MLA Committee On Marine Insurance and General Average
NEWSLETTER

Fall 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:

If you were looking for a respite from the 24 hours news cycle, Instagram doom-scrolling and COVID-19, then this Committee Newsletter is for you. I can promise that you will not see the words "pandemic," "quarantine," or "work-from-home" in its pages. Wishing you continued health and safety.

I would also like to thank the team at Hamilton Miller & Birthisel for their assistance with this Newsletter. It would not have been possible without them.

~~RECENT CASES OF INTEREST~~

PRACTICE AND PROCEDURE

- **MARINE INSURANCE COVERAGE ACTION NOT REMOVABLE**

***Southeastern Dock & Platform, LLC v. Atlantic Specialty Insurance Company,* slip op. 9:20-1204 (D.S.C. Aug. 31, 2020)**

Plaintiffs filed suit in state court asserting causes of action for failure to procure coverage and alleged mishandling of a claim for damage to Plaintiff's barge and excavator which sank in 2018. Defendants removed the action to federal court contending that the revision of the federal statute governing removal rendered claims arising under the general maritime law removable. Defendants relied on a Seventh Circuit decision in *Lu Junhong v. Boeing Co.,* 792 F.3d 805 (7th Cir. 2015) in support of their position. The District Court, however, rejected that view noting that the federal courts in South Carolina and the Fourth Circuit previously adopted the majority approach from other jurisdictions which held that the 2011 amendment to the removal statute did not

allow maritime claims to be removed without an independent basis for federal jurisdiction. Commenting that the state courts had concurrent jurisdiction and were competent to adjudicate *in personam* maritime claims, the matter was remanded.

INSURED BEARS BURDEN OF PROOF OF FORTUITOUS LOSS, with apologies to Lionel Ritchie

***Chartis Property Casualty Company v. Inganmort*, __F.3d __ (3d Cir. 2020)**

Defendants John and Joan Inganamort purchased an all risk policy from Chartis to cover their 65 foot fishing vessel THREE TIMES A LADY which was docked at their part-time residence in Florida. In 2011, while the Inganamorts were at home in New Jersey, the LADY came to the end of her rainbow when she partially sank in calm waters at the dock. A subsequent investigation revealed that there had been clear signs of water incursion, lack of power to operate the bilge pumps and a state of disrepair. Chartis filed a declaratory judgment action seeking to deny cover. In response, defendants argued that the loss was fortuitous. The issue before the court was who bore the burden of proving a fortuitous loss.

The appeals court noted that the First, Second, Fifth and Eleventh Circuits have all held that, for marine insurance policies, the insured bears the burden of proof that the loss was fortuitous. The Inganamorts argued that they were not required to prove fortuity and, even if they did, a loss resulting from negligent behavior or negligent failure to maintain the vessel qualified. The Third Circuit disagreed stating that the defendants' position as to the burden of proof was "against the weight of authority." The Court also noted that while losses resulting from negligent behavior can be considered fortuitous, losses caused by wear and tear typically could not. In a footnote, the Court questioned defendants' suggestion that negligently allowing a vessel to fall into disrepair should be considered fortuitous since it would convert an all-risk policy into a general maintenance contract leaving the insurer liable for all maintenance costs except those which were expressly excluded. Apparently, the point was something that the court felt it must say out loud…….

POLICY CONTRACT CONSTRUCTION

- **UNILATERAL CHANGE TO POLICY VOID, CITING STATE LAW**

***Geico Marine Insurance Company v. Monette,* slip op. 5:19-cv-44 (ED KY 2020)**

Plaintiff Geico issued a marine insurance policy covering defendant's monohull sailboat. Following a claim submitted by defendant for water damage to the sailboat, Geico investigated and a surveyor reported that the sailboat was in poor condition, the damage was due to deterioration, and the vessel was over-valued at $90,000.00. Geico then issued an endorsement amending the cruising limits of the vessel to "Port Risk Ashore." The endorsement clarified that "this restriction provides no coverage for navigation, and coverage will only apply to the insured vessel while the boat is out of the water." Subsequent to receiving the endorsement, Monette's vessel remained in the water where it was damaged by Hurricane Michael and declared a constructive total loss.

