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Certain Underwriters v. Inlet Fisheries The United States Court of Appeals for the Ninth Circuit 2008 A.M.C. 305 (Filed February 11, 2008)

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THE DOCTRINE OF *UBERRIMAE FIEDEI* APPLIES TO VESSEL POLLUTION INSURANCE POLICIES.

The United States Court of Appeals for the Ninth Circuit held that the doctrine of *uberrimae fidei*, which requires utmost good faith in insurance policies, still applies and therefore, insurer was entitled to void the policy when the insured failed to disclose all material information.

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The doctrine of *uberrimae fidei* provides that insureds must disclose all information material to the risk an insurer was asked to shoulder. The doctrine developed when insurers had no reasonable means of obtaining such information efficiently. The doctrine, however, has generally diminished in importance as the insurer's burden of obtaining such information has eased. This case evaluates the current status of the doctrine in the context of contemporary vessel pollution insurance, one of the few areas where *uberrimae fidei* continues to apply. The issue addressed is whether the doctrine of *uberrimae fidei* applies to vessel pollution insurance policies covering statutory environmental liabilities.

Inlet Fisheries, Inc. and Inlet Fish Producers, Inc. (together "Inlet") are Alaska-based fish buying and processing businesses. Inlet owns a number of vessels, including the YUKON II, FORT YUKON, MAREN I, HARVESTER BARGE ("HB"), and the QANIRTUUQ PRINCESS ("QP"). Waster Quality Insurance Syndicate ("WQIS") provided stand-alone vessel pollution insurance to the vessels in Inlet's fleet. In August of 2000, following several pollution incidents involving the MAREN I and HB, WQIS sent notice that it was canceling Inlet's policy because Inlet failed to conduct a survey of its fleet and failed to pay premiums. After receiving WQIS's notice of cancellation, but before the effective date, Inlet sought vessel pollution insurance from Lloyds. The information on Inlet's application forms the basis of the current dispute because Inlet listed WQIS as its current pollution insurance carrier and also wrote that it had no pollution loss history. The application did not request a survey of Inlet's fleet, question Inlet's financial position, or ask why WQIS cancelled Inlet's previous policy.

In August of 2002, the QP sank and spilled near Bethel, Alaska. Inlet made a claim to Lloyds, and Lloyds subsequently commenced an investigation into both the incident and Inlet, generally. Upon learning of Inlet's history, Lloyds filed suit seeking a declaratory judgment that it had the right to void the policy *ab initio* under the doctrine of *uberrimae fidei*. Inlet counterclaimed that Alaska state law, rather than federal maritime law, applied, and that Lloyds never asked for the allegedly material information. The district court granted Lloyds motion for summary judgment. The court held that *uberrimae fidei* applied and that Lloyds was entitled to void the policy.

The Ninth Circuit began its analysis with a detailed history of the doctrine of *uberrimae fidei*. The court then briefly discussed the consequences of applying the doctrine in various contexts.[1] The court next looked at whether federal maritime law or state law should apply. Prior to *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, both states and the federal government, through statutes and judicial decisions, regulated marine insurance.[2] Following *Wilburn Boat*, courts were instructed to look to state law, rather than fashion a new federal admiralty rule or adopt a rule from British law, if federal admiralty law does not contain an applicable rule. In effect, the Supreme Court acknowledged the

[1] Cohen, Friedlander & Martin Co. v. Massachusetts Mutual Life Insurance Co., 166 F.2d 63 (6th Cir. 1948); Gulfstream Cargo, Ltd. v. Reliance Ins. Co., 409 F.2d 974 (5th Cir. 1969).
[2] 348 U.S. 310 (1955).

leading role of the states in governing insurance policies, including maritime insurance policies. In *Wilburn Boat*, however, the Supreme Court also reiterated that federal courts should look first to federal admiralty law as an initial inquiry.

The process for determining whether a rule is "judicially established" can be found in *Bohemia, Inc. v. Home Ins. Co.*, which held that "state law will control the interpretation of a marine insurance policy only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice."[3] The Ninth Circuit found that *uberrimae fidei* is an established federal admiralty rule.[4]

Following *Wilburn Boat*, American courts have not directly addressed whether *uberrimae fidei* or state insurance law applies in insurance cases. Nonetheless, courts have repeatedly acknowledged *uberrimae fidei* as a part of admiralty law.[5] In fact, many of the states within the ninth circuit, and other circuits for that matter, have incorporated the doctrine into their own laws. Notably, the fifth circuit is the only circuit that no longer applies the doctrine.[6] This court found the fifth circuit's approach in *Anh Thi Kieu* unpersuasive in light of the lengthy history and overwhelming acceptance of the doctrine.

The Ninth Circuit then asked whether marine insurance includes vessel pollution insurance. Pollution insurance was formerly covered under most protection and indemnity ("P&I") policies, which insured the shipowner against claims by third parties. The expansion of such liability by modern statute led many P&I insurers to exclude coverage for pollution damages. As a result, vessel pollution policies were developed to cover liability under OPA 90 and other environmental statutes. The court noted that vessel pollution insurance fits well within the general conception of maritime insurance, as it is a contract of indemnity triggered by an event that is maritime in character. The court distinguished *Port of Portland v. WQIS*, a case on which Inlet relied, because that case turned on state law and the very specific terms of Port's insurance policy.[7]

The final issue the Ninth Circuit considered was whether *uberrimae fidei* applies to this specific policy. The court noted that *uberrimae fidei* rests on the concept of disclosure, and not solicitation. The information Lloyds requested from Inlet, therefore, was significant. Among the facts Lloyd's claims were not disclosed by Inlet were the condition of Inlet's fleet, Inlet's financial condition, and the reason WQIS was canceling Inlet's previous policy. Lloyds produced overwhelming and unrefuted evidence that any of these undisclosed facts would have affected its decision to offer the policy to Inlet.

Inlet, in addition to making the argument that Lloyds did not solicit such information, also argued that Lloyd's act of renewing the policy precluded Lloyds from arguing that they would have canceled the policy had they known all information. Specifically, Lloyds agreed to renew the policy two days after the QP sank in August of 2002. Upon review of the facts, such as the time it took for notice of the sinking to reach Lloyds, Lloyds immediate investigation, and Lloyds quote to Inlet many weeks prior to the sinking, the court found this argument unpersuasive. Moreover, *uberrimae fidei* is a duty applicable to marine insurance generally, not just to the party seeking marine insurance. In other words, Lloyd's was also bound by a duty of utmost good faith, and had good reason to believe that had it refused to renew the policy based on unsubstantiated rumors, it would have exposed itself to liability under the doctrine of *uberrimae fidei*. For these reasons, the Ninth Circuit affirmed that the doctrine of *uberrimae fidei* applies to vessel pollution insurance policies and Lloyds was entitled to void the policy.

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[3] 725 F.2d 506 (9th Cir. 1984).
[4] Id.
[5] Sentry Select Ins. Co. v. Roayl Ins. Co of Am., 481 F.3d 1208 (9th Cir. 2007); Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412 (9th Cir. 1998).
[6] Albany Insurance Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991).
[7] 796 F.2d 1188 (9th Cir. 1986).