

FORT LAUDERDALE MARINER'S CLUB

Annual Seminar

October 30, 2002

**TO DENY COVERAGE OR NOT
DENY COVERAGE?: QUESTIONS
UNDERWRITERS MUST ASK WHEN
DECIDING TO ACCEPT A MARINE
CLAIM**

SPEAKER: KEITH S. BRAIS, ESQ.

Florida Bar Board Certified Admiralty & Maritime Lawyer

AUTHOR: KEITH S. BRAIS, ESQ.¹

BRAIS & ASSOCIATES, P.A.
100 N. Biscayne Blvd., Suite 800
MIAMI, FL 33130
Office: (305) 416-2901
Fax: (305) 416-2902

¹ Mr. Brais gratefully acknowledges the assistance of Russell Pfeifer whose diligent work resulted in this paper.

I. Introduction

The subject of this Article is the myriad of possible things insureds may do which would justify their claim's denial. It attempts to embrace virtually all of the circumstances in which coverage can or cannot be denied while clarifying confusion which will ultimately arise due to the lack of uniformity in the application of state and federal law. Though some of the language in marine insurance remains arcane, state regulation has greatly expanded the scope of marine insurance coverage. In addition, the deviating and often conflicting opinions of various courts illustrate the difficulties claims examiners face when deciding whether to deny coverage. Lastly, the paper tracks some of the more traditional and well-established principles underlying marine insurance while exploring some of the forthcoming issues underwriters are likely to encounter in this new era of increased recreational boating.

II. Fortuity Requirement

The concept of fortuity is a well-embodied principle of insurance law which has naturally lent itself to marine insurance contracts. A fortuitous event is described as an event which so far as the parties to the contract are aware, is dependent on chance, or more easily stated, a happening by chance or accident.¹ This requirement is implicit in both the traditional "named-perils" policies and the "all-risks" policies of frequent employ, and has the effect of excluding from coverage, losses which occur from inherent defects, ordinary wear and tear, and intentional misconduct.² The fortuity requirement is therefore an unwritten, judicially created and enforced doctrine which must be satisfied in order to recover based on "covered named-perils" and with equal application to all-risks policies notwithstanding the misnomer.³

A. Inherent Defects, Ordinary Wear and Tear, and Latent Defects

While case-law doesn't readily enumerate a set of inherent defects, they can be thought of as obvious defects readily discoverable by ordinary means along with defects occurring from wear and tear and, may become more clear when contrasted against latent defects. To restate, both all-risk and named-peril marine hull policies do not cover losses occurring from inherent defects or wear and tear.⁴ If such a condition is determined to be the proximate cause⁵ of the loss then an insurer may rightfully deny the claim.⁶ However, if the cause is determined to be the result of a latent defect, then the loss remains covered under the policy.

The distinction between a latent and an inherent defect may turn on an issue of fact resting properly for the trier of fact.⁷ Historically, the protection from latent defects arose out the need for additional insurance from such defects which were not covered by the traditional terms of named-perils policies.⁸ The new policies covering latent defects and operational negligence were referred to as Inchmaree clauses after the steamship damaged by her crew's negligence in allowing her boiler to explode.⁹ Early on, the courts in interpreting these policies imposed a greater burden on the insured to show that a latent defect was not from gradual deterioration, but from a defect in the material out of which the vessel was constructed; and in addition, the insured had the burden of showing that the latent defect was not discoverable.¹⁰ Thus, for example, where a houseboat sank while moored at its slip caused by a severely worm-eaten hull, the court upheld the insurer's denial of coverage holding that the damage was not caused by a latent defect, but from gradual deterioration which was not latent but plainly visible.¹¹

Subsequent cases have not held insureds to such a high burden and have relaxed the standard somewhat shifting the focus away from the defect necessarily being in the original material, and to whether the defect was discoverable upon reasonable inspection.¹² In fact, a Louisiana appellate court

in Walker v. Travelers Indemnity Company,¹³ adopted a more liberal definition of latent defect almost paraphrasing Black's Law Dictionary; "we deem a proper definition of latent defect to be a defect that is hidden or concealed from knowledge as well as from sight and which a reasonable customary inspection would not reveal."¹⁴

Accordingly, the Walker court held that a hole in the vessel's muffler which was partially concealed in its location in the engine room, causing the vessel to sink, was a latent defect within the meaning of the all-risk policy. The court reasoned that the hole in the muffler could not be discovered because of its location, and the record reflected that the insured "did all that prudence required to ascertain or discover any defect."¹⁵ If anyone was to be faulted for failure to discover the condition, then it would be the repairers who the day prior to the sinking inspected the vessel. Either way the court reasoned the all-risk policy's Inchmaree clause covered the loss; that is, the policy covered latent defects as defined by the court in addition to negligence on the part of employees of the insured.¹⁶

B. Intentional Misconduct, Defined and Distinguished from Negligence and Recklessness

1. Intentional Acts

Although a loss is not considered fortuitous if it results from the intentional misconduct of the insured, there is much debate over whether an insurer may deny a claim from which the loss resulted from negligence, recklessness or intentional misconduct on the part of the insured or a third-party acting on his behalf. Thus, the pivotal question becomes to what extent fault will prevent coverage under the application of the fortuity requirement.¹⁷ "Negligent and intentional conduct mark the endpoints of the spectrum: the former is fortuitous, the latter is not. Reckless conduct lies somewhere in between."¹⁸ Intent, recklessness and negligence are all defined by state law and may differ slightly

among the jurisdictions. However, it is safe to say that a person acts with intent where he or she contemplates any result, as not unlikely to follow from a deliberate act of his or her own, whether the result of the act was so desired.¹⁹ To illustrate, “an actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence.”²⁰

With this definition in mind, it becomes clear that an intentional act cannot be said to be fortuitous within the fortuity requirement of marine insurance. Thus, where an insured intentionally causes loss or damage to his vessel, the insurer may rightfully deny the claim.²¹ As easy and straightforward as this principle may seem, there is a caveat the insurer must be aware of. Under Florida law, the doctrine of the innocent co-insured provides that an innocent co-insured may recover under an insurance policy even where the loss was caused by another co-insured’s intentional acts unless the insurance policy at issues makes clear that the policy provides for joint coverage rather than several coverage.²²

2. Florida’s Doctrine of Innocent Co-Insured

In Assurance Generale De France v. Cathcart, Richard and Donna Cathcart, husband and wife, jointly owned one hundred percent of the stock of the F/V Lady Donna, which they had incorporated for ownership of the fishing vessel. While in the Gulf of Mexico the vessel sunk; Richard Cathcart and other crew members were indicted and later convicted of fraud and conspiracy to destroy the vessel with intent to injure its insurer. He was sentenced to 20 months incarceration and ordered to pay \$194,699 in restitution. After his conviction, Donna Cathcart filed a claim and moved for summary judgment against Assurance, which denied the claim on account that Richard Cathcart intentionally scuttled the vessel. Because Assurance offered no evidence of Mrs. Cathcart’s

complicity in the loss of the vessel, and the policy did not make clear that it provided joint coverage, the court granted Mrs. Cathcart's motion for summary judgment along with prejudgment interest against the insurer.²³ Thus, despite a criminal finding beyond a reasonable doubt that the boat had been intentionally sunk, the insurer was still liable for the loss to the innocent co-insured spouse.

3. Reckless Acts

Moving away from intentional acts, the line blurs even greater with respect to whether a loss is considered fortuitous. For example, recklessness is acting with a lesser degree of certainty than intent.²⁴ When juxtaposed between negligent and intentional acts, reckless acts are said to be acts done in disregard to a known risk of a loss, but without the knowledge of substantial certainty that such loss will occur.²⁵ Applying the fortuity requirement to such conduct, courts have consistently held that reckless conduct which results in loss is nonetheless fortuitous, and as a consequence, covered under marine insurance.²⁶ This is so because courts define fortuitous as a happening by chance or accident, and although recklessness involves a known risk, it does not rise to the state of mind consistent with intent, design, fraud, or knavery.²⁷ It follows then that if loss resulting from recklessness is considered fortuitous, negligence by implication is considered fortuitous.

4. Intentional, Reckless and Negligent Acts by a Third-Party

a. Barratry

One covered "peril," whether under a named-perils or all-risks policy, is that of barratry. Barratry can be defined as (1) an act committed by the master or mariners of a ship involving a deliberate and willful disobedience of the owner's instruction, (2) an act committed by the master or mariners of a ship for some unlawful, dishonest, or fraudulent purpose, contrary to their duty to the

owners, or (3) every violation of duty by the master or mariners arising from gross and culpable negligence contrary to their duty to the owner.²⁸ Hence, barratry covers both intentional and negligent acts committed by third-parties acting on behalf of the insured. But before discussing whether an insurer may deny coverage of a loss resulting from a barratrous act, it is imperative that both the admiralty attorney and insurer understand causation in maritime.

b. Causation in Admiralty

“Courts analyzing problems of marine insurance causation have, as a rule, applied strictly the doctrine of *causa proxima non remota spectatur* (the immediate not the remote cause is considered). That is to say, courts seeking to determine the cause of a vessel’s damage assign greater weight to the ultimate, efficient causes than to the temporally remote causes.”²⁹ What this means in application is that where an act of a third-party qualifying as barratry causes loss to a ship owner, recovery can only be had if the ultimate cause of the loss (i.e., not the barratry) is within the coverage of the policy. Or, where barratry is one of the causes of the loss, if the ultimate cause of the loss is excluded from coverage by a warranty or exclusionary clause, recovery may not be had on the grounds of barratry.³⁰

Nowhere is this better illustrated than in Tillery v. Hull & Company, Inc.³¹ In Tillery, the owner of the vessel Texas Pride entered into a contract with a captain to fish the vessel off the coast of Florida. The contract proscribed fishing in excess of 200 miles from the shore as well as prohibiting the carrying of illegal substances. The owner’s insurance policy had a provision excluding losses resulting from capture and seizure (Free of Capture and Seizure Clause³²). Shortly after the contract was struck between the owner and the fishing captain, the latter took the vessel to Jamaica to pick up a shipment of marijuana. The vessel was seized by the Jamaican government and stripped of its gear and equipment. The 11th Circuit affirmed the district court’s denial of coverage on the

rationale that the damage to the vessel was proximately caused not by the captain's barratry, but, rather, by the stripping subsequent to the seizure. Because the insurance policy has an express exclusion or warranty against damages from capture and seizure, the damage fell outside the scope of coverage.³³

Again to restate, the fortuity requirement allows for an insurer to deny coverage if the loss or damage results from an inherent defect, wear and tear, or intentional misconduct. However, as illustrated above, there are many exceptions to the rule which turn on the facts of each case. In addition, the inclusion of Inchmaree clauses provide additional protection to the insured. Outside of obvious defects such as worm-eaten hulls and intentional misconduct such as setting off explosive devices to sink a vessel, the insurer may be left wondering if he may rightfully deny coverage; unless, some policy exclusion applies.

