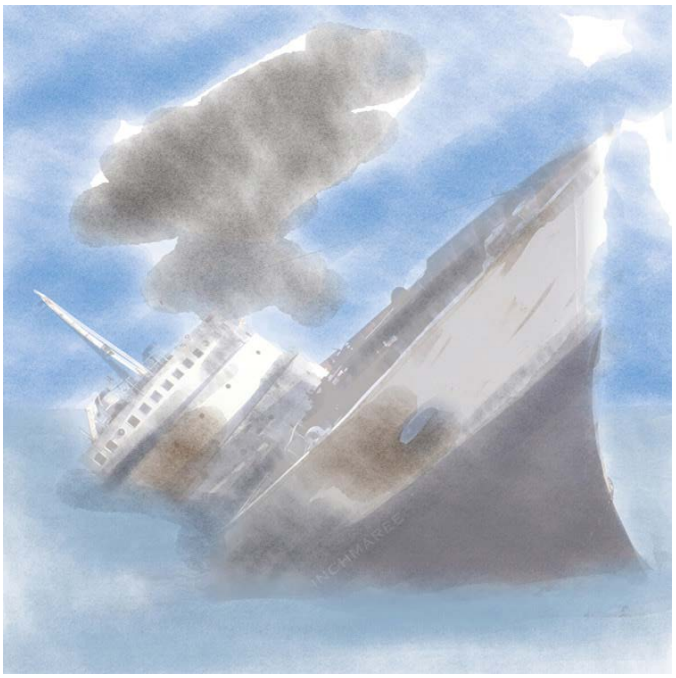
MLA Committee On Marine Insurance and General Average
NEWSLETTER
FALL 2015 | Committee Chair: Andrew C. Wilson, Esq., New Orleans, LA | Editor: Julia M. Moore, Esq., New York, NY

In This Issue:

1. **Article summarizing *uberrimae fidei*, written by Joseph G. Grasso of Wiggin & Dana, LP;**

2. **Case Summaries related to the following issues:**
   a. *uberrimae fidei;*
   b. breach of hull warranty;
   c. pollution coverage;
   d. right to jury trial;
   e. duty to defend;
   f. care, custody & control exclusion; and,
   g. who is a named insured?



– Anna Wilson

Editorial Note:

Once again, this edition of the Newsletter leads with a focus on the maritime doctrine of utmost good faith, *uberrimae fidei*. First there is an article by Joe Grasso based on his recent presentation on the current status of the doctrine as interpreted by the various federal circuits. To date, the U.S. Supreme Court has yet to weigh in on the issue.

Next, there are case summaries, beginning with a recent circuit court decision strictly interpreting the doctrine, or, *uberrimae fidei strictissimi.* In that instance, the Eighth Circuit Court of Appeals examined the parameters of the doctrine and determined that this defense to coverage is not available in the absence of reliance on the part of the underwriter. The opinion purports to break new ground by explicitly declaring reliance as a distinct element of the doctrine. That said, practitioners in this area will recognize the Eighth's Circuit's analysis as a variation on the theme of materiality which is applied by other circuits. The decision appears to be the first to explicitly declare that reliance and materiality are distinct elements and that both are required to void a policy.

UBERRIMAE FIDEI IS ALIVE AND WELL IN THE U.S.
By Joseph G. Grasso

Three Federal Circuit Courts of Appeal have weighed in this year on the question of whether the duty of utmost good faith (uberrimae fidei) is an entrenched U.S. federal admiralty law concept. All three held that it is. *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*,__ F.3d__ (8th Cir. 2015); *AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296 (11th Cir. 2015); *Catlin at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69 (1st Cir. 2015).

Two of these decisions reaffirmed earlier holdings (*O'Neill* (11th Circuit) and *Abhe & Svoboda* (8th Circuit)), and one held for the first time that the concept is indeed entrenched in our federal admiralty law (*San Juan Towing* (1st Circuit)). This brings the number of Circuit Courts holding that the duty of utmost good faith is an entrenched concept under U.S. admiralty law to six. *See*, in addition to the three cases cited above: *St. Paul Fire & Marine Ins. Co. v. Matrix Posh*, LLC, 507 Fed. App'x 94 (2nd Cir. 2013); *SW Traders LLC v. United Specialty Ins. Co.*, 409 Fed. App'x 96 (9th Cir. 2010); *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255 (3rd Cir 2008). These Circuit Courts are all in line with the seminal US Supreme Court decisions on the duty, *McLanahan v. Universal Ins. Co.*, 26 U.S. 170 (1828); and *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311 (1928)(the latter case involving a non-marine policy and a misrepresentation on an application for a life insurance policy).

