Symposium: Troubled Waters - Admiralty Law: Insurance, Pollution, and Finance Issues: Dagger, Shield, or Double-Edged Sword?: The Reciprocal Nature of the Doctrine of Uberrimae Fidei

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Text

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I. Introduction

The doctrine of ***uberrimae fidei*** is generally recognized as one of the most firmly entrenched principles in maritime law. Almost every circuit court has recognized the continuing vitality of this doctrine in modern marine insurance cases, and it is experiencing a recent trend toward consistent use. The utility of the doctrine as applied by insurers cannot be understated, because it is a recognized and common method for voidance of the insurance policy. The doctrine is a mutual one, requiring both parties to an insurance contract to act in good faith. However, reliance upon the doctrine is almost exclusively by insurance companies against their insureds, as a method for voiding the policy, rather than the other way around. Insureds have just begun to press for the application of this doctrine against insurers, which requires a certain level of conduct in the underwriting process.

What are the ramifications of the reciprocal duty of good faith as applied to the marine insurer? As will be discussed below, the doctrine originally grew out of the nature of marine insurance at the time. In previous centuries, underwriters did not have the resources to obtain all material information relative to the risk insured; thus, it was imperative that the insured provide full disclosure of all such information that was solely in its possession. However, with the advent of modern technology, skilled marine surveyors, and worldwide agents, modern underwriters are at less of a disadvantage with respect to investigating a risk. The Internet, modern communications, and transportation now provide more options than ever for an underwriter to obtain significant information about a vessel, cargo, or other marine risk prior to binding coverage. Therefore, may an underwriter rest on its laurels and require that the insured provide any and all information that might be relative to the risk, without any reciprocal obligation to conduct its own investigation, or at least to ask questions designed to obtain the information he needs? What about once the contract is entered into: Does the insurer have a reciprocal duty of good faith in adjusting and investigating a claim? While the reciprocal duty is only beginning to be explored and relied upon by insureds as a way to respond to the potentially harsh consequences of the doctrine, it is likely that such arguments will increase.

[*1165] This Article will explore the historical context of ***uberrimae fidei*** and its use and application in marine insurance law. It will also provide an analysis of the current state of the acceptance of the doctrine in the various federal circuits which have addressed its application in maritime law. The Article will then address the reciprocal nature of the doctrine by examining both U.S. and English case law in which the doctrine has been applied, or was sought to be applied, against insurers. The Article will further address bad faith in maritime cases and how and whether an overlap exists between the reciprocal duty of ***uberrimae fidei*** and state law regarding bad faith. Finally, the Article will conclude with some thoughts regarding the nature of the reciprocal duty and what ramifications it may hold for legal practitioners representing underwriters and claims handlers.

II. History and Nature of the Doctrine

The doctrine of ***uberrimae fidei*** is an implied duty of good faith imposed on both parties to an insurance contract. The doctrine is applicable with respect to all types of marine insurance, including hull, cargo, charterer's policies, P&I, and personal injury. The "classic definition" of ***uberrimae fidei*** is as follows: "The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made." [1] The doctrine has traditionally focused on the disclosure requirements for an insured in presenting a risk. "The doctrine of ***uberrimae fidei*** requires a party seeking marine insurance to disclose all circumstances known to it which materially affect the risk. If a party omits to disclose material information applicable to the risk involved, the policy is void." [2] "The duty of utmost good faith encompasses not only misrepresentations as to terms expressed or implied in the contract but also a duty to disclose any circumstance that materially affects the risk." [3] Numerous cases have described this reciprocal duty between parties to a marine insurance contract in the following basic terms:

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This stringent doctrine requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured. Since the assured is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, rather than wait for the underwriter to inquire. [4]

The standard for determining whether a fact is material to the risk being undertaken is objective, and the fact must have been ""something which would have controlled the underwriter's decision' to accept the risk." [5] This understanding arose out of the extreme difficulty, if not impossibility, of obtaining information regarding the condition of a vessel or other marine risk and, therefore, the magnitude of the risk, without significant economic investment. Thus, the rule was designed to minimize costs to both insurers and insureds by placing the obligation of disclosure on the party with knowledge of the risk. [6]

