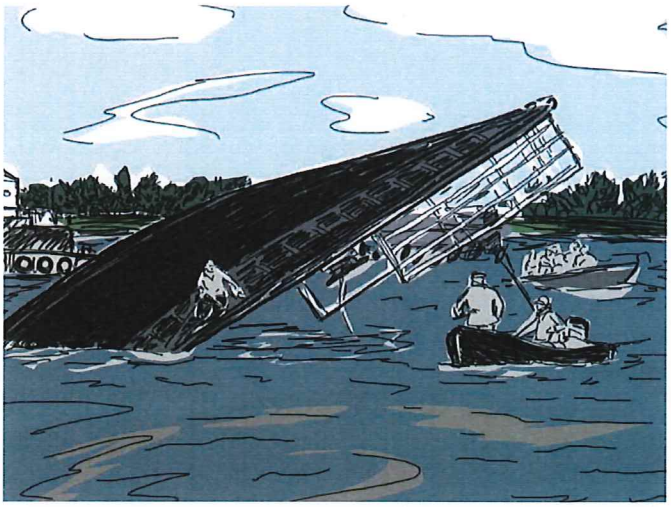
MLA Committee On Marine Insurance and General Average
NEWSLETTER
FALL 2016 | Committee Chair: Andrew C. Wilson, Esq., New Orleans, LA | Editor: Julia M. Moore, Esq., New York, NY

In This Issue:



*Forty years ago, 77 people died in the worst ferry disaster in U.S. history. The Luling-Destrehan Ferry sank after being struck by the Norwegian tanker FROSTA as the ferry crossed the Mississippi River near Luling, La. Only18 people survived.**

Editorial Note:

Many thanks to the members of the MLA Young Lawyers Committee who contributed the case summaries, specifically Theresa M. Carroll, Esq. of Carroll, McNulty, Kull, LLP (Chicago), Olaf Aprans of Clinton & Muzyka (Boston) and Hugh Baker, a Tulane law student and managing editor of the Tulane Maritime Law Journal.

THE HANJIN BANKRUPTCY AND FIRST-PARTY CARGO COVERAGE FOR FORWARDING CHARGES

I. INTRODUCTION

On 31 August 2016, Hanjin Shipping Co. Ltd. ("Hanjin") filed a petition for rehabilitation in the Bankruptcy Division of the Seoul Central District Court. By that time, Hanjin's debt was roughly $5 billion. And there was $14 billion in cargo in transit, in 500,000 containers, worldwide. Typically, the Court would have acted on the rehabilitation petition within two to four weeks. But in this case, the Court granted the petition on 1 September 2016.

While Hanjin was filing its rehabilitation petition, creditors were filing lawsuits against Hanjin, including actions in the United States under Rules B and C under the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. But all actions against Hanjin in the United States quickly became subject to an automatic stay. Hanjin accomplished that by filing a petition in the United States Bankruptcy Court for the District of New Jersey for "recognition" of the Korean rehabilitation action under Chapter 15 of the Bankruptcy Code. Days later, Hanjin moved for and obtained provisional relief to get that recognition. Ordinarily, there is a recognition hearing roughly 30 days after the filing of the petition. During that "gap period," there is no automatic stay in the United States as to any collections actions. But the granting of the provisional relief put the automatic stay in place.

II. COVERAGE FOR "FORWARDING CHARGES" UNDER STANDARD POLICY TERMS

The inability, at least initially, of ships to discharge cargoes, the difficulties that consignees had with taking delivery of their cargoes, the suspension of "door" deliveries by Hanjin, and the issues arising over the extended holding of empty Hanjin containers and attached chassis are only a few of the issues that have arisen since Hanjin's filing. Those operational issues will almost certainly give rise to numerous insurance-related issues. This short article will address the issue of forwarding charges for cargoes "stranded" as a result of the bankruptcy.

After the filing, Hanjin terminated all multimodal "door" deliveries at the cargoes' ports of discharge or at the designated rail ramps. That termination meant that cargo interests have become responsible for recovering their cargoes at the points of termination and then arranging for their on-carriage to their inland points of destination.

In the first instance, clause 12 of the 2009 Institute Cargo Clauses (A) ("ICCA") grants coverage for the cost of the on-carriage to inland delivery points. But given Hanjin's circumstances, the exclusions in the clause would likely take away that coverage:

> **Forwarding Charges**
> 12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, *shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.* [Emphasis added.]

Clause 4.6 of the ICCA excludes:

> [L]oss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.
> This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

The above condition as to an assured's "awareness" of a vessel owner's or operator's insolvency or financial default or, alternatively, that an assured *should* have been aware of the same, could give rise to some interesting issues. Hanjin's perilous financial condition and its efforts to restructure its debt had been in the news for months leading up to the filing of the rehabilitation petition.

The Lloyd's Market Association's Joint Cargo Committee's Insolvency Exclusion Clause (JC93), which is in some older policies, is even more demanding on assureds:

It is hereby agreed that the exclusion "loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel" is amended to read as follows:

> In no case shall this insurance cover loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel where the Assured are unable to show that, prior to the loading of the subject-matter insured onboard the vessel, *all reasonable practicable and prudent measures were taken by the Assured, their servants and agents, to establish the financial reliability of the party in default.* [Emphasis added.]

A policy that incorporates the AIMU's 2004 All Risks Cargo Clauses ("AIMU") would likely lead to the same result as under the ICCA. AIMU clause 2(D) covers "[l]anding, warehousing, forwarding and special charges incurred by reason of perils insured against." But that coverage is subject to the insolvency exclusion in clause 3(A)(2)(c), which excludes loss, damage, or expense "arising from insolvency or financial default of the owners, managers, charterers, or operators of the vessel."