The lone Circuit holding otherwise continues to be the Fifth Circuit. *See, Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.,* 585 F.3d 236 (5th Cir. 2009); *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882 (5th Cir. 1991).

Application of the Concept

While the concept of utmost good faith is widely accepted as entrenched in U.S. admiralty law (the Fifth Circuit notwithstanding), there remain subtle differences as to how the concept is applied in insurance coverage disputes from Circuit to Circuit. In particular, some decisions have required only a showing of materiality (generally an objective standard – would the information that was not disclosed or misrepresented have influenced the underwriting decision of a "prudent underwriter?") while others have also required a showing of reliance or inducement on the part of the underwriter (a subjective standard – did the information that was not disclosed or misrepresented actually influence the underwriting decision of the underwriter who wrote the risk?). Many decisions have either glossed over this difference or failed to address it.

However, the Eighth Circuit recently addressed this issue head on in the *Abhe & Svoboda* case. In that case, the Court held that the underwriter must demonstrate reliance as well as materiality in order to rescind a policy based on breach of the duty of utmost good faith. The Court also used the term inducement in describing the requirement, and it noted that the underwriter needs to, in effect, demonstrate causation as part of reliance (as distinct from the element of materiality, where causation is not required). There is a petition for rehearing pending in the case, and it remains to be seen whether other Circuits will also require a showing of reliance. (At least one other Circuit, the Second, has noted in passing that reliance is a necessary element of a cause of action for rescission based on the breach of the duty of utmost good faith. *See, Knight v. U.S. Fire Ins. Co*, 804 F.2d 9 (2nd Cir. 1986).

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Will the Fifth Circuit Ever Join the Rest?

Following the decision in *Anh Thi Kieu*, the principal reason given by the Fifth Circuit panels facing the issue, all of which have followed the holding in *Anh Thi Kieu*, has been that one panel cannot overrule another panel in the Fifth Circuit. *See Durham Auctions*, at 241. The question therefore remains whether the Fifth Circuit, sitting en banc, would overturn the *Ahn Thi Kieu* decision. Given the trend among other Circuits and the widespread criticism of the *Anh Thi Kieu* holding by other courts, one has to think that there is a likelihood that the answer is "yes." But will the issue ever be brought to the entire Circuit sitting en banc?

What Would the Supreme Court Do?

The question also remains, given the existing split in the Circuits, whether the Supreme Court might ultimately weigh in and, if so, how they would rule. While it is perhaps unlikely that the Supreme Court would in fact agree to hear a case involving this issue, if they do, they might be persuaded by the majority of Circuits as well as the precedent from that court on which the concept is based. (*McLanahan; Stipcich*). However, if the issue ever does make it to the Supreme Court's docket, the insured will undoubtedly raise the UK's recent revision of the Marine Insurance Act to remove the duty of utmost good faith. Nonetheless, it seems clear that the concept is well-entrenched in US admiralty law.

RECENT CASES OF INTEREST

UBERRIMAE FIDEI/UTMOST GOOD FAITH – Reliance required

***St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc., slip op.* 14-2234, Aug. 20, 2015, __ F.3d __ (8th Cir. 2015); 2015 WL 4939878.**

After affirming the doctrine of *uberrimae fidei* as entrenched federal maritime precedent in *New York Marine and General Insurance Co. v. Continental Cement Co., LLC*, 761 F.3d 830 (8th Cir. 2014), the Eighth Circuit Court of Appeals returned to the issue to decide whether a showing of reliance was required in order to void a marine insurance policy for breach of the duty. Following the Second Circuit's decision in *Puritan Insurance Co. v. Eagle Steamship Co., S.A.,* 779 F.2d 866 (2d Cir. 1985), the Eighth Circuit declared that a showing of reliance was a necessary element of the *uberrimae fidei* defense.