The material disclosure must not necessarily be related to the loss claimed. Courts have applied the doctrine in a variety of circumstances, often finding that the insured had failed to disclose or misrepresented a material fact and that the policy was, therefore, voidable. Categories of typical nondisclosures or misrepresentations include, for

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[1] *Thebes Shipping, Inc. v. Assicurazioni Ausonia SPA, 599 F. Supp. 405, 427 (S.D.N.Y. 1984)* (quoting Black's Law Dictionary 1690 (4th ed. 1951)).

[2] ***Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 308, 1998 AMC 223, 246 (2d Cir. 1987)*** (citations omitted).

[3] 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).*

[4] E.g., *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13, 1987 AMC 1, 5-6 (2d Cir. 1986).*

[5] ***Id., 1987 AMC at 6*** (quoting *Btesh v. Royal Ins. Co. of Liverpool, 49 F.2d 720, 721, 1931 AMC 1044, 1046 (2d Cir. 1931)).*

[6] Schoenbaum, supra note 3, at 3.

example, failure to disclose the true purchase price of the vessel, [7] prior loss or damage to the vessel or other vessels in a fleet, [8] or the care and condition of cargo during transit. [9]

In Knight v. U.S. Fire Insurance Co., for instance, the court agreed with the insurer that the doctrine of ***uberrimae fidei*** should serve to void the policy where the insured, an art collector, failed to disclose the circumstances of cancellation of a prior policy on a collection of statues. The prior cancellation had been based on a series of anonymous phone calls alleging that the insured was planning to perpetrate a fraud with the artwork. [10] These calls led to an investigation and a determination that the entire collection was **[*1167]** "grossly overvalued." [11] The insured argued that the anonymous phone calls were fictitious, but the court held that regardless of the nature of the phone calls, the insured was obligated to notify his current insurers of the cancellation as a fact that would materially affect the risk. [12] As a result of the insured's nondisclosure, the policy was held void ab initio. [13]

Generally, it is understood that ***uberrimae fidei*** applies at the inception of the risk. There is also authority for the proposition, however, that the duty of utmost good faith continues throughout the duration of the policy. [14] The doctrine has been implicated in situations in which an insured fails to make a material disclosure subsequent to the application or breaches a warranty. Some commentators have noted that American law is unclear as to the reach of ***uberrimae fidei*** in the postcontractual context. [15] English law, however, appears to provide for the continuing obligation of good faith under certain circumstances, such as where disclosure is required by the provisions of the policy. [16]

Some American cases have either implicitly applied the doctrine in a postcontractual setting involving an open cargo policy or have noted that the doctrine would apply in such a situation. Btesh v. Royal Insurance Co. of Liverpool applied the doctrine to a dispute involving a shipper's failure to properly categorize cargo under an open cargo policy. [17] In Btesh, the shipper prepared a cargo of silk and cotton material, mislabeling the cargo on the bill of lading as consisting of only the less valuable cotton items. The certificate of insurance, however, correctly

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[7] See ***Markel Am. Ins. Co. v. Nodarse, 2008 AMC 1402, 1408-09 (S.D. Fla. 2008)*** (compiling cases holding that the purchase price of a vessel is a material fact).

[8] See *St. Paul Fire & Marine Ins. Co. v. Halifax Trawlers, Inc., 495 F. Supp. 2d 232, 240, 2007 AMC 2183, 2192 (D. Mass. 2007).*

[9] *Btesh, 49 F.2d at 721-22, 1931 AMC at 1046-47.*

[10] *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11, 1987 AMC 1, 2-3 (2d Cir. 1986).*

[11] Id.

