Committee On Marine Insurance and General Average
NEWSLETTER

FALL 2018 | Committee Chair: Andrew D. Kehagiaras, Long Beach, CA | Editor: Julia M. Moore, New York, NY

The following articles, case notes and comments are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of the Maritime Law Association of the United States or the Committee on Marine Insurance and General Average.

In this Issue:

Case summaries related to the following issues:

(a.) Policy Contract Construction
(b.) Practice and Procedure
(c.) Choice of Law – Maritime Contracts
(d.) Uberrimae Fidei Strictissimi/Utmost Good Faith

Editor's Comment:

First, a note on the Committee's change in leadership. At the close of the Spring meeting, Andrew Wilson turned over the "helm" of this Committee to the new Committee Chair, Andrew Kehagiaras. Andy Wilson led this Committee with intelligence, an indefatigable sense of humor and genuine enthusiasm for the work of this committee and the mission of the MLA. In addition to sharing the same first name as the out-going Chair, Andy Kehagiaras also brings those same qualities to this Committee and we are very fortunate to have his leadership going forward. Thanks to both of you for your commitment, time and talents.

~~RECENT CASES OF INTEREST~~

POLICY CONTRACT CONSTRUCTION

- **Warehouse to Warehouse, Storage, Loading and Unloading**

***Beauty Plus Trading Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*,**
No. A-3380-16T3, 2018 WL 3848386 (N.J. Super. Ct. App. Div. Aug. 14, 2018)

The interpretation of a Loading and Unloading clause in a marine cargo policy was at issue in this unreported decision from an intermediate appellate court in New Jersey. The insured received its goods at its warehouse on a Friday evening whereupon the container was backed into the warehouse unloading bay and left over the weekend. By the following Monday, the entire container had been stolen and the insured sought coverage under the Warehouse to Warehouse, Loading and Unloading, and Storage clauses. National Union denied the claim and litigation followed.

The court summarily held that the Warehouse to Warehouse clause, which extended coverage while the goods were in transit, was inapplicable because the goods had been delivered to the insured's warehouse. The Storage clause was similarly unavailing for coverage because it applied only to goods being stored in warehouses and the subject goods had been stored in a container. The focus of the opinion was on the Loading and Unloading

clause (the full text of which was quoted in the opinion). The court held that the plain language of the clause extended coverage for seventy-two hours after delivery, "but not later than" twenty-four hours after the insured had notice of delivery. Applying the plain meaning of the clause, the court found that the theft had occurred more than twenty-four hours after the insured had received notice of delivery and, therefore, there was no coverage. The court also rejected the insured's contention that the insuring period should be extended by the "next business day" rule, which often applies to extend a deadline to the next business day when a required action falls on a weekend. In rejecting application of the "next business day" rule, the court reasoned that the clause was unambiguous and the expiration of coverage did not require an affirmative act by the insured. Accordingly, there was no coverage.

- **"Contracting Out" of Marine Warranty of Seaworthiness and *Uberrimae Fidei***

***GEICO Marine Ins. Co. v. Shackleford*, 316 F. Supp. 3d 1365 (M.D. Fla. 2018)**

On March 13, 2016, GEICO issued a liability-only marine insurance policy for James Shackleford's vessel, Sea the World. On June 17, 2016, the vessel suffered damage while moored near Fort Lauderdale when a storm caused her to drag anchor and lodge against a seawall. As a result, she took on water and suffered damage. In response to Shackleford's claim, GEICO sought a declaratory judgment that the policy was void and did not cover the loss because Shackleford breached a navigational warranty in the policy, the absolute implied warranty of seaworthiness, and the maritime duty of *uberrimae fidei*. Shackleford countered that the parties "contracted-out" of the implied warranty and that the loss was covered.

The issue was whether the court would enforce the absolute implied warranty of seaworthiness in admiralty, or if it would apply Florida law governing warranties. Under Florida law, a breach of a warranty in a marine insurance policy does not void the policy unless the breach increased the hazard insured against. Florida law also requires the insurer to demonstrate a causal connection between the breach of warranty and the loss to avoid coverage. To resolve the question, the court had to determine whether the parties agreed to "contract-out" or "contract-around" the admiralty warranty by the terms and conditions of the GEICO Policy. Adhering to 11th Circuit law, the court stated that "parties are free to 'contract-out' or 'contract around' state or federal law with regard to an [marine] insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract." *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990). Although the implied warranty of seaworthiness may be "entrenched" in federal maritime jurisprudence, the court noted that a policy may alter the traditional implied warranty by its terms.

Therefore, if GEICO and Shackleford had "contracted out" of the absolute implied warranty of seaworthiness, and Florida law applied, then GEICO had to show that the Vessel's unseaworthiness increased the risk that she would take on water and suffer damage during a storm. The court found that GEICO and Shackleford "contracted out" of the absolute implied warranty of seaworthiness. GEICO was required, therefore, to show that Shackleford's conduct constituted a breach of the implied warranty of seaworthiness and that breach increased the risk. The court held that GEICO had failed to meet that burden.

GEICO also contended that Shackleford breached the doctrine of *uberrimae fidei* by failing to disclose the vessel's condition and value. *Uberrimae fidei* requires an insured to voluntarily and fully disclose all facts within his knowledge that are material to a calculation of the insurance risk. The court held that parties to a marine insurance policy may also "contract out" of *uberrimae fidei* so long as the contract is not void as to public policy or statute. *King*, 906 F.2d at 1542. And, when parties "contract for their own standard to show misrepresentation or omission," that language "controls the rights and obligations of the parties," and the doctrine of *uberrimae fidei* does not apply.