C. Express Exclusions from Loss

All-risk terms normally insure all risks of direct loss or damage, including loss due to the negligence of the insured, excepting only those risks expressly excluded from coverage.³⁴ That is, absent fraud or misconduct, the loss will be deemed fortuitous and covered under the policy unless such policy contains a specific provision expressly excluding the loss from coverage.³⁵ Therefore it is to the advantage of the insurer to include express terms of exclusion for such conditions he does not wish to assure. For example, in Mariner Charters, Inc. v. Foremost Insurance Co., the insured could not recover for the loss of his vessel where he lawfully chartered the vessel, and the charterer went outside the navigational limits of the policy with the intent to steal the vessel.³⁶ Although the facts of this case looked like a typical barratry, the court noted that the policy had two exceptions which were applicable to the loss of the vessel. The first was that the policy excluded coverage of loss resulting

from infidelity of persons to whom the insured property was entrusted. The second exception was that the policy had geographical limitations, which were exceeded here by the charterer.³⁷ The court reasoned that upon the strength of the first exclusion alone, “we believe that the insurer is free of liability in those situations where the charter company is induced by false representations ... to someone with the intent to misappropriate the vessel.”³⁸

D. Interpretation of Express Exclusions, the Rule of Contra Proferentem

Specific exclusions from coverage will be enforced barring the insured from recovery only where the provision is clear and unambiguous. As a maxim of contract law (called the rule of contra proferentem), and of particular application to insurance contracts, “any ambiguities in an insurance policy, including a marine insurance policy, are construed against the drafter, here the insurance company, and in favor of coverage.”³⁹ Under Florida law, a number of rules govern the interpretation of insurance provisions. First, the interpretation of provisions is a matter of law to be decided by the court. Second, the court must construe the provisions according to the entirety of the policy’s terms and conditions.⁴⁰ Third, the interpretation and application of the policy terms are to be governed by state law.⁴¹ Thus, insurers must exercise caution in drafting clear, simple, direct and unambiguous provisions because poorly drafted provisions in the insurance contract will be construed in favor of coverage.⁴²

III. Breaches of Explicit or Implicit Warranties or Provisions

As illustrated in the previous section, outside a few circumstances, a loss will be considered fortuitous and covered by a marine insurance policy unless it falls squarely within a defined exception. To be enforced, the exception must be clear and unambiguous. Once the insurer has

satisfied this strict prerequisite and is satisfied that the loss resulted from a defined exception, coverage may rightfully be denied. In addition, coverage may be denied if the insured has breached an implied or express warranty. The difference in theory between exclusions and warranties is slight, in that both preclude coverage if the insured is in breach. However, the difference in practice is great, notably in the application of state or federal law to the underlying breach.

A. Choice of Law Analysis

Because the interpretation of a marine insurance policy often depends on the application of state or federal law, the admiralty attorney and insurer must appreciate this choice of law analysis in order to evaluate coverage.⁴³ First and foremost, marine insurance policies along with vessel service contracts⁴⁴ are maritime contracts within the admiralty and maritime jurisdiction of federal courts.⁴⁵ It should follow then that maritime law will provide the rules for interpreting such contracts and any disputes thereunder. But this is not the case. Prior to the Supreme Court's landmark decision in 1955,⁴⁶ maritime law was controlling with limited exception for state law.⁴⁷ But Wilburn Boat Co. v. Fireman's Fund Insurance Co., changed this reversing the preference by holding that state law should ordinarily govern the interpretation of marine insurance contracts except in areas where federal maritime precedent to the contrary is firmly entrenched.⁴⁸ Thus, in its decision, the Court paid deference to the States' paramount interest in regulating insurance.

Wilburn Boat does for admiralty what Erie RR⁴⁹ does for civil procedure; it allows the federal district courts to apply state substantive law to the issues before them. Naturally, this leads to splits among the Circuits. However, illustrating the importance of keeping maritime law uniform, the Eleventh Circuit's interpretation of Wilburn Boat is that only when "neither statutory nor judicially created maritime principles provide an answer to a specific legal question, courts may apply state law

provided that the application of state law does not frustrate national interests in having uniformity in admiralty law.”⁵⁰ But even with this principle in application, the Eleventh Circuit reversed a district court’s denial of attorney fees where the insured alleged breach of contract and demanded attorney’s fees pursuant to a Florida Statute.⁵¹ The Court reasoned that since there was no specific and controlling rule (entrenched in maritime) regarding the award of attorney’s fees pursuant to state statute in marine insurance disputes, and since the controlling Florida statute was substantive for purposes of Erie, an award of fees may be had pursuant to state law. (All Underwriters v. Wesiberg)⁵²

Prior to the Weisberg decision, the Eleventh Circuit upheld a Florida Statute which granted third-party beneficiaries a direct action against a maritime insurer in Steelmet, Inc. v. Caribe Towing Corp. The Court reasoned that “federal admiralty law confers no general right to sue an insurance company directly, nor does it contain any specific bar against such action.”⁵³ Since there was no “solidly entrenched” rule in federal maritime law and thus no conflict (between state and federal law), the Court had the option of fashioning an admiralty rule in which it declined.⁵⁴ In declining to do so, it allowed the Florida statute to govern noting that Wilburn Boat was based upon the important state interest in the regulation of insurance.

Wilburn Boat and its progeny have made clear that the procedure for determining what law applies to a marine insurance contract is controlled by the Wilburn analysis. Under such analysis, the regulation of marine insurance should be left to the states, and questions in the admiralty field are to be decided on the basis of state law unless there exists a judicially established admiralty rule governing the question.⁵⁵ There are however, some judicially established admiralty rules entrenched in maritime law which will govern notwithstanding state law to the contrary. Such examples are readily found in warranties; again, it is important to understand the difference between federal and

state law in this regard. Simply put, federal law strictly enforces warranties when a breach occurs regardless of whether the breach caused the loss.⁵⁶

B. Warranties

Of course, like express exclusion from loss provisions found in an insurance contract, these express warranties must be clear and unambiguous to be enforced.⁵⁷ However, not all warranties are express; implicit warranties have the full force of express warranties.⁵⁸ Examples of implicit warranties are the insured's duty of utmost good faith⁵⁹ and the implied warranty of seaworthiness.

1. Insured's Duty of Utmost Good Faith, *Uberrimae Fidei*

“Nothing is better established in the law of marine insurance than that ‘a mistake or commission material to a marine risk, whether it be willful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy. And the same rule obtains, even though the insured did not suppose the fact to be material.’”⁶⁰ Thus, the law of marine insurance imposes a duty of utmost good faith, or “*uberrimae fidei*” upon insureds requiring full disclosure of all facts material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.⁶¹ In ascertaining whether a misrepresentation or omission is material, courts have employed the “decisive influence” test.⁶² That is, in order to be material, the misrepresentation or omission, at minimum, must be something which would have controlled the underwriter's decision to accept the risk.⁶³ Ostensibly, this burden is not particularly onerous.

Failing the duty to deal in the uttermost good faith and make full disclosures in the application process results in the policy being declared void ab initio.⁶⁴ This holds true whether courts apply federal admiralty law or state law with perhaps the exception of the Fifth Circuit.⁶⁵ However, since

Wilburn Boat, most courts have assumed uberrimae fidei is solidly entrenched in federal maritime law and have not applied the Wilburn analysis; others applying the analysis have determined that the doctrine is firmly entrenched in maritime law and thus state law is inapplicable; while yet other court's have held that even if state law applied, identical results are demanded.⁶⁶

Nonetheless, the doctrine of uberrimae fidei is well settled in the Eleventh Circuit as a clear rule of maritime law and controls notwithstanding state law to the contrary.⁶⁷ In strictly applying this duty, courts will uphold an insurer's denial of coverage regardless of the cause of loss.⁶⁸ For example, in Gulfstream Cargo, Ltd. v. Reliance Insurance Co., the court upheld the denial of coverage where the insured provided results of a survey on his vessel but failed to disclose a second survey of the vessel which revealed that the boat needed more extensive repairs and was "unfit for any purpose offshore."⁶⁹ Moreover, in Royal Insurance Co of America v. Fleming, the court granted insurer's declaratory judgment of non-liability where the insured misrepresented the age of the vessel.⁷⁰ Courts have also held marine insurance policies void where insureds' failed to disclose: a prior cancellation of policy to a new insurer, the true value of the insured vessel, that insured vessel had struck a submerged object and sustained hull damage prior to renewing a policy.⁷¹

A breach of the duty of utmost good faith is one of the most solid grounds for an insurer to deny coverage. It is firmly entrenched in maritime law, and as David Hallock put it, "[it] has weathered numerous attempts to limit its scope."⁷² Not only is intent to deceive on the part of the insured irrelevant, the material omission need not be causally related to the loss.⁷³ Thus, where an insured accidentally fails to disclose information deemed material, such as the age or true value of his vessel, coverage may be denied despite that there is no casual connection between the omission and the resulting loss. Furthermore, the Eleventh Circuit in Kilpatrick has made clear that the insurer has no obligation to inquire into material facts which are concealed;⁷⁴ "the insurer is entitled to rely on

the insured to come forward with all facts material to the risk and may presume the absence of any such facts not communicated by the insured.”⁷⁵ Nor will partially disclosing material information satisfy the strict full disclosure required by the good faith rule. In *Gulfstream Cargo*, the court flatly rejected the insured’s argument that disclosing one of two surveys to the insurer satisfied the disclosure request and therefore the insurer should be estopped by waiver.⁷⁶ Though Reliance had not waived its right to disclosure under the facts of the case, the Court went on to state that an insurer could waive the stringent requirements of the doctrine of utmost good faith if information communicated by the insured would put a reasonable and prudent insurer on notice of a material nondisclosure.⁷⁷

Additionally, insurers must be aware that they risk waiver if the policies’ language is ambiguous; waiver of good faith may be implied by judicial construction. This is illustrated by the Eleventh Circuit’s holding in *King v. Allstate*, wherein the policy at issue contained the express language, “the policy is void only if the insured intentionally concealed or misrepresented a material fact during the application process.”⁷⁸ When the boat sunk, the insurer denied coverage citing erroneous information provided by the insured in the application process voided the policy under federal admiralty law; the court held there was no basis on which to instruct the jury on federal maritime law because of the express language contained in the policy. Allstate argued that such language was irrelevant to the well-established good faith maritime rule. The Court felt differently holding that the parties were free to contract around state or federal law with regard to an insurance contract, and because the parties did so, and contracted for the parties’ own standard to show misrepresentations, the policy controlled.⁷⁹ Thus, Allstate freely elected to employ an intent standard, and waived any right to the well entrenched federal maritime rule of utmost good faith.

