MLA Committee On Marine Insurance and General Average
NEWSLETTER

SPRING 2017 | Committee Chair: Andrew C. Wilson, Esq., New Orleans, LA | Editor: Julia M. Moore, Esq., New York, NY

In This Issue:

Editorial Note:

This edition of the Newsletter leads with a timely and concise article by Jonathan Spencer on the recent substantive changes to the York Antwerp Rules 2016 and the CMI Guidelines. Many thanks to Jonathan for sharing his expertise with our Committee. Next is an article submitted by Jason Minkin and Jonathan Cipriani on examinations under oath which coverage practitioners will find useful. Finally, the case summaries contain a number of interesting decisions which highlight variations in judicial analyses among the state and federal courts hearing marine insurance cases.

YORK-ANTWERP RULES 2016 and GUIDELINES

By Jonathan S. Spencer[1]

On May 6th 2016 in New York City, at the General Assembly of the Comité Maritime International (CMI)[2], the **York-Antwerp Rules 2016** were approved by 42 countries in attendance, with none opposed and none abstaining.

Background

The Rules are the culmination of some three years' work by a CMI International Working Group (IWG) comprised of the following people—

Bent Nielsen (Denmark) (Chairman)
Richard Cornah (UK) (Association of Average Adjusters) (Co-Rapporteur)
Taco van der Valk (Netherlands) (Co-Rapporteur)
Andrew Bardot (UK) (International Group of P&I Clubs)
Ben Browne (UK) (IUMI - International Union of Marine Insurance)
Frédéric Denèfle (France)
Jürgen Hahn (Germany)
Michael Harvey (UK) (AMD - Association Mondiale de Dispacheurs)
Kiran Khosla (UK) (ICS - International Chamber of Shipping)
Jirou Kubo (Japan)
Sveinung Måkestad (Norway)
John O'Connor (Canada)
Peter Sandell (Finland)
Jonathan Spencer (USA)
Esteban Vivanco (Argentina)

Those shown in **bold** are practicing average adjusters, who contributed significantly to the successful outcome of the IWG's work, which began in 2012. It should also be noted that ICS worked closely with BIMCO[3].

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[1] Jonathan Spencer is a New York-based average adjuster. Although 90% of his caseload involves particular average on hull and cargo, and marine liability claims, he enjoys grappling with general average issues and is the only average adjuster to have attended the CMI Conferences in which YAR 1994, 2004 and 2016 were adopted. The scope of this paper is introductory and he welcomes requests for further clarification, at jss@jssusa.com. This paper is an update of one that originally appeared in Benedict's Marine Bulletin, Vol. 14, No. 3 – Third Quarter 2016

[2] The CMI was established in 1897. It is a non-governmental not-for-profit international organization established in Antwerp, whose object is to contribute to the unification of maritime law in all its aspects.

[3] Self-described as 'the world's largest international shipping association, with more than 2,200 members globally [providing] a wide range of services to our global membership – which includes shipowners, operators, managers, brokers and agents.'

The York-Antwerp Rules for the Adjustment of General Average[4] (YAR) have existed since the 1860's and have been the subject of revisions at approximately 20 to 25 year intervals. Early versions of the Rules were drafted by commercial interests and average adjusters, to bring uniformity to the adjustment of general average; since the late 1940's revisions have taken place under the auspices of the CMI, which is often described as their "custodian". The Rules do not have the force of law (although different versions have been incorporated at different times into the national laws of countries as diverse as the Soviet Union, Egypt, and Norway) and they become binding on the parties to a common maritime adventure by reason of their incorporation into the contract of carriage, typically embodied in a charter party or bill of lading, and their application is near-universal.

Historically, each successive revision has replaced the one that preceded it; this was not the case with the prior revision of the Rules in 2004, which did not have the support of vessel operating interests, largely because crew wages were no longer allowed while a vessel was detained at a port of refuge after a general average act and because of the revisions to Rule VI, dealing with salvage, discussed below under a separate heading; most model charter parties and bills of lading have continued to provide for the application of the extant, 1994 Rules. The only significant entities that adopted the 2004 Rules were various oil majors and US Government departments and there is no clear indication whether this was a policy decision or simply a practice of adopting the most recent version. Most average adjusters have not encountered a case falling under the 2004 Rules

Nevertheless, the CMI was perturbed at the lack of uniformity arising from the co-existence of the 1994 and 2004 Rules and resolved to develop a revision acceptable to all stakeholders. It is therefore of note that the proposed text that was brought before the New York Assembly enjoyed the unanimous support of the vessel-owner representatives, being ICS and BIMCO, and of IUMI which, although its membership comprises both hull and cargo insurers, has been the voice of the cargo interests in this forum.

This was the product of an extensive review process, which began with a questionnaire that was circulated to national maritime law associations and trade and professional associations representing the various stakeholders. Twenty-six responses were received; notably, there was no support from any quarter for the proposition that general average should be abolished.

Subsequently, BIMCO has revised its principal charter party and bill of lading forms to provide for the application of the new Rules.

A set of **CMI Guidelines for the Adjustment of General Average** also were adopted in New York. This is a new document developed by the IWG, in preference over a suggestion that the York-Antwerp Rules should be expanded to include a set of definitions, and its stated intention is to "*to assist in dealing with general average cases and to provide:*

- general background information
- guidance as to recognized best practice
- an outline of procedures."

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[4] The word "average", in this context, comes from a proto-Indo-European root meaning marine damage. Rule A of the York-Antwerp Rules gives the following definition—

> There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

It is written very much with the non-practitioner in mind, and its operation and effectiveness will be monitored by a Standing Committee representing stakeholders and practitioners, consisting of—

- Taco van der Valk (Convenor)
- Ben Browne (IUMI)
- Jonathan Spencer (US and Canadian AA)
- Jörn Groninger (Germany)
- Jurou Kubo (Insurer, Japan)
- Kiran Khosla (ICS)
- Michael Harvey (AMD)
- Richard Cornah (AAA)
- Sveinung Måkestad (Insurer, Norway)

YAR 2016 and the Guidelines are available on the CMI website at http://comitemaritime.org/Review-of-the-Rules-on-General-Average/0,27140,114032,00.html, together with all the documents generated during the work of the IWG.

A number of changes were made to YAR simply for clarity, and a consistent numbering protocol was adopted. This commentary will concentrate on the substantive changes.

YAR are organized in a group of lettered rules (A-G), setting out broad principles as to what constitutes general average, and twenty-three numbered rules dealing with specific instances of sacrifice – the giving of property in time of peril to preserve the interests involved in a common maritime adventure, and expenditure – the giving of money, for the same purpose in the same circumstances.

