been inspected or recertified, contrary to the requirements of an insurance policy covering the loss. As a result of these findings, Great Lakes denied Raiders' insurance claim.

The subject insurance contract contained a choice-of-law clause specifying that disputes would be governed by federal admiralty law, or in its absence, by New York law:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well-established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

Pennsylvania District Court

Great Lakes filed a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania, asserting that the insurance policy was invalid due to breaches of its terms by Raiders. Great Lakes contended that the failure to maintain the vessel's fire extinguishing equipment as required by the policy justified the denial of the insurance coverage.

In response, Raiders filed five counterclaims based on Pennsylvania law, three of which explicitly invoked state law grounds. Great Lakes argued that the choice-of-law provision in the insurance contract mandated the application of New York law, thus rendering the Pennsylvania claims inapplicable. Raiders responded that the Supreme Court decision of *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972) made the choice of law provision unenforceable. In *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), the Supreme Court held that "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."

Despite Raiders' public policy arguments, the District Court ruled in favor of Great Lakes. The court granted Great Lakes' motion for judgment on the pleadings, concluding that the strong public policy of Pennsylvania could not override the "presumptive validity" of maritime choice-of-law principles. This decision affirmed the applicability of New York law as per the contractual agreement between the parties.

U.S. Court of Appeals for the Third Circuit

Raiders appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. The appellate court reaffirmed the general principle that choice-of-law provisions in maritime contracts are indeed presumptively enforceable.

However, the Court of Appeals diverged significantly in its approach to state public policy. The court recognized that while federal law generally supports the enforcement of contractual agreements, including choice-of-law provisions, these provisions must not contravene the strong public policies of the states where the disputes are adjudicated. Specifically, the court focused on Pennsylvania's public policy against the bad faith denial of insurance coverage. The appellate court remanded the case back to the District Court to assess whether applying New York law, as stipulated in the contract's choice-of-law clause, would indeed violate the public policy of Pennsylvania. If found to be true, Pennsylvania law might need to be applied instead.

Supreme Court Decision

The U.S. Supreme Court granted certiorari to resolve a split in the Courts of Appeals regarding the enforceability of choice-of-law provisions in maritime contracts. Justice Kavanaugh delivered the opinion for a unanimous Court and reversed the decision of the Court of Appeals.

The Court firmly upheld the presumption that choice-of-law provisions in maritime contracts are enforceable, emphasizing that this presumption is subject to only narrow exceptions, none of which were applicable in the current case. However, the Supreme Court decisively declined to establish a new exception for cases involving a conflict between the law of the forum state and the law designated by the contractual choice-of-law provision. The Court reasoned that introducing such an exception lacked historical support and would substantially disrupt the predictability and uniformity that maritime law aims to provide.

The Court notably rejected the argument that *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955), required the application of state law, specifically stating that *Wilburn Boat* "does not control the analysis of choice-of-law provisions in maritime contracts." The distinction regarding *Wilburn Boat* is particularly important as that 1955 case established the use of state law as a "gap-filler" where there is an absence of uniform maritime law on point.

The Court drew parallels between choice-of-law provisions and forum-selection clauses, which have been consistently upheld in past Supreme Court decisions, such as *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). The Court highlighted that both types of clauses serve to enhance the efficiency and certainty of maritime commerce by minimizing uncertainties regarding the applicable legal framework or judicial venue for resolving contract disputes.

This emphasis on certainty and predictability, as noted in the Court's reasoning, aligns with the broader objectives of maritime law to facilitate smooth commercial operations across different jurisdictions. The Supreme

Court's decision in *Great Lakes* not only reinforces the enforceability of contractual agreements in maritime settings but also clarifies the limited scope within which state public policies can influence such federal contractual norms.

Implications

The Supreme Court's ruling in *Great Lakes* marks a significant victory for the maritime insurance industry, with potential far-reaching consequences for the handling of maritime claims across the United States. This decision solidifies the enforceability of choice-of-law provisions in maritime contracts, providing a robust defense tool for insurance providers.

Parties in maritime cases are now better positioned to insist on the enforcement of a policy's choice-of-law provision. This strategic advantage is particularly valuable when policyholders seek application of the law of a jurisdiction deemed more favorable to their clients.

Of course, this decision not only impacts maritime insurance contracts but also extends to maritime contracts generally. This broad application underscores the Court's intention to foster predictability and stability in maritime commerce. By reinforcing the validity of choice-of-law clauses, the Court ensured that parties to a maritime contract have a better understanding of the legal framework that governs their agreements, thereby minimizing uncertainties and disputes.

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~~RECENT CASES OF INTEREST~~

INSURANCE CONTRACT CONSTRUCTION

- **Additional Shipping Expense and Sue and Labor Clauses did not provide coverage for delay damages where the cargo had not sustained physical damage**

***Century Aluminum Co. v. Certain Underwriters at Lloyd's*, No. 23-5543, 2024 WL 1460451, 2024 U.S. App. LEXIS 8063 (6th Cir. 2024)**

For the continued production of aluminum at its factory, the insured relied on river barges to continuously supply alumina carried upriver from New Orleans to the insured's facility on the Ohio River. The Army Corp of Engineers shut several locks down on the river due to low water levels and mechanical problems, which delayed the insured's receipt of its ore carried on the river by barge. To keep its production level, the insured diverted the cargo over land (by trucking and rail) in place of barge transit, but at significant additional cost. The insured sought coverage under its marine cargo policy for the extra expenses. The insurer agreed to pay the limit ($1 million) under the Extra Expense Clause in the policy, but claimed the policy otherwise excluded losses due to delay. The dispute resulted in litigation and the district court granted summary judgment in favor of the insurer.

Applying Kentucky law, as provided for in the policy, the court first held that coverage under the All-Risks clause was not triggered because the alumina did not suffer any physical loss or damage. It rejected the insured's contention that the cargo had sustained a physical loss because the insured had been deprived of the use of the cargo. However, the court reasoned that deprivation of use constitutes loss under an All-Risks policy only

when the owner has lost all possession or control of the property, or the property has become unusable because it has become physically defective, unsafe, or otherwise uninhabitable, which did not happen in this case.

Next, the court held that the insured perils (or "Risks Covered") clause covered "arrests, restraints and detainments," but was limited to circumstances where a governmental authority takes possession of the vessel or cargo or forcibly confines the vessel in port. In the present circumstances, the court found that the "government never took control of the barges or impounded the alumina, ruling out arrest and detainment. Nor did [the insured] suffer a restraint. Once it learned of the Corps's closures, it diverted its barges down the Ohio River for unloading on the Mississippi River. The barges never found themselves trapped within the locks, unable to escape."

The court found the Shipping Expense clause also did not provide coverage to the insured. The court held that the clause covers "reasonable direct charges incidental to shipping" when "the subject matter insured is not delivered to the destination contemplated due to circumstances beyond the control of the Insured." It applied only to "the risk of a failed delivery, not an untimely delivery." The court rejected the insured's contention that "not delivered" instead of "never delivered" suggested the clause covered expenses associated with delays.