Title 46 ocean transportation intermediaries ("OTIs") often sell cargo insurance to their customers under the OTIs' open marine cargo policies. Given the language of the above insolvency exclusions, OTIs could face claims implicating their errors-and-omissions coverages("E&O")—yet another insurance implication of Hanjin's bankruptcy. For example, an affected ICCA cargo owner could argue that under the circumstances, its non-vessel-operating common carrier or ocean freight forwarder "negligently selected" Hanjin in the early part of 2016, because of its lack of "financial reliability" or, at the very least, because Hanjin's pre-petition insolvency or financial defaults could have prevented the normal prosecution of the voyage in question.

Concern over Hanjin-related cargo-cover, extra-expense, and E&O issues, among others, is just starting. Stay tuned!

RECENT CASES OF INTEREST

Jurisdiction & Venue

***Zambrano et al. v. Vivir Seguros, C.A., et al.*, 2016 WL 5076185 (S.D. Fla. Sept. 20, 2016).**

The motor yacht FREE WATER sank to the bottom of Venezuelan waters on May 22, 2015. The vessel's insurer, Vivir Seguros, C.A. ("Seguros") denied coverage for the loss on the grounds that the owners breached a warranty under the insurance policy by towing an auxiliary boat in violation of the Policy and in violation of Venezuelan Law. The coverage limit on the policy was $430,000.00.
The owners filed an action against Seguros in the Southern District of Florida and sought a Rule B maritime attachment in the amount of $562,900.00. The Court granted the Rule B attachment *Ex Parte,* and the Garnishee Intercontinental Bank held $200,994.69 under that process. Seguros filed a motion to vacate this maritime attachment under Rule E(4)(f).
The Court held that owners had a bona fide admiralty claim against Seguros for breach of a marine insurance contract and rejected Seguros's procedural arguments based on Venezuelan law, whereby Seguros claimed that the action should have been filed in Venezuelan maritime courts and with the approval of Venezuelan insurance regulators. The Court further found that Seguros was not found within the District and that Intercontinental Bank was within the district and in possession of Seguros's funds. Accordingly, owners had a valid Rule B attachment.
The Court nonetheless decided to vacate the Rule B attachment under its equitable vacatur power when considering that both of the parties were subject to the jurisdiction of Venezuelan Courts, the incident occurred in Venezuelan waters, and the fact that the attachment was not over a vessel, but bank accounts held by Seguros. The Court, therefore, vacated the Rule B attachment and dismissed the Complaint.

***Neal v. Christini* (slip op.), CA No. 16 – 00242 DKW–RLP, 2016 WL 5928797 (D. Hawaii 2016)**

In this case, a defendant insurance broker won dismissal of a lawsuit for lack of admiralty subject matter jurisdiction, as the plaintiff insureds' allegations involved professional negligence from torts occurring entirely on land. The plaintiffs were a scuba diving and snorkeling tour company that had bought maritime insurance through the defendant broker "for the purpose of being protected against claims arising from scuba diving and snorkeling tours." Plaintiffs were sued following an accident in which one person was killed and two were injured; one of the injured parties made claims for maintenance and cure under the Jones Act.

Upon tendering their claims, plaintiffs allegedly discovered for the first time that their insurance coverage did not include Maritime Employment Liability ("MEL") coverage. Plaintiffs then sued several entities involved with the placement of their insurance policies, alleging that the brokers breached their duty to offer or provide MEL coverage. The jurisdictional basis for plaintiffs' lawsuit was based solely on admiralty jurisdiction.

The court, upon reciting the test for general maritime jurisdiction over torts as requiring a "location" prong and a "connection" prong, found that the plaintiffs' lawsuit failed to satisfy the first prong. The location requirement requires that the alleged incident occur on navigable water or be caused by a vessel on navigable water; however, in the case before the court, the "sale of and negotiation over [the] insurance policies did not occur on navigable water, nor did the subsequent denial of coverage." The court further held that even if plaintiffs amended their complaint to assert a breach of contract claim, they could not demonstrate

contractually-based admiralty jurisdiction. Such jurisdiction requires that the subject matter of the contract involved services that are "maritime in nature." The court found that plaintiffs' proposed claim – a contract to provide proper maritime insurance – could not, without more, satisfy the contract test for admiralty jurisdiction. Accordingly, the court granted the defendant insurance broker's motion to dismiss for lack of admiralty jurisdiction.

Definition of "Occurrence"

***United Specialty Insurance Company v. Porto Castelo, Inc. et al.*, 2016 WL 2595072 (S.D. Tex. May 5, 2016).**

The insurer, United Specialty Insurance Company ("United") issued a Protection and Indemnity Policy to Porto Castelo, Inc. ("Porto") and Trident Circle, Inc. ("Trident"), who owned the shrimp trawler MISS EVA. The P&I Policy had a limit of $500,000.00, with a crew sublimit of $100,000.00 applicable to each "occurrence."
On December 1, 2014, an explosion and fire occurred onboard the MISS EVA, resulting in significant injuries to the four [4] crewmen onboard. Porto and Trident demanded that United pay the policy limit of $100,000.00 applicable to each injured crew member, or $400,000.00. United refused, arguing that there was a single occurrence and that the $100,000.00 limit applied to the aggregate of the four [4] crewmen injuries.
The Court agreed that the plain and unambiguous language of the policy construed "occurrence" "on events that cause the injuries and give rise to the insured's liability rather than the number of injurious effects." This clear language capped United's liability at $100,000.00 for the aggregate injuries of the crewmembers. The Court, therefore, ruled for the insurer.

Removal

***Katchmore Luhrs, LLC v. Allianz Global & Corporate Specialty,* 2016 WL 1756911 (S.D. Fla., May 3, 2016).**

In this case, the Defendant insurer removed the action from State Court on the basis of diversity jurisdiction under 28 U.S.C. 1332, and on the purported grounds that the Federal Court had original jurisdiction as an admiralty and maritime claim under 18 U.S.C. 1333, as the action involved a marine insurance policy. Because the Court found diversity jurisdiction to exist, it declined to rule on the issue of whether removal was appropriate under 28 U.S.C. 1333.