Streamlining

The general average regime has been criticized as being too time-consuming. Rule E.2 has been amended to provide that "All parties to the common maritime adventure shall, as soon as possible, supply particulars of value in respect of their contributory interest and, if claiming in general average, shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution, and supply evidence in support thereof." Formerly it additionally provided that if such information was not provided within twelve months of a request for it, the average adjuster could estimate the information. There was concern that the 12-month clock was reset each time the adjuster chased the information, and it has been re-written as follows:

> Failing notification, or if any party does not supply particulars in support of a notified claim, within 12 months of the termination of the common maritime adventure or payment of the expense, the average adjuster shall be at liberty to estimate the extent of the allowance on the basis of the information available to the adjuster. Particulars of value shall be provided within 12 months of the termination of the common maritime adventure, failing which the average adjuster shall be at liberty to estimate the contributory value on the same basis. Such estimates shall be communicated to the party in question in writing. Estimates may only be challenged within two months of receipt of the communication and only on the grounds that they are manifestly incorrect.

Further, average adjusters have reported having to re-adjust claims, a time-consuming and expensive process, because one or more parties to the adventure did not advise that they had made a recovery from a third party in respect of a loss allowed in general average. Rule E.4 has been introduced with the intention of averting these situations:

> Any party to the common maritime adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the average adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within two months of receipt of the recovery.

Rule XVII deals with contributory values and, in the case of intermodal cargoes, where the commercial invoice shows the price of the goods at their ultimate, inland destination, average adjusters have struggled to establish the value at the termination of the maritime adventure. Rule XVII(a)(i) has addressed this problem by providing that the "commercial invoice may be deemed by the average adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage." This means that where documentation for a particular shipment clearly indicates the ocean freight as a separate item, the adjuster will be able to calculate the value of the goods at the termination of the maritime adventure. Where the freight to final destination is shown as a lumpsum, he is not required to obtain a breakdown of the ocean and inland freight costs.

Rule XVII(a)(ii) has gained new wording to endorse an existing practice, consistent with the position that exists under Clause 15 of the Lloyd's Standard Salvage and Arbitration Clauses, providing—

> Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.

Modernizing

Rule XIII, dealing with the deductions "new for old" to be made from the cost of repairs to sacrificial damage to the vessel, has been amended to allow half the costs of bottom painting if the ship had been painted within the 24 months preceding the date of the general average act rather than 12 months as previously, to reflect the longer service life of current bottom coatings.

Financial issues

Through YAR 1994, under Rule XX – Provision of Funds, a commission of 2% was allowed on general average disbursements. This has been eliminated as being inconsistent with modern banking practices[5].

Under Rule XXI, interest is allowed on general average sacrifices and expenditures. Under YAR 1994, the rate was 7% per annum, which had become unrealistically high. Under a formula adopted in YAR 2004, interest was established annually at a rate that most shipowners considered too low.[6] Rule XXI(b) now contains a formula accepted as realistic by the principal stakeholders:

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[5] Under United States practice, advancing commission of 2.5% is allowed. Contracts of affreightment occasionally provide that general average be adjusted per YAR "and, as to matters not provided for in those Rules, in accordance with the laws and usages of the Port of New York" (or other US port); the Association of Average Adjusters of the United States and Canada has not taken a position on how they will approach commission under YAR 2016, though it seems possible that in certain cases such an allowance might be inconsistent with YAR's Rule Paramount.

[6] The rates applicable to the 2004 Rules can be found at http://comitemaritime.org/York-Antwerp-Rules-and-General-Average-Interest-Rates/0,2754,15432,00.html

> The rate for calculating interest accruing during each calendar year shall be the 12-month ICE LIBOR for the currency in which the adjustment is prepared as announced on the first banking day of that calendar year, increased by four percentage points. If the adjustment is prepared in a currency for which no ICE LIBOR is announced, the rate shall be the 12-month US Dollar ICE LIBOR, increased by four percentage points.

Rule XXII – Treatment of Cash Deposits, needed to be amended because its requirement that deposits be held in an account in the joint names of the shipowners and the depositors cannot be met under current banking regulations. Funds are now required to be held by the average adjuster in a special account "constituted in accordance with the law regarding client or third party funds applicable in the domicile of the average adjuster. The account shall be held separately from the average adjuster's own funds, in trust or in compliance with similar rules of law providing for the administration of the funds of third parties."

Clarification

Rule B, dealing with tug and tow cases, was introduced in 1994 and immediately gave rise to uncertainty over whether the disconnection of one vessel from another to achieve the safety of the disconnecting vessel could be a general average act. The Rule was amended in 2016 to provide greater clarity about "disconnection" cases and to briefly address port of refuge expenses, as follows:

2. If the vessels are in common peril and one is disconnected either to increase the disconnecting vessel's safety alone, or the safety of all vessels in the common maritime adventure, the disconnection will be a general average act.

3. Where vessels involved in a common maritime adventure resort to a port or place of refuge, allowances under these Rules may be made in relation to each of the vessels. Subject to the provisions of paragraphs 3 and 4 of Rule G, allowances in general average shall cease at the time that the common maritime adventure comes to an end.

Rule G deals with the situation where cargo is forwarded from a port of refuge in a different vessel and general average allowances continue to be made under a non-separation agreement, the so-called "Bigham Clause" in Rule G.4 providing that the proportion thus attaching to cargo "shall be limited to the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense." Differences in practice among average adjusters had emerged as to whether the cap applied to the entire amount claimed as contribution from cargo or whether allowances made under the substituted expenses provision of Rule F[7] should be excluded. The 2016 Rule now includes the clarification, "This limit shall not apply to any allowances made under Rule F."

Rule XI(c)(ii), dealing with expenses at a port of refuge, was added to address an unsatisfactory English case[8] involving additional tug assistance at a port of refuge, where the judge decided that the term "port charges" related only to the charges a vessel would ordinarily incur in entering a port. The Rule was therefore re-worded to reflect prevailing practice—

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[7] "Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

[8] *Trade Green* [2000] 2 Lloyd's Rep. 451, 456

For the purpose of these Rules, port charges shall include all customary or additional expenses incurred for the common safety or to enable a vessel to enter or remain at a port of refuge or call in the circumstances outlined in Rule XI(b)(i).

