



Mercante's Sea Trials



Penalty For Delay Of Claim

Marine insurance contracts on yachts and other pleasure craft contain terms requiring a claim to be filed with the insurance company in a timely manner. As one vessel owner recently learned, failure to comply can result in no insurance coverage.

Nationwide Mutual Fire Insurance Company ("Nationwide") issued a marine insurance contract to cover a 1998 Eliminator 25-foot powerboat. The Eliminator was damaged in an accident while underway on a lake. The vessel owner and insurer subsequently found themselves engaged in a dispute over the meaning of the "notice" provision in the policy. The provision in the Nationwide policy reads as follows:

Section I - Conditions

* * *

2. Your Duties after Loss. In case of loss, you must:

a) give notice to us or our agent and in case of theft also to the police as soon as possible.

Nationwide interpreted this provision to mean that the insured/vessel owner must notify the insurance company of any damage to the boat or other occurrence "as soon as possible" after the accident. But, the vessel owner read it differently - arguing that he was only obligated to give notice as soon as possible to the police in case of "theft", and that the provision was silent as to when notice was required in case of a "loss". Thus, the insured argued that the policy was ambiguous and should be construed in his favor and against the company (Nationwide) that drafted the terms. The dispute

wound up in court.

The Accident

The owner of the Eliminator was operating his boat on a lake when, according to him, a 4- to 5-foot rogue wave struck and launched the boat "probably 4 to 6 feet out of the water" ejecting him into the lake. When he got back on board, the owner noticed that the boat had suffered "stress cracks" in the cockpit fiberglass and he had to turn the ignition key several times before the engine would turn over. He made it back to his boat-house and hauled it out of the water on his boat lift. While he knew that some repair work would be required to fix the stress cracks and the engine damage, he thought the cost of repairs would be minimal. Therefore, the insured decided not to file a claim with Nationwide because he wanted to "keep his insurance premium from going up". The boat remained unrepaired and undisturbed on the boat lift for the next five months.

The owner then brought the boat to a marine service company to be winterized and there the boat stayed for nearly two years while the owner tried to save enough money to fix the problems himself. As it turned out, the boat required extensive repairs to the engine, stress cracks and a "softball-sized hole" in the hull. Thus, nearly three years elapsed after the rogue wave hit before the owner filed a claim with Nationwide seeking insurance coverage for the damage. Nationwide denied the claim due to breach of the notice provision. The owner countered with a lawsuit against Nationwide as-

serting causes of action including breach of contract, breach of the duty to settle a covered claim and breach of a fiduciary relationship. (*Digh v. Nationwide Mut. Fire Ins. Company*)

The Court Fight

Nationwide responded with a quick motion for summary judgment believing that the court easily could decide the coverage dispute because the claim had been filed so long after the incident occurred. The trial court accepted the insurer's argument and ruled in favor of Nationwide on summary judgment. The insured then appealed the decision to a higher court.

A marine insurance policy is like any contract between two parties. The appeals court noted that it must construe the maritime contract just as it is written and not attempt to rewrite it to make a new contract for the parties. The court was required to construe the terms of the policy according to the plain, ordinary and accepted meaning of the language used. An ambiguity in an insurance contract typically is construed against the company that drafted the policy terms. This applies only if the suggested alternative interpretation is fair and reasonable and not simply a warped reading of the policy. The court noted that as a general proposition, if no time for the performance of an obligation is agreed upon by the parties to a contract, the act must be performed

Continued on page 16

Continued from page 14

within a reasonable time.

Notice not Reasonable

When an insured has a claim against its insurance company, the policy's notice provision governs the timing of when the claim must be filed. However, even if the provision is ambiguous, notice must be given as soon as practicable. The insured cannot sit on a claim and do nothing since an insurance company has rights to investigate a claim and inordinate delay can impact its investigation.

Here, the Appellate Court first had to determine whether or not there had been an unreasonable delay in notifying the insurer. Since the accident happened nearly three years before the claim was filed with the insurance company, the Appellate Court found that it was beyond dispute that the delay was significant and unreasonable.

The next step for the Appellate Court was to determine whether or not the insured acted in good faith in delaying giving notice for so long. The court noted that the vessel owner conceded that he was aware of the loss on the same day it occurred and that he admitted the

only reason for delaying notice was to prevent his insurance premiums from increasing. As a result, the Appellate Court determined that even though the notice provision may have been capable of two different interpretations, the vessel owner was aware of the loss yet purposefully and knowingly delayed giving notice to Nationwide. Therefore, the vessel owner's delay was found not to be in good faith. The court ruled that the insurance company had no duty to cover the loss to the boat and affirmed the trial court's entry of summary judgment in its favor.

Conclusion

You have heard the phrase Timing is everything... and now you know it applies in marine insurance as well.

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.