Finally, the court held that the Sue and Labor clause "promises to reimburse [the insured] for fulfilling its duty to mitigate [the insurer's] exposure under the policy, but it does not obligate [the insurer] to pay anything for reducing losses that fall outside the policy." The clause was unavailing to the insured because the insured did not face a risk of physical loss to the cargo. The insured argued that the Sue and Labor clause covered the "interests insured" and the insured's interest was in safeguarding its profits from consequential losses. The court found that the Marine Consequential Loss Insurance section set the conditions under which the insurer would compensate the insured for consequential losses and it did not cover the insured's efforts to protect its profits. Accordingly, the court affirmed the district court's summary judgment in favor of the insurer.

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- **Choice of Law clause did not apply to extracontractual claims**

***Great Lakes Ins. SE v. Andersson*, 66 F.4th 20 (1st Cir. 2023)**

The plaintiff-insurer, Great Lakes Insurance SE, sought to void coverage under a marine yacht insurance policy issued to the defendant-insured, the owner of a catamaran that sustained catastrophic damage after striking the breakwater near the Dominican Republic. The insurer alleged that the insured had breached the warranty of seaworthiness and navigational limits warranty in the yacht policy and, therefore, the yacht policy was void. In its answer to the insurer's declaratory judgment action, which was commenced in the United States District Court for the District of Massachusetts, the insured counterclaimed for unfair claims settlement practices under Massachusetts statutory law (Mass. Gen. Laws ch. 176D, § 3(9) (2023)). The insurer moved to dismiss the state-based, statutory "bad faith" claims on the basis that the claims were barred by the New York choice-of-law clause in the yacht policy. As reported in this Committee's Fall 2021 Newsletter, the district court granted the insurer's motion and found that the New York choice-of-law clause in the policy applied to extracontractual claims and thereby precluded claims under the Massachusetts statute for unfair claims practices.

The insured filed an interlocutory appeal and the Court of Appeals for the First Circuit considered only the applicability of the choice-of-law clause in the marine yacht policy to extracontractual claims. (The Court of Appeals specifically noted that the public policy concerns at issue in *Raiders Retreat Realty Co.* were "not raised by the instant appeal.") The relevant choice-of-law clause provided: "It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive

United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York." Pursuant to the foregoing clause, the insured did not dispute that *if* an entrenched admiralty precedent existed it would apply to his extracontractual claims, but argued that none existed. Next, the insured argued that the second, disjunctive clause of the choice-of-law provision narrowed the application of New York law to the "insuring agreement" and not to extracontractual claims. Accordingly, the insured asserted that his statutory extracontractual claims did not fall within the scope of the choice-of-law provision. The Court of Appeals agreed.

The Court of Appeals first found that the insured's claims were extracontractual because they were not "at the core" of the insured's breach of contract claim, but rather were based on "entirely separate and district" acts such as "[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims" or "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information." Next, the court held that the insured's extracontractual claims constituted a "dispute arising hereunder [i.e., the policy]" within the meaning of the choice-of-law clause. However, the differential in wording employed by the choice-of-law provision — "any dispute arising hereunder" versus "this insuring agreement" — created an ambiguity because it was subject to more than one reasonable interpretation. The court explained that "two distinct classes of claims are arguably contemplated in the choice-of-law provision. The first clause encompasses 'any dispute arising hereunder,' which could include contract-related and extracontractual claims. But, the second clause is limited to 'this insuring agreement,' which could be limited to contract-related claims." Only the contract-related claims were specifically subjected to New York law according to the court and it was "entirely unclear whether extracontractual claims — even if they may be said to 'arise[] hereunder' — were also subject to New York law." The court construed the ambiguity against the insurer, without consideration of extrinsic evidence, because such evidence would "not aid [the court's] analysis of the policy's boilerplate choice-of-law provision."

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- **Marine cargo insurance policy did not cover inventory that was not in transit at time of loss**

***Certain Underwriters at Lloyds of London v. Pero Fam. Farm Food Co.*,**
No. 20-12711, 2023 WL 2855844, 2023 U.S. App. LEXIS 8451 (11th Cir. Apr. 10, 2023)

The insured grew crops for retail and wholesale from seed in its own fields as well as in a third-party greenhouse until the seedlings had grown such that they could be transported to the insured's fields. A hurricane damaged the planted crops and seedlings. The insured sought coverage for the damage under an all-risks marine cargo policy that applied to the insured's goods from the start of inland transit until the risk of loss transferred to the purchaser of the goods.

The insurer paid for transiting goods damaged by the hurricane, but declined coverage for the plants in the insured's fields and seedlings in the third-party greenhouse. The insurer reasoned that the plants still in the ground were not cargo or goods in transit, which was a requisite for coverage under the policy. The insured contended the damaged crops were goods or merchandise incidental to their business and therefore covered. The insured further noted that "goods" and "cargo" were not defined in the policy. Both the district and appellate court found cover in the subject policy for "goods" and "merchandise" in transit at the time of loss, but not for the plants and seedling.

The court considered the Duration of Coverage clause and held that the "cover . . . attached" only "[w]ithin the geographic limits of the policy," which was a "voyage" or port or place in North America and, therefore,

required the inception of transit. Using the claims handling section of the policy, which required transit related information and documentation with the insured's first notice of loss for any submitted claim, the court reasoned that the policy covered only goods and merchandise in transit or in storage as part of the transit process. Additionally, the Court of Appeals for the Eleventh Circuit also looked to the original insurance application, which confirmed cover for only goods or merchandise in transit at the time of loss. The court affirmed the judgment declaring the policy did not cover the plants and seedlings.

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- **P&I policy covered seaman's maintenance and cure for an injury sustained away from the insured vessel and insured waived subrogated recovery against responsible party**

***Certain Underwriters at Lloyds v. Cox Operating*, 83 F.4th 998 (5th Cir. 2023)**

This case arises in the context of an insurer's intervener complaint to recover maintenance and cure benefits it paid to an injured seaman under a protection and indemnity policy issued to the seaman's employer. The seaman was the captain of a lift boat the seaman's employer had time chartered to another party, Cox Operating. The seaman injured himself when, while away from the boat, he slipped on a platform owned by Cox Operating. The master agreement between the employer and Cox Operating obligated the employer to defend and indemnify Cox Operating for, *inter alia*, all losses arising out of their master agreement. To cover its indemnity obligations, the employer procured a P&I policy and added Cox Operating as an additional insured. The insurer paid maintenance and cure to the seaman under the P&I policy and then filed an intervener complaint seeking to recoup those costs from Cox Operating as the party at fault for the seaman's injuries. The district court granted summary judgment to Cox Operating on the basis that the insurer had no right to recover from Cox Operating because it was an additional insured under the P&I policy and the employer had released Cox Operating pursuant to their master agreement.

On appeal, the insurer argued that its P&I policy did not cover the seaman's injuries because they occurred on Cox Operating's platform and not the employer's lift boat. The policy provided coverage only for the employer's liability "as owners" of the scheduled vessels. Therefore, according to the insurers, the P&I policy only extended so far as there was a causal operational relation between the vessel and the resulting injury. The Fifth Circuit held that the employer "bore the obligation to pay maintenance and cure to Jones [i.e., the seaman] as a shipowner whose seaman was injured while 'in service of the vessel.' [The employer] thus became liable to pay Jones maintenance and cure precisely as the 'owner' of the M/V SELECT 102 [i.e., the lift boat]." Therefore, "[b]ecause Select was liable to pay Jones maintenance and cure as 'owner' of the M/V SELECT 102, such benefits were covered by the P&I policy." As a consequence of the parties' master agreement, the court held that the employer had no right to seek reimbursement for the seaman's maintenance and cure and, therefore, nor did the subrogated insurer. The court also held that the employer's waiver of subrogation in favor of Cox Operating in their master agreement precluded the insurer's subrogated claim.