Salvage

The allowance of salvage expenditure as general average is a classic example of general average. A uniform treatment was introduced in YAR 1974 and rapidly became controversial with cargo interests, who in many cases thought that they were being asked to contribute to substantial adjusting fees while the financial outcome was often no different than had the salvage expenditure been allowed to lie where it fell when settled under the applicable mechanism for determining the quantum of the salvage. IUMI insisted that the treatment of salvage be very much restricted in YAR 2004 and the following text was adopted:

> Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salved values and not General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.

Average adjusters, who are trained to achieve an equitable distribution of losses, found this very hard to accept.

The principal difficulty arises because payments to salvors are assessed on the value of the property at the time the salvage services terminate, whereas contribution to general average is "adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the common maritime adventure ends[9]." The contributory value for general average purposes includes "the amount allowed as general average for property sacrificed."[10] An inequity arises if a piece of property with significant value is sacrificed before or during the salvage operation. Having no value, it contributes nothing under the salvage settlement but the amount of its sacrifice is made good in general average. In an adjustment under YAR 2004, it is in a better financial position than the cargo that was saved, since it receives its sacrifice made good, but does not contribute to the salvage expenditure.[11]

As a corollary, if a piece of property is lost or damaged after the salvage services have been rendered, but prior to the termination of the maritime adventure, it would still be liable to pay salvage, even though nothing was ultimately saved.

The solution now adopted under YAR 2016 is to allow salvage under the general average adjustment if to do so materially affects the outcome of the case. Under Rule VI(b), "salvage shall only be allowed should any of the following arise:

(i) there is a subsequent accident or other circumstances resulting in loss or damage to property during the voyage that results in significant differences between salved and contributory values,

(ii) there are significant general average sacrifices,

[9] Rule G.1

[10] Rule XVII(b)

[11] Certain commentators have suggested that principles of hypothetical salvage should apply in such a case but it is not known whether such principles have ever been applied in practice.

(iii) salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,
(iv) any of the parties to the salvage has paid a significant proportion of salvage due from another party,
(v) a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest."

Where salvage remains outside the general average adjustment, settlements made by the parties still rank as a deduction from contributory value and Rule XVII(b) has been amended to clarify that such "deductions in respect of payment for salvage services shall be limited to the amount paid to the salvors including interest and salvors' costs" with the effect that the adjuster does not have to make inquiry of the contributing interests regarding ancillary expenses, such as costs of providing security, and of legal representation during the salvage arbitration.

Port of refuge expenses
Wording was added to Rule X(b)(ii) to make it clear that when cargo is discharged and stored ashore as a general average measure, the provisions of Rule XI, dealing with wages and maintenance and port of refuge expenses, apply while the cargo while the cargo is being restowed.

Rule XI was changed to allow wages and maintenance during the extra detention while a ship is under average at a port or place of refuge, reverting to the pre-2004 position.

Guidelines
As discussed, a preliminary version of the CMI Guidelines was adopted in New York. The first major endeavor of the Standing Committee is the development of model general average security documents, with the intention that an approved draft should be in place in time for adoption at the CMI's next Assembly, scheduled to take place in Genoa in September 2017.

Of additional interest is the proposal that a form of average guarantee has been developed specifically to cover time charterers' bunkers and freight at risk. These interests can represent a significant proportion of contributory values, but shipowners have tended to be reluctant to ask their chartering customers for general average security in respect of these. It is hoped that their inclusion in the Guidelines will ratify this as a best practice.

The drafts are attached, and have previously been put before AIMU and the chairs of the MLA COG and Marine Insurance committees. US insurers historically have tended to insist on signing their own forms of GA guarantee rather than those that are in near-universal use elsewhere. It might be that the market no longer has any strong feelings on this point but certainly if the drafts are adopted in Genoa substantially in their present form, the international shipping and adjusting community likely will expect the US market to issue GA guarantees in the agreed form rather than continuing to use their own wordings.

The Standing committee will circulate final drafts, with accompanying notes, among the national MLA's for further review in advance of the Genoa conference.

New York
July 2016 rev. April 2017

EXAMINATIONS UNDER OATH

***QBE Seguros v. Morales-Vazquez*, No. 15-2091, 2017 WL 775789 (D.P.R. Feb. 27, 2017)**

Examinations Under Oath Need Not Comply with Federal Rules of Civil Procedure

by Jason P. Minkin and Jonathan A. Cipriani, Bates Carey LLP Chicago

Examinations under oath (EUOs) can be a critical investigative tool for an insurer. A recent decision by a federal magistrate judge in Puerto Rico demonstrates the flexibility that insurers have to use EUOs in investigating claims, free from the more formal rules that govern depositions under the Federal Rules of Civil Procedure. *QBE Seguros v. Morales-Vazquez*, No. 15-2091, 2017 WL 775789 (D.P.R. Feb. 27, 2017). In *QBE Seguros*, the court denied a policyholder's motion to dismiss his marine insurer's complaint to void the insurance policy based on a breach of the *uberrimae fidei* doctrine, holding that an EUO need not comply with Federal Rule of Civil Procedure 27. Contrary to the position taken by the policyholder, the statements allegedly obtained in the EUO could be used by the insurer in its complaint to void the policy. Notably, this is not the first time this case was discussed in the Marine Insurance and General Average Newsletter. A prior ruling in the case was discussed in the Fall 2016 Newsletter, where the court rejected the policyholder's argument that the passage of the United Kingdom's Insurance Act of 2015, which abolished the doctrine of *uberrimae fidei*, served as a model for likewise abandoning the doctrine in the United States. After ruling that the case could go forward, the policyholder then sought to dismiss the complaint on the grounds that the EUO did not comply with Federal Rule of Civil Procedure 27, because the insurer did not first file a petition with the court requesting a deposition under that rule.

Background

The insurer, QBE Seguros, issued an ocean marine insurance policy to the plaintiff, Morales, for his yacht. The insurance policy application stated that "answers provided [in the application] are warranted by [the applicant] to be true and correct." The insurance policy separately provided that it would "be void and without effect" if the insured made a false statement or concealed or misrepresented any material fact or circumstance relating to the insurance on the application form. After making a claim for damage to the yacht, Morales underwent an EUO at the insurer's request, pursuant to the requirement in the policy that he submit to an EUO. During the EUO, Morales allegedly made statements "which indicated that he had not been completely forthcoming" in his insurance policy application. Morales allegedly did not disclose a 2010 accident involving a boat he was operating, which resulted in a total loss, and failed to disclose his ownership of multiple other vessels. The insurer later filed a complaint for declaratory judgment relying on these statements to void the policy.