[12] ***Id. at 13, 1987 AMC at 6-7.***

[13] ***Id. at 15, 1987 AMC at 10.***

[14] *Reliance Nat'l Ins. Co. (Eur.) v. Hanover, 246 F. Supp. 2d 126, 136, 2003 AMC 715, 727 (D. Mass. 2003).*

[15] Martin Davies, Insured's Post-Contract Duty ***Uberrimae Fidei***: *Manifest Shipping Co., Ltd v. Uni-Polaris Shipping Co., Ltd (The Star Sea), [2001] 1 All E.R. 743 (House of Lords), 32 J. Mar. L. & Com. 501, 506 (2001)* ("Less clear is the American position on whether the doctrine of utmost good faith in marine insurance contracts continues after the contract is made and, if so, to what extent."); Schoenbaum, supra note 3, at 32 ("In the American cases there is no discussion of whether the duty of utmost good faith may apply after the conclusion of the contract.").

[16] Schoenbaum, supra note 3, at 32 ("The English cases posit several circumstances where the duty of utmost good faith comes into play during the post-contractual period: (1) where disclosure is expressly or impliedly required by the provisions or warranties under the policy … .").

[17] *49 F.2d 720, 1931 AMC 1044 (2d Cir. 1931).*

described the contents of the cargo. [18] When the **[*1168]** cargo was stolen en route, the insurer declined coverage because of the insured's failure to properly describe the cargo on the bill of lading. The court found that the insured had failed to disclose the full risk of the shipment by improperly categorizing the goods. [19] In Ingersoll Milling Machine Co. v. M/V Bodena, the court rejected the insurer's argument that ***uberrimae fidei*** should apply where the insured failed to disclose that cargo had been stowed on deck, but the court did so based on the fact that the on-deck stowage did not materially affect the risk. [20]

In St. Paul Insurance Co. of Illinois v. Great Lakes Turnings, Ltd., the court was not called on to reach the merits of whether the insured was precluded from coverage based on its misrepresentations and nondisclosures. [21] However, in reaching the conclusion that ***uberrimae fidei*** was applicable under the circumstances, the court continually noted the "ongoing obligation" of the doctrine. The court noted that "the federal admiralty doctrine of ***uberrimae fidei*** applies to marine insurance disputes over ongoing contractual obligations between parties engaged in international and commercial matters." [22] However, the policy in this case required declarations for each shipment of cargo. [23] Thus, a new contract was formed each time a declaration was issued.

Where an insured is found to have breached the obligation of good faith, the policy is void ab initio. [24] Therefore, the insurer is entitled to the return of monies paid on previous claims. [25] However, the insured is, likewise, entitled to a return of its premium. [26]

The doctrine of ***uberrimae fidei*** spans several centuries and likely arose out of the early days of marine insurance in London. "The historical origins of this duty "can probably be traced to the early coffee-house days when the writing of insurance on ships and cargoes **[*1169]** in far away ports would have been impossible without complete and utter candor as to all material aspects of the risk.'" [27]

The earliest reference to the doctrine in case law was in the English case of Carter v. Boehm in 1766. [28] In that case, the underwriter had insured a fort on the island of Sumatra. The fort was taken over by the French, and the governor made a claim under the policy. [29] The underwriter claimed that the insured had failed to disclose the condition and state of the fort, as well as a threat against the fort the year before. [30] The court went on to hold, however, that the insured had not been obligated to disclose such things, because they were either discoverable by

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[18] *Id. at 720-21, 1931 AMC at 1045.*

[19] *Id. at 721, 1931 AMC at 1046-47.*

[20] ***829 F.2d 293, 308, 1988 AMC 223, 246 (2d Cir. 1987).***

[21] *829 F. Supp. 982, 1993 AMC 2539 (N.D. Ill. 1993).*

[22] ***Id. at 988, 1993 AMC at 2548.***

[23] ***Id. at 983, 1993 AMC at 2540.***

[24] ***Puritan Ins. Co. v. Eagle S.S. Co. S.A., 779 F.2d 866, 870, 1986 AMC 1240, 1245 (2d Cir. 1985).***

[25] *Royal Ins. Co. of Am. v. Harbor Shuttle, Inc., 1999 AMC 929, 937 (E.D.N.Y. 1999).*

[26] *Id. at 937-38* (citing ***Albany Ins. Co. v. Horak, 1994 AMC 273, 280-81 (E.D.N.Y. 1993)).***

[27] Jeremy A. Herschaft, Not Your Average Coffee Shop: Lloyd's of London - A Twenty-First-Century Primer on the History, Structure, and Future of the Backbone of Marine Insurance, *29 Tul. Mar. L.J. 169, 180 (2005).*

[28] Carter v. Boehm, (1766) 97 Eng. Rep. 1162.