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- **Extrinsic evidence required to interpret whether "Approved Location" encompassed a single warehouse or entire parcel of land**

***Ezrasons, Inc. v. Travelers Indem. Co.*, 89 F.4th 388, 391 (2d Cir. 2023)**

The insured's goods were destroyed when a fire consumed the warehouse in which the goods were stored. The insured sought coverage under its marine cargo insurance policy, which paid for the loss up to the limit

applicable for unnamed locations. The policy had a different, higher limit of liability for a warehouse that was an "Approved Location." The insured argued that the warehouse was one of three warehouses on a large parcel of land, one of which bore the address of an "Approved Location" in the marine cargo policy. The other two warehouses abutted other streets and had different addresses. The trial court granted summary judgment to the insurer.

On the appeal, the Second Circuit held that the policy was ambiguous as to whether the warehouse name and address specified in the policy as an "Approved Location" applied to the entire parcel of land with its three warehouses or one particular warehouse. The court rejected the insurer's argument that the singular term "Location" for the "Approved Location" meant a single building. The court reasoned that "[w]hile it is true that an address . . . particularly in an urban context, often identifies nothing other than a single building, there is nothing unusual, particularly in the case of business companies or other institutions, in the use of a street address to identify an entire campus or parcel that includes multiple buildings." The court held that the district court should have admitted extrinsic evidence to resolve the equally reasonable interpretations because "[b]y looking solely at the terms of the Policy without reference to external facts, it is not clear whether the pertinent 'Approved Location' includes only the warehouse building located at 56 Branch Street, or all three warehouse buildings on the parcel located at 56 Branch Street."

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- **Extrinsic evidence required to interpret policy term precluded summary judgment**

***Norwegian Hull Club v. N. Star Fishing Co.*, No. 5:21cv181, 2023 WL 2731703, 2023 U.S. Dist. LEXIS 60539 (N.D. Fla. Feb. 8, 2023)**

The insurer sought a declaratory judgment that it had paid the policy limits, under a builder's risk policy, for the substantial damage to the insured vessel as a result of a hurricane. The vessel broke loose, drifted and sustained significant damage. The insured asserted that the escalation clause — which increased the insured value of the vessel in the event of any increase in the cost of labor, materials, or change in design — applied. However, the parties had left a blank space in the escalation clause, which provided in part that "any increase shall be limited to __ per cent. of the Agreed Value as previously declared . . . ." On dueling motions for summary judgment, the insurer argued that the blank space meant there was no escalation, while the insured argued that it meant the escalation was unlimited. The court found that "each side has presented nonconclusory parol evidence supporting its position — evidence that, if credited, would support a finding that the parties intended either no escalation clause, or an unlimited escalation clause, or perhaps something in between, more in line with the 15% to 25% often inserted into this blank in this builder's risk form."

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- **Additional insured coverage under umbrella policy did not incorporate by reference payout limits in underlying service contract**

***Exxonmobil Corp. v. Nat'l Union Fire Ins. Co*., 66 Tex. Sup. J. 622 (Tex. 2023)**

The Texas Supreme Court considered whether an insurance policy incorporated the payout limits set forth in an underlying service contract entered into between Exxonmobil and its contractor. Pursuant to the service contract, the contractor agreed to procure minimum levels of insurance and add Exxonmobil as an additional insured to certain insurance policies, including an umbrella policy and marine bumbershoot policy.

After reaching a bodily injury settlement with two employees of the contractor injured during a workplace accident, Exxonmobil sought indemnification from the umbrella and bumbershoot insurers. Both insurers declined on the basis that Exxonmobil did not meet the status of "additional insured" and, if it did, coverage did not exist under the policies. (Primary coverage was not in dispute and the primary insurer had tendered its limit of liability towards the settlement.)

The Texas Supreme Court dismissed the contentions of the insurers. It explained that, under Texas law, interpretation of an insurance policy looks at the subject policy and considers extrinsic documents when incorporated and only to the extent of the incorporation. Any adventure beyond the insurance contract is limited to the scope of the clearly authorized reference in the policy.

First, the insurance policies each defined an insured as any person who qualified as an additional insured under the primary policy. The court turned to the primary policy, which included as an additional insured any person whom the contractor was obligated to name as such. Therefore, the court turned to the underlying service contract and found that it required the contractor to add Exxonmobil as an additional insured to each policy. Thus, the court held that Exxonmobil qualified as an additional insured for both insurance policies.

Next, the court considered the scope of the coverage afforded to Exxonmobil as an additional insured. The umbrella insurer disclaimed any "broader coverage" than the limit of the primary policy. The underlying service contract required a certain amount of insurance and, according to the umbrella insurer, any indemnity beyond the minimum level of insurance would afford Exxonmobil "broader coverage" than provided for by the terms of the umbrella policy. The court disagreed and held the disclaimer of "broader coverage" did not reference the payout limits in the underlying service contract and, even if they did, the service agreement provided for a minimum amount of insurance, not a maximum and the contractor had chosen to obtain more insurance.

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- **Insurers prevailed on disclaiming COVID Claims**

***Hartford Fire Ins. Co. v. Moda, LLC*, 346 Conn. 64, 67, 288 A.3d 206, 209 (Ct. 2023)**

The trial court granted summary judgment to the insurer on the basis that the losses the insured incurred to the value and use of its insured property when its stores were forced to close during the pandemic were not covered by the package policy or marine policy because the losses did not result from any tangible physical alteration to the insured's stock or real property. The Connecticut Supreme Court affirmed the grant of summary judgment. The court held that the marine policy provided coverage only for "direct physical loss or direct physical damage to [i]nsured [p]roperty . . . ." Applying New York, the court reached the same conclusion with respect to the marine policy that it reached under Connecticut law, in particular that such the language does not describe business income losses incurred as a result of COVID-19 related closures when the insured property itself was not alleged or shown to have suffered direct physical loss or physical damage.

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- **Option, as to opposed to duty, of commercial inland marine insurer to defend insured was ambiguous**

***Reg'l Logistics Grp., v. W. Am. Ins. Co.*, No. 21-CV-347, 2023 WL 2694067, 2023 U.S. Dist. LEXIS 52982 (W.D.N.Y. Mar. 28, 2023)**

Insured, a warehouse and logistics company called Regional had a dispute with a customer over the pallets they used and packaging materials. Regional put their insurer on notice of the claim, chosen counsel and an opportunity to get involved in the defense at an upcoming hearing. Regional proceeded to reach a settlement on the cargo issue with the insurer Liberty Mutual, but Liberty disclaimed defense costs. Their reasoning the policy expressly provides them with the option to defend a claim should they so choose. Regional proceeded filing suit against Liberty in New York.