Decision

Morales sought to dismiss the insurer's complaint, arguing that the insurer improperly obtained his statements during the EUO because that examination did not comply with the requirements for taking a deposition under Federal Rule of Civil Procedure 27. Rule 27 is meant "'to apply to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced.'" *QBE Seguros*, 2017 WL 775789, *2, *citing Petition of Ferkauf*, 3 F.R.D. 89, 91 (S.D.N.Y. 1943). The Rule permits a federal district court to authorize a deposition where the anticipated litigation is within federal jurisdiction; the petitioner is unable to bring or cause to be brought the underlying action; and there is a reason or need to perpetuate the testimony sought.

Morales took the position that any statements from the EUO should be stricken from the insurer's complaint, which he contended was not sufficient to state a claim without those statements. The court rejected this argument. The court noted that Rule 27 and EUO serve different purposes: the former is meant to preserve testimony that may otherwise be lost, while the purpose of the latter is for the insurer to obtain information as part of its investigation of a claim, rather than for litigation. Citing precedent from the Seventh and Eleventh Circuits, the court explained that the right to take an EUO is contractual, and that federal procedural rules governing depositions are at most of only persuasive value. *See Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.,* 528 F.3d 508, 521 (7th Cir. 2008) ("[T]he Federal Rules of Civil Procedure are not authoritative or dispositive regarding the contractual obligations [relating to EUOs] at issue here"); *U.S. Fid. & Guar. Co. v. Welch*, 854 F.2d 459, 461 (11th Cir. 1988) ("right to obtain sworn statements" during EUO "arises from the policy provisions" and thus right to take EUO "is not to be confused with procedures authorized by statute for taking depositions"). It was uncontested, according to the court, that the insurance policy had at least two unambiguous clauses that required him to submit to an EUO. The court found the insurer "had a right – arising under the marine insurance contract" – to ask Morales to participate in the EUO. Such a contractual right, the court explained, was distinct from the protections under the Federal Rules, which meant the insurer did not have to abide by Rule 27 prior to conducting the EUO. Because the insurance policy unambiguously required Morales to submit to an EUO, and because the insurer did not have to comply with Rule 27 before taking the EUO, the court denied Morales' motion to dismiss.

Conclusion

The court's straightforward decision demonstrates what should, by now, be an uncontroversial point: EUOs are creatures of contract, not statute or rule. As such, they are not bound by the same formal restrictions that govern depositions under the Federal Rules of Civil Procedure, and those rules are no bar to including statements from an EUO in a complaint.

<u>DEFENSE COSTS AND POLICY LIMITS</u>

***American Commercial Lines, LLC v. Water Quality Ins. Syndicate*, Nos. 16-91, 16-119, 2017 U.S. App. LEXIS 2460, at *1-2 (2d Cir. Feb. 10, 2017).**

Case note by Laura Beck Knoll, Chaffe McCall LLP New Orleans

In this case, the United States Court of Appeals for the Second Circuit interpreted a primary oil pollution policy and held that the primary insurer was not obligated to continue paying defense costs incurred after the policy limit was exhausted. The decision was based on the specific language of the policy, it's overall purpose and scheme, and the parties' actions after the limit was reached.

The underlying pollution incident was a 300,000 gal oil spill from a barge in the Mississippi River on July 23, 2008 after the tow of the M/V MEL OLIVER collided with the M/V TINTOMARA. American Commercial Lines ("ACL"), the discharging barge's owner, had a $5,000,000.00 primary pollution policy and three excess layers totaling approximately $295,000,000.00 in marine liability coverage for the incident. Water Quality Insurance Syndicate ("WQIS"), as the primary insurer, immediately began managing the pollution response effort with a Marine Pollution Response Team. Within approximately five weeks of the collision, on August 27, 2008, the primary policy's $5 million limit was reached, and the excess underwriters then separately hired the Marine Pollution Response Team to continue the oil spill response management. Over a year later, in October 2009, ACL submitted its first claim for reimbursement of defense costs to WQIS, then in September 2009, ACL sued WQIS for breach of the policy alleging that WQIS failed to cover (1) approximately $300,000 in defense costs before the $5 million coverage limit was reached and (2) approximately $2,000,000 in defense costs after the $5 million coverage limit was reached.

The two relevant policy provisions were coverage for liability and defense costs, Coverages A and C, respectively:

> COVERAGE A
>
> The Discharge or Substantial Threat of a Discharge of Oil
>
> 1) Liability to the United States or to any Claimant imposed under Section 1002 of the Oil Pollution Act of 1990 (Public Law 101-380, as amended), hereafter the "Act", and costs and expenses incurred by the Assured for Removal of Oil for which liability would have been imposed under Section 1002 of the Act, had the Assured not undertaken such Removal voluntarily;
> . . . .
>
> COVERAGE C
>
> Investigation and Defense
>
> Costs and expenses incurred by the Assured with the prior consent of WQIS for investigation of, or defense against, any liabilities covered under COVERAGE A or B of PART I of the policy.

The district court, adopting the report and recommendation of a Special Master, held that WQIS was obligated to pay defense costs even after the $5 million indemnity coverage limit was reached. In other words, that WQIS was responsible for defense costs under Coverage C notwithstanding that its obligation under Coverage A had ended. The Second Circuit reversed.

The Second Circuit observed that the policy language was ambiguous because "a reasonably intelligent person" could conclude either: (1) Coverage A and C clauses operated independently; or (2) that even though there was no explicit dollar amount for defense costs under Coverage C, that obligation ceased once Coverage A did. Moving on from the plain language interpretation, however, the Second Circuit was persuaded that continuing the insurer's *indemnity* obligation for defense costs, "when it no longer had an interest in defending or minimizing liability for the incident," would be an absurd result. Finally, the Court buttressed its opinion by relying on the customs and practices of the industry as described in affidavits from both the WQIS claims handler and an excess insurer stating that WQIS ceased its active participation in ACL's claims after reaching the $5 million of liability. The Second Circuit therefore reversed the grant of summary judgment in ACL's favor and instructed the district court to consider the extrinsic evidence and interpret the policy to give effect to the intent of the parties as developed in discovery.

MARITIME CONTRACTS – CHOICE OF LAW

***Hartford Fire Ins. Co. v. Harborview Marina and Yacht Club Community Association*, No. 16-769, 2016 U.S. Dist. LEXIS 170438 (D. Md. Dec. 9, 2016).**

Case note by Laura Beck Knoll, Chaffe McCall, New Orleans

In this decision, the United States District Court for the District of Maryland determined that a Marina Operators Legal Liability and Boat Dealer Policy was not a maritime contract simply because the insured was a marina and yacht club. In arriving at this conclusion, the Court conducted a law review style analysis of when a contract is sufficiently "salty" in order for maritime law and admiralty jurisdiction to apply.