In the declaratory judgment action that followed, Geico contended that the loss was precluded by Monette's failure to comply with the port risk only endorsement. However, the court found that the endorsement was void even though Monette admitted receiving it. Relying on state law, the court found that there had been no mutual assent to the change in policy terms and Geico's motion for judgment on the pleadings was denied. The court also denied Monette's motion for judgment finding that there were questions of fact as to whether Monette had

failed to maintain the vessel in seaworthy condition and had made misrepresentations in the application for insurance. The court found there were questions of fact on both points which were to be decided by the jury.

- **LATE NOTICE VOIDS COVER**

New York Marine & General Insurance Company v. Travelers Property Casualty Company of America, slip op. 19 CV 1728 (S.D.N.Y. Sept. 9, 2020)

In this case, both plaintiff NYMGIC and defendant Travelers issued policies of insurance that covered, to some degree, a maritime personal injury claim and suit filed against their mutual insured, D'Onofrio General Contractors Corp. (D'Onofrio"). The injury was allegedly sustained aboard a barge owned by D'Onofrio which was scheduled as a covered vessel under the ocean marine policy issued by Travelers. Plaintiff NYMGIC contended that Travelers must provide coverage and a defense to D'Onofrio and that it must assume all of the costs incurred by NYMGIC in defending D'Onofrio together with future legal costs and any settlement or judgment. Travelers contended that the incident did not occur on the barge and that it had no cover obligations as D'Onofrio had failed to provide it with formal notice of the incident and suit in a timely manner as required by the policy. There was no dispute that D'Onofrio never provided notice to Travelers nor requested a defense. Notice to Travelers was first given by NYMGIC almost 2 years after the injury and 7 months after the suit was filed.

As a threshold matter, the court had to determine whether New York Insurance Law §3420 applied to the dispute. The statute provides that late notice to the insurer does not invalidate a claim unless the insurer is prejudiced. Since the statute does not apply to insurance issued in connection with "ocean going vessels," the court had to determine whether the barge at issue was an ocean going vessel. After noting a "paucity" of research defining the term "ocean going vessel" the court based its analysis on the Navigation Warranty in the policy which limited the barge to coastal and in-land waters. Ultimately, the court determined that the use of the term "coastal" implied that the barge was authorized to navigate in the Atlantic Ocean, making it an "ocean going vessel" which was not subject to the statute.

The court then addressed whether the notice to Travelers was sufficient and timely as required and found that it was neither. The notice was insufficient because D'Onofrio never provided notice to its insurer – Travelers received notice from NYMGIC - and it was deemed untimely because the two year delay was unreasonable as a matter of law. Traveler's motion for summary judgment was granted.

ADMIRALTY JURISDICTION

- **COURT DECLINES ADMIRALTY SUBJECT MATTER JURISDICTION**

Great Lakes Insurance SE v. American Steamship Owners Mutual Protection and Indemnity Association Inc., et al, **slip op. No. 19-CV-10656 (S.D.N.Y. Aug. 6, 2020)**

Plaintiff Great Lakes Insurance ("Great Lakes") filed an action against the American Club and one of its Members/vessel owners George and Efstathios Gourdomichalis ("Gourdomichalis") asserting tort claims based upon an alleged conspiracy to wrongfully abandon the vessel M/V/ ADAMASTOS in Brazil and to terminate her insurance cover with the American Club in order to avoid paying a large cargo claim following the vessel's grounding in Brazil. The grounding, abandonment and related cargo claims resulted in an $18M settlement payment by Great Lakes for which it sought recovery. Great Lakes filed suit in federal court and defendants sought to dismiss the claim for lack of subject matter (admiralty) jurisdiction.

The court applied the two-part test set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527 (1995): first, whether the alleged tort meets the location test in that the incident occurred on navigable waters or was caused by a vessel on navigable waters; and second, whether the general character of the activity giving rise to the incident bears a substantial relationship to traditional maritime activity. Ultimately, the court determined that the suit arose out of torts that were land-based (conspiracy). With regard to the second prong, the court found that while the incident was best described as an abandonment of a detained vessel on navigable waters with a subsequent termination of the vessel's insurance coverage, the court could not agree that such an incident had a potentially disruptive impact on maritime commerce as required by *Grubart*. Therefore, the court concluded that it did not have admiralty jurisdiction over the matter and the action was dismissed for lack of subject matter jurisdiction.

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

Julia M. Moore, Esq.
Thomas Miller (Americas) Inc.
Harborside 5
185 Hudson Street, Suite 2700
Jersey City, New Jersey 07311
Phone: (201) 557-7300
Direct Dial: (201) 557-7433
E-mail: Julia.Moore@thomasmiller.com