PRACTICE AND PROCEDURE

- **Invoking the Declaratory Judgment Act for Coverage Determination**

***Travelers Prop. Cas. Co. of Am. v. Chip Yachting Team, Inc.*, No. 18-CIV-60828-COHN/SELTZER, 2018 U.S. Dist. LEXIS 104911 (S.D. Fla. June 20, 2018)**

In this action, Travelers issued a policy to Chip Yachting Team ("Chip") covering "accidental direct physical loss of or damage to [the yacht]," subject to various terms, conditions, exclusions, and endorsements. The policy excluded coverage for "any loss or damage caused by or resulting from wear and tear, electrolysis, lack of maintenance, corrosion, deterioration, mold, or fiberglass blistering." It also contained a policy condition requiring Chip to "notify [Travelers] immediately after any loss, damage, accident, or expense that occurs and which may be covered or give rise to a claim." Finally, the policy contained a warranty that Chip "employ a professional captain for the [Vessel]. Such captain shall be employed full time and approved by [Travelers]." Following a loss to the insured yacht, Travelers filed a declaratory judgment action contending that several defenses barred coverage for damage to the yacht. Chip moved to dismiss, arguing that the Court should abstain from issuing a declaratory judgment, since the dispute would be more appropriately resolved as a breach of contract action in state court. The district court agreed.

The decision notes that the Supreme Court has long recognized that the Declaratory Judgment Act, 28 U.S.C. section *et seq.*, "is an enabling Act, which confers a discretion on courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (internal quotation marks omitted). In other words, the Declaratory Judgment Act "only gives federal courts competence to make a declaration of rights; it does not impose a duty to do so." *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005).

In *Ameritas*, the Eleventh Circuit propounded a non-exhaustive list of factors that a district court should consider in determining "whether to abstain from exercising jurisdiction over state-law claims in the face of parallel litigation in state courts." *Id.* at 1331. In applying the *Ameritas* factors, the district court concluded that the appropriate course of action was to abstain from exercising its jurisdiction. The district court was "heavily persuaded" by the third *Ameritas* factor, which looks to whether the federal action "would serve a useful purpose." The district court held that the declaratory judgment action in this case would not serve a useful purpose. In doing so, the district court differentiated Traveler's action against Chip from a coverage dispute based upon a liability policy in which the parties would benefit from an early determination of the carrier's duties to defend and indemnify the insured. Here, the court noted that the subject policy afforded coverage for property damage. The Court added that the state interest in resolving this dispute outweighed the federal interest, since state contract and insurance law principles governed.

CHOICE OF LAW

- **Maritime Contracts**

***Crescent Energy Servs., L.L.C. v. Carrizo Oil & Gas, Inc. (In re Crescent Energy Servs., L.L.C.)*, 896 F.3d 350 (5th Cir. 2018)**

The issue before the Fifth Circuit in this personal injury action was whether a contract between Crescent and Carrizo to plug and abandon three offshore oil wells was a maritime contract. If the contract was a maritime one, then federal law would apply and Louisiana's bar to indemnity provisions would be inapplicable. The appellant insurers were, thus, arguing for the application of state law—both Texas and Louisiana have anti-indemnity statutes that invalidate most indemnity contracts. Here, Fifth Circuit affirmed the district court's grant of summary judgment that the contract was maritime.

Earlier in 2018, the Fifth Circuit modified its test as to the finding of a maritime contract in the offshore oil and gas context. *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018). "We now only ask: (1) 'is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?' and (2) 'does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?'" *Id.* at 576. The circuit court stated: "We are no longer concerned about whether the worker was on a platform or vessel. The question is whether this contract concerned the drilling and production of oil and gas on navigable waters from a vessel. All parties acknowledge that the wells were located within the territorial inland waters of Louisiana and that the vessels involved in this contract were able to navigate to them." *Crescent*, 896 F.3d at 356-57. The court held that the contract satisfied the first prong of the *Doiron* test.

As to the second prong, whether the Crescent-Carrizo contract contemplated that a vessel would play a substantial role in the performance of the contract, *Doiron*'s guidance as to what "substantial" means is that if "work is performed in part on a vessel and in part on a platform or on land, we should consider not only time spent on the vessel but also the relative importance and value of the vessel-based work to completing the contract." *Doiron*, 879 F.3d at 576 n.47.

Applying *Doiron* the Fifth Circuit held that the contract anticipated the constant and substantial use of multiple vessels. The parties intended that the spud barge in question, the OB 808, "would be necessary as a work platform; that essential equipment would need to remain on that vessel, including a crane; that the most important component of the work, the wireline operation, would be substantially controlled from the barge; and that other incidental uses of the vessel would exist such as for crew quarters. This vessel and the other two vessels were expected to perform an important role, indeed, a substantial one, under the Crescent and Carrizo contract." *Crescent*, 896 F.3d at 361-62. Accordingly, the Court held that the contract was a maritime one and the Louisiana Oilfield Anti-Indemnity Act was inapplicable.

<u>UBERRIMAE FIDEI STRICTISSIMI/UTMOST GOOD FAITH</u>

***QBE Seguros v. Carlos A. Morales-Vazquez*, slip op. No. 15-2091 (D. P.R. Aug. 7, 2018).**

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. Motions for summary judgment were previously denied and the matter proceeded to a non-jury trial.

In a lengthy discussion, the court held that Morales failed to disclose or misrepresented facts in his application for insurance, that the non-disclosed or misrepresented facts were material, that the broker placing the policy was not the agent of QBE and, therefore, QBE did not have constructive knowledge of the misrepresentations, that Morales breached the policy's "warranty of truthfulness" and that QBE considered Morales' compliance with this warranty to be material to its acceptance of the risk and that QBE did not waive its right to void the

policy nor should it be estopped from asserting its coverage defenses. In sum, QBE was excused from covering the claimed loss and all of Morales' claims were dismissed.

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ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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