The claim arose out of the collapse of a fixed pier at Harborview's marina. Following an investigation into the cause of the collapse, Hartford filed a declaratory judgment action in admiralty against Harborview contending *inter alia* that coverage was absent or void based on Harborview's breach of the conditions of coverage, misrepresentation of the pier's condition and/or lack of fortuity.

The Court began its colorful and detailed analysis by recapping the law on admiralty jurisdiction over maritime contracts both before and after the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*. Then, after noting that "[t]he Fourth Circuit, however, has yet to drop anchor on the question of whether a mixed insurance contract is a maritime contract," the court engaged in a detailed review of post-*Kirby* authority from the Second, Sixth, Fifth, and Ninth Circuits, highlighting the points of agreement and disagreement among the circuits. Ultimately, the Court distilled the circuit court approaches into "four potential considerations…: (1) the nature of the dispute; (2) the type or form of the policy at issue; (3) the scope of the policy's coverage; and (4) the interests insured by the policy." Significantly, the Court agreed with the Second Circuit's view that "coverage determines whether a policy is 'marine insurance,' and coverage is a function of the terms of the contract and the nature of the business insured."

The Court then applied its test to the policy written by Hartford which covered fixed docks and piers, roadways, benches, flag poles, pool equipment, trash receptacles and furniture, all traditionally land-based risks, and which did not cover floating docks, floating piers, vessels, marina operations like vessel launching and hauling, collisions, pollution or other classically maritime risks. The Court concluded that the focus of the risks insured and the "primary objective" of the policy was the protection of land-based property and not on maritime commerce. The Court rejected Hartford's claim that coverage for salvage charges and terrorism justified the application of admiralty jurisdiction as "all sail and no anchor." Accordingly, the Court declined to exercise admiralty jurisdiction over the case, precluding the concomitant application of substantive maritime law doctrines like *uberrimae fidei* on which Hartford had apparently intended to rely.

In the final analysis, the Harborview policy was "an insurance policy for land-based property bearing at most a tangential relationship to marine commerce" and that it lacked a primary objective fundamentally maritime sufficient to be a maritime contract.

***In re: Crescent Energy Services, LLC,* No. 15-819 c/w 15-5783 (E.D. La. Nov. 7, 2016)**
While the *Harborview* decision focused on the "saltiness" of the insurance contract, this decision centered on whether an underlying commercial contract was sufficiently maritime in order to avoid the application of a Louisiana state law barring indemnity agreements in oil and gas contracts. Here, the insurers contended that maritime law did not apply in order to avoid liability to additional insureds.

This limitation action arose out of a well blow out which caused severe personal injuries to a pump operator working aboard a barge owned by Crescent Energy Services, LLC ("Crescent"). At the time of the blow out, Crescent/the barge were hired by Carrizo Oil & Gas, Inc. ("Carrizo") to plug and abandon Carrizo's off-shore wells. Carrizo contended that it was entitled to contractual indemnity from Crescent and coverage from Crescent's insurers as an additional insured. Crescent's insurers, Liberty Mutual, Starr, Torus and Lloyd's of London denied coverage and filed motions for summary judgment. The primary issue before the Court was whether the contract between Crescent and Carrizo was a maritime contract which would require the Court to apply the general maritime law and not the state law of Louisiana. The outcome of this analysis would determine whether the indemnity obligations created by the contract were enforceable under the general maritime law or entirely unenforceable under the Louisiana Oilfield Anti-Indemnity Act which declares indemnity provisions in oil and gas agreements void.

Following the general rule that a contract must have a "genuinely salty flavor" in order to be considered a maritime contract, the Court followed the fact specific analysis required by the Fifth Circuit in *Davis & Sons, Inc. v. Gulf Oil Corp.,* 919 F.2d 313 (5th Cir. 1990). After noting that the historical precedent on the issue was unclear and had been described as a "marshland," the Court held that the *Davis* analysis required a finding that the contract was maritime and the indemnity provision was enforceable. The insurers' motions were denied.

Mutual Mistake in a Maritime Services Contract Could Be Reformed in a Way that Adversely Affected Third-Party Insurer By Expanding Scope of Indemnified Parties

***Richard v. Anadarko Petro. Corp.*, No. 16-30216, 2017 U.S. App. LEXIS 3812, at *2 (5th Cir. Mar. 2, 2017).**

Case note by Laura Beck Knoll, Chaffe McCall LLP, New Orleans

In this case, the United States Court of Appeals for the Fifth Circuit held that the parties to a maritime contract could equitably reform the agreement to include standard knock for knock indemnity by applying Louisiana state law of mutual mistake and not federal maritime law. The Court allowed the reformation under state law even though it expanded the liability of an interested third party insurer.

The issue arose out of a Master Services Contract ("MSC") between Offshore Energy Services ("OES") and Anadarko. The MSC provided for reciprocal indemnity of employee work-related accidents for OES or Anadarko and their "subcontractors," but not "contractors" even though the extension of reciprocal indemnity to "contractors" is an industry standard. The mistake came to light when Richard, an OES employee, was injured and sued OES, Anadarko, Dolphin Drilling and Smith International. Richard's case settled and OES' insurer provided coverage for OES's expenditures except for those related to Dolphin Drilling and Smith International, who turned to OES through the chain of contractual indemnification with Anadarko, on the basis that OES owed no indemnity to either Dolphin or Smith because those companies were Anadarko's "contractors" (not covered) and not "subcontractors" (covered).

The threshold issue for the Fifth Circuit was which law governed the parties' right to reformation. The insurer argued that federal maritime law foreclosed reformation, while the other parties argued that state law permitted it. The analysis was complicated by the fact that the MSC was a maritime contract which required the application of federal maritime choice of law rules. Ultimately, the Fifth Circuit affirmed the district court's use of state law as a "gap filler" and further affirmed the district court's determination that Louisiana state law applied.

Having settled which law applied, the Fifth Circuit then addressed whether grounds for reformation existed. First, the court observed that an adverse impact on the insurer, standing alone, would not bar the reformation, relying primarily on a Louisiana Supreme Court case, *Samuels v. State Farm Mutual Automobile Ins. Co.* Next, the Fifth Circuit distinguished two of its own more recent opinions declining to reform contracts, *American Electric Power Co. v. Affiliated FM Ins. Co.* and *Wilcox v. Wild Well Control, Inc.*, on the basis that those cases involved redefining terms contrary to the basic norms of fairness.

