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ADMIRALTY LAW

Expert Analysis

Good Faith Matters Utmost

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Uberrimae fidei—rhymes with obey! This matters in maritime law. The doctrine is one of the oldest and deeply entrenched of all maritime laws, yet so often it causes unwary mariners to run aground.

The Latin phrase translates to "utmost good faith". It requires an insured purchasing marine insurance to "disclose to the insurer all known circumstances that materially affect the risk being insured." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986). Failure to abide has dire consequences. The breach of this duty permits the insurer to void the entire marine policy "ab initio", another Latin phrase, meaning from the beginning!

Uberrimae fidei requires "the most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made." *Thebes Shipping v. Assicurazioni Ausonia SPA*, 599 F. Supp. 405, 427 (S.D.N.Y. 1984). The doctrine is implied in all maritime insurance contracts. The disclosure must typically be made on the insurance application, which is the document containing all pertinent information regarding the vessel to be insured, the person to be insured, and other information requested by the underwriter. If an insured omits information or makes a misrepresentation that is considered material (important), the insurer does not need to demonstrate that the insured acted intentionally in order to rescind the contract. The insurer only needs to prove that the representation of a fact was false and material.

Ancient History

The origins of uberrimae fidei can be traced back centuries, even before the existence of U.S. courts. It was for good reason because a marine underwriter was not in a position to know all material facts relative to a risk to be insured, especially in the transient world of maritime commerce. It was thus imperative that the insured provide full disclosure of all material information when binding marine insurance. See Thomas J. Schoenbaum, Admiralty and Maritime Law §19:14, at 460 (6th ed. 2018). "The historical origins of this duty 'can probably be traced to the early coffee-house days when the writing of insurance on ships and cargoes in far away ports would have been impossible without complete and utter candor as to all material aspects of the risk.'" Jeremy A. Herschaft, *Not Your Average Coffee Shop: Lloyd's of London—A Twenty-First-Century Primer on the History, Structure, and Future of the Backbone of Marine Insurance*, 29 Tul. Mar. L.J. 169, 180 (2005). "As early as 1766, Lord Mansfield recognized that insurance contracts impose a heightened duty of good faith to prevent a party from omitting or concealing facts that would induce the counterparty into a bargain,

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from his ignorance." Parliament later codified the doctrine of uberrimae fidei into the Marine Insurance Act of 1906. *QBE Seguros v. Morales-Vázquez*, 2021 U.S. App. LEXIS 1399 (1st Cir. Jan 19, 2021), citing *Carter v. Boehm* (1766) 97 Eng. Rep. 1162, 1164 (K.B.). "Such a requirement was rooted in practical wisdom, recognizing that an insurer often lacked the ability to verify the insured's representations before issuing a policy." *QBE Seguros*, 2021 U.S. App. LEXIS 1399 (1st Cir. Jan. 19, 2021).

The earliest U.S. maritime case referencing the doctrine of uberrimae fidei stems back to the early 1800s. In *M'Lanahan v. Universal Insurance Co*., 26 U.S. 170 (1828), a marine policy was requested for the wooden brig named CREOLE by a written letter. However, insurance was not effected until two months after the initial request, at which time it was suspected that the vessel had already been lost. The U.S. Supreme Court, Justice Story had notably referred to uberrimae fidei as an "enlightened moral policy", thereby cementing uberrimae fidei as a doctrine recognized in U.S. maritime law.

The United Kingdom, where uberrimae fidei was first launched, abolished the Marine Insurance Act in 2015, and no longer permits an insurer to outright cancel a policy for a potential nondisclosure without further development. However, this duty of utmost good faith doctrine remains steadfast in U.S. maritime law.

What's App?

An important question becomes what is considered "material" to a marine underwriter? Information will be considered material if "it might have a bearing on the risk to be assumed by the insurer." *HIH Marine Services v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000). As noted, a material misrepresentation or omission in the policy application is grounds for voiding the policy. *Royal Ins. Co. of Am. v. Harbor Shuttle*, 1999 U.S. Dist. LEXIS 23964 (E.D.N.Y. 1999).

For starters, information that is requested on an insurance application is deemed material as a matter of law. *Royal Ins. Co. of Am*., 1999 U.S. Dist. LEXIS 23964 (purchase price of vessel); *Griffith v. American National Fire Ins. Co.*, 1997 AMC 2745 (D. Del. 1997) (ownership of vessel).

The material non-disclosure does not need to be related to the loss. Courts apply the doctrine of uberrimae fidei in a variety of circumstances.

> The well entrenched admiralty doctrine of uberrimae fidei shows no signs of going out of style. Despite the fact that the doctrine was harpooned from the UK's marine insurance code, it remains steadfast on our shores.

