MLA Committee On Marine Insurance and General Average
NEWSLETTER

**Spring 2020| Committee Chair: Andrew D. Kehagiaras, Long Beach, CA | Editor: Julia M. Moore, New York, NY**



## In this Issue:

Case summaries related to the following issues:



## Editor's Comment:

This newsletter would not have been possible without the time, effort and sharp legal analysis of willing attorneys from the MLA's Young Lawyers Committee. I extend special thanks to Anna Wilson for her illustration and to Andrew Anastor, Esq., Claim Specialist, Multinational, Chubb North America for coordinating the work that resulted in this edition of the Newsletter. I also especially thank Guillermo Cancio, Esq. of Thomas Miller (Americas), Inc. for his help, and Keith W. Heard, Esq. for Lennon Murphy & Phillips LLC for his ongoing contributions.

## ~~RECENT CASES OF INTEREST~~

POLICY INTERPRETATION

***Ohio Casualty Insurance Company v. CNA / The Continental Insurance Company*, No. 2:18-cv-01385-SJO-JC, 2018 U.S. Dist. LEXIS 197249 (C.D. Cal. Nov. 6, 2018)**

French was a clothing company insured by both plaintiff and defendant. Prior to 2016, the defendant issued French a Marine Open Cargo policy number OC 246207 (the "Policy"). In January 2016, French ordered 32 cartons of silk fabric (the "Fabric") from a seller in China. On February 3, 2016, French received the Fabric at French's Los Angeles warehouse, where it was stored until it was to be shipped to Tavares Cutting & Fusing SVC ("Tavares") for cutting. On February 11, 2016, the Fabric was loaded onto French's truck at the entrance of the warehouse, for delivery to Tavares. After loading the Fabric onto the truck, the driver locked the truck's doors and entered the warehouse. Between February 11 and February 12, 2016, the truck was stolen from the entrance of the warehouse.

Defendant argued that any coverage under the Policy ceased when the Fabric arrived at French's warehouse on February 3, 2016. The Policy's main coverage is described in the "Warehouse to Warehouse" clause, which states that the insurance offered by defendant "continues while the goods are in transit and/or awaiting transit until: (i) delivered to final warehouse at the destination named in the policy, certification or declaration, or (ii) until the expiry of 15 days (or 30 days if the destination to which the goods are insured is outside the limits of the port), whichever shall first occur." The Court agreed with Defendant that there was no coverage for the theft.

The Court held that "warehouse to warehouse" provisions are common in marine insurance contracts, and the Ninth Circuit in an early case described such provisions to be "evidently intended to cover the goods after being discharged at port of destination while in the ordinary course of transit to the consignee's warehouse, or some other equivalent place of storage where the goods are held for the consignee." To determine whether coverage terminated under a warehouse to warehouse clause, the "critical question" is whether the insured "exercised dominion or control" over the goods. On that issue, the Court concluded:

> The facts establish that the Silk Fabric was delivered to Plaintiff's warehouse, *remained safely there for about a week, and was loaded onto a truck a week later* to be sent to another location to be cut into patterns. The theft occurred after the carrier delivered the goods to the Insured, and after the Insured took possession of and stored the Silk Fabric. The Insured was free to store, pack, cut, or use the fabrics in any way the Insured saw fit following delivery. Thus, the Insured exercised dominion and control over the fabric.

*Id.* at *13–*14 (citations to the record omitted).

As to the Policy's "Warehouse/Processing Coverage Endorsement," which provided coverage for "goods while stored inside warehouse(s) and only at the approved warehouse(s)," the Court held:

> Here, the contract clearly states that coverage extends to goods inside an approved warehouse. The insured goods were inside a truck that was placed outside of the warehouse at the time of the theft. When the words are given their plain and ordinary meanings, the Policy contemplates coverage only while the goods are stored inside an approved warehouse.

*Id.* at * 14 (emphasis in original).