Regional sued Liberty citing they were informed from the beginning of the claim but did not receive any objection or reservation of rights letter. Conversely, Liberty maintained Regional retained counsel on their own and litigated without any input from Liberty. In support, Liberty cites a provision in the policy giving them an option – not the obligation – to defend. Interpreting the policy under its plain meaning, as required under New York law, the Court found this reading inconsistent with the following clauses. The very next clause stated Liberty's duty to defend ceased with the tendering of the policy limits. If Liberty's purported interpretation were true, then, the Court reasoned, that would render the very next clause meaningless. That violated a basic rule of contract interpretation. Summary judgment granted for Regional against Liberty.

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- **Keel falling off vessel was not an "occurrence" under policy**

***D&B Marine LLC v. AIG Prop. Cas. Co.*, 288 N.C. App. 106 (N.C. Ct. App. 2023)**

An insured's claim for vessel damage was not covered in following years of unfortunate events. The insured purchased a 72-foot designer yacht in 2013. A few months later, the yacht struck a submerged rock and sustained serious damage. The vessel was partially repaired and then a large crack was noted in an area that was previously patched. While en route for further repairs, the vessel's rudder fell off. It appeared these issues caused water to seep into the hull, and moisture to accumulate. However, the hull was never replaced. The vessel sunk three years later while at anchor. She was later found several miles away with her keel missing. A jury determined that there was no 'occurrence' during the policy period that caused this loss. This decision was upheld on appeal, and coverage was denied on the claim.

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- **Policy exclusion for corrosion was not limited to long term neglect**

***Zalewski v. Travelers Home & Marine Ins. Co.*, No. KNL-CV22-5023391-S2024 Conn. Super. LEXIS 369 (Ct. Super. Ct. Feb. 23, 2024)**

The insured's boat suffered mechanical breakdown while the insured was fishing and the insured was forced to have his boat towed to a shop for repair. The insurer reimbursed the insured for a portion of the towing expense because of a limit applicable to towing expenses and because the policy excluded "loss or damage caused by or resulting from . . . Inherent vice, wet or dry rot, rust or corrosion." The court found that the mechanical breakdown was caused by corrosion of the battery terminals. The court rejected the insured's contention that the

exclusion for corrosion "only relates to long term neglect and does not apply to mild corrosion or that the policy exclusion should be interpreted in such a way."

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- **One-year suit in policy ran from last date insurer adjusted any claims and had rejected insured's tender of constructive total loss**

***Polar Vortex, LLC v. Certain Underwriters at Lloyd's*, No. 22-CV-61067, 2023 WL 6294646, 2023 U.S. Dist. LEXIS 173179 (S.D. Fla. Sep. 27, 2023)**

After a bench trial, the district court entered judgment for the insurer on the basis that the insured's claims were time-barred. The policy provided that an action on the policy must be "commenced within one (1) year from the date of the happening or the occurrence out of which the claim arose." The parties argued that the one-year period began to run at different times, but the court found that the last event that triggered the limitations period was when the insurer had "last adjusted any claims" and had "agreed the Vessel was a Constructive Total Loss—but nevertheless rejected [the insured's] Notice of Tender." Because the event occurred more than one year before the insured commenced suit, the claims were time-barred. The court also rejected the insured's argument that the continuing violations doctrine applied because there was no "continuing obligation" owed by the insurer.

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UBERRIMAE FIDEI/UTMOST GOOD FAITH

- **Insured's failure to disclose captain's prior convictions and violations voided policy**

***Clear Spring Prop. & Cas. Co. v. Astonbluwaves LLC*, No. 22-21854-Civ, 2024 WL 665673, 2024 U.S. Dist. LEXIS 13515 (S.D. Fla. Jan. 24, 2024)**

Following a claim for damages for a vessel fire, the insurer discovered that the insured's application for marine insurance misrepresented facts about the captain employed in connection with the vessel. The insured had made several factual misrepresentations to the insurer about the captain's criminal history and driving record in its application for marine insurance. In both the marine insurance application and in the supplemental operator form, the insured represented that the captain had never been convicted of a criminal offense and had never pleaded no contest. The insured further represented to the insurer in the marine insurance application and in the supplemental operator form that the captain had no auto violations/suspensions in the last five years. The captain, however, was convicted of driving under the influence of alcohol twice after pleading no contest to both charges. Additionally, the captain had been issued citations for speeding and driving with a suspended license within the five years prior to the insurance application. The insured, however, did not disclose any of these facts about the captain's criminal history and driving record to the insurer. The insured argued that the captain had completed the relevant responses in the application and the insured had not altered the responses, but rather had forwarded the information it received. The court rejected the insured's defense because under the doctrine of *uberrimae fidei* "an insured . . . is responsible for any misrepresentations made in its application for marine insurance—regardless of whether another person completed the application on its behalf." The court granted summary judgment to the insurer.

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- **Insured's misrepresentation of captain's qualifications and breaches of survey compliance and regulatory compliance warranties voided the policy**

***Great Lakes Ins. SE v. Chtd. Yachts Mia. LLC*, 676 F. Supp. 3d 1251 (S.D. Fla. 2023)**

The district court granted summary judgment to the insurer on the grounds that the insured breached its duty of utmost good faith and the survey compliance warranty. It was undisputed that the insured misrepresented that the putative captain of the vessel had a particular US Coast Guard license when, in fact, his license had lapsed many years earlier. However, the insured argued that the misrepresentation was immaterial. The court disagreed and found the insurer's underwriter had unequivocally stated that "he would have issued different policy terms if he had been made aware that [the captain] did not have a U.S. Coast Guard captain's license." The insured argued that the underwriter's affidavit was self-serving, which the court had to reject. The court disagreed because the underwriter had provided "meaningful reasons" to support his position. Consequently, the court held that the insured's misrepresentation was material.

The court also found that the insured had breached the survey compliance and regulatory compliance warranties. The survey compliance warranty required, in part: "If the survey makes any recommendations with respect to the Scheduled Vessel, then it is warranted that all such recommendations are completed prior to any loss giving rise to any claim hereunder, by skilled workmen using fit and proper materials . . . ." The regulatory compliance warranty provided: "It is warranted that covered persons must at all times comply with all laws and regulations governing the use and or operation of the Scheduled Vessel." The court found that the insured had breached the warranties by failing to recertify the life raft as recommended in the survey report and required by 46 C.F.R. §§ 160.151-57

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PRACTICE & PROCEDURE

- **Insurer satisfied the real claim requirement for declaratory judgment action**

***Aspen Am. Ins. Co. v. Morrow*, 643 F. Supp. 3d 941 (D. Alaska 2022)**

Plaintiff Aspen filed a declaratory judgment action against its insured for losses arising from breach of the lay-up warranty in the subject policy. The insured took the subject vessel out for commercial fishing during the designated lay-up period. The lay-up warranty allowed for minimal movement within the port for servicing and fueling. While out fishing, the vessel sunk and the insured filed a notice of loss with Aspen.

Alaska's Declaratory Judgment Act requires insurers to allege an actual controversy, which is definite and concrete rather than hypothetical and abstract. In simpler terms, the insurer needs to seek relief from a real claim as opposed to one which may happen. Using the statue defensively against anticipated claims satisfies Alaska's requirement for insurers. Here, the insurer pled sufficiently; Aspen received a notice of claim from the insured and identified an applicable exclusion precluding the loss from cover. As the insured did not appear in the action, the court held defendant insured in default.