The parties agreed that they were citizens of different states, but disagreed as to the amount in controversy. The face value of the policy was $71,500.00, but because the plaintiff was asserting claims for attorneys' fees based on Florida's bad faith statute, the Court found diversity jurisdiction to exist based on the overwhelming evidence that Plaintiffs' claim for unpaid attorneys' fees will exceed $3,500.00.

All Risks Policy Interpretation

***AGCS Marine Insurance Company v. World Fuel Services, Inc. et al.*, CA No. 14-05902, 2016 WL 2918428 (S.D.N.Y. May 17, 2016).**

In *World Fuel*, the Southern District of New York considered the issue of whether there was coverage under an "all risk" cargo policy for the loss of approximately $17 Million worth of marine gasoil ("MGO") on account of the insureds', World Fuel Services, Inc. and World Fuel Services, Europe, Ltd. (collectively "World Fuel") being duped into transferring the MGO at sea to an imposter purporting to work for the U.S. Government. The imposter thereafter absconded with the MGO, and World Fuel looked to their "all risk" policy issued by AGCS Marine Insurance Company ("AGCS") to pay for this loss. The Court granted summary judgment in favor of World Fuel, holding that the loss occurred during transit and falls within the broad all risk cover.

An individual by the name of James Battell emailed World Fuel on October 28, 2013 seeking to purchase significant quantities of MGO. He advised that he worked for the Defense Logistics Agency, which supplies fuel to the U.S. Government. Battell, ultimately was an imposter and thief. The parties eventually reached a contract to sell 17,000 metric tons of MGO worth an estimated $17,284,750.00. The delivery terms were "F.O.B. destination," i.e. the buyer would take title only upon delivery. The MGO was delivered by one of World Fuel's suppliers, Monjasa A/S ("Monjasa") off the coast of Lome, Togo in two ship to ship transfers. Thereafter, World Fuel sent Battell an invoice for the fuel, which was never paid. It was later discovered that Battell was an imposter. Upon this discovery World Fuel submitted a claim to its insurer, which denied coverage.

The Court considered three policy provisions at issue, (1) the "All Risk" Clause, (2) the "Fraudulent Bills of Lading" Clause, and (3) the "F.O.B. Clause."

1. All Risk Clause. The "All Risk" clause in the Policy protected World Fuel "[a]gainst all risks of physical loss or damage from any external cause . . . *from time of leaving tanks at port of shipment and while in transit and/or awaiting transit and until safely delivered in tanks at destination*."

AGCS denied coverage on the grounds that the loss did not occur within the temporal scope of the all risk cover. AGCS primarily argued that the "loss" postdated the safe delivery of the MGO, because Barrett absconded with the fuel after delivery. World Fuel took the position that "safe delivery at destination" never actually occurred because the fuel was delivered to a thief.

After engaging in an in depth historical analysis of analogous case law, the Court found that under New York Law World Fuel met its burden of showing that the loss occurred within the temporal scope of the all risk coverage, stating that "delivery" to a thief is no delivery at all. The Court found that there is a distinction on this issue between cases involving fraud at the outset and those involving long running customers who were, at the time of delivery, bona fide, but who later failed to pay. This case fell into the former category, was caused by malicious fraud, and was therefore unforeseeable and unavoidable, thereby invoking coverage under the all

risk clause. The Court, therefore, found that the "loss" occurred while the MGO was "in transit" and covered under the all risk clause in the Policy.

AGCS argued in the alternative that World Fuel lacked an insurable interest in the MGO, because Monjasa had title to the fuel during the transit. World Fuel, according to AGCS, only acquired title after the MGO's delivery. The Court likewise rejected this argument, as World Fuel was still physically dispossessed of the fuel.

In an alternative argument, AGCS sought to apply the "inherent vice" exclusion in the Policy, which stated that "[t]his insurance shall in no case be deemed to extend to cover loss, damage or expense proximately caused by [i]nherent vice or nature of the subject matter insured." AGCS argued that an inherent defect in the cargo existed predating the shipment on account of Barrett's misconduct predating the shipment. The Court declined to extend the doctrine of inherent vice to this fact pattern, holding that it is limited to occasions of physical defects inherent to the cargo itself, and not externally caused fraudulent activities such as Barrett's activity at issue.

Although coverage under the All Risks Clause was sufficient to grant summary judgment in favor of World Fuel, the court went on to comment on the remaining clauses at issue for purposes of completeness.

2. The Fraudulent Bills of Lading Clause. The fraudulent bills of lading clause provided an independent grant of coverage for physical loss incurred "through the acceptance by [World Fuel], its Agents or the shipper of fraudulent bills of lading, shipping receipts, messenger receipts, warehouse receipts or other shipping documents." World Fuel argued that its contract with Battell constituted an "other shipping document," but the Court rejected this argument, holding that "a contract is not used in the ordinary course of shipping, even though it may initiate and even describe the shipping process." World Fuel also argued that the bunker delivery receipts qualified coverage under this clause as "shipping documents," but the Court likewise rejected this argument because the bunkering receipts were not issued until *after* the transfer or loss, and could not have been the actual cause of the loss whereby coverage would apply.

3. The F.O.B. Clause. The F.O.B. Clause provided coverage for goods "sold by [World Fuel] on F.O.B., F.A.S., Cost and Freight or similar terms whereby [World Fuel] is not obligated to furnish marine insurance." The F.O.B. Clause "attaches subject to its terms and conditions and continues until the goods . . . are loaded onto the primary conveyance or until [World Fuel's] interest ceases." The Court declined to find coverage under this clause as to do so "would transform the Policy from a guard against physical loss or damage during transit into a guard against non-payment for any reason whatsoever . . ." The Court found "AGCS's interpretation of the F.O.B. Clause, so as not to cover non-payment risk in perpetuity, is the only reasonable one."

