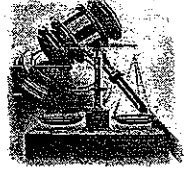




Mercante's Sea Trials



Sorry...Wrong Captain!

A good captain can be hard to come by. Qualified and quality-licensed mariners are in demand for all types of vessels including merchant ships, fishing vessels and even yachts.

Marine insurance underwriters like to know the credentials of the captain that will be in command before deciding whether or not to accept, for example, a commercial fishing vessel or yacht as an insured risk. Some marine insurers even require that the captain they approve (and whose name may be written into the policy) must be in charge when a loss occurs for insurance protection to apply. One fishing vessel owner found this out recently the hard way.

Vessel Sinks

A fishing vessel grounded and sank off Montauk, New York. The insurance policy included a commercial fishing vessel endorsement with a "captain warranty". This warranty provided that: "The Assured shall disclose the name(s) of all captain(s) which are operating the boat(s) as of the effective date of this policy and these captain(s) shall be named hereunder as follows: [Captain Jesse James]

In the event that the Assured hires additional or replacement full-time captains...underwriters will require that the Assured provide the Company with information concerning their experience, qualifications and general reputation within the industry as soon as possible. The Assured agrees to exercise due diligence in the hiring or replacing of captains".

Who Are You?

When the vessel sank, Captain Jesse James (name changed) was not onboard. A new captain was at the helm, one whose experience and qualifications had not been disclosed to the insurance company as required

by the "captain warranty". As a result, the insurer denied coverage for the loss and then filed an action in federal court seeking a declaration that this breach of warranty forfeited coverage. *Northern Assurance Company of America v. Adam Rathbum* (D. Conn July 2008).

As a rule, warranties in maritime insurance contracts must be strictly complied with. In many states, a breach of warranty will result in no coverage even if the breach had nothing to do with the loss. As stated by one federal appeals court . . . "in marine insurance, there is historically no requirement that the breach of warranty relate to the loss, so that any breach bars recovery even though a loss would have happened had the warranty been carried out to the letter." For this reason, boaters should be aware of and comply with all warranties stated in their marine insurance policy.

The rule of strict compliance with warranties in a marine insurance contract stems from the recognition that "it is peculiarly difficult for marine insurers to assess their risk, such that insurers must rely on the representations and warranties made by the insured regarding their vessels' condition and usage."

Policy Breaches

In the *Northern Assurance* case, there was no dispute that the vessel owner did not disclose any information about the new captain who was in charge of the vessel at the time of the accident. The new captain had been hired five months beforehand, so there was plenty of time to notify the underwriters. More than likely, the vessel owner simply didn't read the insurance contract and was unaware of the "captain warranty" or just forgot about it! Either way, it was a costly error for the vessel owner who lost his vessel

and then had no insurance to cover the loss.

The court agreed that the captain warranty was breached and in a written decision denied recovery to the vessel owner. The court also considered the change of captain a change of management of the vessel and cited another provision of the policy that voided coverage if the management of the vessel changed. This clause said "this insurance shall be void...if there be any change of management or charter of the vessel, without the previous consent in writing of this Company."

Even the bank that loaned money to the vessel owner was stung by the ruling. The bank named as "loss payee" in the policy was unable to recover its loan due to the breach of contract. This was because the loss payee's rights "were no better than those acquired under the policy by the insured".

Conclusion

The two breaches of contract terms resulted in no insurance coverage for the vessel owner's loss, although, bear in mind that one breach of a marine insurance policy term, condition or warranty is usually enough to break the chain of coverage. How to avoid this? Get a copy of your policy now and read it...good time of year for that. If you don't have a copy, and many boaters don't, call your broker and get it.

If you have a question, e-mail me and perhaps your inquiry will be worthy of a future *SEA TRIALS* article.

JAMES E. MERCANTE, admiralty partner with Rubin, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York. E-mail address: jmercante@rubinfiorella.com. The information in this article must not be construed as legal advice and laws may vary from jurisdiction to jurisdiction.