2. Warranty of Seaworthiness and the American Rule

In McAllister Lighterage Line v. Insurance Company of North America, the Second Circuit held that there is a covenant of seaworthiness implied in every marine insurance contract.⁸⁰ “Seaworthiness is the ability of a vessel adequately to perform the particular services required of her on the voyage she undertakes.”⁸¹ A breach of the implied warranty of seaworthiness will result in one of two possibilities depending upon when the breach is deemed to have occurred. If the breach of the warranty occurs before the policy attaches, that is, an insured seeks to secure insurance on an unseaworthy vessel, the policy is void from its inception, and coverage may therefore be denied.⁸² On the other hand, if the breach occurs after the inception of coverage, necessarily meaning the vessel was seaworthy at the time of inception, then coverage may be denied only to the extent that the unseaworthy condition proximately caused the loss.⁸³ This distinction becomes clear when comparing the facts and circumstances of Gulfstream Cargo with Spot Pak.

In Gulfstream Cargo, not only did the insured breach the duty of utmost good faith by failing to disclose the existence of the second survey *supra*, but that survey made clear that the vessel was “unfit for anything,” even simply floating in water.⁸⁴ Therefore the Court reasoned, that as a consequence of the vessel being unseaworthy at the time the insurance attached, the breach absolutely voids the policy. Conversely, in Spot Pak, the vessel was deemed to be seaworthy at the inception of the policy; fire broke out subsequently and the vessel was lost. However, the cause of the fire was undermined and the court found in favor of coverage. The insurer unsuccessfully argued that the insured failed the continuing duty of keeping the vessel seaworthy by failing to install a repaired circuit breaker between the starboard generator and main electrical switchboard panel. Though finding in favor of coverage, the Court espoused the “American Rule” regarding the warranty of seaworthiness.⁸⁵

Unlike the English Rule which limits the warranty (of seaworthiness) to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for the loss or damage caused proximately by such unseaworthiness.⁸⁶

Thus, in order to breach the continuing warranty of seaworthiness, the insured must know of the unseaworthy condition, and such condition must be the proximate cause of the loss. If these two conditions are met, the insurer may deny coverage for all loss proximately caused by the condition.⁸⁷

Such was the case in Insurance Company of North America v. Board of Commissioners of the Port of New Orleans, where the Court found that the vessel was not maintained in a seaworthy condition by virtue of the boat being staffed with unlicensed captains who collided with an oil tanker on the Mississippi.⁸⁸

3. Navigation or Trading Warranty

A navigational limits warranty is an express warranty which means, as one court aptly stated, "exactly that:" the navigational warranty places limitations which include the locations listed in the policy."⁸⁹ Moreover, it is established that these warranties are "peculiarly maritime in nature," and consequently, the Eleventh Circuit and Florida courts apply federal maritime law to breaches of trading⁹⁰ and navigational limit warranties. The application of "admiralty law requires strict construction of express warranties in marine insurance contracts; breach of an express warranty by

the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss.”⁹¹

The Eleventh Circuit, in Lexington Insurance Co. v. Cooke’s Seafood, established a federal admiralty rule requiring strict adherence to navigational limits warranties. Accordingly, the Court strictly construed a navigational limits warranty against the insured where the policy covered against loss, provided that the vessel remained confined to inland and coastal waters, not exceeding 100 miles offshore, and excluded all territorial waters of Cuba and Mexico.⁹² In this case, the vessel’s captain, while at sea noticed that the boat’s oil filters clogged and decided to sail to an oilrig outside the navigational limits set by the policy. The Court, noting that admiralty law strictly enforces warranties with the exception when human life or safety is at stake, found that the captain sailed outside of the navigational limits to repair the vessel; and as such, he breached the warranty relieving the insurer from liability where a hurricane subsequently destroyed the vessel while it was moored at the oilrig.⁹³

Strict application of the rule was again employed by the district court in Home Insurance Co. v. Vernon Holdings, which denied coverage to the insured where a breach of navigational limits occurred. The Court rejected the insured’s argument that Florida law should govern and affirmed the principle that federal admiralty law applies requiring marine warranties to be strictly and literally complied with.⁹⁴ In the instant case, the vessel was insured to travel between the Turks, Caicos Islands, Dominican Republic and the Bahama Islands. When the vessel sank en route from Turks and Caicos to a port in Haiti, the insurer denied coverage based on a breach of the navigational limits warranty. The district court held that this was a breach which voided the policy, notwithstanding that the vessel would have been in the same waters on a voyage to the Dominican Republic.⁹⁵ In rejecting the insured’s argument that the warranty was ambiguous because it did not contain specific limits in terms of miles from shore, the Court held that “not every policy lends itself to description according

to precise geographical points,” and that this provision was not ambiguous because it was the only practical way of describing the navigational limits the insurer was willing to insure.⁹⁶

Because federal admiralty law applies to breaches of navigational or trade limits warranties in Florida and throughout the Eleventh Circuit, an insurer has a solid ground upon which to deny coverage. Breaches of these warranties are deemed to void the policy regardless of the causation between the breach and the loss. However, like any express term in a contract of insurance, the language must be clear and unambiguous in order to enforce the warranty against the insured. If the court finds the warranty to be ambiguous, then it will “apply the well-settled rule that where a warranty in a marine hull insurance policy would work a great hardship, policy language will be construed quite strictly in the assured’s favor.”⁹⁷ For example, in Eagle Star Insurance Co v. Ross, the policy contained a navigational limits warranty confining the vessel “to inland and coastal waters of the State of Florida.”⁹⁸ The insurer contended that such language meant waters within the State of Florida but the Court held that if the insurer wished to limit navigation to state boundaries, it could have done so in clear, unambiguous language.⁹⁹ Finding the policy to be ambiguous, the insurer was estopped from denying the claim on the grounds that the insured breached the navigational limits warranty.¹⁰⁰ Nevertheless, if the insurer takes note of drafting the navigational limits warranty language with specificity and clarity, then a breach by the insured releases the insurer from liability even if compliance would not have avoided the loss.¹⁰¹

4. Free of Capture and Seizure Warranty

Although the original purpose of the Free of Capture and Seizure Clause (hereinafter FC&S) was to exclude only wartime losses, it is now interpreted to exclude losses caused by arrests, seizures and detentions by governmental and civil authorities in time of war or peace.¹⁰² The effect of the

insured warranting the ship (or goods) free from capture or seizure is that the coverage is voided if either take place.¹⁰³ Federal courts have interpreted this warranty strictly in accordance with admiralty law principles.¹⁰⁴ For example, in Resin Coating Corp. v. Fidelity and Casualty Co of NY, the insured sent a shipment of resin to Damman, Saudi Arabia but the shipment was offloaded at Jeddah, Saudi Arabia instead. The documents necessary to release the goods were not available and were not made available pursuant to numerous requests. Finally, Arabian officials sold off the shipment of resin at auction and the insured filed a claim for coverage. The court determined that actions of the Arabian Customs constituted a seizure within the meaning of the FC&S clause, and the plain language of the insurance policy did not cover any loss or damage caused by seizure.¹⁰⁵

Similarly, in Kitma AS v. Royal Insurance Co., the Washington Appellate Court held that a FC&S clause excluded coverage where cargo was confiscated by the Russian government. The insureds were transporting cargo of fish and crab worth three million dollars from Russia to Korea when it was arrested by Russian authorities for failure to comply with its orders to return to port and failure to produce the required transshipment permit. Consequently, the cargo was confiscated and sold at auction; the insureds filed a claim which was denied based on the FC&S clause. The Court upheld the insurer's denial of claim reasoning that "[i]t is difficult to imagine how the policy could more clearly state that loss due to seizure is not covered under any circumstances."¹⁰⁶

The Kitma Court rejected the insured's argument that coverage was still applicable under either the war-risks policy or the Inchmaree clause contained within the insurance contract again on the grounds that the policy's FC&S clause clearly excluded such loss from coverage. After these cases, and to revisit Tillery v. Hull Insurance, Co. supra, wherein the Eleventh Circuit found that damage to a vessel resulted from a seizure by Jamaican authorities and not by the captain's barratry, courts are likely to preclude coverage for any loss or damage that results from an arrest or seizure,

including Rule C arrests.¹⁰⁷ This is so because courts analyzing problems of marine insurance causation apply the doctrine of *causa proxima non remota spectatur* (the immediate not the remote cause is considered) *supra*. Thus, in cases of arrest or seizure, courts only look to the proximate cause of the loss- i.e., the arrest, and not to the underlying cause of the arrest or seizure (which may be protected by other clauses such as barratry or Inchmaree).

5. Change in Ownership and Management Warranty

The change of ownership clause provides for automatic cancellation of the policy if the owner of the vessel is changed without the written agreement of the underwriters.¹⁰⁸ The district court in New York Marine & General Ins. Co. v. Gulf Marine Towing, Inc., espoused that when dealing with these warranties, federal admiralty law applies requiring strict compliance with such warranties, the breach of which releases the insurance company from liability even if compliance would not have avoided the loss.¹⁰⁹ Thus, in Parfait v. Central Towing, Inc., the Fifth Circuit held in favor of insurers against the insured where the latter sold the corporation holding title to his vessel without the previous written consent of the insurer.¹¹⁰ The clear and unambiguous language of the change in ownership or management warranty voided the policy upon the breach of the warranty.¹¹¹ This suggests that courts will apply federal admiralty law strictly construing breaches of said warranties because the deciding courts had not attempted to find a casual connection between the breach and the loss.¹¹² Accordingly, an insurer who has clearly and unambiguously stated that a change in ownership or management without its consent voids the policy will have a solid ground to deny a claim after such an occurrence.