Finally, the Fifth Circuit found that Liberty Mutual unequivocally did not review or rely on the language of the MSC before issuing the OES policy and OES had provided the insurer with a loss history reflecting similar indemnification claims. The Fifth Circuit reasoned that the insurer could not then complain that of an unfair surprise for redefining unambiguous terms when the insurer "[w]ith the unreformed MSC and OES's "Loss History" in hand . . . had reason to perceive OES and Anadarko's shared, ultimately mistaken perception of the MSC indemnity provisions' scope." The District Court's order reforming the MSC was affirmed..

POLICY CONTRACT CONSTRUCTION

***AGCS Marine Insurance v. World Fuel Services, Inc.,* 14 Civ. 5902 (S.D.N.Y. Nov. 11, 2016).**

This case was originally reported in the Fall, 2016 edition of this Newsletter. Briefly, the original decision resolved a coverage dispute between marine insurer AGCS and its insured, World Fuel, over whether the policy covered a multi-million dollar loss of bunkers as a result of a fraud perpetrated on World Fuel. AGCS filed the action against its insured seeking a declaratory judgment that the loss was not covered. On summary judgment, the Court disagreed and found that the loss fell within the period of all-risk transit coverage because, under New York law, delivery to a fraudster, rather than a bona fide customer, does not terminate coverage. Last November, the parties returned to court on cross motions for summary judgment which resolved the remaining issues in the case including the calculation of damages and the award, and rate, of prejudgment interest.

In deciding damages, the Court was asked to apply the policy's "valuation clause" which stated that the insured property was to be valued at "invoice value (premium included)." AGCS argued that invoice value was set by the supply invoice i.e. the amount that World Fuel paid its supplier. World Fuel asserted that the correct measure of invoice value was set by the re-sale invoice to the (fraudulent) buyer which was over $900,000 higher than supply invoice. To resolve the question, the Court applied New York law and rejected AGCS's interpretation as both "factually and linguistically" wrong. Noting that the policy did not define the term "invoice value" and that the case law was sparse, the Court followed the reasoning of an apposite case *Groban v. S.S. PEGU,*331 F. Supp. 883 (S.D.N.Y. 1971), *aff'd sub nom*. *Groban v. Am. Cas. Co.*, 456 F.2d 685 (2d Cir. 1972) which contained an essentially identical valuation clause and which determined that the proper measure of damages was the amount of the re-sale invoice, not the supply invoice, a construction that favored World Fuel's position. The Court stated that "parties to a commercial agreement that uses terms construed in reported decisions are assumed to negotiate against the backdrop of such case law." Viewed against this backdrop, the Court held for World Fuel.

With regard to pre-judgment interest, that parties disputed the applicable rate and the accrual date. World Fuel argued for the New York statutory rate of 9%. AGCS argued for the T-bill rate of 0.33%. Siding again with World Fuel, the Court based its decision on the fact that the substantive law used to resolve the parties' claims was exclusively New York law notwithstanding the fact that the Court had both admiralty and diversity jurisdiction over the suit. The Court also noted that it had broad discretion in admiralty to set the rate of interest and, for the avoidance of doubt, the Court would have selected the 9% rate in its discretion in order to serve the function of awarding interest in an amount which will fully compensate the party for the actual damages suffered, considers fairness and the relative equity of the award, the remedial purpose of the statute involved and any other general principals deemed relevant. The Court then construed the plain language of the policy on the accrual date as the "earliest ascertainable date the cause of action existed" and held that the earliest date was thirty days after a proof of loss was filed and not on the date that the claim was "final" as argued by AGCS.

***Sullivan v. Certain Underwriters at Lloyds*, D. Ore. No. 3:15-CV-00926, 2016 U.S. Dist. LEXIS 177132 (Dec. 22, 2016).**

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

This decision on the construction of a navigation limits clause arose out of a wrongful death claim filed by Plaintiff Sullivan, as personal representative of his deceased son, against the owners of a yacht insured by Certain Underwriters at Lloyds ("Lloyds"). Lloyds declined to defend or indemnify its insured in that action, claiming that the accident occurred outside of the navigational limits of the insurance policy. The yacht owners then assigned their rights against Lloyds to the plaintiff, and the plaintiff commenced this action seeking a declaratory judgment that Lloyds had breached it duty to defend and indemnify its insured in the wrongful death action.

The accident at issue occurred while the yacht was underway on the Oregon side of the Columbia River near St. Helens, Oregon. The insurance policy, however, limited coverage to "losses which occur within the navigational limits as stated on the declaration page." The declaration page contained a navigational limit, permitting coverage only when the vessel is "confined to the use and navigation of Washington and British Columbia including the inland lakes and rivers." It was on this basis that Lloyds declined coverage.

The parties filed cross motions for summary judgment. Lloyds alleged that, because the yacht was not on a Washington river at the time of accident, coverage was excluded under the navigational limits clause. The plaintiff argued that the navigational limits clause was ambiguous, and that the navigational limits included the entirety of the Columbia River. Applying Washington law, the U.S. District Court for the District of Oregon upheld a magistrate judge's recommendation and granted summary judgment in favor of the plaintiff. The Court held that the phrase "inland lakes and rivers" is ambiguous as to whether it included "inland lakes" and all "rivers" or only "inland lakes" and "inland rivers." The Court stated that it was not reasonable to interpret an insurance policy to cover a vessel only on one side of a river. In addition to finding the policy clause ambiguous, the Court relied on an 1859 statute that provided Washington and Oregon concurrent jurisdiction over the entire Columbia River for civil and criminal matters. Accordingly, the Court held that the navigational limits clause was ambiguous, and that it was not reasonable to construe the policy as limiting coverage to only the Washington side of the Columbia River.

Lloyds has appealed the decision to the Court of Appeals for the Ninth Circuit The appeal remains pending.

***Overbeek v. Fremont Ins. Co.*, 2017 Mich. App. LEXIS 57 (Mich. Ct. App. January 17, 2017).**

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

In this case, Plaintiff Overbeek hired a fishing guide, Defendant John Matson, to take him fishing on the Pere Marquette River in Michigan. On the day of the accident, the plaintiff and Mr. Matson arrived at a boat launch in Mr. Matson's truck with the fishing boat in tow. Mr. Matson backed the truck and trailer down the boat launch ramp, but forgot to shift his truck into park. As the plaintiff and Mr. Matson were winching the boat, the truck began to rapidly descend down the ramp towards the river. The plaintiff tried to engage the truck's brake, but was seriously injured when his arm was pinned between the truck's tire and the concrete steps of the ramp.

