MLA Committee On Marine Insurance and General Average
NEWSLETTER

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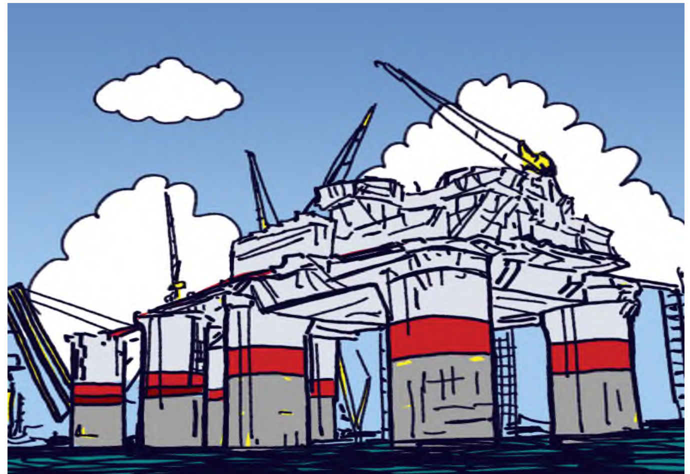

BIG FOOT RIG – *Anna Wilson*

SUBROGATION- Barred against additional assured but separate tort claims to proceed.
***Lloyd's Syndicate 457 v. Floatec, LLC,* slip op. No.16-03050, 2017 WL 3189020 (S.D. Tex. 7/27/17) (Appealed to CTA 5, 8/29/17)**

Subrogated underwriters on an "Offshore Construction Risk Policy" sued an engineering firm and a warranty surveyor to recoup losses paid when the mooring "tendons" for the enormous deep water drilling rig, BIG FOOT, fell to the ocean floor in 5000 ft. of water during installation and were lost. The Defendants filed Motions to Dismiss claiming that they were "Other Insureds" as defined under the policy, or, the claims were barred under the Louisiana anti-subrogation rule barring subrogated underwriters' claims against additional or "other" insureds. Alternatively, they sought to compel arbitration under the terms of their contract with the rig owner.

Underwriters presented numerous arguments surrounding the interpretation of the term "Other Insured" in their policy, all of which were rejected by the court. Underwriters then argued that the allocation of risk and indemnity provisions in the Defendants' contract with the rig owner related to the rig owner's property losses, all of which were in favor of the rig owner, were inconsistent with the Defendants' interpretation of their status under the policy. The court rejected this argument as well as Underwriters' contention that the Defendants' liability policies were required to be primary per their contract with the rig owner, stating that this language was taken out of context and that the Defendants were not required to obtain Builder's Risk insurance under their contract with the rig owner, which rendered the "primary" theory inapposite. On these and other bases, the Court dismissed the Underwriters' claims with prejudice.

In contrast, on the claims against the warranty surveyor, the court concluded that these were not based upon subrogation, but instead upon separate tort theories of negligence and breach of the warranty of workmanlike performance under Louisiana law. Because of the separate and independent theory of recovery, the court held that the warranty surveyor's defenses of "Other Insured" status and the Louisiana anti-subrogation rule were simply inapplicable, and the claims could proceed. The court also concluded that there was no right to arbitration available based upon the terms of the rig owner's contract since Underwriters were not a party to that contract and their rights arose independently of it. The case is now on appeal before the U.S. Fifth Circuit.

POLICY CONTRACT – Cover For Salvage Costs Denied
***Starr Indemnity & Liability Co. a/s/o and as assignee of all rights of Genesis Marine, LLC v. Water Quality Insurance Syndicate,* slip op. No. 15 Civ. 2365 (S.D.N.Y. Apr. 25, 2018)**