Drilling Rig Exclusion

***Richard v. Dolphin Drilling, Ltd. et al.*, Case No. 16-30003, 832 F. 3d 246 (5th Cir. 8/1/16).**

In *Richard*, the Fifth Circuit considered whether, under Louisiana Law, a plaintiff's personal injury onboard a drill ship was excluded by an excess policy's "drilling rig" exclusion for "any liability for, or any loss, damage, injury or expense caused by, resulting from or incurred by reason of any liability or expense arising out of the ownership, use, or operation of drilling rigs . . . ." The Fifth Circuit affirmed the decision of the Western District of Louisiana and answered that question in the affirmative. The Fifth Circuit rejected the Third Party Defendant-Appellant Offshore Energy Services, Inc.'s ("Offshore") argument that a "drill ship" is not a "drilling rig," holding that the purpose of the exclusion was to limit coverage to vessels while excluding drilling platforms.

The Fifth Circuit likewise rejected Offshore's waiver argument, whereby Offshore claimed that its excess underwriter, Valiant Insurance Company ("Valiant") waived its drilling rig exclusion defense by waiting until 2014 to assert it (suit beginning in August 2011) and by failing to issue a reservations of rights letter. The court found that there was no waiver because Valient never participated in Offshore's defense and because Valiant was not made a party to the suit until three[3] years after it was commenced. Being there was no evidence that Valiant relinquished its drilling rig exclusion, the Court found that no waiver occurred.

Other Insurance Clause

***Mitsui Sumitomo Insurance USA, Inc. et al. v. Tokio Marine & Nichido Fire Insurance Company, Ltd.*, Case No. 14-56337, 2016 WL 4191904 (9th Cir. 8/9/16)**

In *Mitsui*, the Ninth Circuit considered the issue of whether the defendant-appellee, Tokio Marine & Nichido Fire Insurance Company, Ltd. ("Tokio") was obligated to contribute to the defense costs paid by the plaintiffs-appellants, Mitsui Sumitomo Insurance USA, Inc. and Mitsui Sumitomo Insurance Company of America (collectively "Mitsui"). Mitsui brought a claim against Tokio for equitable contribution arguing that both Mitsui and Tokio were primary insurers on the same risk. The Central District of California, however, found that Tokio did not share the same level of risk as Mitsui because the Tokio Policy's Endorsement 8 stated that it was "in excess of the greater of" amounts collectible by "other insurance." Further, this "Endorsement replaced operative language on the first page of the policy indicated that the Endorsement is addressing the level of risk, primary vs. excess, and is not a mere 'other insurance' clause." The Ninth Circuit agreed based on the plain language of this Policy Endorsement and accordingly affirmed the District Court's dismissal of Mitsui's claim on summary judgment.

The Ninth Circuit likewise affirmed the Central District of California's decision to dismiss Mitsui's subrogated bad faith claim for improper venue based on a forum selection clause in the Tokio Policy. Lastly, the Ninth Circuit denied Tokio's request for attorneys' fees, advising that there was no basis for such an award.

Uberrimae Fidei

***QBE Seguros v. Carlos Morales-Vazquez,* Case No.: 15-02091-BJM 2016 WL 5462806 (D.P.R. 9/28/16)**

The insurer, QBE Seguros ("QBE") brought a declaratory judgment action seeking to find that its yacht policy issued to its insured, Carols Morales Vazquez ("Vazquez") was void *ab initio* because Morales breached what the court called the "warranty of truthfulness," also known as the doctrine of *uberrimae fidei*.

The Policy insured a 48' yacht that sustained damages as a result of a fire. In its investigation, QBE learned that around 2010 Morales owned a 40' yacht and grounded the vessel while no one else was onboard, resulting in a total loss of the vessel. Morales failed to disclose this prior loss to QBE when he completed his insurance application, which specifically inquired as to any past accidents or losses involving vessels he owned, operated or controlled. Morales also failed to list five vessels that he likewise owned in his application.

Morales argued that the passage of the United Kingdom's Insurance Act of 2015 ("U.K. Insurance Act"), which abolished the doctrine of *uberrimae fidei*, served as a model for likewise abandoning that doctrine in the United States. The District of Puerto Rico rejected this argument, noting that the First Circuit had recently joined the view of most circuit courts in adopting the doctrine of *uberrimae fidei* as an established rule of federal maritime law. Although English law is on occasion referenced in support of federal maritime decisions, this does not mean that federal courts should act in lock step with English marine insurance law. Accordingly, the District of Puerto Rico denied Morales's motion for judgment on the pleadings and allowed QBE to proceed with its declaratory judgment action predicated on Morales's breach of the *uberrimae fidei* doctrine.

UK Fraudulent Claims Rule ¶

***Versloot Dredging BV et al. v. HDI Gerling Industrie Versicherung AG, et al,* [2016] UKSC 45**

In this case, the United Kingdom Supreme Court addressed the question of whether an insurer is entitled to deny coverage to a claim that an insured embellished or supported with false statements, where the claim would have been equally recoverable whether the falsities had been made or not. The analysis of the so-called "fraudulent claims rule" arose in the context of a claim involving the *DC MERWESTONE*, which was incapacitated when water flooded and destroyed the engine room. One of the vessel's managers represented to the insurer's investigators that the bilge alarm had sounded when water entered the engine room, but the crew had been unable to investigate or deal with the leak because of bad weather conditions. The manager pretended that members of the crew had told him about the alarm but, in fact, he had invented the story. Although the vessel's master later supported the manager's story, the manager had no basis for his theory at the time he gave it to the insurance company. The manager's proffered explanation for lying was that he was "frustrated by the insurers' delay in recognizing the claim and making a payment on the account." The lower court, noting that the manager's lie was irrelevant to the claim for coverage purposes, nevertheless held that

the insurer could properly deny coverage in light of the manager's collateral lie. The UK Supreme Court reversed, finding that "fraudulent claims rule" did not preclude coverage for an otherwise covered claim that the insured had bolstered or embellished with falsehoods. Lord Sumption, writing for the majority, found that a fraudulently exaggerated claim differed from a justified claim supported by collateral lies: fraudulence implies dishonesty calculated to get something to which the insured is not entitled, whereas an insured seeks no more than what he is owed by telling collateral lies that do not go to the heart of an otherwise covered claim. In considering how "material" the lie must be to the claim before coverage will be impacted, Lord Sumption found that the fraudulent claims rule "does not apply to a lie which the true facts, once admitted or ascertained, show to have been immaterial to the insured's right to recover." In other words, if the lie is wholly unrelated to the insured's ability to recover under the policy, the insurer is not entitled to deny coverage based upon any collateral misrepresentations. Lord Mance filed a dissenting opinion, noting that he would have affirmed the lower court's finding that the manager's collateral lie resulted in forfeiture of coverage.