The plaintiff sought recovery under Mr. Matson's marine insurance policy, issued by Defendant Fremont Insurance Company. The policy specifically excluded coverage for property damage or bodily injury resulting from transporting the insured boat or trailers on land. The trial court granted summary disposition in favor of the plaintiff, holding that the exclusion did not apply in this instance. The Michigan Court of Appeals affirmed, holding that the exclusion did not apply to negate coverage. The Court stated that the plaintiff and Mr. Matson were not "transporting" the vessel at the time of the accident. The Court reasoned that when the boat and trailer arrived at the boat launch, transportation had ceased. Further, no one was moving the vehicle or vessel at the time of the incident, as it was sliding down the ramp, because the brake had not been engaged. As such, the policy exclusion did not apply, and summary disposition was appropriate.

ARBITRATION CLAUSES ARE ENFORCEABLE

***O'Connor v. Mar. Mgmt. Corp.*, E.D. La. No. 16-16201, 2017 U.S. Dist. LEXIS 37798 (Mar. 16, 2017).**

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

Plaintiff O'Connor originally brought suit in a Louisiana state court alleging that he contracted lung cancer as a result of asbestos exposure from years spent working as a machinist aboard several oil tankers in the early 1980s. One of the defendants, West of England, removed the matter to federal court invoking the removal provisions of the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 9 U.S.C. § 205. In support of this argument, West of England cited an arbitration clause found in its Club Rules that was in effect at the time of the plaintiff's employment. The plaintiff opposed the removal and filed a motion to remand.

The U.S. District Court for the Eastern District of Louisiana denied the plaintiff's motion to remand, holding that the arbitration clause in West of England's Club Rules could conceivably affect the outcome of the plaintiff's lawsuit. The Court interpreted § 205 of the New York Convention broadly, holding that it conferred federal question jurisdiction upon district courts. Because West of England's arbitration agreement fell under the New York Convention, the dispositive issue was whether the arbitration clause related to the plaintiff's lawsuit. Citing Fifth Circuit precedent in *Beiser v. Weyler,* 284 F.3d 665, 669 (5th Cir. 2002), an arbitration clause "relates to" a plaintiff's suit whenever the clause could conceivably have an effect on the outcome of the case. The *O'Connor* court held that West of England's arbitration clause could conceivably have an effect on the plaintiff's lawsuit. As such, the matter was properly removed to the federal district court where it remains pending.

***Voorhees v. ACE Am. Ins. Co.,* E.D. Wisc. No. 15-CV-1193, 2017 U.S. Dist. LEXIS 43289 (Mar. 24, 2017).**

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

In *Voorhees*, the U.S. District Court for the Eastern District of Wisconsin granted the defendant-insurer's motion to compel arbitration and held that a determination of whether the insurer had waived its right to compel arbitration was for the arbitrator to decide.

The case stems from a generator failure and related repairs that occurred on an insured's yacht. The *Voorhees* plaintiffs, the owners of the yacht, filed suit against the yacht's insurer, Defendant ACE American Insurance Company ("Ace"), in Wisconsin state court. ACE removed the matter to federal court and moved to compel arbitration based on a clause in its insurance policy stating that the parties agreed to arbitrate "any controversy or claim…arising out of or related to this Policy, the interpretation, enforcement, or breach thereof, or handling of any claim involving this Policy." In compelling arbitration, the federal district court held that the clause was not ambiguous. In opposing the motion, plaintiffs claimed that ACE had waived its right to arbitrate by ignoring a pre-suit request for arbitration and by failing to respond to a pre-suit notice of arbitration. ACE responded that the pre-suit request for arbitration was untimely, and the pre-suit notice of arbitration fell below the policy deductible. As such, ACE argued that its lack of response to these notices was appropriate.

The federal district court ultimately enforced the arbitration clause, staying the litigation and compelling arbitration. To the extent that ACE's pre-litigation conduct waived its right to arbitrate the claims, the federal district court recognized that the arbitrators could and should determine that issue.

***Gemini Ins. Co. v. Certain Underwriters at Lloyd's,* S.D. Tex. No. 4:17-CV-1044, 2017 U.S. Dist. LEXIS 56583 (Apr. 13, 2017).**

Case note by Markus Apelis and Sarah Beaubien, Gallagher Sharp LLP, Cleveland

Plaintiff Gemini Insurance Company ("Gemini") issued a marine liability insurance policy to Galveston Bay Energy, LLC. Defendant Certain Underwriters at Lloyd's London ("Lloyds") underwrote another policy issued to Galveston Bay ("Galveston"). The insurers disputed whether Lloyd's was required to help fund a settlement in a personal injury action against their mutual insured. Gemini had funded part of the settlement, in excess of its *pro rata* share, in exchange for which Galveston assigned its rights against Lloyd's to Gemini.

Lloyd's invoked an arbitration clause in the policy and filed for arbitration in England. Gemini filed a subrogation action in Texas state court, seeking a preliminary injunction barring the defendants from seeking arbitration. The Texas state court granted the temporary restraining order. When the matter was removed to federal court, Gemini submitted a petition for a preliminary injunction. The federal district court denied the application, and dissolved the state court restraining order.

The federal district court recognized that the Lloyd's policy contained a "Law and Practice" clause, providing for arbitration of all disputes in England. The policy also contained a "Service of Suit" clause under which Lloyd's would submit to the jurisdiction of a United States court for claims of failure to pay any amount due under its policy.

The district ultimately denied Gemini's application for a preliminary injunction, upholding the policy's arbitration clause. The Court held that the Service of Suit clause did not override the Law and Practice clause, as the Service of Suit clause was explicitly subject to the Law and Practice clause. The court further held that the Law and Practice clause specifically incorporated English law into the contract of insurance. As English arbitration law unambiguously provides that arbitrators have the power to decide threshold questions of arbitrability, the parties unmistakably consented to delegate to the arbitrator the authority to determine which claims are arbitrable. Thus, the Court denied the preliminary injunction and dissolved the temporary restraining order, allowing the arbitration proceedings in England to go forward.

Lloyd's has since sought dismissal of the action in favor of arbitration in England. That motion remains pending.