This case arose out of the April 6, 2014 grounding of two tank barges, GM-5001 and GM-5002, carrying approximately 300,000 barrels of decant oil on the Upper Mississippi, while they were being pushed by the M/V KAREN PAPE. Genesis Marine was, at all relevant times, the owner of the barges and the M/V KAREN PAPE. As a result of the grounding, which occurred at a time when the river level was falling rapidly, Genesis Marine incurred substantial costs for the lightering and refloating of the barges, which was done by T&T Salvage. No oil was discharged from the barges as a result of the grounding, or during the lightering and refloating operations. Genesis Marine thereafter filed claims with its Hull/Protection & Indemnity insurer, Starr Indemnity & Liability Co., and its primary pollution liability insurer, Water Quality Insurance Syndicate ("WQIS"). Specifically, Genesis Marine presented a claim to Starr as the hull insurer for the entire invoiced amount of the salvage costs incurred by Genesis Marine to refloat the barges, in the amount of $2,892,670.37. Starr ultimately paid $2,864,756.26 of the costs charged by the salvor. WQIS paid pollution control costs incurred and claimed by Genesis Marine in excess of $280,000.

Starr, as assignee of Genesis Marine, filed suit against WQIS seeking reimbursement of the salvage costs paid by Starr. Starr claimed that WQIS was responsible for covering these costs under several provisions of the WQIS Policy on the basis that the measures taken by Genesis Marine in response to the grounding were, in whole or in part, to respond to a substantial threat of a discharge of oil from the stranded barges. It was undisputed that the WQIS Policy does not provide coverage for the costs of salvage unless such costs are incurred to mitigate or prevent a "substantial threat of discharge" under the Oil Pollution Act of 1990 ("OPA '90"). WQIS denied that the grounded barges posed a substantial threat of discharge under OPA '90, and declined to reimburse Starr for the subject payments made to Genesis Marine.

Following a three day bench trial, during which the parties' presented fact and expert testimony, and documentary evidence, the Hon. Paul A. Engelmayer issued a 46 page decision finding, *inter alia*, that the barges did not pose a substantial threat of discharge, and holding that none of the provisions of the WQIS Policy were triggered and therefore WQIS is not liable to Starr for any of the salvage costs incurred by Genesis Marine. In so holding, the Court expressly credited the contemporaneous documentary evidence and testimony over the testimony of Plaintiffs' witnesses, including the Coast Guard, stating that "[t]he evidence does not reflect – and the participants in real time did not conclude – that there was a substantial risk of discharge. Rather, the evidence overwhelmingly showed that the barges – by their nature and in the circumstances at hand – were never at risk (or anywhere close) of the type of failure that might have resulted in an oil discharge."

Thanks to John Woods and Corey Greenwald of Clyde & Co. US LLP for submitting this case note.

ARBITRATION CLAUSE ENFORCEABLE

***Galilea v. AGSC Marine Ins. Co.*, slip op, No. 16-35474, 35474 (Jan. 16, 2018) __ F.3d __ (9th Cir. 2018).**

After introducing its decision with a literary flourish from Plato and Shakespeare, the Ninth Circuit Court of Appeals turned to the quotidian question of arbitration clauses and marine insurance policies. The Circuit Court then affirmed in part, and reversed in part, the decision of the District Court and found that the arbitration clause in the policy contract was enforceable. In doing so, the Court examined the intersection of the McCarran-Ferguson Act 15 USC §1012 and the Federal Arbitration Act ("FAA") 9 USC §1-16 which provides for enforcement of arbitration provisions in maritime contracts. Noting that plaintiff policy-holder Galilea was attempting to "navigate around" the arbitration clause by invoking McCarran-Ferguson, the Court concluded that because no state's law was applicable to the insurance contract in the first instance, McCarran-Ferguson had no applicability. Finally, the Court ruled that the question of arbitrability was delegated to the arbitrator as a matter of contract and was not for the Court to decide. The Court of Appeals disagreed with the lower court on the issue of whether the arbitration clause in the policy application bound the parties to arbitration and reversed that decision. However, because the Court of Appeals affirmed the decision on the arbitrability of the insurance contract itself, the Court remanded the matter back to the District Court with instructions to grant the Underwriters motion to compel arbitration in its entirety.

This decision was originally reported in the Spring 2016 edition of this newsletter.

WARRANTY

Starnet Insurance Co. v. La Marine Service LLC and Leonard Jourdan, Jr., slip op., 16-13511 (E.D. La. December 27, 2017).