Material Misrepresentation

***Firemen's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, CA No. 14-1346, 822 F.3d 620 (2d Cir. 5/20/16)**

Policies issued by Great American Insurance Company of New York ("Great American") and Max Specialty Insurance Company ("MSI") were void *ab initio* under admiralty law and applicable state law, respectively, in light of the insured's failure to disclose information about a dry dock's deteriorating condition. The insured, Signal International, LLC ("Signal") owned and later leased a dry dock in Texas. Multiple engineering and risk management firms evaluated the dry dock over a period of several years, and reported that the dry dock had significant problems (including a corroded pontoon deck) that required extensive repairs. Several of the reports indicated that the repairs were not economically justifiable, given the high cost of repairs as compared with the dry dock's advanced age and limited projected life span. Signal did not, in fact, replace the damaged pontoon deck, instead engaging in temporary solutions to patch holes in the deck, and did not disclose the dry dock evaluations to its insurers for the 2009 policy year. On August 20, 2009, Signal attempted to remove one of the pontoons, which ultimately caused the dry dock to sink.

With regard to the loss of Signal's dry dock, Firemen's Fund Insurance Co. ("Firemen's Fund"), which issued a primary and excess policy to Signal, sought contribution from Great American, which had issued a pollution policy, and MSI, which issued an excess property policy. The Second Circuit, after determining that the Great American policy was a "marine insurance contract" subject to admiralty jurisdiction and the doctrine of *uberrimae fidei*, found that Signal had violated its duty of utmost good faith to Great American by failing to disclose the dry dock's condition in its renewal application. It was undisputed that Signal had multiple surveys of the dry dock in its possession at the time of renewal that, if disclosed, would "have raised significant concerns about the likelihood of pollutant emissions from the dry dock." The fact that Great American did not request such information was irrelevant; Signal's duty of utmost good faith required it to disclose informational material to the risk, and there was "no genuine dispute that a reasonable person in Signal's position would have known that these particular facts were material."

Turning to the MSI policy, the Second Circuit found that Signal's failure to disclose the dry dock's condition also constituted a "misstatement of material fact in the [insurance] application" under Mississippi law, which governed that policy. The fact that MSI accepted a "property insurance submission" of Signal's own creation, rather than a formal insurance application, did not change this conclusion. The court cited the Mississippi Supreme Court's recognition of "the universal rule that any contract induced by misrepresentation or concealment of material facts may be avoided by the party injuriously affected thereby," and found that

Signal's selective disclosure of information about the dry dock violated this rule, as it was material and intended to induce MSI to insure it.

Broker Duties

***Gemini Ins. co. v. Western Marine Ins. Servs. Corp.*, CA No. 10-03172, 2016 WL 3418413 (E.D. Cal. 6/21/16)**

Western was a surplus lines broker for Gemini, with authority to underwrite binding coverage for Gemini pursuant to a Program Administrator Agreement; the agreement also required Western to indemnify Gemini against third party claims. The lawsuit arose out of Westerns issuance of policies to an insured, Wesco, over a three-year period. Wesco failed to provide answers to certain required questions in the insurance application and renewal applications, but Western issued the policies without following up. Western also failed to notify Wesco in the second and third policy years that it was not offering, and did not issue, requested blanket coverage for several marinas owned by Wesco.

Wesco sought coverage for "wind/storm damage caused to docks." Investigation of the claim revealed a variety of discrepancies in the insurance application, as well as post-dating of the date of loss by several years. Gemini ultimately decided to pay Wesco's claim, but only up to individual limits of liability rather than pursuant to Wesco's requested blanket coverage. In Wesco's ensuing coverage action, Western's insurer (Scottsdale) defended Gemini pursuant to the Agreement, but later withdrew; Western did not assume Gemini's defense. Following a settlement, Gemini filed a lawsuit against Western, alleging breach of contract and negligence.

The court first addressed several issues in connection to whether Gemini was entitled to summary judgment for its breach of contract claim against Western. The court concluded the Gemini was a party entitled to indemnification under the agreement with Western and that Western was required to provide notice to Wesco that the renewed policies did not contain the requested blanket coverage. However, with regard to whether Gemini was negligent in the events leading to Wesco's underlying lawsuit (which would have triggered Western's indemnity obligation), genuine issues of material fact existed. Specifically, the court found that Western was entitled to rely on Wesco's insurance application and was under no duty to inquire about Wesco's omissions. Further, the court found that there was disputed evidence with regard to whether Gemini negligently waived coverage defenses to Wesco's claim. Accordingly, the court denied Gemini's summary judgment motion as to its breach of contract claim.

The court then granted Western's summary judgment motion on Gemini's negligence claim, finding that Gemini was seeking to recover a purely economic loss in violation of the economic loss rule.

***Certain Interested Underwriters at Lloyds, London v. Bear LLC.*, 2016 WL 4496831 (S.D. Cal. 4/29/16)**

This decision concerns a motion to dismiss by Third-Party Defendant, Marsh USA, Inc. ("Marsh"). The case arose out of action where the Plaintiff, Certain Interested Underwriters at Lloyd's, London ("Underwriters"), filed a complaint against Defendant Bear LLC ("Bear"). Bear then filed an Amended Third Party Complaint ("ATC") against Marsh. Marsh then sought to have the claim dismissed.