This decision arose out of the sinking of dumb barge SE-34 leased to insured Abhe & Svoboda ("A&S") and being used as a stationary equipment platform for a bridge painting project. The leasing agreement for barge SE-34 required A&S to conduct a survey which revealed that the SE-34 had pinholes in its deck, the under-deck tanks lacked watertight integrity and it was valued at $90,000, which reflected the value of the scrap metal "plus a little bit more because the barge was still useful." Three months into the painting project, A&S purchased a new marine package insurance policy from St. Paul. St. Paul did *not* request that A&S complete an application for insurance but accepted an application submitted to the prior insurer. The schedule of vessels on that application did not include the SE-34 and it also stated that none of the scheduled vessels were surveyed within the last two years because, at the time of that application, the survey of the SE-34 had not yet been performed. Subsequently, A&S provided St. Paul with an updated schedule of vessels, indicating that the SE-34 had a value of $225,000 based on the agreed value stated in the lease agreement for the barge.

A&S did not provide St. Paul with the leasing survey and St. Paul did not attempt to survey any of the A&S vessels as it was entitled to do.

Several months after the policy attached, the SE-34 sank during a nor'easter. The barge landed upside down, crushing the equipment that had been welded to its deck. After the loss, A&S provided its insurer with a copy of the SE-34's survey, lease agreement and salvage plans. The Coast Guard ordered the wreck removed and efforts to salvage the wreck and the barge's equipment resulted in claims between A&S and the salvage company. A&S sought coverage from St. Paul for defense costs and indemnification in connection with that dispute. St. Paul denied coverage for that dispute based on A&S's failure to disclose the 2010 survey on its application for insurance. On summary judgment, the District Court held that St. Paul was under no obligation to provide a defense or indemnity. A&S appealed and the Eighth Circuit reversed.

The issue on appeal was whether an insurer could void a marine insurance policy for violation of *uberrimae fidei* without a showing that the insurer relied upon the non-disclosure in issuing the policy. The Court of Appeals noted that "[t]here is surprisingly little authority on whether a showing of reliance is required to void an insurance policy under the doctrine of *uberrimae fidei*." To resolve the issue, the Eighth Circuit turned to the Second Circuit again for guidance. Relying upon the Second Circuit's decision in *Puritan Insurance Co,* which held that "the principle of *uberrimae fidei* does not require the voiding of the contract unless the undisclosed facts were material *and relied upon…"* the Eighth Circuit found that reliance was a necessary element and that the Second Circuit's reasoning in *Puritan* was "persuasive." The Eighth Circuit also found support for its ruling in general contract law which holds that a misrepresentation by omission has no legal effect unless it induces action by the recipient.

This decision concedes that most circuit courts do not explicitly require proof of reliance as a distinct element of the doctrine of utmost good faith. "While most circuits have not explicitly recognized reliance as a distinct element of the *uberrimae fidei* defense, some courts have applied a subjective test for materiality that asks whether the insurer in fact would have found the omitted information to be material. The standard applied by these circuits effectively requires a showing of actual reliance by the insurer, because it defines a material fact as one that the insurer relied upon." The Eighth Circuit then drew a distinction between materiality and reliance stating, "[t]hese decisions are consistent in substance with our conclusion, but we think clarity is enhanced by preserving actual reliance and objective materiality as distinct elements." The court explained that materiality examines whether a fact would have influenced a reasonable and prudent underwriter's decision to write the risk, while the reliance test examines whether there was a causal connection between the misrepresentation or concealment and the actual underwriter's decision to issue the policy. Applying this test to the facts at hand, the circuit court found sufficient evidence present in the record below to support reversing the grant of summary judgment. The court determined that there were questions of fact surrounding the issue of whether the undisclosed facts were material and whether St. Paul relied upon them when it wrote the risk.