This action arose out of the sinking of the vessel M/V CAPT. L.J. owned by defendant La Marine Service and covered by a time-hull insurance policy issued by Plaintiff Starnet. Starnet denied coverage for the loss and contended that the vessel sank because of negligent maintenance. Evidence indicated that the stuffing boxes were poorly maintained and leaking and the vessel relied on an automatic bilge pump to keep water pumped out of the vessel. On the night of the sinking, the generator engine stopped running and, without power, the bilge pumps no longer worked to keep water out of the engine room. The central issue before the court was whether the defendants' negligent maintenance precluded coverage under the implied warranty of seaworthiness and/or the Liner Negligence Clause. Before reaching these questions, the Court first determined that federal maritime law applied since the Liner Negligence Clause at issue was closely related to the Inchmaree Clause which was governed by Fifth Circuit admiralty precedent.

Noting the settled "American Rule" that federal maritime law implies two warranties of seaworthiness in a time hull insurance policy: (1) an absolute warranty of seaworthiness at the inception of the policy and (2) a modified negative warranty under which an insured promises not to knowingly send a vessel to sea in an unseaworthy condition, the Court determined that the Liner Negligence Clause waived or displaced the American Rule's implied warranties of seaworthiness. Therefore, the salient question was whether the vessel owner exercised due diligence to keep the vessel in a seaworthy condition. After weighing the evidence, the

court found that it was essentially uncontested that the vessel's stuffing boxes and propulsion shafts were not properly maintained, and that the lack of proper maintenance caused the leaking which caused the loss. Relying on the evidence of negligent maintenance, the Court held that La Marine failed to exercise due diligence to maintain the vessel in a seaworthy condition and that, as a result, the loss was excluded under the Liner Negligence Clause.

NAMED INSURED PROVISIONS

***Maclean v. Travelers Insurance Co.*, slip op., 16-11338 (D. Mass. Oct. 26, 2017**

The Plaintiffs, Kevin and Donna Maclean, ("Macleans") were passengers in a speedboat travelling at high speed as part of a "lightning speedboat adventure" when the speedboat crossed another boat's wake, tossing the Macleans into the air and injuring them. The owner of the speedboat they were in was insured by the Travelers Insurance Co. ("Travelers") under a policy with a Named Operators Endorsement. Unfortunately, the person operating the boat at the time of the accident was not listed in the Named Operators Endorsement. Travelers contended that this vitiated cover and, as a result, Travelers had no duty to defend or indemnify the speedboat's owners in connection with the Maclean's claims. The speedboat's owner then assigned its coverage rights against Travelers to the Macleans who prosecuted the captioned suit.

Travelers moved to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted. The court then determined that while it had subject matter jurisdiction to hear the dispute, it would dismiss the claim as the clear language of the policy contract unambiguously placed the loss outside the protection of the policy. Rejecting the Plaintiff's claim that Massachusetts state law applied, the court found that the Named Operators Endorsement was a promissory warranty and that "under maritime law 'breach of a promissory warranty in a maritime insurance contract excuses the insurer from coverage.'" *Lloyds of London v. Pagan-Sanchez*, 539 F.3d 19 (citations omitted). The district court also rejected the Macleans' argument that the post-accident addition of the speedboat operator to the Endorsement was a "retroactive approval," which barred the enforcement of the warranty. The court noted that the argument was "clever," but that it did not square with the text of the policy which was rendered void when the vessel was operated by a non-listed operator.

Thanks to Brad Gandrup of Fisher Broyles, LLP and Keith Heard of Burke & Parsons for submitting this case note.

***Mt. Hawley Insurance Company v. Miami River Port Terminal, LLC*, slip op. No. 17-10770 (Nov. 16, 2017 11th Cir.)**

In this unpublished opinion, the Eleventh Circuit affirmed a district court's decision that the Plaintiff insurer did not owe a defense or indemnity to an entity that was not named in the policy. The error first occurred in 2010 when the defendant sought to add the Miami River Port Terminal to its policy as an insured location and to add the company that owned the terminal property as a named insured. Unfortunately, only the Terminal was added as an insured location. The error was not noticed during renewals in 2010, 2011 and 2012. Not until 2013, when a longshoreman fell from the dock and sustained severe personal injuries, did the error come to light. The insurer agreed to add the property-owning company to the policy prospectively, not retroactively,

and withdrew its defense of the property-owning company. The insurer then sought a declaration from the court that it was not obligated to defend or indemnify the unnamed property owner. After reviewing the policy, the district court determined that the property-owning company was not a named insured. Citing policy language that stated "No person or organization is an insured…that is not shown as a Named Insured in the Declarations," the court held that the failure to list the property-owing company in the Declarations was fatal to coverage despite the naming of the Terminal property as an insured location. Finally, the court commented that the Defendant's request for reformation of the policy served as an acknowledgment that the property-owning company was not a named insured.