Here, the dispute arose between Defendant Bear and Third Party Defendant Marsh over the coverage acquired by Marsh, acting as broker, for Bear's 102-foot-long yacht the M/V POLAR BEAR ("POLAR BEAR"). Bear

stated that its principal, Larry Jodsaas, had authorized Marsh to secure a single layer insurance policy that included hull coverage in the amount of $17,000,000. However, instead of purchasing a single layer insurance policy as requested, Bear alleges that Marsh acquired a policy that contained two covers for physical loss and damage. Although this policy insured a total amount of $17,250,000, the policy was broken into two parts: (1) $12,150,000 for "Hull Insurance"; and (2) $5,100,000 for "Increase Value and Exce3ss Liabilities Clauses."

The POLAR BEAR ran aground in May of 2014, damaging the bottom of its hull. While undergoing repairs at a San Diego ship yard, the yacht caught fire and the vessel was completely destroyed. Bear's Third Party Complaint alleges that Marsh: (1) breached its oral contract; (2) breached its fiduciary duty; and (3) committed negligence. Marsh seeks to have the claim dismissed arguing that because the insurance coverage totaled over $17,000,000, Bear was not damaged by any alleged breach.

Before the district court could determine whether or not the claims could be dismissed, it first had to determine the applicable law. After finding admiralty jurisdiction and determining that there was no federally entrenched federal maritime rule concerning contracts for the procurement of insurance and disputes arising between an insurance broker and its principal, the court determined that state law applied to Bear's Third Party Complaint. Next, the district court found that Florida had the most significant relationship to the issues in question, and therefore Florida state law was the appropriate applicable law. In making its determination the court reasoned that because Marsh's representative from its Florida office reached out to Bear and processed the agreement authorizing Marsh to procure insurance on behalf of Bear, Florida state law applied to the substantive issues.

In order to overcome Marsh's motion to dismiss, the district court stated that Bear's allegations "must be enough to raise a right to relive above the speculative level," and "[o]nly a complaint that states a plausible claim for relief will survive a motion to dismiss." When analyzing Bear's claim for a breach of contract the court stated that under Florida law, a contract claim requires three elements: (1) a valid contract; (2) a material breach; and (3) damages. Here, the court held that Bear alleged facts sufficient to state a plausible claim. The court reasoned Bear had sufficiently stated that it had entered into an oral agreement with Marsh to obtain a single layer insurance policy and Marsh had failed in procuring such a policy. Furthermore, the court stated Bear's allegations that it "may have to incur fees and costs to prove the amount of its losses on the 'sum insured' excess value cover, even though it would not otherwise be required to do so," was sufficient in showing its potential for suffering damages. Therefore, the court held that the claim survived summary judgment.

Next, the court addressed whether Bear stated a plausible claim in its allegations that Marsh, as Bears insurance broker, breached its fiduciary duty. The court stated that under Florida law, an insurance broker owes a fiduciary duty to its insured and must not mislead the insured as to the scope of its coverage. The court held that Bear's allegations that Marsh had procured a double layer insurance policy, instead of a single layer policy and that because Marsh had failed to inform Bear of the different policy obtained, Bear had stated a plausible claim.

Lastly, the court addressed Bear's negligence claim. Under Florida law, an insurance broker may be held liable when "there is an agreement to procure insurance and a negligent failure to do so." This liability can result from a "negligent failure to obtain coverage which is specially requested or clearly warranted by the insured's express needs." Because Bear alleges that it specifically requested a single layer insurance policy, it has alleged a plausible claim. Therefore, Marsh's motion to dismiss was denied.

Held Covered Clause

***Atlantic Specialty Ins. Co. v. Thomassen,* CA N0. 15–0009–SLG, 2016 WL 464-9804 (D. Alaska 9/6/16)**

This decision concerns an interpretation of a policy of insurance covering a 73-foot tender vessel, the KUPREANOF, owned by Angelette, LLC, which is solely owned by the Defendant, Jay Thomassen. Mr. Thomassen obtained insurance for the vessel through an insurance agent, Sea-Mountain Insurance. The Plaintiffs, Atlantic Specialty Insurance Company, Travelers Property Casualty Company of America, Navigators Insurance services of Washington, Inc., and Great American Insurance Company ("Underwriters"), agreed to underwrite a marine insurance policy for the vessel. The policy contained both a "Layup Warranty" provision and a "Held Covered Clause." The two provisions stated:

> **Layup Warranty**: Vessel warranted laid up and out of commission from August 20 to June 20, annually. Permission granted to make alterations and repairs, to dock and undock, go on or off ways, gridirons and drydocks and to move about port for said purposes.
>
> **Held Covered Clause:** Held Covered in respect to breach of trading warranty, and/or lay-up warranty provided Underwriters are advised within 72 hours from inception of the breach, at additional premiums if any, to be determined by Underwriters.

On June 6, 2015 the vessel was in Petersburg, Alaska undergoing repairs. Sometime during the morning of June 7, the vessel departed the docks at Petersburg heading towards Juneau. On June 10, the vessel sank and Mr. Thomassen notified the Underwriters of the sinking at 8:04 am Alaskan time. Plaintiff Underwriters then filed a suit seeking declaratory judgment stating that there was no coverage under the policy for hull or protection and indemnity because the vessel and crew claims arose from a sinking that occurred while the vessel was in breach of the layup warranty. Mr. Thomassen then sought to take advantage of the held covered clause in the policy, but was informed by the Underwriters that they did not receive the proper 72-hour notice required by the provision. Mr. Thomassen filed a motion for summary judgment and the Underwriters filed a cross-motion for summary judgment. Additionally, there was a motion to intervene filed by a crew member, Yolanda Perez Orozco.

Before the district court could make a ruling on the motions presented, the court first had to determine whether state law or maritime law would apply. Since the issues surround two warranty provisions within a marine insurance policy, the district court followed the Supreme Court's decision in Wilburn Boat v. Fireman's Fund Insurance Company and held that marine insurance warranty clauses should be interpreted using state law. Therefore, the court determined that Alaska state law would apply.