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- **Insurer's declaratory judgment action was jurisdictionally dismissed where it constituted procedural fencing**

***Starr Indem. & Liab. Co. v. Exist, Inc.*, No. 23-912, 2024 WL 503729, 2024 U.S. App. LEXIS 3204 (2d Cir. Feb. 9, 2024)**

The Second Circuit affirmed the district court's discretion to decline the marine insurer's declaratory judgment action. The court set forth six factors that should inform a district court's exercise of discretion: (1) whether the declaratory judgment sought will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether such a judgment would finalize the controversy and offer relief from uncertainty; (3) whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; (5) whether there is a better or more effective remedy; and (6) whether concerns for judicial efficiency and judicial economy favor declining to exercise jurisdiction. The court held that "[o]n the facts of the case, [the district court] was entitled to conclude that [the insurer's] declaratory judgment suit constituted 'procedural fencing or a race to res judicata,' especially in light of [the insurer's] decision to inform [the insured] only via federal complaint that it had denied [the insured's] insurance claims." Further, the appellate court found no error in the district court's conclusion that the declaratory judgment action served no "useful purpose" in that it was not necessary to "finalize the controversy and offer relief from uncertainty." The insurer waived its argument that the declaratory judgment served a useful purpose by potentially allowing it to avoid administrative expenses and interest because the argument "was neither made before the district court nor in its opening appellate brief, and [the insurer] offers no justification for these failures."

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- **Actual prejudice in reporting claim voids coverage under policy**

***Champangne v. M/V Uncle John*, No. 21-476, 2023 WL 35733, 2023 U.S. Dist. LEXIS 797 (E.D. La Jan. 4, 2023)**

The insured's vessel allided with a dock causing significant damage. Following the allision, the insured intentionally refrained from informing its insurer. Subsequent information established that the dock interests would have accepted $3,500 for the damage at the outset. However, the insured and dock interests never struck a deal, so the dock was not repaired. As a result of prolonged delay before repair, the repair costs escalated to approximately $200,000. The dock interests sued the insured-vessel owner for the extensive damage to the erosion protection concrete bank cover located on their property. The insured commenced a third-party action against its insurer for coverage for the insured's defense costs and liability to the dock interests. The insurer moved for summary judgment against the insured's claims, which the court granted. The insurer proved actual prejudice because of the insured's failure to report the claim, which resulted in increased damages.

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- **Cover voided after owner's failure to effectuate repairs**

***Clear Spring Prop. & Casualty Co. v. Bluewater Adventures of Sarasota*, No. 22-CV-60554, 2022 WL 18027821, 2022 U.S. Dist. LEXIS 219768 (S.D. Fla. Dec. 6, 2022)**

The insured produced to its prospective insurer a vessel survey report prior to coverage being bound. The report contained a list of ten items needing repair. Underwriters requested confirmation that those issues were addressed by the insured, which the insured verified. Notwithstanding that representation, the insured never

actually remedied the items. The vessel thereafter struck several coral heads in the Bahamas, and coverage was denied for the damage. Because the repair recommendations were considered material to the insurer's decision to bind cover, the court held that the misrepresentation by the insured could void coverage *ab initio*, and denied the insured's motion for summary judgment on same. Further, the court held that a plausible claim was made for breach of the Operator Warranty because the insured failed to hire a Coast Guard licensed captain for its vessel.

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- **Insured waived right to the return of premium for policy voided *ab initio***

***Seguros v. Morales-Vázquez*, No. 15-cv-2091, 2023 WL 3766078, 2023 U.S. Dist. LEXIS 96721 (D.P.R. June 1, 2023)**

The insured sought a return of premium after the court entered a judgment declaring that the subject marine insurance policy was void *ab initio* under the doctrine of *uberrimae fidei*. The court entered the judgment and the clerk had taxed costs without the insured claiming his right to the return of premium. The insured "conceded he did not previously mention the issue, but contended he did not waive his argument because he was not entitled to a refund of his premiums until the court declared his policy void." The court rejected the argument. The insured waited fifteen months before seeking the return of his insurance premiums and offered no reason for his delay. Consequently, the court held that the insured had waived his claim to have the premium refunded.

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- **Fees recoverable under Florida law in marine insurance context**

***Serendipity at Sea, LLC v. Underwriters at Lloyd's of London Subscribing to Pol'y No. 187581*, No. 20-CV-60520, 2024 WL 1077155, 2024 U.S. Dist. LEXIS 33472 (S.D. Fla. Feb. 26, 2024), *report and recommendation adopted by* 2024 WL 1071732, 2024 U.S. Dist. LEXIS 43079 (S.D. Fla. Mar. 12, 2024)**

The insurer sought its attorneys' fees and costs after it prevailed over the insured's coverage litigation. The insurer contended that it was entitled to its attorneys' fees under Florida's offer-of-judgment statute (Fla. Stat. § 768.79 (2024)), but the insured argued that the statute did not apply to marine cases. The court held that Florida's statute applied because a "state statute may give rise to entitlement to attorney's fees in a maritime insurance case but not in other maritime cases outside of the marine insurance context."

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- **Insurer's third declaratory judgment action dismissed after two prior voluntary dismissals notwithstanding insured's consent to one prior dismissal**

***Great Lakes Ins. SE v. Crabtree*, 673 F. Supp. 3d 1301 (S.D. Fla. 2023)**

When the insureds' vessel was damaged in a fire, they turned to the defendant-insurer for the proceeds of the insurance policy for the boat. Rather than cover the loss, though, the insurer sued the insured and sought declaratory relief and argued that it had no duty to pay. The insurer sued the insured not only once, *but three times*. The insurer first sued the insureds in the District of Montana, but voluntarily dismissed the first case based on the insureds' representation that they would accept service in Florida. The insurer then sued the insureds in the Southern District of Florida, but voluntarily dismissed that second case as well. Then, "[i]n a confounding turn of events, [the insurer] then sued the [insureds] again in the District of Montana." The case was transferred back to the Southern District of Florida where the insureds moved for summary judgment on the ground that the

"two-dismissal rule" under Rule 41 of the Federal Rules of Civil Procedure precluded the insurer's third suit. The court granted the motion.

Rule 41(a)(1)(B) provides that "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." The insurer conceded that "the two prior dismissals were in competent courts, the parties were the same, and the claims were the same." It argued the two-dismissal rule did not apply when (as here) one of the plaintiff's dismissals was not unilateral (i.e., where the plaintiff and the defendant informally agreed to one of the two dismissals). The court applied the plain meaning of the words in Rule 41 and held that the Rule precluded the insurer's third suit. The court acknowledged that the Second and Ninth Circuits had held that the two-dismissal rule does not apply where (as here) the defendant agreed to one of the two dismissals, but stated "we (sitting here in the Eleventh Circuit) just don't find these cases persuasive."

