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No Secrets Allowed

By Marilyn Raia

It may not come as a surprise to some, but many people continue to believe it is acceptable, if not desirable, to withhold information when applying for marine insurance. It is neither. Indeed, withholding material information from a marine insurer will likely result in no coverage for a loss.

The Doctrine of *Uberrimae Fidei*

Uberrimae fidei is a Latin phrase meaning "the utmost of good faith." The doctrine of *uberrimae fidei* is unique to marine insurance. It means the parties to the marine insurance contract must deal with each other in the utmost of good faith. The doctrine was first recognized in 1766 in England, and later codified there in the Marine Insurance Act of 1906. The doctrine became part of American marine insurance law in 1828 in a United States Supreme Court case, Lanahan v. The Universal Insurance Company, 26 U.S. 170 (1828) which involved the prospective insured's failure to provide a brig's correct time of sailing, and failure to withdraw a request for insurance on the brig which became wrecked after the insurance was requested but before the policy was agreed to.

The doctrine of *uberrimae fidei* was based on morality and trust. In the early days of marine insurance in London, insurers had no practical means of obtaining information about the vessels they were asked to insure because the vessels were usually at sea, far away. The only available information came from the vessel owners themselves. Under those circumstances, the vessel owner was said to be morally obligated to disclose all information material to the risk it was asking the marine insurer to bear. And the marine insurer had the right to trust that the vessel owner was providing all of the material information so it could make an informed decision about whether to insure the vessel. Today, with modern technology, marine insurers have easier access to information about the vessels they are asked to insure. Nonetheless, the doctrine of *uberrimae fidei* remains an important part of marine insurance law.

What *Uberrimae Fidei* Requires

The doctrine of *uberrimae fidei* requires all facts that may have an effect on an insurer's decision to insure a risk to be disclosed. These are known as "material facts." As customarily stated, the doctrine requires the disclosure of all material facts even if the prospective insurer did not ask about them in the application. However, from a practical standpoint, if the application for marine insurance asks for particular information, that information will be presumed material. If the application does not ask for information that the insurer later contends was not disclosed, a court may find such information to have been immaterial, reasoning if the information was material, the insurer would have asked about it in the first instance. One court has said the marine insurance contract "is conceived in the utmost good faith and incubated in a legal environment which transcends the sharper practices of the world of commerce."

Non-Disclosure

Under federal maritime law, the insured's failure to disclose material information allows an insurer to void or rescind a marine insurance policy whether or not the failure to disclose was intentional, or merely negligent. State law varies on the consequences of a non-disclosure. Some states require the non-disclosure to have been of a material fact before rescission is permitted regardless of whether the non-disclosure was intentional. Other states do not allow

rescission unless the non-disclosure was intentional.

Adverse Consequences

The non-disclosure of material information about a risk to a marine insurer may result from a simple lack of knowledge about the obligations imposed by the doctrine of *uberrimae fidei*. Or it may have been by design. No matter what the cause, many courts have not hesitated to leave an insured without coverage for a loss after the non-disclosure of material information has been discovered.

The insureds in Certain Underwriters at Lloyds v. Inlet Fisheries Incorporated, 518 F.3d 645 (9th Cir. 2008), were fish-buying and processing businesses that owned several boats. They had stand-alone pollution insurance with the Water Quality Insurance Syndicate. WQIS sent a notice of cancellation of the policy because of the insureds' failure to: 1) conduct surveys of their vessels; and 2) pay the policy premiums. The request for surveys arose when one of the vessels sank with 3,000 gallons of diesel oil on board. The same vessel had been involved in a pollution incident one week before the sinking. The day after WQIS sent the notice of cancellation, another of Inlet's vessels was involved in an oil spill.

After receiving the notice of cancellation, but before its effective date, Inlet applied for pollution insurance from Lloyds. In response to a question about its pollution loss history, Inlet wrote "none." Inlet did not disclose, nor did the insurance application ask about, the condition of Inlet's vessels, Inlet's finances, or the fact of and reason for WQIS's cancellation of the prior policy.

After the Lloyd's policy became effective, another one of Inlet's vessels sank. Inlet made a claim for the total loss of that vessel. Lloyds investigated the sinking as well as Inlet generally. After discovering Inlet's failure to disclose the prior incidents involving its vessels, the poor condition of its vessels, and its pending bankruptcy, Lloyds filed a declaratory relief action asking the court to hold it had the right to void the policy under the doctrine of *uberrimae fidei*. Lloyds alleged Inlet did not disclose material information. Inlet filed a counterclaim arguing Lloyds did not ask for the information it claimed was withheld, and therefore could not deny coverage on that basis.

The district court held the pollution policy was "within the boundaries of marine insurance" to which the doctrine of *uberrimae fidei* applied. It also held the policy void because of Inlet's failure to disclose material information about the vessels to be insured. The Ninth Circuit affirmed. It rejected Inlet's argument that because employees of Lloyds' agent had hearsay information about Inlet's problems but issued a renewal policy anyway, such information was not material. It reasoned that if Lloyds had refused to renew the policy based on unsubstantiated rumors about Inlet, it would be exposed to potential liability itself for violation of the doctrine of *uberrimae fidei*.

Reliance Insurance Company v. McGrath, 671 F.Supp. 669 (N.D.Ca. 1987) is frequently relied on by courts deciding an action for policy rescission due to the insured's non-disclosure of material facts. In that case, the insured vessel struck a submerged object. The vessel owner did not believe much damage had been done to the vessel in the incident and took no steps to haul the vessel. When he renewed his insurance policy many months later, he did not disclose the striking of the submerged object. After the policy was renewed, the insured vessel sank. During the investigation of the sinking, the insured told the insurer's surveyor about having previously struck a submerged object. The surveyor determined the boat sank as a result of damage to

the chine caused by the submerged object and the vessel's unseaworthy condition. The court held the damage caused by the submerged object as well as the vessel's unseaworthiness were non-disclosed material facts resulting in a void policy, and leaving the insured without coverage for the loss of the vessel. The district court held the insured had a duty to disclose every material circumstance known to him and was "deemed to know every circumstance which in the ordinary course of business ought to be known to him."

In Pacific Queen Fisheries v. Symes, 307 F.2d 700 (9th Cir. 1962), when renewing his hull insurance, the insured failed to disclose to his surveyor and insurance broker an increase in the insured vessel's gasoline tank capacity from 3,000 to 8,000 gallons and a modification of the vessel's piping, valving, and internal method of dispensing gasoline. The vessel sank while tied up to the dock in Tacoma. The cause of the loss was determined to be a gasoline explosion. The insured made a claim for the constructive total loss of the vessel. The district court held there was no coverage because of the insured's failure to disclose the changes to the vessel.

The Ninth Circuit affirmed, deciding the case under English law, which the parties agreed applied. The insureds argued they did not have a duty to disclose the increased gasoline tank capacity or the alteration of the system for dispensing gasoline because the insurers should be presumed to have had notice of the changes. That is, they argued as a matter of law insurers are presumed to know matters of common knowledge, and matters which insurers should know. The Ninth Circuit disagreed. It found the method of handling gasoline on the insured vessel was unique and not within common knowledge. Relying on British law and US law, the Ninth Circuit held the insureds were under a duty to advise the interested parties about the alterations. The failure to disclose the alterations, which materially increased the risk, rendered the policy void.

Applicants for marine insurance have a duty to disclose to their insurers all material facts about the risk under the doctrine of *uberrimae fidei*. They should not fail to do so. The failure to disclose material facts may well leave an insured uninsured for a loss.

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