***Nanolab Technologies, Inc. v. Roanoke Claims Services, Inc., slip op.* 5:15 -02699 (May 15, 2015 N.D. Ca), 2015 WL 2356905.**

While the typical *uberrimae fidei* case involves a vessel, in this case, underwriters sought to void an open marine cargo policy covering the truck transportation of a spectrometer from Mexico to California based on the plaintiff's failure to disclose to the underwriter that part of the transportation would include carriage in a non-air-ride van across Mexico City before transfer to an air-ride van for carriage to California. Plaintiff Nanolab argued that the doctrine of *uberrimae fidei* could not be invoked to void the coverage as the insurance was not "marine." Nanolab argued that marine insurance only insured against losses that are specifically

marine in nature. The district court disagreed. Relying on California law, the court held that "[b]y the plain language of the statute, there can be no question that transportation over land is covered in a marine insurance contract." The court also noted that the policy itself was titled "Marine Open Cargo Policy" which completely undercut Nanolab's argument that it was not on notice that the coverage was a marine insurance policy.

The district court then ruled against the underwriters and concluded that questions of fact existed as to whether a reasonable person would conclude that details of the type of truck transportation were material to the underwriter's decision to write the risk given the fact that the underwriter's own insurance quote used the generic term "truck" and no mention was made of an air-ride requirement. Based on the record, the district court held that a reasonable jury could conclude that Nanolab was not required to disclose the additional information.

BREACH OF MARINE INSURANCE WARRANTY

Guam Industrial Services, Inc. v. Zurich American Insurance Co., 787 F.3d 1001 (9th Cir. 2015).

This coverage action arose out of the sinking of a dry dock loaded with 113,000 gallons of oil during a typhoon on Guam. No oil leaked from the containers due to the sinking. The dry dock, owned by Guam Industrial Services, Inc. ("Guam Industrial") was covered by two insurance policies: one policy covered damage to the dry dock, the other policy covered liability for property damage caused by pollutants. After the dry dock sank, Guam Industrial made a claim under both policies for its losses. Both insurers denied the claims and suit followed. The district court granted summary judgment in favor of both insurers by finding that the dry dock policy was voidable due to the Guam Industrial's failure to comply with an express warranty. The court also found that the second policy was never triggered because no pollutants were released.

The dry dock was covered by a named perils hull and machinery policy which required, as an express warranty and condition of coverage, that Guam Industrial obtain and maintain a Navy Certificate for the dry dock. The Navy Certificate ensures that the dry dock has satisfied a certain level of structural integrity and is the highest standard in the industry. Despite the warranty, Guam Industrial did not obtain a Navy Certificate. Instead, it obtained a "commercial" certificate. At the time of the loss, the commercial certificate had expired and the issuer of the certificate would not renew it unless Guam Industrial completed substantial repairs to the dry dock. The dry dock was in the process of being repaired when it sank.

The Ninth Circuit began its analysis by noting that typically, a court must determine whether to apply state or federal maritime law to interpret an insurance policy. In this case, however, the Circuit Court found that it need not decide which law applied as both state and federal maritime law required a strict construction of warranties in a marine insurance policy. The Court held, "[t]he federal rule, if one in fact exists, is that admiralty law requires the strict construction of express warranties in marine insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss." The court reached the conclusion despite the fact that Guam's courts had not yet spoken on the issue. Following the rule that when state courts are silent on an issue, the federal courts must make a reasonable determination of how the state's highest court might rule if deciding the case, the Ninth Circuit determined that Guam would follow the law of California since Guam's insurance statutes were derived from California law. California law requires strict compliance with warranties when they are material. The court then held, "[u]ltimately, whether derived from federal admiralty law or state law, we conclude that the law requires strict compliance with marine insurance policy warranties, *even when the breach of the warranty did not cause the loss." (*Emphasis added). Guam Industrial argued that underwriters

had waived their right to demand strict compliance with the Navy Certificate warranty because it had previously accepted the commercial certification. The court noted that even if underwriters had waived the requirement of a Navy Certificate, the underwriters had not waived the requirement of the commercial certificate which was expired when the dry dock sank.

The court then addressed the claim under the ocean marine policy covering property damage caused by pollutants. Finding that it was obligated to enforce the plain and unambiguous language of the policy, the court held that the sealed barrels of oil did not constitute "pollutants" under the plain terms of the policy. The Court held that since there was no actual discharge of pollutants, even though the containers of oil were submerged after the sinking, the cost of retrieving the containers was not covered by the policy's coverage for cleanup after "discharge, dispersal, release or escape" of pollutants.