[29] Id. at 1163.

[30] Id.

the underwriter or not relevant to the risk. [31] Even in this earliest case discussing the doctrine, the reciprocal nature of ***uberrimae fidei*** was recognized and applied to the detriment of the insurer.

Carter has also been credited with the earliest explanation of the mutuality of the doctrine. The underwriter in Carter apparently was aware that the governor of Sumatra had received some threat against the fort, and it has been suggested that the writing of the policy with such knowledge may have been a breach of the underwriter's own obligation of good faith. [32] "Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary." [33]

The doctrine of ***uberrimae fidei*** was codified in the British Marine Insurance Act of 1906, as a statement of the existing law, as follows:

17.Insurance is ***uberrimae fidei***

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. [34]

Not long after Carter, in the early nineteenth century, American courts followed suit in recognizing the doctrine as a fundamental one **[*1170]** in marine insurance. In M'Lanahan v. Universal Insurance Co., the United States Supreme Court construed a policy of insurance in light of the doctrine. In M'Lanahan, insurance was requested for the brig CREOLE by letter. [35] However, insurance was not effected until two months after the initial request, at which time the vessel had likely already been lost. [36] The court remanded the case for a jury's determination of whether proper disclosure of the loss could have been made prior to the binding of insurance, cementing ***uberrimae fidei*** as a doctrine recognized in U.S. law. "It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there cannot at this time be any legal doubt." [37]

Almost sixty years later, the Supreme Court again recognized the doctrine of ***uberrimae fidei***, this time finding that the insured in a reinsurance case had failed to disclose a material fact and therefore voided coverage. In Sun Mutual Insurance Co. v. Ocean Insurance Co., the Court applied the doctrine in finding that a policy of reinsurance on a vessel was properly voided where the original insurance company failed to disclose that the vessel was under double charter. [38] In Sun Mutual, the original insurer, Ocean Insurance, issued a policy insuring a cargo during a voyage from San Francisco to New York. [39] Ocean Insurance sought and obtained reinsurance from Sun Mutual but failed to disclose that there was a second charter on the vessel during the voyage. [40] After the vessel sank and a claim was made for recovery under the policy, Sun Mutual asserted that the policy should be voided based on Ocean Insurance's nondisclosure of the double charter. The Supreme Court agreed, finding that Ocean Insurance had breached its good faith obligation to disclose any facts that might be material to the risk. "The duty of

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[31] Id. at 1165.

[32] Drake Ins. PLC v. Provident Ins. PLC, [2003] EWCA (Civ.) 1834, [84], [2004] 1 Lloyd's Rep. 268, 287 (U.K.).

[33] Carter, 97 Eng. Rep. at 1164; see also Graydon S. Staring & George L. Waddell, Marine Insurance, *73 Tul. L. Rev. 1619, 1659 (1999).*

[34] Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 17 (Eng.).

[35] ***26 U.S. (1 Pet.) 170, 171-72, 1998 AMC 285, 287 (1828).***

[36] ***Id. at 176-77, 1998 AMC at 291-92.***

[37] ***Id. at 188, 1998 AMC at 299.***

[38] ***107 U.S. 485, 509-10, 1998 AMC 1191, 1212 (1882).***

[39] ***Id. at 508-09, 1998 AMC at 1211-12.***

[40] Id.

communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive." [41] Thus, even in a case between two "insurers," courts have historically held the parties to a high standard of disclosure in the formation of marine insurance policies.