C. State Law Analysis of Warranties

Federal admiralty law requires strict construction of explicit and implicit warranties and exclusions. As a result, this relieves the insurer from liability even where there is no relationship between the breach of the warranty or exclusion and the loss.¹¹³ Though the majority of the States follow the federal admiralty rule and strictly construe warranties, Florida, Texas, Hawaii and Washington all require the insurer to first demonstrate a casual connection between the breach and the loss before denying coverage.¹¹⁴ Hence, the state law in Florida differs from the federal rule and the insurer is not afforded such an easy burden of proof in order to lawfully deny coverage.

1. The Florida Rule, Florida Statute Section 627.409(2)

As discussed *supra*, federal maritime law, and the accompanying rule of strict construction applies to the breaches of only a few well-defined warranties.¹¹⁵ Outside of these warranties, state substantive law applies. In Florida, an insurer, in order to deny a claim for a breach of an express or implicit warranty or exclusion must show that the breach “increased the hazard by any means within the control of the insured” (herein referred to as the Florida rule).¹¹⁶ The threshold the insurer must meet in order to deny coverage is more burdensome in some states. For example, under Texas law, the insurer must show that the “breach or violation contributed to bring about the destruction of the property.”¹¹⁷ Illustrating the relative ease under the Florida rule, the district court in Firefighter’s Fund Insurance Co. v. Cox, found that where one or two additional crew members were on board the vessel, this increased the hazard or risk of loss over and above that which the insurer had agreed to insure.¹¹⁸

In *Cox*, the policy set forth in clear and unambiguous terms that the coverage would be void if the number of crew members on board the vessel exceeded three. While at sea, the captain and mate

were attacked by two crew members resulting in the captain's death. The captain's estate brought suit against the crew members and the insurer sought a declaratory judgment that it was under no duty to defend or indemnify the defendants. Defendants contended that the additional crew members did not increase the hazard to the vessel. Nonetheless, the court rejected this argument based on Florida's anti-technical statute, section 627.409(2) (also referred to as the Florida rule),¹¹⁹ which sets forth a distinct approach to marine insurance contracts. The Court reasoned that the presence of one or two additional crew members, particularly when the policy expressly set limit of only three, was not a mere technical violation of the policy, but significantly altered the risk of loss the insurer would be called on to bear.¹²⁰ Accordingly, the insurer was relieved from liability.

The rule in Florida was "designed to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss."¹²¹ Therefore, in accord with Florida law, an insurer may only deny coverage if the breach (1) increased the potential hazard or risk of loss above that which the insurer has agreed to insure, (2) is not a mere technical violation of the policy, and (3) significantly alters the risk of loss the insurer would be called on to bear.¹²² To illustrate, the Eleventh Circuit applying the Florida rule in Windward Traders, Ltd. v. Fred S. James & Co. of NY, Inc., found in favor of the insured against the insurer where the former breached a notification requirement under the policy.¹²³ Because the "breach of the notification provision clearly did not increase the hazard to the vessel ... [and] obviously played no part in causing the loss," the Court required the insurer to pay its share of the coverage despite the breach of the express provision.¹²⁴

2. Inapplicability of Florida Rule to Certain Warranties

The Florida rule will not however save an insured from a breach of a warranty in which federal maritime precedent is entrenched.¹²⁵ Thus, the Florida Court of Appeals aptly noted that

Section 627.409(2) and Florida law should not apply where an insured breached an express navigational limits policy because federal law is controlling.¹²⁶ In Aetna Insurance Co. v. Dudney, the policy set forth a navigational limit restricting coverage to the Atlantic and Gulf coastwise and inland tributary waters of the United States and Canada. The vessel was chartered and taken to the Bahamas where one crew member sustained an injury when she slipped and fell on the yacht.

The Court did not need to reach the issue of whether the breach of the navigational limits warranty increased the hazard of loss as contemplated by §627.409(2) because federal law requires that “[a] breach of an express navigational warranty releases the insurance company from liability even if compliance with the warranty would not have avoided the loss.”¹²⁷ Had Florida law applied, it would be hard to imagine that the breach of the navigational warranty had increased the hazard of a slip and fall occurring. But Florida’s anti-technical statute will not apply where breaches of certain warranties are controlled by federal law.¹²⁸ Nonetheless, these warranties are few in number compared to the myriad of possible warranties or exceptions that may be found in a marine insurance contract; and so, in all other circumstances, section 627.409(2) applies.

D. Other Clauses Strictly Construed Under the Florida Rule

Florida law imposes on the insurer the burden of showing an increased hazard as a result of a breach in order to deny coverage. Failing this, coverage remains in effect. However, I surmise that most breaches of typical warranties or exclusions found within marine insurance contracts will lend themselves to an argument that such breach gave rise to an increased exposure of risk, and that strict compliance with these conditions is necessary on the part of the assured to avoid a contested battle. As a case in point, Cox exemplifies the simplicity in showing an increased hazard as contemplated by the Florida rule. Also, it shows that passenger limitations will be “strictly construed” even under the

Florida rule.¹²⁹ In *Cox*, the inclusion of one additional crew member increased the hazard and significantly altered the risk of loss enough to justify the denial of coverage.¹³⁰ The Court also cited Mutual Fire, Marine & Inland Insurance Co. v. Costa, 789 F.2d 83 (1986), wherein the First Circuit held that an insurance carrier could deny coverage when the policy set a limit of 100 passengers and 118 passengers were actually aboard the vessel when the injuries occurred.¹³¹

The additional crew members or passengers onboard clearly “increased the hazard” satisfying the burden of the insurer to thereby void coverage where the policies in question made reference to specific limitations.¹³² The same holds true where too few members are onboard inconsistent with conditions warranted. Accordingly, the Fifth Circuit, in Aguirre v. Citizens Casualty Co., upheld a denial of coverage based on the insurer’s argument that manning the vessel with two instead of a three man crew breached the warranty of seaworthiness.¹³³ In another case, the Fifth Circuit again upheld an insurer’s denial of coverage, finding the hull policy void because the assured breached the policy’s implied warranty of seaworthiness by manning its vessel with unqualified personnel who did not possess the Coast Guard licenses required by law to operate the vessel.¹³⁴

In these cases, both insurers premised their arguments based on an alleged breach of seaworthiness which is strictly enforced notwithstanding a lack of casual relationship between the breach and the loss.¹³⁵ The insurer in *Aguirre* most likely posited this argument as a defense to coverage because Texas law was applicable, and under Texas law, the insurer would have to show that the breach caused or contributed to the loss in order to successfully deny coverage, which can be quite an onerous burden.¹³⁶ The insurer in the second example most probably forwarded this defense since there was no express provision under the policy which required the staffing of licensed pilots. Had there been such a provision, then Louisiana law would require strict compliance therewith. Nonetheless, with this in mind, the insurer can see the importance of drafting clear and unambiguous

exclusions or conditions into the policies which would provide a first line of defense in cases of breach.

Though in Florida there is not much case law interpreting §627.409(2), the Courts have upheld denials of claims pursuant to the statute where insurers have offered proof of an increased risk as a result of the underlying breach.¹³⁷ Thus, it follows then that other types of explicit limitations or conditions will require strict compliance under the Florida rule. For instance, an owner aboard warranty which usually warrants that the owner or insured remain aboard the vessel at all times when the vessel is not safely in port may require strict compliance if a resulting loss occurs in breach of the provision. Of course, the facts of each case would control the outcome, but one can see the potential argument to be made: that the owner's absence increased the hazard by _____ (fill in the blank).

E. Other Clauses

1. Pleasure Boat Restrictions, Private Pleasure Warranty

On the issues of whether an insurer may deny coverage for a breach of a private pleasure warranty, the application of §627.409(2) will apply unless the insured has not fully disclosed its intentions in the application process. A typical private pleasure warranty restricts the use of the vessel to "private pleasure purposes" and declares the policy void upon the chartering or hiring of the yacht for other than private pleasure purposes, unless the insurer has previously consented in writing.¹³⁸ Naturally, an insurer is justified in insisting upon knowing the risks associated with insuring a vessel before undertaking the same. Therefore, where the assured is less than forthcoming with information in the application process, the strict rule of uberrimae fidei takes force and voids the policy from its inception.¹³⁹ For example, the district court in La Reunion Francaise, SA v. Thompson, held for the insurer where the assured answered "no" to questions in the policy regarding chartering the vessel

and use for commercial purposes.¹⁴⁰ Upon the acceptance of the insurer's "significant evidence" that Thompson held himself out as a charter captain and advertised the vessel as a charter boat for hire, the Court determined that federal admiralty law and not Florida law governed the issue, holding the policy void for a lack of perfect good faith.¹⁴¹

However, where the assured has made her intentions to charter the vessel known to the insurer, and the insurer's policy language requires prior written consent, the courts will apply the Florida rule analysis. Accordingly, in Proprietors Insurance Co. v. Siegel, the court held that the assured's failure to obtain the insurer's consent before chartering the yacht did not void the policy because such breach did not increase the hazard by any means within the control of the assured.¹⁴² The court reasoned that in her application for insurance, the assured stated that she sought to obtain coverage for uses commercial including chartering the vessel; this application constituted the basis of the insurance agreement, and as such, Proprietors were clearly informed concerning the vessel's use.¹⁴³ Thus, under a §627.409(2) analysis, it is hard to see how a breach of a notification requirement will increase the hazard above that which the insurer has agreed to insure in order to effectively relieve it from liability. It is only when a breach of notification is coupled with a disclosure issue governed by federal principles of utmost good faith, that the insurer is afforded a right to deny coverage.