Submitted by: Andrew Kehagiaras, Roberts & Kehagiaras, Long Beach, California

***By Design LLC v Samsung Fire & Mar. Ins. Co. Ltd. (U.S. Branch),* 105 N.Y.S.3d 401 (App. Div. 1st Dept 2019)**

When Macy's was unable to take delivery of a $1,500,000 shipment of clothes, plaintiff sent the goods to a third-party warehouse for a limited time. While warehoused, the goods were destroyed by a fire. Plaintiff filed suit seeking the application of its $5 million limit under the policy's "Consolidation, Deconsolidation & Containerization (CD&C) Clause" ("the Clause"). The clause provides coverage for "goods while on premises of warehousemen… for the purpose of consolidation, deconsolidation, containerization, decontainerization, distribution, redistribution… after discharge from overseas vessel…for a period not exceeding 45 days." The trial court held that the $5 million limit applied to the loss. Samsung appealed.

On appeal, Samsung argued the Clause limit only applied during "Consolidation", and not the other activities described in the Clause. The court reasoned Samsung's limited reading of the policy language is out of context with the unambiguous clause language. Furthermore, the court added that Samsung's argument would render the Clause language superfluous. Because the Clause unambiguously purports to apply to all activities listed, the court unanimously upheld the previous ruling that coverage existed for the warehouse fire, plus prejudgment and post-judgment interest and costs.

Submitted by: Kyle Brennan, Young Lawyers Committee

*UBERRIMAE FIDEI*

***Quintero v. Geico Marine Insurance Co*, 380 F. Supp. 3d. 1153 (S.D. Fla. 2019)**

The court ruled that Geico was not obligated to cover the loss under the doctrine of *uberrimae fidei*. Quintero had a policy with Geico for his recreational motor vessel, but his coverage lapsed when payment failed to renew his policy. Several weeks later, Quintero called back to reinstate his policy, assuring the representative that the vessel was in good condition and in his possession. Later that day, Quintero called the County Sheriff to report his vessel stolen. Video surveillance footage from his home showed that the vessel had been stolen in the wee morning hours before he called Geico to reinstate his insurance. Geico refused to cover the incident and rescinded the policy ab initio because Quintero had misrepresented the condition of the vessel and his possession of it.

The court's agreed that Quintero had violated the federal common law duty of *uberrimae fidei* by failing to disclose that the vessel had been stolen. Even an unintentional misrepresentation or omission violates this duty if the information is or ought to be within the knowledge of the policyholder. The court also rejected Quintero's argument that the parties had contracted out of *uberrimae fidei*. It interpreted a clause on fraud and concealment as mirroring the ordinary burden of *uberrimae fidei*, rather than contracting around it. Here, the language denied coverage if the insured "has omitted, concealed, misrepresented, sworn falsely, or committed fraud in reference to any material matter relating to this insurance before or after any loss." The court ruled that nothing in this clause reduced the burden on the plaintiff such as to forgive unintentional omissions.

Submitted by: Kyle Brennan, Young Lawyers Committee

ARBITRATION CLAUSE

***Gray v. Ace Am. Ins. Co.*, No. 8:18-cv-2912-T-02JSS, 2019 WL 2053618 (M.D. Fla. May 9, 2019)**

This case arises from the allision of an insured vessel with a submerged object and the vessel owner's resulting claim against its insurance policy. The insurer ("ACE") denied coverage on the grounds that the damage resulted not from an accident but from a hull defect. The vessel owner sued for a declaratory judgment and for breach of contract and ACE moved to compel arbitration based on a clause in the relevant insurance policy. The clause called for mandatory arbitration of any claim according to CPR Institute for Dispute Resolution Rules with the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1-16) preempting any contrary state law provision.

The vessel owner refused to arbitrate on the grounds that this clause was ambiguous and illusory and that the FAA did not preempt his claims under Florida state law. The court denied the owner's preemption argument because the FAA specifically applies to maritime transactions and a contract for marine insurance certainly fell within that scope. The court furthermore dismissed the owner's claim that the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) prohibits federal encroachment on state insurance regulation on the grounds that the owner could cite to no Florida statute superseding the FAA in this area. Finally, the court found that the arbitration clause at issue was not ambiguous as a matter of law and held that the owner could be bound by its terms. The court stayed all pending matters pending arbitration.