[*1171] In the nineteenth and early twentieth centuries, the doctrine was consistently recognized as a firmly entrenched admiralty law concept in American courts. However, with the Supreme Court's decision in Wilburn Boat Co. v. Fireman's Fund Insurance Co., the status of the doctrine was called into question, as courts were directed to look to state law where an established federal admiralty rule was not already in place on a given issue. [42]

The history of the development of this doctrine provides an interesting context for exploring the reciprocal nature of the duty. Despite being a firmly grounded concept in maritime law for centuries, it is, perhaps surprisingly, rare to find cases discussing the reciprocal duties of the insurer, rather than the insured. The substantial body of case law surrounding this doctrine, as well as its recognition as an important, unique obligation in the marine insurance arena, provides support for the imposition of the duty against insurers on a more regular basis.

III. Recent Opinions Addressing the Doctrine

In the wake of Wilburn Boat, the majority of the circuits which have examined the issue have confirmed the continuing vitality of the doctrine as an established admiralty rule. [43] The concept has enjoyed a resurgence in recent years and has been firmly cemented as one of the fundamental concepts in marine insurance. The United States Court of Appeals for the Fifth Circuit is the only circuit to have held that the doctrine is not an established admiralty rule. [44] In Albany Insurance Co. v. Anh Thi Kieu, the Fifth Circuit parted ways with earlier pronouncements from its own circuit in holding that ***uberrimae fidei*** did not meet the standard of a firmly entrenched maritime concept. The Anh Thi Kieu court recognized that previous Fifth Circuit cases had expressed their understanding of ***uberrimae fidei*** as controlling precedent under maritime law but dismissed such pronouncements as dicta. [45] The court went on to hold that Texas law should apply to the question of whether the insured made misrepresentations in the application process that would serve to void the policy. [46] Under the **[*1172]** stricter requirements of Texas law as relating to misrepresentations, the court found that the insurer was unable to establish that the insured had intended to deceive the insurer. [47]

Since the Fifth Circuit's decision in Anh Thi Kieu, various circuits have taken the opportunity to analyze the continuing application of the doctrine, and the vast majority have come down in favor of finding that this doctrine is a firmly entrenched aspect of the general maritime law. In 2008 alone, two circuit courts have affirmed the continuing application of the doctrine and have applied it in favor of voiding the policies at issue.

Most recently, the Third Circuit reaffirmed its reliance on the doctrine in AGF Marine Aviation & Transport v. Cassin. [48] In Cassin, the defendant-insured placed renewal insurance through AGF for coverage of his yacht. On the application, as well as in previous applications and other documents, the purchase price was represented as $

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[41] ***Id. at 510, 1998 AMC at 1212.***

[42] See *348 U.S. 310, 1955 AMC 467 (1955).*

[43] *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc. (Lloyds II), 518 F.3d 645, 651-52, 2008 AMC 305, 313-14 (9th Cir. 2008).*

[44] ***Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991).*** For criticism of Anh Thi Kieu, see *Lloyds II, 518 F.3d at 651-53, 2008 AMC at 314-16.*

[45] ***Anh Thi Kieu, 927 F.2d at 889, 1991 AMC at 2219.***

[46] ***Id. at 890-91, 1991 AMC at 2222.***

[47] ***Id. at 891, 1991 AMC at 2223.***

[48] *544 F.3d 255, 2008 AMC 2300 (3d Cir. 2008).*

600,000. [49] However, the seller received only $ 400,000 for the purchase of the vessel. [50] During the AGF policy period, the vessel sank, and Cassin made a claim under the policy. AGF denied coverage and filed a declaratory judgment action, seeking to void the policy based on the doctrine of ***uberrimae fidei*** for the insured's material misrepresentation as to the purchase price of the vessel. [51] On appeal, the Third Circuit affirmed the district court's finding that (1) ***uberrimae fidei*** was an entrenched federal precedent and (2) the insured's misrepresentation of the purchase price was a material misrepresentation causing the policy to be void. [52]