BREACH OF WARRANTY – STATE LAW, ECONOMIC LOSS RULE

***Federal Insurance Company v. Mathews Brothers, LLC, slip op.* 1:14-03794 (D. Md. Aug. 14, 2015)**

This decision arose out of the sinking of the yacht RIVER RAT requiring repairs totaling over $750,000. The cause of the sinking was attributed to the improper installation of the fuel cooler discharge line which caused a nipple fitting to break allowing seawater to enter the vessel. Plaintiff Federal Insurance Company ("Federal") paid out its policy limits for the loss and became subrogated to the rights of the yacht owner. Federal then sued the builder of the yacht, defendant Mathews Brothers, LLC ("Mathews") and the supplier of the engine, Alban Tractor, Co. ("Alban") asserting causes of action for breach of warranty and negligence. On a motion to dismiss, the district court determined that Federal's complaint failed to meet the pleading standards required by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and all claims against the defendants were dismissed.

With respect to the causes of action asserting breach of express warranty, breach of the implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose, the district court stated that it was undisputed that Maryland state law applied as it was well established that a contract for the sale of a yacht was a non-maritime contract and that any claim for breach of warranty in the sale of a yacht did not state a cause of action in admiralty. The court was then faced with the question of whether the state law warranty claims were time-barred. Defendants claimed that the Maryland Commercial Code ("UCC") with a four year statute of limitations applied. Plaintiffs argued that a section of the Maryland state commercial law governing contracts with a three-year from discovery rule applied. To resolve the question, the district court analyzed whether the "predominant factor" or "thrust" of the contracts at issue were for the sale of goods or the supply of services. The court concluded that the contracts were predominantly were to provide goods – the vessel and the engine – and that any necessary labor to install the engine was of secondary concern. Relying upon *East River S.S. Corp. v. Delaval, Inc.*, 476 U.S. 858 (1986) the court held that contracts relating to the construction of, or supply of, materials to a ship and warranty claims grounded in such contracts were governed by state law, and in particular, the Uniform Commercial Code. As a result, the UCC statute of limitations applied and the claims were time-barred.

With respect to the negligence claims, the court dismissed these as barred by admiralty's economic loss rule. The court noted that while state law governed the warranty claims, admiralty law governed the negligence claims. The district court held that, under admiralty law, the economic loss rule generally prohibits a party from recovering in tort when a defective product harms only the product itself, but causes no loss or damage to person or other property. Therefore, as Federal sought recovery for damage to the vessel itself, and not for damage to any person or other property, the economic loss rule barred the negligence claims. Federal

argued that the economic loss rule was inapplicable as the damage was caused by a defective *service* not a defective product. The court rejected this claim based on decisional law from the Fifth Circuit which holds that the economic loss rule adopted in *East River* precludes recovery in maritime tort for purely economic losses stemming from the negligent performance of a contract for professional services when those services are rendered as part of the construction of a vessel. The district court acknowledged that the Fourth Circuit had yet to speak authoritatively on the issue, but that it found the reasoning of the Fifth Circuit sufficiently persuasive.

Finally, with regard to the claim for breach of the warranty of workmanlike performance, the district court found that the warranty was essentially an admiralty application of the rule that a party who agrees to perform a service is obligated to do so in a workmanlike fashion. Because the court had previously determined that the contracts at issue were not maritime contracts, the court held that the implied warranty of workmanlike performance did not apply.

NO RIGHT TO JURY TRIAL IN MARINE INSURANCE COVERAGE ACTION

***Travelers Property Casualty Company of America v. Ivy Marine Consultants, L.L.C., slip op.* 14-0378 (May 5, 2015 S.D. Al.) 2015 WL 2128935**

Plaintiff Travelers filed a declaratory judgment action against its insured seeking a declaration that it had no obligation to pay for damage to a vessel under a marine insurance policy. In filing the complaint, Travelers pleaded that jurisdiction was founded upon 28 U.S.C. §1333 and Rule 9(h) of the Federal Rules of Civil Procedure. Travelers also pleaded diversity jurisdiction. The insured filed a counterclaim for coverage against Travelers and demanded a jury trial. The court requested briefing on the issue on whether any party or claim was entitled to a jury trial.