Submitted by: Kyle Brennan, Young Lawyers Committee

LIMITATION ACT

***In re United Marine Offshore LLC*, 2019 WL 2170642 (W.D. La. April 22, 2019), *report and recommendation adopted*, 2019 WL 2180683 (W.D. La. May 20, 2019)**

Keith Caywood, a deckhand employed by United Marine Offshore, LLC ("United Marine"), allegedly sustained injuries from an incident while working aboard United Marine's vessel, the M/V MISS JULIE, on April 26, 2017. On February 20, 2018, Caywood filed a state court action against United Marine, asserting claims based in negligence and the unseaworthiness of the vessel. On August 14, 2018, United Marine commenced a limitation action in federal court under the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30501 *et seq*. ("Limitation Act"). In response, Caywood filed a motion to dismiss the limitation action for untimeliness.

Section 30511 of the Limitation Act mandates that a limitation action under the statute be filed within six months after the claimant gives the owner written notice of a claim. This standard incorporates two inquiries: 1) whether the writing communicates the reasonable possibility of a claim; and 2) whether it communicates the reasonable possibility of damages in excess of the vessel's value. Mere knowledge by the owner that an incident occurred or of a claim for maintenance and cure is insufficient. Caywood's attorneys produced several letters that they argued put United Marine on notice of a claim, however, all of the letters either were in the context of Caywood's maintenance and cure claim or otherwise would not have notified United Marine to the possibility of a claim other than for maintenance and cure. United Marine argued that it first received notice of Caywood's other claims when it received service of the complaint. The court agreed, and because the limitation action was filed less than six months after the state court complaint, denied Caywood's motion to dismiss.

Submitted by: Alex R. D'Amico, Morrison Mahoney LLP, New York, New York.

SUBROGATION

***Lloyd's Syndicate 457 v. FloaTEC LLC*, 388 F. Supp. 3d 835 (S.D. Tex. 2019)**

In 2014, Chevron contracted to build an oil-drilling platform in the Gulf of Mexico as part of its "Bigfoot Project." The project design included sixteen steel tethers, or "tendons," to secure the platform to the seabed. Chevron obtained an Offshore Construction Risk Policy (the "Policy") to insure against "all risks" of physical damage or loss to the Bigfoot Project. The Policy spread the risk across a group of underwriters (the "Underwriters"). The Policy required Chevron to hire a marine warranty surveyor to review and approve major marine operations for the project. Chevron chose American Global Maritime ("American Global"), and the parties entered into a service contract (the "Contract"). Under the Contract, American Global agreed to indemnify Chevron for up to $5 million of "damage or loss" arising out of the Contract and to procure a commercial general liability policy naming Chevron as an additional insured and serving as primary insurance for all insureds and additional insureds. American Global obtained a commercial general liability policy with a $2 million limit, naming Chevron an additional insured for whom coverage was primary and non-contributory. Additionally, American Global was named an "Other Assured" under the Policy and the Underwriters waived their subrogation rights against Chevron and the Other Assureds.

On May 16, 2015, American Global issued a certificate of approval relating to the installation of the tendons. Shortly thereafter, the tendon installation failed. The Underwriters paid Chevron about a $500 million loss and sued American Global for negligence. American Global moved for summary judgment. The court rejected the Underwriters' argument that the insurance and indemnity provisions in the Contract served as a waiver by American Global of its right to coverage under the Policy as an Other Assured. Once American Global's liability

was capped at $5 million and its limits under the commercial general liability policy were exhausted, it was entitled to coverage under the Policy.