In determining what constitutes a "material" misrepresentation for purposes of the doctrine, the court found itself somewhere between the Second Circuit's "narrow" definition (""something which would have controlled the underwriter's decision' to accept the risk"), [53] and the Ninth Circuit's "broader" construction (information which the insured has demanded in an insurance application). [54] However, the court did not provide its own definition, other than to squarely hold **[*1173]** that the purchase price of a vessel is a fact material to the risk. [55] Because the insured had failed to disclose the true purchase price of the vessel, the policy was found to be void ab initio. [56]

In another recent case, Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc. (Lloyds II), the Ninth Circuit also addressed whether the doctrine is an established maritime rule. [57] Lloyds II involved an insurer who sought to void a marine insurance pollution policy based on the insured's failure to disclose prior losses. The Ninth Circuit upheld the district court's determination that the doctrine of ***uberrimae fidei*** was entrenched federal precedent. The court took the opportunity to review the modern history of the doctrine, coming down squarely in support of the majority of circuits which have recognized the doctrine's established presence in maritime jurisprudence. [58]

Both Lloyds II and Cassin addressed and distinguished the Fifth Circuit's ruling in Anh Thi Kieu from their own support of the doctrine as well-settled maritime law, dismissing that decision as an anomaly amongst the circuits. [59] The Ninth Circuit noted, "whatever traction it might have, Anh Thi Kieu does not undermine our conclusion that "no rule of marine insurance is better established than the utmost good faith rule."' [60]

The only other circuit in which some question remains as to whether ***uberrimae fidei*** is settled maritime law is the First Circuit, which has twice rejected the opportunity to make a formal determination as to whether it views the doctrine as a firmly entrenched rule of maritime law, deciding the cases instead on other grounds. [61] In both Commercial Union Insurance Co. v. Pesante and Windsor Mount Joy Insurance Co. v. Giragosian, the court found

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[49] ***Id. at 258, 2008 AMC at 2301.***

[50] Id.

[51] ***Id. at 259, 2008 AMC at 2303.***

[52] ***Id. at 263, 265, 2008 AMC at 2309, 2312.***

[53] ***Id. at 264, 2008 AMC at 2310*** (quoting *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13, 1987 AMC 1, 6 (2d Cir. 1986)).*

[54] ***Id., 2008 AMC at 2310-11.***

[55] ***Id. at 265, 2008 AMC at 2311.***

[56] Id.

[57] *518 F.3d 645, 2008 AMC 305 (9th Cir. 2008).*

[58] ***Id. at 653-54, 2008 AMC at 315-16.***

[59] ***Id. at 651-53, 2008 AMC at 314-16;*** *Cassin, 544 F.3d at 263, 2008 AMC at 2309.*

[60] *Lloyds II, 518 F.3d at 653, 2008 AMC at 316* (alteration in original) (quoting Schoenbaum, supra note 3, at 11).

[61] See *Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 2006 AMC 2113 (1st Cir. 2006);* ***Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 1995 AMC 2542 (1st Cir. 1995).***

that the application of ***uberrimae fidei*** would not have changed the result in those cases, and, thus, declined to address the issue. [62]

[*1174] Two district courts in the Eleventh Circuit have also recently addressed the viability of the doctrine in maritime law, relying on that circuit's precedent in HIH Marine Services, Inc. v. Fraser and applying the doctrine to void coverage. [63] "The legal principle of ***uberrimae fidei***, utmost good faith, is the settled and recognized law binding all district courts within the Eleventh Circuit." [64]

The remaining circuits have all expressed their recognition of ***uberrimae fidei*** as a well-established tenet of maritime law. The Second Circuit has perhaps taken the lead in this regard, consistently applying the doctrine over the years. Its pronouncements on the interpretation of ***uberrimae fidei*** are recognized and relied upon throughout all of the jurisdictions that have affirmed the doctrine's application. The court's opinions in Knight and Puritan Insurance Co. v. Eagle Steamship Co. S.A., for instance, are commonly cited as bases for the doctrine's continuing application. In these and subsequent cases, the courts set forth an unwavering view of the "stringent" doctrine and its place in maritime law. "It is well-established under the doctrine of ***uberrimae fidei*** that the parties to a marine insurance policy must accord each other the highest degree of good faith." [65] The United States Courts of Appeals for the Fourth, Seventh, Eighth, and Tenth Circuits have not had occasion to comment on the doctrine in recent years. However, decisions by the district courts in these circuits also support its continuing application. [66]

As can be seen from the foregoing summary, the recent surge in, or perhaps return to, reliance on the doctrine of ***uberrimae fidei*** is the trend amongst circuits. It appears unlikely that the anomaly of the Anh Thi Kieu decision will have any further sway on courts and that more and more courts will continue to call on the doctrine for guiding coverage disputes between insureds and insurers in the context of marine insurance.