After determining that Alaska state law would apply, the court addressed the issue of whether or not there was a breach of the layup warranty provision. The parties dispute as the meaning of the phrase "[p]ermission granted to make alterations and repairs, to dock and undock, go on or off ways, gridirons and drydocks and to move about port for said purposes." The Defendant sought to argue that it could reasonably be interpreted to allow the vessel to transit from Petersburg to Juneau and head to its fishing grounds, without breaching the layup warranty provision. The Underwriters countered by arguing that under the "permission granted" clause, the vessel was in breach of the warranty on June 6' meaning that the vessel was no longer laid up once its repairs were completed and it had started preparing to leave Petersburg. The district court found both of these arguments unpersuasive. Instead, the district court determined that the provisions: (1) provides permission to make alterations and repairs; (2) provides permission to dock and undock, go on or off ways, gridirons and

drydocks; and (3) provides permission to move about port for said purposes in order to make alterations or repairs *or* "dock[ing] and undock[ing], go[ing] on or off ways, gridirons and drydocks." Furthermore, the district court determined that the layup warranty would have been breached when "the vessel left a particular location for any purpose other than (1) to make alterations and repairs, or (2) to dock and undock, or to go on or off ways, gridirons, and drydocks within the port." Therefore, the court held that the layup warranty was breached when the vessel moved about the port for purposes other than for making alterations or repairs, docking or undocking, or going on or off ways, gridirons, or drydocks within the same port.

Next, the district court addressed whether or not, pursuant to the held covered clause, the Underwriters received the proper 72-hour notice. Here, it was determined by the district court that the vessel was covered under the policy only if the Underwriters were notified within 72 hours of the precise time a breach of the layup warranty began. Mr. Thomassen's knowledge of the breach was irrelevant. Mr. Thomassen asserts, along with crew member Yolanda Perez, that the vessel left the dock at 8:04 am. The Underwriters rely on a Coast Guard report filed by the vessel's captain, stating that the vessel left Petersburg at 4:00 am on June 7. Because there is a genuine dispute of a material fact, the district court denied both parties motions for summary judgment.

Lastly, the district court addresses whether or not Ms. Perez has a right to intervene pursuant to the Federal Rules of Civil Procedure. In order to intervene pursuant to Fed. R. Civ. P. 24(a)(2), the Ninth Circuit requires an applicant to demonstrate that "(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." Here, Ms. Perez argues that she has a protectable interest in that she will suffer a practical impairment of her interest if the Underwriters were to prevail. However, the court determined that her protectable interest is in her right to seek cure, and therefore, the district court held that because the outcome of this litigation will have not affect the validity of Ms. Perez's legal claims for cure, the court would not allow intervention.

Therefore, the court denied both the Plaintiff's and Defendant's motion for summary judgment, and denied Ms. Yolanda Perez motion to intervene.

Other Work Endorsement

***St. Paul Fire & Marine Insurance Co. v. Renegade Super Grafix, Inc. et al.*, CA No.15–104**
2016 WL 4926190 (S.D. Miss., 9/15/16)

In 2009, Gulf Coast Shipyard Group, Inc. ("Gulf Coast") began construction of a vessel named "T-051" under a vessel construction contract dated December 18, 2006. Gulf Coast hired Renegade Super Grafix, Inc. ("Renegade") to paint the vessel using Awlgrip paint. Renegade began painting in 2010, but cracks began appearing in the work as early as December 2011. These cracks eventually worsened to catastrophic failure of the Awlgrip system. Renegade attempted to repair this failure in 2012 and 2013, but failed. Gulf Coast removed the defective Awlgrip system thereafter.

On October 8, 2013, Gulf Coast filed suit in state court against Renegade, Akzo Nobel Coatings, Inc. ("Akzo") and International Paint, LLC ("International"), alleging a myriad of claims, including breach of contract, warranty, fraud, misrepresentation, and tort based claims. Renegade sought defense and

indemnification from its marine general liability carriers, St. Paul Fire & Marine Insurance Company ("St. Paul") who insured Renegade for the Policy Period from July 12, 2011 through July 12, 2012, and Travelers Property Casualty Company of America ("Travelers"), who insured Renegade for the Policy Period from July 12, 2012 through July 12, 2013.

Travelers and St. Paul filed this declaratory judgment action in the Southern District of Mississippi, seeking a declaration that neither were liable to defend or indemnify Renegade. The insurers argued on summary judgment that there was no "occurrence" under either policy. Further, the insurers argued that the loss fell within several exclusions even if covered. Renegade countered, arguing that the policy was ambiguous and should be read to consider the foregoing event an "occurrence." Moreover, Renegade argued that the "other work" endorsement of the policy covered Renegade for "boat service and repair- painting of hulls."

The Court, applying Mississippi Law, found that the policies appeared "to at least arguably afford coverage for the claims asserted by Gulf Coast in the underlying state court litigation." The Policy defined "occurrence" as "an accident, including the continuous or repeated exposure to substantially the same general harmful conditions." The "Other Work Endorsement" provided coverage as follows:

> **OTHER WORK ENDORSEMENT**
>
> This endorsement alters the coverage provided under Section III: Ship Repairer's Legal Liability
>
> In consideration of the premium charged, it is hereby mutually agreed that the following coverage is added:
>
> Subject to prior notification and agreement of the Company, this insurance shall be extended to cover other repair operations which do not come within the scope of ship repairing operations of the insured. The gross charges incurred from such operations shall be declared to the Company and adjusted at the rate set forth elsewhere in the policy.
>
> With respect to such operations:
>
> (a) the terms "ship repairers" and "ship repairing" wherever used in this policy shall be deemed to include other repair operations of the insured;
>
> (b) it is mutually agreed that this shall include coverage for loss of or damage to property other than watercraft which is in the care, custody and control of the Insured for purpose of being worked upon including whilst in transit to or from sub-contracted repairer's or manufacturer's premises.

OTHER REPAIR OPERATIONS NOTED ABOVE CONSIST OF:
BOAT SERVICE AND REPAIR- painting of hulls.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned policy, other than as above stated.