A recent decision from the First Circuit voided coverage for a 40-foot yacht when an insured failed to disclose a prior grounding of another vessel. The insured also failed to identify on his application several vessels he had previously owned. When the insured yacht sustained significant fire damage, the insurer denied coverage citing breach of the duty of uberrimae fidei. The court held that "this case is a poster child for the continuing relevance of the doctrine … [the] underwriter was "pressed for time because [the insured] needed the insurance for that same day." To accommodate the insured, the underwriter moved rapidly; it delivered the requested coverage just 36 minutes after the broker submitted the insured's application. In other words, the stringent burden of disclosure allowed the insured to obtain marine insurance in a matter of minutes. Reaffirming the significance of the doctrine of uberriemae fidei, the First Circuit explained: "This practical wisdom still rings true when applied to marine insurance—an industry in which, for example, a policy may have to be issued in London, on a time-sensitive basis, for a vessel berthed halfway across the globe." *QBE Seguros v. Morales-Vazquez*, 2021 U.S. App. LEXIS 1399 (1st Cir. Jan 19, 2021). The court observed: "Although the availability of information has improved dramatically in recent times, a marine insurer and its insured do not have equal access to the information needed to make underwriting decisions and to set premiums … Thus, even though uberrimae fidei has been scuttled in other areas of insurance law, the peculiarities of marine insurance underscore the case for its continued desirability." Id. at 14.

Btesh v. Royal Insurance Co. of Liverpool, 49 F.2d 720 (2d Cir. 1931), applied the doctrine to void coverage when a shipper of silk and cotton material mislabeled the cargo as consisting of only cotton items. The certificate of insurance, however, correctly described the

cargo as containing both cotton and silk. The cargo was stolen en route, and the insurer declined coverage. The Second Circuit affirmed the ruling that the insured had failed to disclose the full risk of the shipment by improperly categorizing the goods.

In *Knight v U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), the insurance contract was void ab initio when the insured failed to disclose to the insurer that his prior marine policy was canceled for fraud. The insured procured artwork in a foreign country and insured it for an ocean voyage. The insurance was cancelled because the insurers received unsubstantiated information that a fraud was occurring. The insured then went ahead and insured the items with another insurer without disclosing the prior cancellation. As fate would have it, vessel sank, items lost, and insurance claim submitted. The district court voided the policy ab initio. The Second Circuit affirmed and held that under the doctrine of uberrimae fidei the insured was required to disclose the prior insurance cancellation, even if the allegations of prior fraud were unsubstantiated.

In *St. Paul Fire & Marine Ins. Co. v. Matrix Posh*, 507 Fed. Appx. 94 (2d Cir. 2013), the insured failed to disclose a loss that had occurred prior to inception of the policy, permitting the insurer to rescind the contract. The court explained that the doctrine of uberrimae fidei demands "that the parties to a marine insurance policy must accord each other the highest degree of good faith." This duty "requires an assured to disclose any information that materially affects the risk being insured, because the assured is more likely to be aware of such information." If the insured fails to make the required disclosures—i.e., any material information—the policy is void ab initio. The insured is required to communicate the information to the insurer before the policy is issued, so that the insurer can decide for itself at that time whether to accept the risk.

Most courts will require some proof that the marine insurer relied upon the misrepresentation. There is a school of thought that permitting rescission or avoidance without some showing of reliance would create a "moral hazard" by permitting insurers to accept premium for suspect risks and then avoiding coverage when a claim is made based on a misrepresentation.

For instance, in *Albany Ins. Co. v. Horak*, 1993 U.S. Dist. LEXIS 9500 (E.D.N.Y. 1993), an insured's policy was void ab initio for theft of a vessel when the insured failed to disclose in his application the purchase price, the condition of his vessel, and a significant prior loss. The prior owner had struck a submerged object and punctured a hole in the bottom of the vessel, causing water to enter. The vessel was repaired and then sold to the insured "*as is*" for $54,000. The insured then invested nearly $50,000 to restore the vessel and applied for insurance. The insurer issued a policy with a hull value of $350,000 after receiving a marine survey and application from the insured. In the subsequent theft claim dispute, the court voided the policy ab initio because the insured failed to disclose to the marine underwriter that he had paid only $57,000 for the boat and purchased it "*as is where is*" after an accident. The court held that a reasonable person in the insured's position would know that these particular facts "would have controlled the underwriter's decision" as to whether or not to accept the risk, as was made clear both by the underwriter's affidavit and by the fact that the matter was the subject of direct questions on the application form.

Steady as She Goes

The well entrenched admiralty doctrine of uberrimae fidei shows no signs of going out of style. Despite the fact that the doctrine was harpooned from the UK's marine insurance code, it remains steadfast on our shores. Thus, as this doctrine compels, it is better to be an open book when applying for marine insurance, because despite the well-entrenched phrase, it is not the "loose lips" that sink ships.

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