Notwithstanding the waiver of their subrogation rights, the Underwriters argued that they had a valid negligence claim against American Global because they sought reimbursement rather than subrogation. Indeed, the court noted case law supporting the premise that in certain circumstances an insurer may seek reimbursement from its insured, such as for recovered property or in the case of an overpayment for losses, even where subrogation is forbidden. However, the court rejected the Underwriters' reimbursement claim seeking to recoup insurance benefits paid to American Global pursuant to the Policy. The court ruled that the Underwriters' claim against American Global was barred for violating the principle that an insurer may not sue an insured to recover payment for the very risk that the insurer promised to insure.

The vessel owner refused to arbitrate on the grounds that this clause was ambiguous and illusory and that the FAA did not preempt his claims under Florida state law. The court denied the owner's preemption argument because the FAA specifically applies to maritime transactions and a contract for marine insurance certainly fell within that scope. The court furthermore dismissed the owner's claim that the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) prohibits federal encroachment on state insurance regulation on the grounds that the owner could cite to no Florida statute superseding the FAA in this area. Finally, the court found that the arbitration clause at issue was not ambiguous as a matter of law and held that the owner could be bound by its terms. The court stayed all pending matters pending arbitration.

Submitted by: Alex R. D'Amico, Morrison Mahoney LLP, New York, New York.

UNSEAWORTHINESS

***Kol B'Seder, Inc v. Certain Underwriters of Lloyd's of London*, 766 F. App'x. 795 (11th Cir. 2019)**

Plaintiff brought his yacht for routine repairs under its own power on a Friday. The boatyard was not able to haul the vessel out of the water immediately and left it dockside over the weekend. On Monday, boatyard employees discovered that the yacht had taken on water and partially submerged over the weekend. The vessel had not received bottom maintenance in over three years and evidence suggested that it suffered an accidental grounding during that time. The owner refused to pay the boatyard for restoration and storage costs it incurred trying to salvage the vessel.

Upon learning of the submersion, the yacht owner brought a claim against its insurer. The insurance policy provided coverage for accidents, but excluded "wear and tear, gradual deterioration, osmosis, wet or dry rot, corrosion," "defects in design," and "[a]ny claims caused by or arising out of … lack of repair of the vessel caused by the lack of reasonable care and due diligence in the …. maintenance of the vessel." The insurer denied coverage based on surveyor's report that found that the submersion was most likely caused by a design defect in the hull precipitated by normal wear and tear and a lack of maintenance by the yacht owner. The yacht owner sued its insurer for breach of contract and sued the boatyard on other grounds. The district court granted summary judgment for both the insurer and the boatyard (on all claims against it by the yacht owner and on its counterclaim) and the yacht owner appealed.

The Eleventh Circuit Court of Appeals affirmed *per curiam* the grant of summary judgment in favor of the insurer on the grounds that the yacht owner had put forth no evidence tending to show that a potential grounding caused or contributed to damage the insurer was allegedly obligated to cover. The surveyor's report – the substance of which the yacht owner did not rebut – showed "a plethora of reasons" as to the cause of the

submersion, all of which suggested that timely investigation and repairs on the part of the yacht owner could have prevented the submersion. The only evidence offered by the yacht owner was that a grounding occurred at some point before the submersion, not that the grounding had any causal relation to the submersion. The appeals court noted in dicta that the exclusions in the insurer's policy would also have barred any recovery by the owner.

Submitted by: Kyle Brennan, Young Lawyers Committee

LIMITATION OF LIABILITY

***In re Harten*, No. 19-cv-454 (NG)(SMG), 2019 WL 2358959 (E.D.N.Y. June 4, 2019)**

Petitioners filed for exoneration from or limitation of liability for claims relating to a recreational boating collision that occurred near Great Kills Harbor, off Staten Island. Respondents moved to dismiss the limitation action as untimely or, alternatively, for failing to comply with the pleading standards set forth at Rule F(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Petitions for exoneration from or limitation of liability under 46 U.S.C. § 30511(a) must be filed within six months of receiving written notice of claim. Respondents submitted copies of letters sent to petitioners on July 10, 2018, notifying them that one respondent intended to pursue a personal injury claim relating to the boating accident. The instant petition for exoneration or limitation was filed on January 23, 2019. The court denied respondents' motion as to untimeliness, finding that the July 10 letters, which provided no detail and did not reference any potential claim for damage to the respondents' vessel or injuries to the second respondent, did not put petitioners on notice of the "reasonable possibility" that claims against them might exceed the value of the vessel, as required to trigger the six-month filing period.