In addition, under Florida law, a breach of a private pleasure warranty does not void the policy, but merely suspends coverage during such time of breach.¹⁴⁴ In Schadeverzekering, NV v. Mulberry Motor Parts, Inc., the insurer unsuccessfully argued that the assured's acceptance of \$500 to \$600 per day for use of his vessel constituted chartering and commercial purposes in violation of the private pleasure provision within the agreement. The court held that the acceptance of the money was to defray costs while the owner was away and not for the purposes of making profit. But more

dispositive was the fact that at the time the assured's vessel was lost, there was no breach of warranty and thus coverage existed.¹⁴⁵ "We construe the private pleasure warranty as bringing about only a temporary termination or suspension of coverage during such time as there might have been a breach of warranty ... [however] coverage is revived the moment the breaches or conditions cease."¹⁴⁶ Thus, even where the insurer has evidence of a breach of private pleasure warranty, the loss must result under such time of breach in order to legitimately deny coverage. Nevertheless, the insurer may protect itself from insuring against hazards arising from unfettered use by unknown third-parties by opting to include a clearly drafted bareboat charter limitation which relieves the insurer's liability where the vessel is chartered to third-parties.¹⁴⁷

2. Sue and Labor, and Assistance and Cooperation Clauses

It is unsettled in Florida, as to whether federal or state law applies to sue and labor obligations which are typically found in marine insurance agreements, and their effect on coverage from such breaches. The sue and labor clause is a separate insurance and is supplementary to the contract; its purpose is to encourage and bind the assured to take steps to prevent a loss for which the underwriter would be liable if it occurred, and when a loss does occur, to take affirmative steps to diminish the amount of loss.¹⁴⁸ Under California law, "there is an express warranty embodied in the Sue and Labor Clause as well as an implied warranty that the owner must minimize his loss by timely inspection and repair."¹⁴⁹ Failing to comply with the requirements of the sue and labor clause may result in a finding that the insurer is not liable for the loss, or a deduction in the amount recoverable.¹⁵⁰ Where sue and labor clauses are clear and unambiguous asserting the duties owed by the assured to the insurer, it would seem that the application of §637.409(2) would be inapposite. Either the assured complied with his or her obligations, or did not. The legal effect of which should be determined on a case by

case basis with the facts dispositive to the outcome. The same holds true with assistance and cooperation clauses which generally require the assured to accede and cooperate with the efforts of the insurer in defending his or her case. Thus, ripe for question, is whether in a situation where the assured fails to cooperate with his or her “appointed” counsel provided by the insurer under the latter’s duty to defend, operates to relieve the insurer from liability stemming from the underlying loss.

F. Waiver and Estoppel

The myriad of possible conditions and exceptions, outside of the few delineated federally controlled warranties, will be analyzed pursuant to the Florida rule, §627.409(2). Nonetheless, a breach of warranty may be waived by the insurer, and if the insurer is not careful, its conduct may constitute waiver despite its intent.¹⁵¹ For example, even though the rule of good faith is entrenched in federal maritime law, a breach of which nulls the policy at its inception, an insurer may waive this breach by its conduct.¹⁵² The Second Circuit in Luria Bros. v. Alliance Assurance Co., held for the insureds where underwriters had constructive notice that the insured vessel sustained a serious fire on its first voyage even though the ship owner did not disclose the condition in applying for insurance on its next voyage; this constituted waiver.¹⁵³ Accordingly, where the action is voluntary and expressly shows an intent to forego a benefit, the condition is deemed waived; on the other hand, where conduct is inconsistent with insistence upon the contractual terms, this gives rise to estoppel.¹⁵⁴ Reliance Insurance Co. v. Escapade, illustrates the principles of estoppel. Here, the Fifth Circuit held that the underwriters were estopped from denying coverage because of a breach of the private pleasure warranty, after the insurer insisted that the assured incur salvage expenses by using a specific salvor.¹⁵⁵ The Court balanced the inconsistent actions by the insurer in the face of a known breach

which would have relieved it from liability, and held that the assured was induced by this conduct to take action to his detriment.¹⁵⁶ As such, the insurer could not rightfully deny coverage.

IV. Contractual Clauses in Vessel Service Contracts- Pitfalls and Predicaments

Vessel service contracts are governed by the general maritime law.¹⁵⁷ For purposes of this discussion, I will limit the concerns on liabilities and coverage issues to instances in which such service contracts contain indemnification and exculpatory provisions, contractual limitations on liability, and purport to waive the right of subrogation. Typically, vessel service contracts contain various boilerplate language attempting to shift or exclude liability. Whether these provisions are given effect depends on public policy and the relative bargaining power of the contracting parties.¹⁵⁸

A. Subrogation

A waiver of subrogation clause is a contractual provision whereby the vessel owner waives, or releases, a potential subrogation claim, for example, against a marina or shipyard from damages arising out of the loss or damage to the vessel. These provisions may create a problem between the underwriter and the assured as most insurance contracts contain a clause wherein the insured promises not to impair the subrogation rights of the insurer.

1. The Principle of Subrogation, and the Enforceability of Waivers in Vessel Service Contracts

The doctrine of subrogation is a creature of equity (and often sounding in contract) with its purpose to afford relief to those required to pay a legal obligation that ought to have been met by another.¹⁵⁹ Generally, the subrogee (party who has advanced funds) has the same rights and is subject

to the same defenses that may be asserted against the subrogor (party who has suffered a loss). It is said then that the insurer stands in the same shoes of the insured and any defenses which are valid against the insured are also applicable against the insurer.¹⁶⁰ Thus, when an insured settles with or releases (pre-loss) a third-party from liability for a loss that the third-party caused, the insurer's subrogation rights against such party may be destroyed or lost.¹⁶¹ The enforceability of such waivers of subrogation depend however, upon the circumstances surrounding the parties' bargaining power and public policy per se. The Supreme Court of the United States in Bisso v. Inland Waterways Corp., addressed an issue directly related to the extent such waivers are enforceable.¹⁶² Holding that a contractual exemption of a towboat owner from responsibility for his own negligence is prohibited as against public policy, the Court cited two main rationales for the fashioning of such rule: (1) to discourage negligence by making wrongdoers pay for the damages they cause, and (2) to protect those in need of goods or services from being overreached by others who have the power to drive hard bargains.¹⁶³

2. The Interpretation and Rules Behind Waivers of Subrogation

Normally, the clear wording of a waiver of subrogation is imperative if its to be enforced (if not against public policy or void for unconscionability). The rule of contra proferentem, by which any ambiguities are interpreted against the drafter, applies with force. But where such waivers are clear and unequivocal, they may be enforced. In one reported case, "an insured who contracted away the right to recover from a third-party before the loss occurred, thereby frustrating the insurer's opportunity to subrogate, was held to have breached its obligation of good faith to its insurer, and therefore relieved the insurer of its obligations of indemnification."¹⁶⁴ There are no reported cases on point in Florida or the Eleventh Circuit touching on waivers found within vessel service contracts.

However, the law in Florida with respect to waiver of subrogation and its entailments is well-established.

3. Prejudice Requirement

If the parties to an agreement have relative equal bargaining power,¹⁶⁵ and the terms of the contract are precise and clear, then a waiver of subrogation may be enforced against the insurer thereby extinguishing its rights to proceed against a third-party. But, if the insured waives the insurer's subrogation rights contrary to an express provision against waiver, such a release bars the insured's right of action on the policy, and if the insurer has already indemnified the insured, the insurer may have a right to recover the amount paid on the policy. However, if the insurer has not been prejudiced by the waiver despite the violation of express provisions to the contrary, the insurer may not deny recovery nor may it recover any amount paid on the policy because of a release or settlement. Lastly, the burden rests with the insured to show that he or she did not prejudice the subrogation rights of the insurer.¹⁶⁶ An example in which the court found a lack of prejudice is Tucker v. Seward. This was an automobile insurance case where the insured released the tortfeasor from liability without first acquiring the insurer's consent. Here, the Florida court took notice that the policy provisions against waiving subrogation rights were clearly violated, but the fact that the third-party tortfeasor was 99 years old, a nursing home resident with no future earning potential and no assets, gave rise to a material question of whether the carrier was prejudiced.¹⁶⁷ Thus, the underlying theme is that where there is no subrogation available, there is probably no prejudice to the insurer.¹⁶⁸

In the marine insurance context, and in light of the Florida rule, it is left to speculation as to whether waiving subrogation rights in contravention to an express warranty increases the hazard within the means controlled by the insured. Surely, an insured may make the argument that the

waiver increased the risk of not being able to collect against a negligent third-party over and above that which the insurer had agreed to insure, and had the waiver of subrogation come to light before the policy inception, this would have clearly influenced the judgment of a prudent insurer in fixing the premium, or determining whether he would take the risk at all. Such issues would become even more unclear and convoluted where a third-party acting with, or perhaps, without the authority of the insured enters into a vessel service contract containing a unambiguous waiver of subrogation. Note, that if such person or entity was held to be an additional insured, this would have the effect of implicitly waiving the right of subrogation, because as a general matter of public policy, underwriters cannot subrogate against their own insureds.¹⁶⁹

B. Indemnification and Exculpatory Provisions

1. Exculpatory Clauses

An exculpatory clause attempts to release a party from liability for their own wrongful acts.¹⁷⁰ The degree to which exculpatory clauses contained in vessel service contracts will be enforced varies from court to court and depends heavily on the language used and the exact relationship between the parties. No clear-cut rule exists as to the circumstances when such clauses will be enforced, but significant determining factors include public policy and the relative bargaining power of the contracting parties.¹⁷¹ Moreover, Florida courts do recognize and uphold, not only contracts with exculpatory clauses limiting liability, but also those which exempt liability altogether.¹⁷² “Generally, exculpatory contracts which attempt to relieve a party of his own negligence are not looked upon with favor; however, such contracts have been held valid and enforceable in Florida, where such intention was made clear and unequivocal in such contract.”¹⁷³ Of course, the rule of *contra proferentum* by which any ambiguities are construed against the drafter, applies in this context as well.¹⁷⁴

2. Indemnification Clauses

Closely related to their brethren exculpatory clauses are indemnity clauses which attempt to contractually shift an entire risk or liability from one party to another. Like exculpatory clauses, indemnity clauses are strictly construed and must be drafted in clear and unambiguous language to be enforced.¹⁷⁵ If there are any ambiguities or conflicting terms, such as one paragraph attempting to relieve liability except for willful gross negligence, and another attempting to relieve or limit liability from all negligence (simple and gross), the clauses conflict and become unenforceable.¹⁷⁶ Nonetheless, many vessel service contracts contain one of the aforementioned clauses, if not all of them. If the court, weighing the bargaining power of the parties to the contract and the clarity of the clauses, enforces such, this may prejudice an insurer. Whether these instances increase the hazard within the control of the insureds is left to speculation. Again, these situations would seem to lend themselves to the argument that not only has the assured violated an express (assuming one exists) warranty not to impair the subrogation rights of the insurer, but the exculpatory or indemnification clause has increased the risk insured against due to the lack of ability to collect against an indemnified third-party.