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- **Foreign forum selection clause is not unreasonable or violative of public policy even if claim in foreign forum would be time-barred**

***Noble House, L.L.C. v. Certain Underwriters at Lloyd's, London*, 67 F.4th 243 (5th Cir. 2023)**

The insured's yacht lost its port-side rudder while entering a channel in the Bahamas. The following day, the insured advised the insurer of the casualty, which was allegedly covered by its marine insurance policy. The insured purchased the policy from the insurer by way of a Texas-based insurance broker. The policy contained a forum selection clause that selected the courts of England and Wales. Attached to the policy was a cover note with its own forum selection clause that selected any court of competent jurisdiction within the United States. Allegedly, the cover note was not prepared by the insurer, but by the insured's own insurance broker. The insurer subsequently advised the insured that coverage "may not exist," but had not denied coverage before the insured commenced suit.

The insured first filed suit in Florida, but the action was dismissed for lack of personal jurisdiction. The insured then sued the insurer in Texas and the insurer moved to dismiss on *forum non conveniens grounds*, which the district court granted. The district court found that the forum selection clause that selected the courts of England and Wales controlled over the clause in the cover note that the insured's broker had added, and was enforceable.

On appeal, the insured did not contest which of the two clauses applied. Rather, the insured argued that the foreign forum selection clause was unenforceable. The Court of Appeals for the Fifth Circuit affirmed the dismissal, without prejudice, based on *forum non conveniens* in light of the forum selection clause in the parties' marine package insurance policy. The court rejected the insured's argument that the foreign forum selection clause was unreasonable under the circumstances because it would be deprived of its day in court due to a shortened statute of limitations in England that would be invalid under Texas law and because enforcement of the forum selection clause would violate the public policy of Texas. The Fifth Circuit explained: "Both the Supreme Court and this Court have acknowledged the risk of time-barred claims in the forum-selection-clause context. Unfortunately for [the insured], controlling caselaw affords it no sympathy" because it "would create a large loophole for the party seeking to avoid enforcement of the forum selection clause."

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- **Undermining state policy argument insufficient to overcome burden associated with validity of forum selection clause**

***Eads v. Spheric Assurance Co.*, No. 23-20066, 2023 WL 8613609, 2023 U.S. App. LEXIS 32973 (5th Cir. Dec. 13, 2023).**

With the subject vessel destroyed in a fire, the insured engaged in forum shopping hoping to take advantage of Texas's insured-friendly and favorable insurance laws despite a forum selection clause. The stated forum was the British Virgin Islands, a jurisdiction not known for being as friendly as Texas. The lower court dismissed the action due to this forum selection clause. On appeal, the insured argued against enforcement of the clause. Forum selection clauses have a presumption of enforceability that may be overcome by a clear showing that the clause is unreasonable. In an effort to establish the chosen forum was unreasonable, the insured cited a concurring opinion suggesting that enforcement of the clause undermines Texas's public policy. The Fifth Circuit acknowledged that "Texas law may leave open some avenue for disregarding a forum selection clause on public policy grounds, but the Supreme Court of Texas declined explicit invitations to do so . . . ." However, in the absence of "a case that actually sets aside a forum selection clause on public policy grounds, [the insureds] apparently ask us to do so for the first time. Like the Supreme Court of Texas, we decline that invitation."

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- **Fraudulent inducement is not a defense to an agreed-upon claim adjustment where the truth could be known by exercise of ordinary intelligence**

***Great Lakes Reinsurance (UK) SE v. Herzig*, 673 F. Supp. 3d 432 (S.D.N.Y. 2023)**

The insured and insurer entered into a compromise adjustment of the damages to the insured vessel. The insured executed a release in exchange for the agreed-upon adjustment amount and thirty days of extended coverage. The insurer sought a declaration from the court that the release was enforceable and capped the indemnity owed to the insured, among other arguments. In response, the insured alleged that the insured had fraudulently induced the insured to enter into the release and that he entered into it under duress, which the court analyzed under New York law. The court rejected both contentions based upon its factual findings and granted summary judgment to the insurer. Where, as in this case, a party asserting a fraud claim has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

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- **Admiralty jurisdiction existed for vessel damaged in off season storage**

***Ironshore Indem. Inc. v. Villa Marina Yacht Harbor Inc.*, No. 23-1370, 2023 WL 6815125, 2023 U.S. Dist. LEXIS 186458 (D P.R. October 17, 2023)**

In an action concerning vessel damage during onshore storage in the off season, the insurer declined cover filing a declaratory judgment action in federal court. In a motion to dismiss for failure to state a claim, the insured challenged the court's exercise of admiralty jurisdiction arguing the subject vessel was a "dead" vessel or not in navigation at the time of loss. This missed the mark, at dispute was cover under a marine insurance policy or maritime contract, something clearly within the purview of admiralty jurisdiction. The inquiry was not what was covered, but rather the coverage in place at the time of loss.

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- **P&I insurer owed no tort duty to co-insurer of vessel**

***Great Lakes Ins. SE v. American S.S. Owners Mut. Protection & Indemn. Ass. Inc.*, 214 A.D.3d 593, 186 N.Y.S.3d 626 (N.Y. App. Div. 2023)**

Plaintiff Great Lakes Insurance filed suit against owners (individuals) of a vessel holding corporation and the American Club for cancelling cover for an allegedly unseaworthy vessel. Prior to loading in Brazil, the port state detained the vessel, which lead to owners' abandonment of the vessel and a subsequent cancellation of cover. Plaintiff's complaint alleged negligence and fraud in the cancellation, which the defendants used to escape from paying millions in losses. The trial court declined American Club's motion to dismiss, but the appellate court reversed holding the American Club owed no duty to the third-party insurer. In the original order, the trial court allowed plaintiff to replead its fraud claims against the American Club.

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- **Broker representations in marine insurance expose broker to tort claims from insured**

***Outlaw Performance Boats LLP v. Brown & Brown of Fla., Inc.*, 654 F. Supp. 3d 634 (D. Mich. 2023)**

The federal district court held that an insured had a viable cause of action for breach of fiduciary duty against its insurance agent when the agent failed to procure cover for the vessel while on its trailer. The insured sought to procure a policy for its charter fishing vessel. The insurance agent held itself out as a specialist in such policies, upon which the insured relied in securing cover. The insured advised the agent that he would operate the vessel in the Gulf of Mexico for part of the season, and trailer the vessel up to Michigan from time to time. Despite the disclosure, the agent acquired a policy for the insured that contained a lay-up exclusion and navigational limit which did not cover the vessel while on its trailer in Michigan. While laid up on its trailer in Michigan, the vessel caught fire. Per the policy exclusions, coverage was denied. The federal court determined that the insured had no breach of contract claim against the insurance agent, but that a viable tort cause of action existed because the agent held himself out as an expert on marine insurance policies.

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EXPRESS & IMPLIED WARRANTIES

- **Breach of a Captain Warranty materially increased the risk of hurricane damage**

***Serendipity at Sea, LLC v. Underwriters at Lloyd's of London Subscribing to Policy No. 187581*, No. 20-CV-60520, 2023 WL 5670199, 2023 U.S. Dist. LEXIS 155538 (S.D. Fla. Sep. 1, 2023)**

This matter arose out of the vessel owner's demand for coverage from its marine insurer following the destruction of the insured vessel during Hurricane Dorian in 2019. The hull insurer denied coverage on the ground that the insured breached the Captain Warranty in the policy, which provided in part that the owner "[w]arranted a full time licensed captain is employed for the maintenance and care of the vessel and is aboard while underway." It was undisputed that the insured breached the Captain Warranty.