CONTRACTUAL STATUTE OF LIMITATIONS

***Equipment Corporation of America v. Hartford Underwriters Insurance Company*, No. 16-178 (W.D.Pa. Oct. 26, 2016).**

This case involved coverage for a rotary drill rig under a Coverage Inland Marine Policy issued by Hartford. On June 13, 2013, a drill rig owned by Equipment Corporation of America ("ECA") rolled over and became damaged beyond repair. On June 20, 2013, ECA submitted a claim to Hartford for the rollover and Hartford accepted coverage for the replacement cost of the drill rig. However, based on Hartford's interpretation of the Other Insurance clause in the policy, Hartford contended it was only obligated to pay 1/3 of the replacement cost of the drill rig and not the full amount of the claim. Hartford then agreed to pay the claim on this basis up to the policy limit of $500,000. Subsequently, ECA's broker discussed reforming the policy to increase the policy limits from $500,000 to $2M for reasons not apparent from the decision. Hartford then tendered its 1/3 share, or $581,709.88, to ECS. ECS had further discussions on Hartford's application of the Other Insurance clause, but Hartford declined to reconsider its determination of the amount due under the policy. ECS filed suit against Hartford for the full replacement value on April 12, 2016.

The policy contained a suit limitation clause requiring the insured to bring an action "within 2 years after you first have knowledge of the direct loss or damage." Hartford took the position that the last date to file suit was June 20, 2015 or two years after ECS submitted its claim to Hartford. ECA disputed that it did not have knowledge of the direct loss or damage it sustained due to Hartford's failure to perform under the policy until after the policy limits were reformed in October of 2015. The Court disagreed and found that the phrase "loss or damage," as used repeatedly throughout the policy, referred to loss or damage of covered property and that ECA did not sustain loss or damage of its covered property due to the actions or inactions of Hartford.

The Court further rejected ECS' claim that Hartford waived this defense and/or was estopped from asserting it. The Court noted that Hartford's "undisputed" acts as asserted by ECA could not have lulled ECA into not filing suit as all the acts took place *after* the suit time limitation had expired nor did Hartford take any act which was inconsistent with the suit time defense. Similarly, the review of the policy to reform the limits did not extend the suit time limitation because Hartford's decision to review the policy could not have induced ECA to take any action which allowed the time limitation to expire. Suit was dismissed.

UBERRIMAE FIDEI STRICTISSIMI/UTMOST GOOD FAITH

***Nat'l Liability & Fire Insurance Co. v. Rooding*, 15-2572 (D. Md. Jan. 20, 2017).**

This declaratory judgment action arose out of the loss of Rooding's vessel MARGARITAVILLE (the "vessel") when it sank at its dock. The investigation into the loss by a marine surveyor revealed that the sinking was caused when ice broke the sea strainer due to an open seacock valve on the supply hose. Water then entered the vessel, overwhelmed the bilge pumps and the vessel sank. The surveyor then determined that the loss occurred after the first freeze i.e. after January 2015 and before March, 2015. The vessel's insurer, National Liability & Fire Insurance Co ("National"), denied coverage asserting that the loss did not occur while its policy was in effect and, even if it had, the policy was void *ab initio* based on a breach of the implied warranty of seaworthiness and Rooding's breach of the fraud and concealment clause.

As a preliminary matter, National issued two policies to Rooding covering the vessel: the first was cancelled for non-payment of premium on December 4, 2014. The second policy was not issued until March 31, 2015 and covered port risks only. Both policies were issued on Rooding's various representations that the purchase price and/or value of the vessel was $25,000 when the actual purchase price was $9,515, and that the vessel was seaworthy when, in fact, at the time of the application on the first policy, the hull valve/seacock was missing a handle and was stuck in the open position. Rooding first reported the loss on May 1, 2015 without any indication of the actual date of the loss.

On a motion for summary judgment, National contended that the loss was not covered because there was no evidence that the vessel sank during the effective dates of either of the two policies. The Court agreed noting that Rooding presented no evidence that the loss occurred before the first policy was terminated or after the second policy went into effect and that National had demonstrated that the sinking occurred while Rooding was uninsured. National further asserted that any coverage that might have attached was void due to Rooding's misrepresentation of the purchase price of the vessel and his concealment of its unseaworthy condition i.e. seacock stuck in open position at the inception of the first policy. Again, the Court agreed with National and found that Rooding had breached his duty of utmost good faith, *uberrimae fidei,* by failing to disclose all circumstances known to him, and unknown to National, which might materially affect the risk being insured. Relying on decisions from other circuits which found that the misrepresentation of a vessel's purchase price was a violation of the duty and permitted the insurer to void the policy, the Court held that Rooding's misrepresentation of the purchase price was a material breach of his *uberrimae fidei* obligations which justified the actions taken by National in voiding the policy. Having found for National on these two grounds, the Court then declined to decide the issue of whether Rooding violated the duty of implied seaworthiness.

The Court then heard National's application for attorney's fees and costs associated with Rooding's apparent attempts to avoid service and granted the application with the amount to be determined.

INSURABLE INTEREST AS REQUIREMENT FOR COVERAGE

***Essex Insurance Co. v.. Schooner's Bar & Grill, Inc.*, 3:15-15881 (S.D.W.Va. Feb. 28, 2017).**

This declaratory judgment action arose out of the sinking of a permanently moored steel deck barge called SCHOONER'S (the "barge") which was operated as a bar and grill at a Marina known as Adams Landing. Essex Insurance Co. ("Essex") issued a marine insurance policy to "Schooner's Bar & Grill, Inc." ("Schooner's"). Following the loss, Essex filed its complaint asserting that Schooner's did not have an insurable interest in the barge, that the policy excluded the cause of the barge's sinking and that any coverage was void due to breach of the duty of cooperation. Essex then filed a motion for summary judgment.

In order to determine whether Schooner's had an insurable interest at the time of the loss, the Court was forced to examine the complicated corporate and contractual relationships between the named insured, the marina, the barge and Adam Tolliver, the person at the center of all of the entities. This task was further muddled by Tolliver's testimony in the form of an examination under oath which caused the Court to comment that Tolliver failed to follow corporate formalities and that Tolliver confused many of his business entities during his testimony. Tolliver also submitted an affidavit in opposition to Essex's motion which was inconsistent with some of the testimony in his EUO. Despite that, the Court found that it would not grant summary judgment. In addition, Relying upon West Virginia statutory law, the Court noted that having an insurable interest in a property does not mean that the insured must own the property. Rather, the insured must prove that it has a "substantial economic interest" in the property in order to recovery under the policy. The Court then determined that there were questions of fact as to whether Schooner's had a substantial economic interest in the property which was best left for the jury.

Tolliver and Adams Landing also sought coverage as "insured's" under the policy which the Court rejected as a matter of law. Finding that the policy unambiguously named only Schooner's as a named insured, summary judgment in favor of Essex was granted.

* * *

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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