The court found for respondents on the alternative basis of inadequate pleading, and dismissed the complaint for failure to state a claim. The court found petitioners' complaint adequately detailed as to the location of the accident ("on the Raritan Bay, in the vicinity of Great Kills Harbor"), and as to the nature of respondents' claims against the vessel. However, the complaint failed to "set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited," as required by Supp. Rule F(2). The complaint did not provide any details regarding the collision, and contained a purely conclusory recitation of the limitation standard, without supporting facts or details. The complaint did not specify the date and place of the voyage's termination, nor the present location or possession of the vessel. Although Petitioners argued that many of the requirements of Supp. Rule F(2) "relate to commercial shipping and thus are not relevant in a pleasure craft Limitation Action," they did not provide support for this assertion, nor specify which provisions they believe to be inapplicable to their case. The complaint was dismissed with leave to amend.

Submitted by: Rebecca Pskowski, Young Lawyers Committee

OTHER INSURANCE CLAUSES

***In re TK Boat Rentals, LLC*, 411 F. Supp. 3d 351 (E.D. La. Aug. 7, 2019)**

This consolidated action arose out of a collision on the lower Mississippi River. Charter operator Extreme Fishing, LLC hired charter captain Andre Boudreau to operate Extreme Fishing's vessel, M/V KINGFISH. The day before a scheduled fishing charter, KINGFISH inexplicably lost her propeller and was rendered inoperable.

At Extreme Fishing's behest, Boudreau secured the use of the M/V SUPER STRIKE, owned by Chase St. Clair, and Extreme Fishing bareboat chartered that vessel for the scheduled trip. With charter passengers onboard, Boudreau was navigating SUPER STRIKE in restricted visibility when the vessel collided with the M/V MISS IDA. Allegedly, four of Boudreau's passengers sustained serious injuries. Both vessel owners filed for limitation of liability, and those actions were consolidated with the passengers' claims for damages before District Judge Barry W. Ashe. Significant insurance coverage disputes amongst the various SUPER STRIKE interests followed. On the day of the accident, Extreme Fishing carried an Allianz Global Corporate and Specialty Marine Insurance Company (Allianz) policy on KINGFISH, which included a provision for additional coverage of a "temporary substitute watercraft," in the circumstance of KINGFISH's inoperability. St. Clair carried a GEICO Marine Insurance Co. (Geico) policy on SUPER STRIKE, which included a provision for coverage of bareboat charterers operating the vessel. Both policies included an "other insurance" clause, which provided that, if other insurance existed for a covered loss, the policy would be considered excess insurance only. Geico and Allianz cross-claimed for summary judgment on the question of coverage, each asserting that coverage existed under the other insurer's policy, and the other insurer was the *primary* insurer of SUPER STRIKE. Additionally, Extreme Fishing moved for summary judgment on its right to limitation of liability.

The court denied Geico's motion for summary judgment on the question of Allianz coverage, citing genuine factual disputes as to whether SUPER STRIKE met the policy definition of a substitute vessel. These factual disputes included questions as to whether KINGFISH's inoperability was caused by a covered loss and whether SUPER STRIKE was sufficiently similar to KINGFISH. The court granted Allianz's motion for a finding of Geico coverage, in part, finding that the Geico policy did cover Extreme Fishing's charter of SUPER STRIKE, and affirming Allianz's standing to assert this claim, as the assignee of Extreme Fishing's rights. As to the identity of the primary insurer, the court held that the Geico and the Allianz policies contained conflicting "other insurance" clauses which, read together, left operator Boudreau without primary coverage, and were therefore mutually repugnant and ineffective under Louisiana law. The court would, therefore, treat Geico and Allianz as co-primary insurers, responsible for their pro rata share of loss. The court denied Extreme Fishing's motion for summary judgment on its right to limitation of liability as premature, where the record contained conflicting and incomplete information regarding the causes of the collision.