3. Enforceability of Such Clauses in Vessel Service Contracts

Nonetheless, the insurer may rest more easily knowing that indemnity and exculpatory clauses are generally disfavored and will only be enforced in the absence of: (1) unequal bargaining power between the parties, (2) contrariness to public policy, and (3) any ambiguity between the provisions. For example, in Sunny Isles Marina v. Adulami the court refused to enforce an exculpatory clause in a small vessel storage contract holding that clauses within the contract conflicted.¹⁷⁷ The contract contained language attempting to relieve liability in all circumstance except those created by the

Marina's own willful gross negligence; it further attempted to relieve liability for loss due to fire, theft, vandalism, collision, etc. Thus, in the event a boat owner suffered a loss due to theft or fire arising from the gross negligence of the marina, it was unclear whether the marina would be liable. The court concluded therefore that any ambiguity rendered the clauses unenforceable. Following the Sunny Isles decision, the Third District Court of Appeal declined to enforce an exculpatory clause in a sports stadium season ticket contract in Covert v. South Florida Stadium Corp. The Court held that "[s]uch clauses are enforceable only where and to the extent that the intention to be relieved is made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away."¹⁷⁸ The court found that the contract contained two ambiguous provisions in which an ordinary and knowledgeable person would not have known what he or she was contracting away.

C. Contractual Limitations on Liability, and Their Enforceability

Contractual limitations on liability are clauses which attempt to limit the extent of damages recoverable from a party in the event of a claim against it. Such clauses, like exculpatory, indemnification, and waivers of subrogation are disfavored and strictly construed against the party claiming to be relieved from liability.¹⁷⁹ Nonetheless, damage limitation clauses are frequently found in vessel service contracts often attempting to exclude consequential, incidental, and loss of use damages. Such clauses are enforceable but only to the extent they are clear, unambiguous and the result of equal bargaining power.¹⁸⁰ However, the limitation may not absolve the party of all liability and must still provide a deterrent to negligence.¹⁸¹

The Eleventh Circuit squarely addressed limitations on liability found within a vessel service contract in Diesel Repower Inc. v. Islander Investments Ltd. In that case, Islander contracted with

Diesel to “repower” Islander’s vessel, fitting it with a reconditioned diesel engine, transmission, and propulsion system. Diesel brought an action for breach of contract for failure to pay under the agreement, and Islander countered for breach of contract alleging negligent design and manufacturing of the engine. The contract contained a damage limitation clause limiting Diesel’s total dollar amount of liability to the purchase price of the equipment sold on the invoice and excluded all other types of damages.¹⁸² The district court found in favor of Islander and applied the limitation clause awarding damages of \$45,000, the amount on the invoice to Islander. On appeal, the Eleventh Circuit upheld the applicability of the clause espousing a three-step test to determine whether a limitation on liability clause is enforceable.

“First, the clause must clearly and unequivocally indicate the parties intentions. Second, the clause may not absolve the repairer of all liability and the liability risk must still provide a deterrent to negligence. Third, the “businessmen” must have equal bargaining power so there is no overreaching.”¹⁸³ The Court applied the analysis finding that it was clear and unequivocal that Diesel’s liability may not exceed \$45,000; the clause did not absolve Diesel of all liability, and the liability risk still provided an adequate deterrent against negligence. Lastly, and probably most importantly, the Court found that there was no overreaching because the parties possessed equal bargaining power upon entering the contract (i.e., this was not a contract of adhesion). The fact that John Miller, director of Islander bought the vessel, sought out Diesel to repower it, negotiated, and executed the contract gives rise to the inference that he was a “sophisticated businessman” possessing familiarity with the marine industry.¹⁸⁴ Accordingly, the damage limitation was enforceable.

V. Insurers' Responsibilities

Generally, an insurer is under the obligation to defend and indemnify. Under Florida law, an insurer's duty to defend is separate and distinct from its duty to indemnify, and is more extensive.¹⁸⁵

The duty to defend is to be determined from the allegations in the complaint against the insured. The insurer must defend if the allegations in the complaint could bring the insured within the policy provisions of coverage. If the complaint alleges facts partially within and partially outside the coverage of the policy, the insurer is obligated to defend the entire suit. The duty to defend is separate and apart from the duty to indemnify and the insurer is required to defend the suit even if the true facts later show there is not coverage. All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured. So long as the complaint alleges facts that create potential coverage under the policy, the insurer must defend the suit.¹⁸⁶

It is clear from this that an insurer is obligated to defend a claim even if it is uncertain whether coverage exists under the policy. However, an insurer may opt to provide a defense under a reservation of rights.¹⁸⁷

Under Florida law, where there are disputes as to coverage, an insurer must exercise one of three options: (1) assume its insured's defense without reservation, despite the dispute; or (2) obtain a non-waiver agreement after full disclosure of the coverage defenses it seeks to preserve; or (3) send a reservation of rights letter and appoint mutually agreeable defense counsel.¹⁸⁸ An insurer does not breach its duty to defend an insured when it provides a defense under a reservation of rights, in fact, "[w]e believe that the better process is to require the insurer to defend the action under a reservation of rights."¹⁸⁹ A reservation of rights may specifically reserve the right to seek reimbursement for attorneys' fees incurred in defending claims not covered under the policy. The District Court of Appeal in Colony Ins. Co. v. G&E Tires & Service, Inc. affirmed this principle. Noting that Florida courts had yet to address whether an insurer should be reimbursed for costs expended in defending

claims which do not, as alleged, give rise to even a potential duty to defend, the court relied on persuasive precedent from the California Supreme Court.¹⁹⁰ Accordingly, if the claims are at least potentially covered, the insurer may not seek reimbursement for defense costs because the insurer is under the duty to defend, and the insurer has been paid premiums by the insured for these types of claims. “As to claims that are not even potentially covered, however, the insurer may indeed seek reimbursement for defense costs.”¹⁹¹

VI. Conclusion

The insurer or underwriter must be careful in deciding whether to deny coverage. Though admiralty law provides some well-established grounds for denying claims, the application of state law makes the decision both more difficult and perilous for the insurer. In addition, the procedure of handling insurance claims is governed by state law and may vary from state to state. Improper handling of claims may waive or estop the insurer from setting forth potential defenses to coverage and can even result in bad faith damages being awarded to the insured.¹⁹² Thus, when a claim is made it is essential for the insurer to investigate and take an appropriate course of action consistent with its intention to either deny the claim, accept the claim, or accept the claim under a reservation of rights. The insurer must also keep in mind that since state substantive law applies, state law which provides for the award of attorneys’ fees by statute or under contract, applies equally as well.¹⁹³ Also, if the insurer chooses to defend the action under a reservation of rights, it has an “enhanced obligation of good faith” which places additional obligations upon the insurer.¹⁹⁴ “If the insurer refuses to provide this “good faith” defense, it does so at its own peril, for a liability insurer who decides not to defend its insured against third-party allegations is liable for the cost of the defense as well as for the bad faith damages if a court later determines that the insurer had a duty to defend.”¹⁹⁵

¹ See *Morrison Grain Co. v. Utica Mutual Insurance Co.*, 632 F.2d 424 (5th Cir. 1980); also, Black's Law Dictionary 589 (5th ed. 1979).

² See e.g. *Reisman v. New Hampshire Fire Insurance Co.*, 312 F.2d 17 (5th Cir. 1963).

³ See Madeline V. Dvorocsik, *Maritime Losses Resulting From Reckless Conduct: Are They Fortuitous?*, 75 Tex. L. Rev. 1133, 1137 (1997).

⁴ See *supra* note 2.

⁵ See discussion of proximate cause in maritime *infra*

⁶ *Reisman v. New Hampshire Fire Insurance Co.*, 312 F.2d 17 (5th Cir. 1963).

⁷ *Egan v. Washington General Insurance Corp.*, 240 So.2d 875 (Fla. 4th DCA 1970)(denying summary judgment where question of fact as to whether the deterioration of the type of bolt that caused the yacht to sink was normal under the conditions).

⁸ See *Thames & Mersey Marine Insurance Co. v. Hamilton Fraser & Co.*, 12 App.Cas. 484 (1887); also, David D. Hallock, Jr., *Recent Developments in Marine Hull Insurance: Charting a Course Through the Coastal States of the Fourth, Fifth, Ninth, and Eleventh Circuits*, 10 U.S.F. Mar. L.J. 277 (1998)(Recognizing the need for additional insurance to cover such defects and operational negligence, the London insurance market began to provide additional coverage for negligence and latent defects, the terms of which coverage became known as Inchmaree terms, after the steamship damaged in *Hamilton Fraser & Co.*).

⁹ See *id.*

¹⁰ *Reisman*, 312 F.2d at 20-21 (holding that damage to the bottom of *Reisman's* boat by worms, in an area where worms ordinarily cause such damage, is not an extraordinary or fortuitous peril of the sea which cannot be avoided by human skill and prudence. It followed that the worm-eaten hull was not a latent defect and the loss was an excepted peril not within the coverage of the policy).

¹¹ See *id.*; also, see *Larsen v. Insurance Co. of North America*, 252 F.Supp. 458 (W.D. Wash. 1965)(finding that the vessel's spoiled cargo of salmon which resulted from the failure of a corroded suction pipe was not a latent defect, but rather gradual deterioration as a natural consequence of wear and tear. The court explained that to be covered as a latent defect, the loss must result from a defect in the vessel's metal itself, or the original basic material).

¹² See *Walker v. Travelers Indemnity Co.*, 289 So.2d 864 (La. App. Ct. 1974).

¹³ *Id.*

¹⁴ *Id.* at 869-70.

¹⁵ *Id.* at 870; also, see *Ocean Towing Co. de Venezuela v. Continental Insurance Co.*, 1994 AMC 152 (E.D. La. 1992)(holding that defects of misadjusted fuel rack settings which caused piston damage were latent defects covered under the Inchmaree clause because it was not diagnosed until after a number of inspections by experts, and thus not the result of lack of due diligence).

¹⁶ See *Walker*, 289 So.2d at 872.

¹⁷ *Dvorocsik*, *supra* note 3, at 1138.

¹⁸ *Id.*

¹⁹ Black's Law Dictionary 728 (5th ed. 1979)

²⁰ Quoting Restatement (Second) of Torts.

²¹ See *Northwestern Mutual Life Insurance Co. v. Linard*, 498 F.2d 556, 564 (2nd Cir. 1974)(holding that scuttling by a set-explosion is not a peril of the sea and quoting Justice Harlan's rationale in an 1898 case, "In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insure, whether it is property, health, or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured is, in contracts of marine or fire insurance, an implied exception to the liability of the insurer").

²² *Assurance Generale De France v. Cathcart*, 756 So.2d 1055 (Fla. 4th DCA 2000).

