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LONDON MARKET NEWS:
ADMIRALTY EDITION

Court Holds Any Contractual Waiver of *Uberrimae Fidei* Must be Explicit

Breaking Developments In London Market Law
03/31/08

On 20 March 2008, the U.S. Court of Appeals for the Ninth Circuit rendered its decision in *New Hampshire Ins. Co. v. C'Est Moi, Inc.*, addressing the maritime insurance doctrine of *Uberrimae Fidei*, or the duty of the assured and insurer of utmost good faith, for the second time in as many months. *Uberrimae Fidei* was first recognized in 1766 by Lord Mansfield and codified in the English Marine Insurance Act of 1906. It imposes a duty of "utmost good faith" on the insured to disclose all facts material to the risk. The United States Supreme Court incorporated the doctrine into American federal general maritime law more than 150 years ago. Later, in *Sun Mutual Ins. Co. v. Ocean Ins.*,107 U.S. 17 (Otto) 485, 510-511 (1882), the United States Supreme Court held:

> It is the duty of the assured to place the Underwriter in the same situation as himself; to give him the same means and opportunity of judging the value of the risks and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy.

The Ninth Circuit has rendered several opinions over the last 15 years allowing insurers to avoid insurance policies from inception on the basis that the assured breached its duty of utmost good faith. The Ninth Circuit recognizes that the doctrine of *Uberrimae Fidei* is a federal rule that applies under the federal general maritime law in all insurance policies. In *C'Est Moi*, the Court held that any agreement between insurer and insured to forego application of *Uberrimae Fidei* must be expressed in clear, unequivocal policy language.

The Assured's Misrepresentation and Breach of the Duty of Utmost Good Faith

In *C'Est Moi*, there was no real question that the insured had made material misrepresentations in its application for insurance. The insured misrepresented the vessel's purchase price, including instead the purported value of subsequent improvements made by the insured. The insured also misrepresented the status of the vessel's insurance, listing "Wash Int." as the insurer, when in fact the vessel was uninsured at the time of its application. However, the insured claimed that one of the policy's "General Conditions and Exclusions" excused it from its

Uberrimae Fidei obligations, imposing a lower standard and permitting rescission of the policy only where the misrepresentation was intentional. The provision at issue states:

> 10. CONCEALMENT OR MISREPRESENTATION
>
> 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.

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The Ninth Circuit did not resolve the question whether an insurer may contractually waive *Uberrimae Fidei*. Instead, the Court noted that such a waiver "would certainly require very clear policy language, unequivocally disclosing a mutual intent to supersede" the doctrine. The Court concluded that the clause quoted above "comes nowhere close" to the clarity sufficient to effect a waiver, as it did not mention *Uberrimae Fidei* or purport to displace any common law obligation. Because the misrepresentations in the insured's insurance policy application were material, the policy was held to be void.

How Do the *Uberimae Fidei* Cases Affect London Market Insurers?

The Ninth Circuit continues to hold that even an innocent non-disclosure that affects the risk to be undertaken, will provide a basis for Underwriters to avoid a policy. The Ninth Circuit's burgeoning *Uberrimae Fidei* jurisprudence has placed it in conflict with two other Circuit Courts. In the February 2008 decision *Inlet Fisheries*, the Ninth Circuit rejected a 1991 case from the Fifth Circuit that questioned the continued application of *Uberrimae Fidei* to marine insurance contracts.

In *C'Est Moi*, the Ninth Circuit disagreed with the Eleventh Circuit, which held in 1990 that a similar policy provision contractually waived the doctrine of *Uberrimae Fidei* and relieved the insured of its duty of utmost good faith. *C'Est Moi* also affirms that, in contrast with some state laws, an insured's misrepresentation need not be intentional, but only material, for the policy to be voided under *Uberrimae Fidei*. Thus, the Ninth Circuit has issued a series of favorable rulings for marine insurers.

* If you wish to discuss the *Uberrimae Fidei* doctrine or any other aspect of maritime law, please contact Katie Matison, Mark Beard, John Devlin, or Brewster Jamieson via e-mail or telephone, 011-503-778-2100, to arrange a mutually convenient time. Our maritime attorneys are experienced in handling marine and insurance issues, including the *Uberrimae Fidei* doctrine. In *Crowley Marine Services, Inc., v. Paul Hunt Syndicate, Underwriters at Lloyd's, London, et al.*, 1995 A.M.C. 2562, Lane Powell successfully defended London Market Insurers on the basis of *Uberrimae Fidei* and avoided the insurance polices at issue from inception on a multi-million dollar claim.

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more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

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