Submitted by: Rebecca Pskowski, Young Lawyers Committee

CONTRACTUAL WARRANTIES

***Clark v. The Travelers Companies, Inc.*, No. 2:16-cv-02503 (ADS)(SIL), 2020 WL 473616 (E.D.N.Y. Jan. 29, 2020)**

Plaintiff, the owner of a 36-foot boat, sued the defendant insurance company "for breach of contract and violation of N.Y. Ins. Law § 2601, stemming from the Defendant's denial of his claim for insurance funds to cover damages to his yacht under a marine insurance policy." The boat sank at its dock, a private slip connected to Plaintiff's residence, "because of the freezing, expansion and cracking of the plastic sea strainer housing on the raw water inlet side of the air conditioning system." These events occurred due to "Plaintiff's failure to winterize the air conditioning system with antifreeze." The insurer denied coverage.

In the lawsuit, the insurer moved "to bifurcate the Plaintiff's breach of contract claim from his statutory claim pursuant to Federal Rule of Civil Procedure 42; (2) for summary judgment pursuant to Rule 56; and (3) to preclude expert testimony by Roy Scott pursuant to Federal Rule of Evidence 702." The Court denied the motion to preclude, granted the motion for summary judgment, and denied the motion to bifurcate as moot.

Submitted by: Keith Heard. Thanks to Charles Murphy and Anne LeVasseur.

GENERAL AVERAGE: CURRENT ISSUES

In late 2019, an International Working Group of the Association Mondiale de Dispacheurs (International Association of Average Adjusters), comprised of members practicing in Argentina, Belgium, Bulgaria, Cyprus, Germany, India, Italy, New Zealand, Singapore, UK and USA, completed a review of current issues its members are confronting in the adjustment of general average.

The group identified recurring difficulties in the following areas:

- Pre adjustment
    - Determining which version of York Antwerp Rules governs, when different versions are used for different shipments on the same vessel
    - Determining the appropriate currency for the adjustment
    - Whether, in cases of major sacrifice of cargo or bunkers, GA security should be taken from the ship
    - Delay on the part of cargo interests, with resultant degradation of perishable or time-sensitive cargo, in negotiating GA security wordings and forwarding terms and conditions
    - The necessity of a GA bond in addition to a guarantee
    - The handling of consolidated cargo / LCL containers in respect of security
    - The use of interim / bridging guarantees (to be given by charterers or freight forwarders to enable onforwarding of cargo to destination before single parties have provided security)
    - Cargo's reluctance to provide security in advance of arrival at destination
    - Abandonment of cargo to avoid general average formalities

- During adjustment
    - Obtaining information relevant to damaged cargo: surveying, refurbishing/repair, settlement of claims by cargo underwriters, and/or dealing with abandoned cargo takes time
    - Obtaining details of salvage paid by cargo interests, particularly in the case of differential settlements
    - Parties failing to communicate recoveries to the average adjusters

- Post adjustment
    - The use of solicitors and average agents to reduce the amounts paid by cargo
    - Inconsistent approach of average adjusters to making interim distributions of GA funds during major collections

Unfinished business at the CMI level is the drafting of uniform general average security documents, originally mooted during the 2016 YAR revision but the international subcommittee ran out of time. Jörn Groninger, a German lawyer who is a sworn average adjuster in Bremen, is current chair of the CMI's standing committee on general average and has reactivated that work. To date, the CMI's standing committee on general average, on which I serve as the US representative, has received responses on this topic from 20 national MLAs to a questionnaire circulate in November.

The Committee will shortly turn its attention to the interest provision in YAR 2016, which is based on a formula incorporating LIBOR, since LIBOR will disappear next year.

Submitted by: Jonathan S. Spencer.

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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