

North American Specialty Insurance Company v. Debis Financial Services Inc. United States Court of Appeals for the Fifth Circuit 2007 A.M.C. 2991 (Decided October 25, 2007)

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**FAILURE TO INVESTIGATE ALLEGATIONS OF UNSEAWORTHINESS AND
ABSENCE OF NONWAIVER AGREEMENTS OR RESERVATIONS-OF-RIGHT
PRECLUDES BAR INSURER FROM COVERAGE REIMBURSEMENT.**

Insurers denied complete reimbursement of the insurance payments because it had failed to investigate allegations of the barge's unseaworthiness prior to deciding to pay the coverage and agreeing to defend barge owner.

North American Specialty Insurance Company v. Debis Financial Services Inc
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In August 2000, the L/B ATLAS, departing from Cameron, LA, sank in the Gulf of Mexico while attempting a jack-up with a Matrix Oil & Gas Production ("Matrix") platform. The ATLAS was a jack-up barge purchased by Offshore Marine Contractors Inc ("Offshore Marine") with the help of financing from Debis Financial Services ("Debis"). Debis loaned the purchase funds to Offshore Marine in return for a secured mortgage on the ATLAS. The ATLAS was insured by North American Specialty Insurance Company, formerly known as Underwriters Insurance Company ("Underwriters"), under a two-part policy. The coverage included both Hull & Machinery ("Hull Policy") and Protection & Indemnity ("P&I") policies. Debis was listed as a loss payee under the Hull Policy due to its position as mortgagee. In the event that Offshore Marine breached its warranty of the ATLAS's seaworthiness, Debis was additionally covered for up to \$2 million under a "Single Interest Mortgage Form."

Offshore Marine notified Underwriters of the loss of the ATLAS immediately following the August sinking. Underwriters retained counsel to represent itself and Offshore Marine in regard to subsequent property damage claims, and retained separate counsel to investigate the cause of the accident. The investigation revealed evidence that, prior to departure, the ATLAS's crew may have been aware of a problem regarding the jacking gear of the port aft leg. Despite these findings, Underwriters elected to fully pay the coverage under the Hull Policy, in addition to costs related to salvage and removal of a wrecked lifeboat.

Offshore Marine proceeded with limitation of liability proceedings, for which they continued to utilize the counsel provided by Underwriters. It was not until after the end of discovery that counsel confirmed Offshore Marine had been aware of the ATLAS' lack of seaworthiness prior to its departure. Underwriters responded by filing an instant action against Offshore Marine and Debis, seeking a complete reimbursement of the insurance payments.

The district court granted summary judgment. In regard to Offshore Marine, the court found that Underwriters had waived all coverage and policy defenses by both failing to issue a reservation-of-rights letter prior to payment and failing to investigate the allegations of unseaworthiness further. In regard to Debis, the court held that as an innocent mortgagee of good faith Debis was protected from recovery claims under the Louisiana Civil Code.

On appeal, Underwriters alleged that they had not waived their right to assert the unseaworthiness defense because (1) they had been unable to investigate the allegations of unseaworthiness further, and (2) they did not have "actual facts" indicating the breach at the time they paid Offshore Marine. The Court put aside Debis's defense of collateral estoppel *arguendo* to review the claims.

The Court held that Underwriters had received allegations of ATLAS's unseaworthiness prior to deciding to both pay the coverage and agreeing to defend Offshore Marine and Debits against the ensuing property damage claims. This foreknowledge should have alerted Underwriters to either obtain

a nonwaiver agreement or issue a reservation-of-rights letter prior to these actions. The failure to take preventative steps constituted a waiver of its right to assert the unseaworthiness defense.

Furthermore, the court disagreed that Underwriters did not possess the “actual facts” indicating the noncoverage of the policy. Evidence pointed toward at least two separate reports regarding ATLAS’s unseaworthiness being sent to Underwriters. Counsel for Matrix had reported to Underwriters that the master of the ATLAS had attempted to notify his Offshore Marine superiors of problems regarding the jacking leg, but was told to keep quiet. Crewmembers had also allegedly reported similar information to the United States Coast Guard. Underwriters’ counsel conceded that it elected not to investigate these allegations further in lieu of paying out the policy so as to protect themselves against possible third-party claims. As such, the court was unable to find Underwriters lacked the possession of any “actual facts.”

In closing, the Court found Debis to be entitled to all the waiver rights of Offshore Marine as their mortgagee. Debis was entitled to retain the monies received as loss payee and Underwriters’ waiver barred any action for recovery. The district court’s grant of summary judgment was affirmed.

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