²³ *Id.* at 1057-58.

-
- ²⁴ Recklessness: The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. Black's Law Dictionary 1142 (5th ed. 1979).
- ²⁵ Dvorocsik, *supra* note 3, at 1138.
- ²⁶ See *id.*
- ²⁷ See *supra* note 1; also, see Linard, 498 F.2d at 561 (citing New York, New Haven & Hartford RR Co. v. Gray, 240 F.2d 460 (2nd Cir. 1957)).
- ²⁸ United States Fire Ins. Co. v. Cavanaugh, 732 F.2d 832, 835 (11th Cir. 1984).
- ²⁹ Tillery v. Hull & Company, Inc., 876 F.2d 1517, 1519 (11th Cir. 1989); accord, Blaine Richards & Co. v. Marine Indemnity Insurance Co., 635 F.2d 1051, 1054 (2nd Cir. 1980)(explaining that to "trace the origins of losses back to their remote causes would violate the parties' reasonable understandings as to the scope of coverage).
- ³⁰ See Cavanaugh, 732 F.2d at 835.
- ³¹ See *supra* note 30.
- ³² Discussed *infra* at section (III. B. 4.).
- ³³ See Tillery; but see in comparison, United States Fire Ins. Co. v. Cavanaugh, (holding that barratry is a covered loss where fishing vessel was taken well outside the navigational limits of the insured' policy, despite making them well-known to the captain. As a consequence of the captain's barratrous act, the vessel ran aground and burned. The court reasoned that since the ultimate cause of the damage was the grounding and burning, and that the policy specifically covered grounding, burning, and barratry, this loss was within the policy coverage).
- ³⁴ See e.g. Reisman v. New Hampshire Fire Insurance Co., 312 F.2d 17 (5th Cir. 1963).
- ³⁵ International Ship Repair and Marine Services, Inc. v. St. Paul Fire and Marine Ins. Co., 944 F.Supp. 886, 892 (M.D. FL 1996).
- ³⁶ Mariner Charters, Inc. v. Foremost Insurance Co., 316 So.2d 602 (Fla. 3rd DCA 1975).
- ³⁷ *Id.* at 603.
- ³⁸ *Id.* at 603. (note, that the court only determined that the insured did not have a cause of action against the insurer because the provisions of the policy negated "any possibility that appellant was protected against this kind of larceny," and did not determine whether the insured had a cause of action against the charterer).
- ³⁹ Ocean Towing Co. de Venezuela v. Continental Insurance Co., 1994 AMC 152, 157 (E.D. La. 1992).
- ⁴⁰ International Ship Repair and Marine Services, Inc., 944 F.Supp. at 891.
- ⁴¹ Walker v. Travelers Indemnity Co., 289 So.2d at 869; see generally, Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 US 310 (1955).
- ⁴² See e.g. International Ship Repair and Marine Services, Inc, (where insurer argued that policy was a named-perils policy, but court held it was an all-risks by virtue of its ambiguous language).
- ⁴³ Hallock, *supra* note 8, at 280.
- ⁴⁴ Discussed *infra* section (IV.).
- ⁴⁵ See Irwin v. Eagle Star Insurance Co., 455 F.2d 827 (5th Cir. 1972); CPSA v. Ocean Repair Serv. Co., 1994 AMC 402 (S.D. NY 1993).
- ⁴⁶ Wilburn Boat Co., 348 US 310 (1955).
- ⁴⁷ See *Id.*
- ⁴⁸ See *Id.*; see Albany Insurance Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991).
- ⁴⁹ Erie RR v. Tompkins, 304 US 64 (1938).
- ⁵⁰ All Underwriters v. Weisberg, 222 F.3d 1309, 1312 (11th Cir. 2000).
- ⁵¹ *Id.*
- ⁵² See *Id.*
- ⁵³ Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1487 (11th Cir. 1986)(citations omitted).
- ⁵⁴ *Id.* at 1489.
- ⁵⁵ See Acadia Insurance Co. v. Allied Marine Transport LLC, 151 F.Supp.2d 107, 117 (D ME 2001).
- ⁵⁶ Lexington Insurance Co. v. Cooke's Seafood, 835 F.2d 1364 (11th Cir. 1988)(holding that breach of express navigation warranty had the effect of voiding the policy).
- ⁵⁷ See e.g. note *supra* 39.
- ⁵⁸ See Cooke's Seafood 835 F.2d at 1367.
- ⁵⁹ Some commentators have distinguished this duty from that of warranties or conditions; there is also some authority that the duty is an implied term of the contract; but for purposes of this paper, it is sufficient that the duty is implied and

operates much like a warranty. See e.g. Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, 4 (1998) (“Breach of warranty is judged by different legal criteria from breach of the duty of utmost good faith, although the same set of facts may violate both doctrines”).

⁶⁰ Gulfstream Cargo, Ltd. v. Reliance Ins. Co., 409 F.2d 974, 980 (5th Cir. 1969)(quoting Wilburn Boat).

⁶¹ For an in-depth analysis and an historical overview of uberrimae fidei – see Schoenbaum, *supra* note 62.

⁶² Schoenbaum, *supra* note 62, at 25.

⁶³ Royal Insurance Co v. Fleming, 1986 AMC 2077 (M.D. FL 1985).

⁶⁴ See *id.* (holding that both Florida and federal admiralty law allow an insurance company to avoid liability under a policy where the insured has made material misrepresentations as to material facts relied upon by the plaintiff insurance company – for instance, where insured misrepresented the age of the vessel).

⁶⁵ See Albany Insurance Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991)(holding that the doctrine of uberrimae fidei is no longer entrenched federal precedent and allowing Texas law to govern good faith and disclosure issues).

⁶⁶ See Robert Bocko et al., *Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L.J. 5, 19 (1995).

⁶⁷ Steelmet, Inc. v. Caribe, 779 F.2d 1485 (11th Cir. 1986).

⁶⁸ See Gulfstream Cargo, Ltd. v. Reliance Ins. Co., 409 F.2d at 976 (5th Cir. 1969).

⁶⁹ See *id.*

⁷⁰ See Fleming 1986 AMC 2077 (M.D. FL 1985).

⁷¹ See, respectively Knight v. US Fire Insurance Co, 804 F.2d 9 (2nd Cir. 1986);King v. Aetna Insurance Co, 54 F.2d 253 (2nd Cir. 1931);Reliance Insurance Co. v. McGrath, 671 F.Supp. 669 (N.D. Cal. 1987).

⁷² Hallock, *supra* note 8, at p 316.

⁷³ See Kilpatrick Marine Piling v. Fireman’s Fund Insurance Co., 795 F.2d 940 (11th Cir. 1986).

⁷⁴ Kilpatrick 795 F.2d at 942.

⁷⁵ Hallock, *supra* note 8, at 316.

⁷⁶ See Gulfstream Cargo, Ltd. v. Reliance Ins. Co., 409 F.2d at 976 (5th Cir. 1969).

⁷⁷ See *id.*

⁷⁸ King v. Allstate Ins. Co., 906 F.2d 1537, 1539 (11th Cir. 1990).

⁷⁹ See *id.*

⁸⁰ McAllister Lighterage Line v. Ins. Co. of North America, 244 F.2d 867 (2nd Cir. 1957).

⁸¹ *Id.* at 870.

⁸² See Saskatchewan Government Ins. Office v. Spot Pack, Inc., 242 F.2d 385 (5th Cir. 1957).

⁸³ See *id.*

⁸⁴ Gulfstream Cargo, Ltd. 409 F.2d at 983.

⁸⁵ Spot Pack, Inc. 242 F.2d at 388.

⁸⁶ *Id.*

⁸⁷ See Insurance Co. of N. Am. v. Board of Comm’rs of the Port of New Orleans, 733 F.2d 1161 (5th Cir. 1984).

⁸⁸ See *id.* at 1165.

⁸⁹ La Reunion Francaise, SA v. Christy, 122 F. Supp.2d 1325, 1332 (M.D. FL 1999)

⁹⁰ See Home Ins. Co. v. Vernon Holdings, 1995 AMC 369, 375 (S.D. FL 1994)(noting that trade limits warranties are recognized by courts as identical to or a type of navigational limits warranty, and established precedent requires such warranties to be strictly construed).

⁹¹ Lexington Insurance Co. v. Cooke’s Seafood, 835 F.2d 1364, 1366 (11th Cir. 1988).

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See Vernon Holdings, 1995 AMC at 373- 375.

⁹⁵ *Id.* at 375.

⁹⁶ *Id.* at 374-375.

⁹⁷ Eagle Star Ins. Co Limited of London v. Ross, 247 So.2d 514 (Fla. 3rd DCA 1971).

⁹⁸ *Id.* at 515.

⁹⁹ See *id.*

¹⁰⁰ See *id.*; also, see La Reunion Francaise, SA v. Halbart, 1999 AMC 14 (E.D. NY 1998)(holding that the navigational warranty was not specific and therefore unenforceable).

