



## SEA TRIALS

by James Mercante

### MARINE INSURANCE: ARE YOU MY AGENT?



Boaters can take a lesson from children's book author, Dr. Seuss, and his famous title "Are you my Mother?" When obtaining insurance, discussing coverage terms or reporting a claim, it behooves a boater to ask "Are you my agent?"

A marine insurance policy can be obtained through a "broker", who represents you the boater, or through an "agent", who represents the insurance company and is, thereby, the insurer's agent.

This distinction is of utmost importance when verbal or written representations are made to the boater by the broker, or the agent, as to who will be bound by such representations. Procuring boat insurance can often include both a broker and an agent in the chain of communications. Few marine insurance companies deal directly with the boater, opting to have agents and brokers handle the policy negotiations, insurance quotes, coverage options, explanations of terms and premium handling. Indeed, it is not unusual for a boater not to have direct communications with the actual insurance company. I can't fathom the number of times I have asked a boater "Who insures your boat?", only to be met with a blank stare. Most often the answer provided is not an insurer at all, but is the name of a broker whom the boater

thinks is the insurer. Hint: the answer is on your insurance contract, typically on the "declarations page". Sometimes, even the policy jacket or cover is issued in the name of the broker or agent, and that's all the boater reads, and then files the contract away never to be seen again unless there is a claim.

In admiralty law, the distinction between broker and agent can make a big difference and is often litigated. An unwary boat owner found this out the hard way in losing coverage for a loss in a recent marine insurance dispute.

Roberts purchased a vessel for \$65,000 that was built in 1988. It was outfitted with two 600 horsepower engines that were put into the vessel brand new sometime after 1998. Roberts contacted Performance Marine Associates to procure insurance on the vessel, including hull and machinery insurance. Performance Marine was an independent broker. Performance Marine obtained a written quote from Jefferson Insurance Company that Performance then transmitted to Roberts on its own form. Performance Marine did not work for Jefferson Insurance and had never been granted authority to act on behalf of Jefferson or to bind the insurer in any respect.

Performance Marine's quote sheet contained some of the insurer's coverage terms including that "damage to the vessel's machinery (engine, props, shafts, drives, etc.) is covered only for vessels up to 10 years of age, and subject to the policy's exact wording and the hull & machinery deductible."

Roberts did what most boaters fail to do...he read all the terms on the quote sheet. He then questioned the broker about the meaning of the terms relating to damages to machinery and the broker assured Roberts that the engines would be covered even though the vessel was older than 10 years, since the engines were less than 10 years old. Roberts took this as gospel and agreed to purchase the policy. The policy contained the terms from the quote sheet in the form of an exclusion that read:

**EXCLUSIONS** - The following losses and consequences thereof are not covered by this policy: (5) With regard to vessels over 10 years of age, damage to electrical and/or mechanical equipment including but not limited to engine, shaft, propeller, rudder, skeg, and outdrive, unless caused by...."

Then, of course, an incident occurred. Roberts

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was operating his vessel when a plastic bag was picked up by the intake tubes at the stern. As a result, the 1998 twin engines suffered significant damage. Roberts filed a notice of claim with the insurer to recover the engine repair costs. Relying on the exclusion for machinery losses on vessels over 10 years old, the insurer denied coverage and initiated an admiralty lawsuit in federal court seeking a declaration from the court that it had no obligation to pay the claim. Roberts counter-claimed and argued that the policy should cover the engine damage because the engines were less than 10 years old, and therefore, it did not matter that the hull was older than that. In addition, Roberts insisted that the insurer should cover the claim because of the verbal representations made to him by Performance Marine.

The court analyzed the policy and found the exclusion terms to be "clear and unequivocal." The court stated that "a commonsense reading--indeed, any reading--of this language of the policy permits of but one conclusion, of one plain and everyday meaning. Damage to engines, no matter the age of the engines, is not covered with regard to vessels over 10 years of age." The court was

firm in its opinion adding that "under no circumstances can that policy language be read, as Roberts would read it, to exclude damage to engines if the engines are 10 years old or older.

The court was similarly unconvinced by Roberts "agency" argument. In this regard, Roberts argued that Performance Marine was the agent of the insurer, and therefore, the verbal representations made by Performance that the exclusion would not apply since the engines were less than 10 years old, was binding on Jefferson Insurance. The record showed that Performance Marine was an independent broker who serviced all of its customers in that capacity, and that it was never an agent acting for or on behalf of Jefferson Insurance. Indeed, Roberts offered no evidence that Performance Marine was an actual agent of the insurance company. No evidence was found to suggest that the conduct of the insurance company caused Roberts to reasonably believe that Performance had any authority to speak for or bind Jefferson Insurance to the interpretation of the exclusions clause that Roberts attributed to Performance Marine. Lastly, there was no direct communications whatsoever between Jefferson Insurance and Roberts, and thus the court found that there was no basis for Roberts' belief that

Performance Marine had the authority to bind the insurer in any respect.

Courts are frequently called upon to determine whether the broker is the agent of the insurer or the insured. As this case shows, the broker's agency status may have significant implications in a coverage dispute between the insured and its insurer and can affect such outcome determinative issues as notice, jurisdiction, terms, exclusions and the appropriate interpretation of the insurance contract. In trying to determine the agency status of a broker, it is important to know that the dispositive factor is not what he or she is called but what he or she does; in other words, whether its role in a particular transaction is consistent with an agency relationship with the insured or with the insurance company.

Sometimes it pays (or may pay the claim) if you know in advance the answer to the question "Are you my agent?"

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