There was no question that cases involving marine insurance contracts give rise to admiralty jurisdiction or that the election to proceed in admiralty under Rule 9(h) precludes a defendant from exercising a right to trial by jury. The real issue was whether Traveler's pleading of diversity jurisdiction nullified the Rule 9(h) election. The Court held, based on Fifth and Eleventh Circuit precedent, that the Rule 9(h) election controls the basis for jurisdiction even if another basis for subject matter jurisdiction exists and is acknowledged in the complaint.

DUTY TO DEFEND

***XL Specialty Insurance Company v. Bollinger Shipyards, Inc.*, __ F. 3d. __ (5st Cir. 2015), 2015 WL 5052504.**

This decision arose out of litigation between Bollinger Shipyards ("Bollinger") and the United States over Bollinger's performance of a multimillion dollar contract with the United States Coast Guard to upgrade eight (8) USCG cutters to 123-foot vessels. The vessels failed and the United States filed suit against Bollinger asserting fraud, unjust enrichment, negligent misrepresentation and violation of the False Claims Act. The claims between the US and Bollinger lead to additional suits between Bollinger and its insurers which were removed and consolidated. Both XL and Bollinger filed competing motions for summary judgment in the district court. The district court granted XL's motion that it was under no obligation to defend or indemnify Bollinger in connection with the underlying claims filed by the US. An appeal followed.

Adhering to the well settled principle that an insurer's duty to defend is determined solely by comparing the allegations of the complaint with the terms of the policy (i.e. the "eight corners" or "four corners" rule) the court compared the allegations of the underlying complaint against Bollinger with the policy terms and conditions. The Court determined that all five claims set forth in the complaint fell within two exclusions of XL's policy. The first exclusion at issue barred coverage for claims that Bollinger's products did not meet a predetermined level of fitness or performance. The Court affirmed that this exclusion applied to the government's claims for unjust enrichment and negligent misrepresentation. With respect to the remaining claims for common law fraud and violation of the False Claims Act, the court found that these claims were excluded by a clause barring coverage for dishonesty, infidelity or breach of federal law regulating or controlling unfair or deceptive practices. As all of the causes of action fell within one of the two exclusions, XL was under no obligation to defend.

The ruling in favor of XL also had implications for Bollinger's claim against its excess carrier, Continental. As a result of the judgment in XL's favor, the court held that Continental's excess coverage could not be implicated as there were no remaining claims that could result in exhaustion of Bollinger's lower level coverages. Further, the court found that the claims under the False Claims Act were not covered since the excess policy insured only property damage and personal injuries.

***Stein v. Northern Assurance Company of America,* __ Fed. Appx. __ (2d Cir. 2015), 2015 WL 4032613.**

This unreported decision determined that an insurer failed to meet its burden of affirmatively establishing that it was entitled to disclaim coverage. The Court noted that under New York law, an insurer owes its insured a duty to defend whenever the allegations of the complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. The Second Circuit reiterated that an insurer's duty to defend claims is ordinarily ascertained by comparing the allegations of the complaint with the wording of the insurance contract and noting that it is "well established" that a liability insurer must defend if the pleadings allege a covered occurrence even if facts outside the four corners of the complaint indicate that the claim may be meritless or not covered. The Second Circuit mentions in a footnote that New York law is "unclear" regarding the circumstances in which a court may consider extrinsic evidence in making coverage determinations citing *IBM v. Liberty Mutual Insurance Co.* 363 F.3d 137, 148 n.4 (2d Cir. 2004). However, in this case, the court determined that the insurers could not meet that burden and the Court was not obligated to delineate the precise scope of the extrinsic evidence exception to resolve the case.

CARE, CUSTODY & CONTROL EXCLUSION

***Collins v. A.B.C. Marine Towing, L.L.C.,* __ F. Supp. 3d __, 2015 WL 4937869 (ED La. Aug. 17, 2015).**

This decision arose out of a fatal allision of a crane barge with the Florida Avenue Bridge spanning the Inner Harbor Navigational Canal in Louisiana. The allision occurred when the tug M/V CORY MICHAEL was towing a crane barge and crane (collectively the "crane barge") and the mast of the crane barge allided with the bridge causing the crane boom to fall on the pilot house, killing the pilot and injuring several other crew members. At the time of the incident, the owner of the tug, ABC Marine, had a Master Service Agreement with the owner of the crane barge, Boh Bro.'s which stated that ABC Marine would defend, indemnify and hold harmless Boh Bro.'s from liabilities in connection with ABC Marine's operations or performance of the agreement. ABC Marine also had several insurance policies, both primary and excess, under which it claimed coverage for the death and other losses. The primary insurer accepted coverage for Boh Bro.'s claim against ABC Marine and entered into a settlement agreement. The excess insurers

(Underwriters at Lloyd's London) contended that the losses sustained by the crane barge fell within a policy exclusion for damage to property in its care, custody and control.