After the Court of Appeals for the Eleventh Circuit held that the determination of whether the vessel owner's failure to hire a full-time captain increased the hazard insured by any means withing the control of the

insured, the trial court conducted a bench trial solely on the issue of whether the breach of the Captain Warranty had increased the risk. The court found that the breach had, in fact, increased the risk. In reaching its finding, the court credited the testimony of the insurer's expert who, simply put, "would have ensured the [the vessel] was nowhere near . . . Pink Paradise when the storm hit. And if the [vessel] had not been at the Pink Paradise when Hurricane Dorian hit, damage to the vessel would have been avoided when the pilings it was tied to ultimately broke."

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- **Strict compliance with Captain Warranty required under Ohio law**

***Boater's Emergency Serv., LLC v. Archon Hat 80, LLC*, No. 3:21-CV-2047, 2024 WL 449530, 2024 U.S. Dist. LEXIS 20863 (N.D. Ohio Feb. 6, 2024)**

When the regular captain fell ill, the insured vessel departed the dock with a substitute captain. Shortly into the voyage, both engines failed and the vessel drifted into a jetty where she partially sank. The vessel was saved by a third-party incurring nearly a half-million dollars in recovery fees. The policy required a licensed captain to be on board at all times while navigating, with the credentials approved by the insurer. However, at the time of loss the insured had a stand-in captain at the helm.

After reviewing precedent in the Sixth Circuit on whether federal maritime law or state law applied to the construction of a Captain Warranty, the court concluded that "it remains unclear whether a Sixth Circuit rule governs the issue" and, therefore, looked to Ohio law. The court held for the insurer, finding that the stand-in captain at the time of loss violated the Captain Warranty in the policy. The insured, through both fact and expert testimony, tried to argue that the vessel was not in navigation at the time of loss so the difference in captain was inconsequential to coverage. The court rejected the insured's interpretation and contention regarding the vessel status; simply not being under power at the time of the loss did not mean the vessel was not underway (or navigating). According to the court, insurers have Captain Warranties and approval requirements to control the amount of risk they assume. To allow a causative element in the analysis would only deepen the cover analysis to "hypothetical determinations of causation." Applying principles of Ohio law, the court enforced strict compliance with the Captain Warranty to void cover for the loss.

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- **Expert opinion required to establish that the breach of a Captain Warranty materially increased the risk**

***Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 71 F.4th 894 (11th Cir. 2023)**

This decision stands in sharp contrast to the outcome in *Serendipity at Sea, LLC* discussed above. As with the preceding case, the insured vessel was destroyed during a hurricane (this time it was Hurricane Irma in 2017). The parties disputed whether the insured had breached the Captain Warranty and the Crew Warranty in the relevant insurance policy. The insurer commenced a declaratory judgment action in New York seeking to avail itself of New York law, which has an established rule that "warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract, if the insured is to recover." However, the insured succeeded in having the case transferred to Florida where the court held that Florida law applied. Under Florida law, an insured remains covered for an accident despite violating a policy warranty, unless the violation increased the hazard by any means within the control of the insured.

The court first held that "to meet its burden under Florida's anti-technical statute, the insured must show that, under the circumstances of the specific accident at issue, the breach of the warranty had some material effect on the loss." Next, the court held that the "effect of [the insured's] failure to retain a full-time captain and crew leading up to and during Hurricane Irma is exactly the kind of issue that requires expert testimony." The insurer failed to present such an expert and, therefore, the court upheld the district court's grant of summary judgment to the insured.

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- **No cover found for breach of a promissory warranty for hurricane mooring arrangements**

***Transpac Marine, LLC v. Yachtinsure Servs., Inc.*, 655 F. Supp. 3d 18 (D. Mass. 2023)**

The court held that an insured's acts voided coverage *ab initio* when it failed to carry out certain promissory representations made in its application for renewal. As part of the renewal form, the insured was required to submit a Hurricane Plan for review by the underwriters. In that plan, the insured represented that it would double the mooring lines in the event of a named windstorm. Coverage was renewed and, thereafter, the insured's yacht was destroyed by Hurricane Dorian while moored in St. Thomas. The insured submitted a claim for total loss. The claim was denied on the basis that the insured used an insufficient amount of mooring lines to secure the yacht in anticipation of the hurricane. The court determined the insured breached a promissory warranty under the policy, and granted summary judgment in favor of the insurer.

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- **Vessel seaworthy despite deviation to port where vessel had no current charts on board**

***Great Lakes Ins. SE v. Andersson*, 662 F. Supp. 3d 142 (D. Mass. 2023)**

The defendant-insured purchased a vessel and intended to take her on a maiden voyage through the southern Caribbean and ending in Saint Marten. Approximately ten hours in to the voyage, the winds picked up and a crew member fell ill. The insured changed course to a northerly direction into the waves to help the crew member. Looking to his radio transmitter, the insured realized it did not work. Speaking to the agent who sold the insured the vessel, the agent recommended the insured take refuge in Boca Chica, Dominican Republic. While waiting for an escort into the harbor, the vessel ran aground.

The vessel had up-to-date paper charts for all waters intended for the original transit. Moreover, the vessel had a GPS on board with charts for the Dominican Republic. That GPS unit, however, was not up to date and did not show the breakwater where the vessel grounded. The insurer sought a declaration cancelling cover from inception, arguing the lack of up-to-date charts rendered the vessel unseaworthy. The insured cross-claimed for cover and alleging breach of contract. Both sides moved for summary judgment.

In granting the insureds motion and denying the insurer's motion, the court looked at the two warranties of seaworthiness in a marine insurance policy under federal admiralty law. The first implied warranty of seaworthiness requires a vessel to be seaworthy from the moment the marine insurance policy attaches. If violated, the policy is voided from inception without fault or causation. To be seaworthy, the vessel must be in suitable condition to endure common perils and dangers on the water. The analysis centers on the physical condition of the vessel and its equipment were sufficient for the intended use. The court noted a complete lack of case law holding a lack of up-to-date charts voids a marine insurance policy from inception. Thus, the insured did not violate the first warranty of seaworthiness.

The second warranty of seaworthiness is more transitory focusing on the vessel's intended use or voyage. The court described it as a modified, negative warranty where the insured promises not to knowingly send a vessel to sea in an unseaworthy condition. Here, the case law is interesting as several cases hold departing port without updated charts for the vessel's intended journey violates this warranty. One court went as far as to hold updated charts are needed not only for the intended voyage but any foreseeable deviation as well. The insurer contended the insured should have updated charts not only for the intended voyage, but the entire western half of the Caribbean. In simpler terms, the vessel should have been seaworthy at all times regardless of where she actually sailed. The court noted that federal admiralty law did not support such an interpretation and granted summary judgment to the insured.