The Court construed the "other work" endorsement at a minimum creates ambiguities in the policies as a whole. The Court noted that the policy exclusions do not specifically appear in the "other work endorsement," which creates an ambiguity as to whether they apply to "boat, service and repair- painting of hulls," a cover which is generally afforded in this endorsement without stating clearly whether further exclusions and conditions found elsewhere in the policy apply. Accordingly, the court denied Travelers' and St. Paul's motions for summary judgment and ordered them to show cause why the court should not enter summary judgment in favor of Renegade.

Bad faith

***Sea Tow Services International, Inc. v. St. Paul Fire & Marine Insurance Company,* 2016 WL 6092486 (E.D.N.Y. 9/29/16)**

Sea Tow Services International ("Sea Tow") was sued along with its Miami franchisee, Triplecheck, Inc. ("Triplecheck") by a Triplecheck employee who sustained severe personal injuries. Sea Tow was insured under its own policy with St. Paul Fire & Marine Insurance Company ("St. Paul") and as an additional insured under Triplecheck's policy with RLI Insurance Company ("RLI"). During the personal injury action, St. Paul took the position that RLI was obligated to defend the action as Sea Tow's primary insurer. RLI, disagreed, but St. Paul agreed to defend the action with an eye of recouping defense and indemnification costs later from RLI. St. Paul pursued a defense and settlement strategy over Sea Tow's objection that only protected Sea Tow, and not its franchisee. In response, Sea Tow went behind St. Paul's back and obtained a global settlement within the combined policy limits available to both Sea Tow and Triplecheck. The settlement was paid by both St. Paul and RLI, and the dispute between these insurers was resolved.

Thereafter, Sea Tow initiated the instant action against St. Paul alleging breach of the insurance policy, bad faith, unfair and deceptive trade practices in violation of the New York general Business Law, § 349, tortious interference with the Sea Tow-Triplecheck contract, professional malpractice, defamation, and civil conspiracy. The Eastern District of New York granted St. Paul's motion for summary judgment and dismissed all counts.

The Court interpreted the St. Paul policy to allow St. Paul to pursue a unilateral settlement for its insured "at its discretion," which is recognized to give the insurer an "unconditioned right to settle [a] claim or suit without the [insured's] consent." St. Paul, therefore, did not breach its contract by pursuing unilateral settlement. Likewise, the Court declined to find a violation of the duty of good faith and fair dealing based on the insurer's unequivocal discretion to settle matters without the insured's consent, provided that the insured is

not personally exposed beyond the policy limits (which did not apply in this case). Further, to establish bad faith, the plaintiff must show "gross disregard" of the insured's interests, which was not the case under these facts.

The Court further noted that at no point did St. Paul waver from its coverage obligation to Sea Tow, and that there is no legal authority that supports the proposition that seeking alternative coverage from other policies such as RLI's creates an instance of bad faith.

As for the claim for interference with the Sea Tow-Triplecheck contracts, the Court found no evidence that there was any breach of these contracts, which is an element of Sea Tow's intentional interference claims. The Court dismissed the remaining claims, of unfair and deceptive acts, civil conspiracy, defamation, and professional malpractice, on similar principles and on account of an utter lack of evidence. Additionally, the defamation claim was barred by the statute of limitations.

***Gemini Ins. co. v. Western Marine Ins. Servs. Corp.*, CA No. 10-03172, 2016 WL 3418413 (E.D. Cal. 6/21/16)**

Western was a surplus lines broker for Gemini, with authority to underwrite binding coverage for Gemini pursuant to a Program Administrator Agreement; the agreement also required Western to indemnify Gemini against third party claims. The lawsuit arose out of Westerns issuance of policies to an insured, Wesco, over a three-year period. Wesco failed to provide answers to certain required questions in the insurance application and renewal applications, but Western issued the policies without following up. Western also failed to notify Wesco in the second and third policy years that it was not offering, and did not issue, requested blanket coverage for several marinas owned by Wesco.

Wesco sought coverage for "wind/storm damage caused to docks." Investigation of the claim revealed a variety of discrepancies in the insurance application, as well as post-dating of the date of loss by several years. Gemini ultimately decided to pay Wesco's claim, but only up to individual limits of liability rather than pursuant to Wesco's requested blanket coverage. In Wesco's ensuing coverage action, Western's insurer (Scottsdale) defended Gemini pursuant to the Agreement, but later withdrew; Western did not assume Gemini's defense. Following a settlement, Gemini filed a lawsuit against Western, alleging breach of contract and negligence.

The court first addressed several issues in connection to whether Gemini was entitled to summary judgment for its breach of contract claim against Western. The court concluded the Gemini was a party entitled to indemnification under the agreement with Western and that Western was required to provide notice to Wesco that the renewed policies did not contain the requested blanket coverage. However, with regard to whether Gemini was negligent in the events leading to Wesco's underlying lawsuit (which would have triggered Western's indemnity obligation), genuine issues of material fact existed. Specifically, the court found that Western was entitled to rely on Wesco's insurance application and was under no duty to inquire about Wesco's omissions. Further, the court found that there was disputed evidence with regard to whether Gemini negligently waived coverage defenses to Wesco's claim. Accordingly, the court denied Gemini's summary judgment motion as to its breach of contract claim.

The court then granted Western's summary judgment motion on Gemini's negligence claim, finding that Gemini was seeking to recover a purely economic loss in violation of the economic loss rule.

**Cover artwork provided by Anna Wilson, an Art Director for an ad agency in St. Petersburg, FL who also does freelance illustration, graphic design and web design. Anna received a BFA in illustration from the Savannah College of Art and Design (SCAD) in 2012. Her website is*: http://www.annawilsonillustration.com.

* * *

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

Julia M. Moore, Esq.
Thomas Miller (Americas) Inc.
Harborside Financial Center
Plaza Five, Suite 2710
Jersey City, New Jersey 07311
E: Julia.Moore@thomasmiller.com