The key question before the court was whether a barge under tow is within the "care custody and control" of the tower. The court concluded that it was not. Central to the court's analysis was a Supreme Court decision from 1932 in which the Court held that under a towage contract, the tug was not the bailee of the vessel in tow or its cargo. While excess underwriters argued case law in which a tower was found to have "control" of its tow, the court distinguished these cases in favor of finding coverage. The Court stated that it "recognizes that there is no Fifth Circuit law directly on point to the issue and appreciates Excess Insurer's position that courts have found tugs to be in control of barges in particular instances, the 'purpose of liability insurance is to afford the insured protection from damage claims' … Therefore, a 'provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language eof the exclusion is subject to two or more reasonable interpretations, the interpretations which favors coverage must be applied." Based on the principles of construction and reasonableness, the district court ruled that the "care custody and control" language was synonymous with bailment and not towage and, accordingly, the exclusion did not apply.

WHO IS A NAMED INSURED?

***International Offshore Services, LLC v. Linear Controls Operating, Inc.*, __ F. Supp. 3d __ (E.D.La 2015), 2015 WL 4875472.**

This declaratory judgment action arose out of an allision of the vessel M/V INTERNATIONAL HUNTER with an unmanned oil production platform in the Gulf of Mexico resulting in personal injury to a passenger. As a result, the owner of the vessel filed suit against the employer of the injured passenger seeking a defense and indemnity pursuant to certain contracts between them. The oil platform owner also brought a claim against the employer's commercial liability insurer contending that it was a "named insured" under the policy issued to the employer and was, therefore, entitled to coverage. The insurer argued that the platform owner was not covered under the policy and filed a motion for summary judgment.

The main issue in dispute was whether the platform owner ("Apache") was a named insured or an additional insured. The distinction was important as the policy provided coverage for personal injury to a named insured, but not to an additional insured. The district court examined the language of the policy including the preamble, definitions and declarations sections and determined that Apache was not listed as a named insured and was not included in any definition of "named insured." The only place in the policy where Apache appeared was an endorsement adding it as an additional insured. While this endorsement also modified the policy to include Apache as a named insured, such coverage applied "only with respect to liability arising out of your ongoing operations performed for that insured." As determined by the Court, this clause did not grant Apache the status of "named insured" with respect to the personal injury claims at issue.

Apache argued that the terms of its contract with the platform owner required that it be covered as a named insured under the policy, and that it had paid premium in exchange for coverage which complied with *Marcel v. Placid Oil Co.,* 11 F.3d 563 (5th Cir. 1994). Apache further argued that as an additional insured, it was entitled to the same coverage as the named insured. The district court rejected these arguments based on the policy language which it found to be clear and unambiguous.

***Rosano v. Freedom Boat Corp.*, *slip op.* 13-842 (EDNY July 8, 2015), 2015 WL 4162754.**

Plaintiff Rosano was the owner of a vessel that he leased to Freedom Boat Corp. and others. As part of the lease agreement, the leasees were obligated to purchase insurance to cover the hull and liability of the vessel. American Modem Insurance Group then issued a policy to Freedom Boat Club, LLC and a lien holder. Plaintiff Rosano was neither listed as a named insured or an additional insured. After the vessel was damaged and American Modem declined to pay Rosano for the loss, Rosano filed suit claiming damage to the vessel, breach of contract, and breach of an insurer's obligation to pay insurance claims. Only American Modem appeared in the action.

In deciding whether Rosano was entitled to coverage, the court examined the plain language of the policy and rejected Rosano's claim. The court stated that "only the policy owner has standing to sue based on an insurance policy." The court further found that there was no evidence that Rosano was intended to be covered as a third party beneficiary. Summary judgment in favor of the American Modem was granted.

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ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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