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- **Strikes, Riots & Civil Commotion Buy-Back reinstated coverage under an open cargo policy for losses caused by riots**

***Navigators Ins. Co. v. Goyard, Inc.*, No. 20-Civ-6609, 2024 WL 360969, 2024 U.S. Dist. LEXIS 17122 (S.D.N.Y. Jan. 31, 2024)**

The defendant-insured's luxury merchandise was stolen when its storefront was looted during civil rioting following the renowned murder of George Floyd. The insured sought coverage for the loss under its ocean marine open cargo policy. The insurer denied coverage on the ground that the policy excluded coverage for retail storage losses caused by strikes, riots, and civil commotion pursuant to a typical paramount "SR&CC" warranty. Some coverages that were excluded under the SR&CC warranty were reinstated (or bought back) through an SR&CC Endorsement, subject to certain conditions and exclusions stated in the endorsement. Further, the insured had added coverage for retail stock throughput, or retail inventory. The retail stock throughput was subject to certain exclusions, specifically it excluded "risks excluded by the F.C. & S and SR&CC warranties contained in the open policy, to which this coverage is attached." The insurer argued that the retail loss caused by rioting was not covered because the retail stock throughput coverage excluded SR&CC perils by referring back to the SR&CC warranty in the policy. However, the court held that the SR&CC warranty did "not entirely preclude SR&CC perils; it excludes them only to the extent an Endorsement does not bring them back," and the SR&CC Endorsement brought back losses caused by riots. Therefore, the loss was covered.

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BAD FAITH

- **Bad faith claim disallowed under Alabama law**

***River Assets, LLC v. Knight Towing, LLC*, No. 1:23-cv-00106, 2024 U.S. Dist. LEXIS 7057 (S.D. Ala. Jan. 11, 2024), *report and recommendation adopted by* 2024 U.S. Dist. LEXIS 15414, at *1 (S.D. Ala. Jan. 29, 2024).**

The plaintiff-vessel owner's spud barge was allegedly damaged while under tow by a third-party tower. The same defendant-insurer had issued a hull policy to the vessel owner and a P&I policy to the third-party tower. When the vessel owner's claims for damage to the spud barge were not addressed to its satisfaction, it commenced suit against the insurer — as its own hull insurer and as the P&I insurer of the tower — and alleged bad faith under Alabama law. The magistrate judge held that the vessel owner could not maintain a direct action against

the insurer in the insurer's capacity as the P&I underwriter for the third-party tower because the vessel owner had not obtained a judgment against the tower, which was a prerequisite for a direct action under Alabama Code § 27-23-2 (LexisNexis 2023). Nor could the vessel owner maintain a bad faith claim against the insurer for conduct related to the P&I insurance because Alabama law did not "allow a cause of action for bad faith or negligent/wrongful claim handling by a third party to the P&I insurance contract at issue." The magistrate judge also dismissed the vessel owner's bad faith claims against the insurer as the hull underwriter for the spud barge because "Alabama courts have squarely rejected attempts to maintain such claims." The district court subsequently adopted the magistrate judge's report and recommendation.

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- **Bad faith claim allowed under Massachusetts law**

***Great Lakes Ins. SE v. Andersson*, No. 20-40020, 2024 WL 1333582, 2024 U.S. Dist. LEXIS 56117 (D. Mass. Mar. 28, 2024)**

As noted above, the First Circuit had held that the choice of law clause in the subject insurance policy did not apply to the insured's extracontractual claims. After the insured prevailed on its coverage claim, it sought summary judgment on its bad faith claims, which the court granted. The insured argued that the insurer had breached the Massachusetts unfair competition and deceptive acts statute by primarily failing to investigate the insured's claim. The court found that the insurer "took no action to investigate the facts of the claim beyond the vessel inspection and interview with Mr. Andersson [i.e., the insured]." The insurer made no attempt to retrieve relevant GPS, never followed up with the insured regarding relevant information provided by the insured, and did not attempt to contact any other witnesses. Accordingly, the court found that the insurer's conduct breached the statutory duty to conduct a reasonable investigation based upon all available information before rejecting a claim.

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GENERAL AVERAGE

- **York-Antwerp Rules 2016 applied to adjustment under a contract providing for "York-Antwerp Rules 1994, or any subsequent modification thereof"**

***Star Axe I LLC v. Royal & Sun Alliance Luxembourg SA*, [2023] EWHC 2784 (Comm), *available at* https://www.bailii.org/ew/cases/EWHC/Comm/2023/2784.html (last visited Apr. 25, 2024).**

The case has been widely reported. Briefly, a general average arose on a vessel carrying cargo shipped under Congenbill 1994 bills of lading, providing that adjustment would be made per "York-Antwerp Rules 1994, or any subsequent modification thereof." The court was asked to decide whether that language should be construed as providing for the application of York-Antwerp Rules 2016 and, contrary to the understanding of most practitioners and text book writers, who have generally understood that the 2016 Rules are a new set of YAR, and not a modification of any earlier version, found that YAR 2016 applied.

The decision of the court, which did not hear any expert testimony, contains a useful review of the evolution of YAR, and of various publications reflecting the view that YAR 2016 — and YAR 2004, for that matter — were new sets of Rules, and not modifications of earlier versions.

However, Mr. Justice Butcher adopted the approach that the parties to the contract in this case could not reasonably be expected to be aware of this underlying discussion. He examined what might be the commercial

expectation of those engaging in the contract. "There is no difficulty, in my view, as a matter of the ordinary use of language, in describing YAR 2004 or YAR 2016 as 'modifications' of YAR 1994. Each was produced by the same body, was directed to the same end, and contained many of the same provisions, but introduced some changes." He pointed out that even some of the commentary that had been submitted as evidence suggested that some ambiguity surrounded the question.

In a one-sentence Conclusion to the judgment, the court held that, impliedly, among the parties, "it was agreed that the relevant general average adjustment was to be conducted under YAR 2016."

The ship owners were given leave to appeal the decision, and opted not to, thus leaving it, in England and Wales at least, and in those countries that look to English common law, as settled.

The decision is of wide significance because similar provisions appear in the Gencon 1994 charter party, other standard forms, and many carriers' bills of lading — which predominantly to this day reference YAR 1994.

A significant impact from the insurance perspective is that YAR 2016 contain a hard time bar,[1] whereas YAR 1994 contained no comparable provision, and disputes under an adjustment would be subject to the statutory time limit of the place where the adjustment was drawn up — English law, for example, a period of six years from the date of the GA Adjustment. It now becomes incumbent on parties claiming contribution to be particularly mindful of the effluxion of suit time.

On the other hand, of benefit to insurers who have been encumbered by carrying reserves on large general average cases often for several years, YAR 2016 do offer the benefit of containing mechanisms to accelerate and simplify the adjustment process, including:

- Enabling the average adjuster to use estimated contributory values and general average allowances when the parties have not provided that information within twelve months of the termination of the common maritime adventure.
- Requiring interests to inform the average adjuster when they achieve a recovery from a third party in respect of sacrifice or expenditure claimed in general average.
- Basing the contributory value of cargo on its invoice value at the time of discharge, regardless of whether that includes further freight to a final, inland destination beyond the place of discharge from the carrying vessel.
- Sanctioning the already-existing practice of excluding low-value cargo "should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution."

[1] Rule XXIII, pertaining to "Time Bar for Contributing to General Average" provides:

(a) Subject always to any mandatory rule on time limitation contained in any applicable law:

(i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment is issued. However, in no case shall such an action be brought after six years from the date of termination of the common maritime adventure.

(ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.

(b) This rule shall not apply as between the parties to the general average and their respective insurers.

In summary, the judgment contributes much towards achieving the CMI's goal of wider application of YAR 2016.

This case note was provided by Jonathan S. Spencer.

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ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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