IV. Reciprocal Duty

As mentioned above, the reciprocal nature of the doctrine has been inherent since the doctrine's inception. When setting forth the basic elements of the ***uberrimae fidei*** doctrine, most courts expressly **[*1175]** recognize the reciprocal duty of good faith as applied to the insurer and insured in the insurance context. [67] While the language employed is typically merely a statement without further analysis, such repetition of the understanding of the reciprocal nature of the duty is clearly well-grounded in years of jurisprudence.

A. Definition of "Good Faith"

Despite the common acceptance of the reciprocal nature of this doctrine, there is scant explanation of what exactly is expected of an insurer under the ***uberrimae fidei*** doctrine. To be sure, there is no shortage of description of what

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[62] *Pesante, 459 F.3d at 38, 2006 AMC at 2117-18;* ***Giragosian, 57 F.3d at 54-55, 1995 AMC at 2548.***

[63] ***Great Lakes Reinsurance (UK) PLC v. Atl. Yacht & Marine Servs., Inc., 2008 AMC 1041, 1043 (S.D. Fla. 2008);*** ***Markel Am. Ins. Co. v. Nodarse, 2008 AMC 1402, 1407 (S.D. Fla. 2008).***

[64] ***Great Lakes, 2008 AMC at 1043.***

[65] *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13, 1987 AMC 1, 5 (2d Cir. 1986).*

[66] See ***Great Lakes, 2008 AMC at 1043;*** ***Markel Am. Ins. Co., 2008 AMC at 1707.***

[67] E.g., *Knight, 804 F.2d at 13, 1987 AMC at 5* ("The parties to a marine insurance policy must accord each other the highest degree of good faith."); ***Contractors Realty Co. v. Ins. Co. of N. Am., 469 F. Supp. 1287, 1294, 1979 AMC 1864, 1875 (S.D.N.Y. 1979);*** *Tremaine v. Phoenix Assurance Co., 45 P.2d 210, 213, 1935 AMC 753, 758 (Cal. Ct. App. 1935).*

is expected of an insured by way of complying with its duty. Generally, it is understood that the insured has the obligation to disclose any circumstances which materially affect the risk. [68]

It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy. [69]

It would make little sense, however, to hold the insurer to the exact same standard as set forth above. The insurer-insured relationship necessarily requires that the insured be the party disclosing, because it is typically the party with knowledge of and access to the risk. Therefore, the obligation of good faith imposed upon the insurer by virtue of the doctrine of ***uberrimae fidei*** is somewhat more amorphous and has been interpreted differently by the few courts that have addressed the issue.

The most detailed statement of what the duty of good faith requires of an insurer was set forth in Contractors Realty Co. v. Insurance Co. of North America. That court stated: "There is a reciprocal duty on the part of the insurer to deal fairly, to give the **[*1176]** assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy of "all risks' insurance." [70] Contractors Realty involved the insuring of a brand new pleasure yacht. The insured purchased an all-risk policy on the yacht from Chris Craft, which was to be used for business and pleasure purposes. Shortly after it was purchased, the vessel began to exhibit various problems, such as "peeling paint, leaky windows, and malfunctioning toilets." [71] Then, the yacht caught fire and sank. [72] The owner made a claim under the all-risk policy, but the insurer denied coverage, claiming breach of the doctrine of ***uberrimae fidei*** for failure to disclose the mechanical and aesthetic issues with the boat, as well as the fact that the owner had brought suit against the manufacturer relating to these defects. [73] The court went on to find, without hesitation, that the insured had not violated its duty to disclose where the insurer's agent had been aware of the owner's dissatisfaction with the yacht, as well as the lawsuit over the defects. [74] The knowledge of the insurer's agent regarding these facts was imputed to the insurer to its detriment, regardless of any evidence that the insurer itself was advised of these issues. While the court did not expressly apply its understanding of the reciprocal nature of the duty, it can be assumed that by elaborating on the insurer's reciprocal duty, this was an underlying consideration in the court's final analysis that the insured had acted properly in disclosing the manufacturing defects and resulting lawsuit to the insurer's agent.