INSURER PROTECTED BY LIMITATION ACT INJUNCTION

***In the matter of Complaint of American Boat Company LLC, and Strait Maritime Group LLC, as Owners, and Western Rivers Boat Management, Inc. as operator and owner pro hac vice, of the M/V DANNY ETHERIDGE for Exoneration from or Limitation of Liability,* slip op. 16-506 (M.D. La April 5, 2018)**

This litigation arose out of the death of a Jones Act seaman employed aboard the M/V DANNY ETHERIDGE. Petitioners filed a limitation action and then sought to enjoin two subsequently filed state court actions. As part of the limitation actions, the insurers of Western Rivers sought to intervene and extend the Limitation Action's injunction against suits to any suit against the insurers of Western Rivers. The Court ruled that Western Rivers' insurers were allowed to intervene and it further extended the injunction barring direct actions in order to prevent the insurance of the ship owner from being exhausted through direct action proceedings.

ADMIRALTY JURISDICTION – State Court's Concurrent Jurisdiction Requires Remand

***Stark v. Markel American Insurance Co.*, slip op., C17-1498 (W.D. Wash. November 7, 2017)**

Plaintiff Stark filed an action against Markel American Insurance Co. ("Markel") in a Washington state court seeking coverage for the loss of his vessel as the result of an accidental fire. Markel denied coverage on the basis of an exclusion for losses if the vessel was afloat. Since the loss occurred while the vessel was afloat at the time of the fire, Markel argued that the policy excluded cover for loss. Stark argued that he was not informed about this exclusion and his broker, DMA & Associates, Inc. was also named in the suit. Markel removed the action to federal court stating that: (1) the court had admiralty and maritime jurisdiction over the suit since the policy was a marine insurance contract; and (2) the court would have diversity once Markel filed a motion to sever Stark's claims against DMA, a non-diverse party. Stark argued that the state court had concurrent jurisdiction and that the severance of DMA was not warranted as the suit concerned a dispute over whether the broker communicated Markel's policy exclusion.

Citing a "strong presumption against removal jurisdiction," the court granted the motion to remand after stating that Markel had failed to meet its burden that removal was appropriate given the state court's concurrent jurisdiction. The court also found that the inclusion of broker DMA in the action was not fraudulent and diversity jurisdiction was not available. The court then awarded Stark attorney's fees based on Markel's "unreasonable" position in arguing against remand.

UBERRIMAE FIDEI STRICTISSIMI/UTMOST GOOD FAITH

***QBE Seguros v. Carlos A. Morales-Vazquez*, slip op. No. 15-2091 (D. P.R. Nov. 14, 2017).**

Plaintiff QBE Seguros ("QBE") filed this action in admiralty against defendant policy holder Carlos Morales-Vazquez ("Morales") seeking a judgment that the policy was void *ab initio* as a result of Morales' misrepresentation of his prior boating history and his prior loss record. Both parties moved for summary judgment: Morales sought to dismiss the entire complaint, QBE sought a declaration that it was under no duty to indemnify Morales. In analyzing the cross-motions, the court relied on well-settled precedent, noting that the marine insurance contract was governed by the principle of utmost good faith and that full disclosure of all material facts was required of the applicant for marine insurance. Morales argued that the non-disclosures were not material because QBE did not rely on that information in choosing to issue the policy. Morales also argued that QBE waived its right to deny cover based on the non-disclosures since QBE's agents knew the information that Morales did not disclose before QBE issued the policy. Finding that there was a genuine issue of fact with respect to whether an agent of QBE had knowledge of the non-disclosed information, the court denied Morales' motion. The court then denied QBE's motion on the same basis.

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