

New Ninth Circuit Case Re: *Uberrimae Fidei*

On March 20, 2008, the Ninth Circuit Court of Appeals published a decision in a maritime insurance case that should interest marine insurance carriers, vessel owners and their counsel. The case is called *New Hampshire Ins. Co. v. C'Est Moi, Inc.*, 2008 WL 732487 (9th Cir. March 20, 2008) (only Westlaw citation currently available), and it involves the longstanding marine insurance doctrine of *uberrimae fidei* (also known as the "duty of utmost good faith"). This doctrine imposes a duty of "utmost good faith" on an applicant for a marine insurance policy (the vessel owner) so that he or she is bound to reveal every fact within their knowledge that is material to the risk. *Cigna Prop. & Casualty Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 420 (9th Cir. 1998). If an insured vessel owner fails to do so, the insurer may rescind the policy, even if the material misrepresentation was not intentional. *Id.*

The Ninth Circuit Court of Appeals ruled, in the recent *New Hampshire Ins. Co.* case, that the duty of utmost good faith may be excluded from a marine insurance contract only by very clear language in the policy that unequivocally discloses a mutual intent to supersede the insured's common law obligation. Noting that its decision is inconsistent with the Eleventh Circuit's decision in *King v. Allstate Insurance Co.*, 906 F.2d 1537 (11th Cir. 1990), the Justices sitting on the Ninth Circuit Court of Appeals suggested that the Eleventh Circuit reconsider this issue.

In the *New Hampshire Ins. Co.* case, a yacht owner cancelled his first marine insurance policy after his yacht was heavily damaged in a fire. The owner restored the yacht and, nine years after the first policy was cancelled, the yacht was insured with another marine insurer. The yacht sank at the dock several years later, and the owner submitted a claim to its carrier, New Hampshire Insurance Co. ("New Hampshire"). It was then that New Hampshire discovered that the owner had made several material misrepresentations in the insurance application. Specifically, the yacht owner failed to disclose the actual purchase price of the yacht, and substituted the purchase price with the significantly higher cost of the restoration. The vessel owner did not disclose that it had made this substitution and the court held that this was a material misrepresentation in violation of the owner's duty of utmost good faith.

In its insurance application with New Hampshire, the yacht owner stated that its "present marine insurer" was the carrier that insured the vessel nine years prior, at the time of the yacht's fire. The vessel owner argued that it had made this mistake because the application forms were confusing. The court stated that this may indicate that the vessel owner's misrepresentation was not intentional, but it held that the misrepresentation was still "material." In so ruling, the court held that New Hampshire was under the impression that it was taking on a risk that another insurance company had been insuring against, which would have led New Hampshire to believe that the yacht was a good candidate for insurance.

The vessel owner argued that the New Hampshire insurance policy, in its "General Conditions and Exclusions," at paragraph 10, superseded the vessel owner's *uberrimae fidei* obligation by substituting a different, and lower standard. Paragraph 10 stated: "Any relevant

coverage(s) shall be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, or your insurance application, before or after a loss.” When New Hampshire Insurance Company sought rescission of the insurance policy, the vessel owner argued that paragraph 10 allowed rescission only for a material misrepresentation that was made intentionally.

The court held that the misrepresentations made by the yacht owner to New Hampshire were “material,” and that the vessel owner violated the duty of utmost good faith. In its response to the yacht owner’s argument that paragraph 10 superceded the doctrine of *uberrimae fidei*, the court stated that:

If this were possible at all, it would certainly require very clear policy language, unequivocally disclosing a mutual intent to supercede the insured’s common law obligation.

Further, the court noted that paragraph 10 of the New Hampshire policy did not mention *uberrimae fidei*, the duty of utmost good faith, and “it doesn’t purport to supersede other rights and responsibilities that the parties may have vis-avis each other by operation of law.” In other words, the doctrine of *uberrimae fidei* is still the law, and the only way this duty can be discharged is by clear and unequivocal language in the policy that reflects a mutual intent to apply a different standard.

We believe that this can prove to be an important decision for the marine insurance industry. This is because we know how useful the doctrine of “utmost good faith” can be to a marine insurer. In fact, we have relied on it in the past in successfully defending a marine insurer against a breach of contract and bad faith case. If you have any questions regarding this issue, or any other maritime matter, please do not hesitate to contact our maritime attorneys, Sterling Stires and Charles LiMandri.