-
- ¹⁰¹ See *Florida Marine Towing, Inc. v. United National Insurance Co.*, 686 So.2d 711, 713 (Fla. 3rd DCA 1997).
- ¹⁰² See *Kitma AS v. Royal Insurance Co.*, 2001 AMC 708, 719 (Wash. App. Ct 2000).
- ¹⁰³ *Resin Coatings Corp. v. Fidelity and Casualty Co. of NY*, 489 F.Supp. 73, 74 (S.D. FL 1980).
- ¹⁰⁴ See *Kitma AS*, 2001 AMC at 710 (on the issue of whether federal or state law applies to the interpretation of proximate cause as it relates to the FC&S clause, the federal admiralty rule is well-established. “Because federal admiralty law adequately covers this area, we need not consider state law.”)(quoting *Commodities Reserve v. St. Paul Fire & Marine Ins. Co.*, 879 F.2d 640, 642 (9th Cir. 1989)).
- ¹⁰⁵ See *id.*
- ¹⁰⁶ *Id.* at 714.
- ¹⁰⁷ See discussion of barratry, section (II. B. 4. a.); note *supra* 30; see also *Hallock*, *supra* note 8, at 306.
- ¹⁰⁸ *Navegacion Goya, SA v. Mutual Boiler and Machinery Ins. Co.*, 411 F.Supp. 929, 933 (S.D. NY 1975).
- ¹⁰⁹ *New York Marine & Gen. Ins. Co. v. Gulf Marine Towing, Inc.*, 1994 AMC 976 (E.D. La. 1993).
- ¹¹⁰ *Parfait v. Central Towing, Inc.*, 660 F.2d 608 (5th Cir. 1981).
- ¹¹¹ See *id.*
- ¹¹² See *Hallock*, *supra* note 8, at 307.
- ¹¹³ See discussion *supra*, Section (III. B. 1).
- ¹¹⁴ *Commercial Union Ins. Co. v. Flagship Marine Services*, 190 F.3d 26, 32 (2nd Cir. 1999)(quoting *Hallock*, *supra* note 8, at 303).
- ¹¹⁵ See discussion *supra*, Section (III. B. 2).
- ¹¹⁶ *Fireman’s Fund Insurance Co. v. Cox*, 742 F.Supp 609, 611 (M.D. Fla. 1989)(quoting FSA §627.409(2)).
- ¹¹⁷ Texas Ins. Code Ann. §6.14
- ¹¹⁸ See *Cox*, 742 F.Supp at 611.
- ¹¹⁹ FSA §627.409(2) provides:
a breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefore shall not render void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.
- ¹²⁰ See *Cox*.
- ¹²¹ *Windward Traders, LTD v. Fred S. James & Co. of NY, Inc.*, 855 F.2d 814, 818 (11th Cir. 1988)(quoting *Pickett v. Woods*, 404 So.2d 1152 (Fla. 5th DCA 1981)).
- ¹²² See *Commercial Union Ins. Co. v. Flagship Marine Services*, 190 F.3d 26, 32 (2nd Cir. 1999).
- ¹²³ *Windward Traders, LTD*.
- ¹²⁴ *Id.* at 818; but, see footnote 5 at 818 (discussing alternative argument insurer could have posited).
- ¹²⁵ See *supra* note 118.
- ¹²⁶ See *Aetna Insurance Co. v. Dudney*, 595 So.2d 238 (Fla. 4th DCA 1992)
- ¹²⁷ *Id.* at 239(relying on *Port Lynch v. New England Int’l Assurety of America, Inc.*, 754 F.Supp. 816 (W.D. Wash. 1991)).
- ¹²⁸ See e.g. *Home Insurance v. Vernon Holdings*, 1995 AMC 369, 375 (S.D. FL 1994).
- ¹²⁹ See *Fireman’s Fund Insurance Co. v. Cox*, 742 F.Supp. 609, 611 (M.D. Fla. 1989).
- ¹³⁰ *Cox*, 742 F.Supp. at 611.
- ¹³¹ *Id.*; *Mutual Fire, Marine Ins. Co. v. Costa*, 789 F.2d 83 (1st Cir. 1986).
- ¹³² Note, *The First Circuit in, Mutual Fire, Marine & Inland Insurance Co. v. Costa* applied Massachusetts law which is in accord with federal maritime law. Thus, the insurer did not need to show an increased hazard as required under Florida law.
- ¹³³ *Aguirre v. Citizens Casualty Co.*, 441 F.2d 141 (5th Cir. 1971).
- ¹³⁴ *Insurance Co. of N. Am. v. Board of Comm’rs of the Port of New Orleans*, 733 F.2d 1161 (5th Cir. 1984).
- ¹³⁵ See *supra*, note 82.
- ¹³⁶ See e.g. *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991).
- ¹³⁷ See *Fireman’s Fund Insurance Co. v. Cox*, 742 F.Supp. 609, 611 (M.D. Fla. 1989).
- ¹³⁸ See *Schadeverzekering v. Mulberry Motor Parts, Inc.*, 457 So.2d 1099, 1100 (Fla. 2nd DCA 1984); *Proprietors Insurance Co. v. Siegel*, 410 So.2d 993, 998 (Fla. 3rd DCA 1982).
- ¹³⁹ See *La Reunion Francaise, SA v. Thompson*, 1999 AMC 2579 (S.D. FL 1999).
- ¹⁴⁰ *Id.* at 2580.

-
- ¹⁴¹ See *id.*
- ¹⁴² *Proprietors Insurance Co. v. Siegel*, 410 So.2d 993 (Fla. 3rd DCA 1982).
- ¹⁴³ *Id.* at 998.
- ¹⁴⁴ See *Schadeverzekering*.
- ¹⁴⁵ *Id.* at 1100-1101.
- ¹⁴⁶ *Id.* at 1101.
- ¹⁴⁷ See *O'Donnell v. Latham*, 525 F.2d 650 (5th Cir. 1976)(discussing bareboat charter limitations).
- ¹⁴⁸ *Home Insurance Co. v. Ciconett*, 179 F.2d 892, 895 (6th Cir. 1950).
- ¹⁴⁹ *Reliance Insurance Co. v. McGrath* 671 F.Supp. 669, 675 (N.D. Cal. 1987).
- ¹⁵⁰ See *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d. 200 (4th Cir. 2000).
- ¹⁵¹ See *Reliance Insurance Co. v. Escapade*, 280 F.2d 482 (5th Cir. 1960); *Luria Bros. & Company, Inc. v. Alliance Assurance Co.*, 780 F.2d 1082 (2nd Cir. 1986).
- ¹⁵² See *Luria Bros*; also note, *King v. Allstate supra* note 81, (insurer risks waiver where policy language is ambiguous regarding good faith duty- i.e., parties to a contract are free to incorporate their own standards for misrepresentation).
- ¹⁵³ See *Luria Bros*.
- ¹⁵⁴ See *Bocko et al., supra* note 69, at 42.
- ¹⁵⁵ See *Reliance Insurance Co. v. Escapade*, 280 F.2d 482 (5th Cir. 1960)
- ¹⁵⁶ See *id.*
- ¹⁵⁷ *CPSA v. Ocean Repair Serv. Co.*, 1994 AMC 402 (S.D. NY 1993).
- ¹⁵⁸ *Ivey Plants, Inc. v. FMC Corp.*, 282 So.2d 205 (Fla. 4th DCA 1973).
- ¹⁵⁹ *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2nd Cir. 1992).
- ¹⁶⁰ *George W. Nowell, Subrogation: Selected Bars, Waivers and Pitfalls*, 7 U. S.F. Mar. L.J. 421, 432 (1995)(paraphrasing *Gibbs v. Hawaiian Eugenia Corp.*).
- ¹⁶¹ *Gibbs*, 966 F.2d at 106.
- ¹⁶² *Bisso v. Inland Waterway Corp.*, 349 US 85 (1955).
- ¹⁶³ *Nowell, supra* note 160, at 459.
- ¹⁶⁴ *Id.* at 466 (referring to *Liberty Mutual Insurance v. Altfillisch Construction*, 70 Cal. App. 3d. 789 (1977)).
- ¹⁶⁵ Note *Fluor Western, Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971)(“Adhesive clauses, exacted by the overreaching of a contracting party who is in an unfairly superior bargaining position, are always subject to the defense of unconscionableness”).
- ¹⁶⁶ See *Tucker v. Seward*, 400 So.2d 505 (Fla. 5th DCA 1981); *New Hampshire Insurance Co. v. Knight*, 506 So.2d 75 (Fla. 5th DCA 1987); *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101 (2nd Cir. 1992)(not applying Florida law, but law in forum essentially same).
- ¹⁶⁷ *Seward*, 400 So.2d at 506.
- ¹⁶⁸ *Id.* at 507; accord *Industriales Nicaraguenses Chipirul, SA v. Switzerland General Ins. Corp. of NY*, 443 So.2d 1062, 1063 (Fla. 3rd DCA 1984)(holding, ... the insurer made no request of the insured to file suit against the shipping line, and therefore, asserted no subrogation rights which were capable of being impaired).
- ¹⁶⁹ Such hypos are outside the scope of this paper; for a more in-depth analysis of subrogation see *Norwell, supra* note 163.
- ¹⁷⁰ *Black's Law Dictionary*, 566 (6th ed. 1995).
- ¹⁷¹ *Ivey Plants, Inc. v. FMC Corp.*, 282 So.2d 205 (Fla. 4th DCA 1973).
- ¹⁷² *Orkin Exterminating Co. v. Montagano*, 359 So.2d 512, 512 (Fla. 4th DCA 1978).
- ¹⁷³ *Id.*
- ¹⁷⁴ *Harbor One, Inc. v. Preston*, 172 So.2d 478 (Fla. 3rd DCA 1965).
- ¹⁷⁵ See *Camp, Dresser & Mckee, Inc. v. Paul N. Howard, Co.*, 721 So.2d 1254 (Fla. 5th DCA 1998).
- ¹⁷⁶ See *Sunny Isles Marina v. Adulami*, 706 So.2d 920 (Fla. 3rd DCA 1998).
- ¹⁷⁷ *Id.*
- ¹⁷⁸ *Covert v. South Florida Stadium Corp.*, 762 So.2d 938, 940 (Fla. 3rd DCA 2000).
- ¹⁷⁹ See *Covert*; see *Diesel Repower, Inc. v. Islander Investments Ltd.*, 271 F.3d 1318 (11th Cir. 2001).
- ¹⁸⁰ See *Diesel Repower Inc.*
- ¹⁸¹ *Id.* at 1324.
- ¹⁸² *Id.* at 1324-25.

¹⁸³ Id. at 1324.

¹⁸⁴ See id. at 1325.

¹⁸⁵ First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co., 695 So.2d 475, 476 (Fla. 3rd DCA 1997).

¹⁸⁶ Colony Ins. Co. v. G&E Tires & Service, Inc., 777 So.2d 1034, 1037 (Fla. 1st DCA 2001)(internal citations omitted).

¹⁸⁷ First Am. Title Ins. Co. 695 So.2d at 477.

¹⁸⁸ G&E Tires & Service, Inc., 777 So.2d at 1037.

¹⁸⁹ Id. at 1037-38 (quoting Irvine v. Prudential Property & Casualty Ins. Co., 630 So.2d 579 (Fla. 3rd DCA 1994)).

¹⁹⁰ Id. at 1038.

¹⁹¹ Id. at 1038.

¹⁹² Hallock, *supra* note 8, at 319; see, e.g. Reliance Ins. Co. v. Escapade, 280 F.2d 482 (5th Cir. 1960).

¹⁹³ See e.g. All Underwriters v. Weisberg, 222 F.3d 1309, 1312 (11th Cir. 2000).

¹⁹⁴ See Aetna Cas. & Sur. Co. v. Mitchell Bros. Inc., 814 So.2d 191(Ala. 2001).

¹⁹⁵ Willey E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1990-1997*, 47 Am. U. L. Rev. 1131 (1998).