However, it is unclear whether the court's statement in Contractors Realty is an accurate, or at least complete, description of the insurer's obligation of good faith. The court provided no authority for its statement, nor did it even seem to rely upon its own words in the opinion. As explained in more detail below, other courts have taken a more limited approach to the insurer's obligation, relating it more to the insured's obligation of disclosure.

B. U.S. Cases Discussing Insurer's Duty of Good Faith

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[68] ***Puritan Ins. Co. v. Eagle S.S. Co. S.A., 779 F.2d 866, 870, 1986 AMC 1240, 1245 (2d Cir. 1985)*** (citing *Btesh v. Royal Ins. Co. of Liverpool, 49 F.2d 720, 721, 1931 AMC 1044, 1046 (2d Cir. 1931)).*

[69] ***Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U.S. 485, 510-11, 1998 AMC 1191, 1213 (1883).***

[70] ***Contractors Realty, 469 F. Supp. at 1294, 1979 AMC at 1875.***

[71] *Id. at 1288, 1979 AMC at 1864-65.*

[72] *Id., 1979 AMC at 1865.*

[73] *Id. at 1294, 1979 AMC at 1875.*

[74] *Id. at 1294-95, 1979 AMC at 1875-76.*

As previously stated, there is a paucity of case law directly applying or discussing the reciprocal nature of the duty of ***uberrimae fidei*** under U.S. law. The case that probably most directly addressed the imposition of the duty upon the insurer in the context of the **[*1177]** doctrine itself is Commercial Union Insurance Co. v. Flagship Marine Services, Inc. [75] In Flagship Marine, Commercial Union filed a declaratory judgment action against its insured, Flagship Marine (Flagship), after one of Flagship's employees was injured aboard a vessel. Flagship was an affiliated company licensed by Sea Tow International, the primary insured. Sea Tow subscribers were entitled to emergency marine services in exchange for an annual fee, and most licensees, including Flagship, also provide nonemergency services to commercial vessels. [76] Commercial alleged that Flagship had not fully disclosed the extent of Flagship's involvement in oil spill and emergency services, such as the one the injured employee had been involved with when the incident occurred. [77]

Flagship, like all other licensees, was originally listed as a named insured under a master insurance policy until 1994. [78] Beginning in 1995, Sea Tow's insurance broker sought alternative coverage for Sea Tow and its licensees. Commercial requested that each Sea Tow licensee provide a separate application for coverage, which was completed by Sea Tow's broker. [79] In addition to the individual applications, each licensee provided various documentation including a full list of vessels, complete loss listing for the previous two years, and information regarding vessels and captains. [80]

The court quickly dismissed Commercial Union's claim that Flagship failed to meet its duty of good faith by not disclosing the full extent of Flagship's business operations during the application process. [81] The court specifically pointed to the volumes of documents and surveys provided regarding the nature of the business operations that supported the conclusion that Flagship was involved in operations other than the towing of pleasure crafts. [82] The court then invoked the reciprocal duty of ***uberrimae fidei*** in response to Commercial Union's assertion that although they had requested the surveys, they had not read them. "Commercial Union had its own good faith duty to read what it had requested, especially when the insurance coverage for the individual licensees was expressly made subject to their provision of **[*1178]** such requested documents… ." [83] Based on the insurer's breach of its good faith obligation, the court dismissed the insurer's claim seeking a denial of coverage and instead entered judgment in favor of the insured on its claims for breach of contract and duty to defend. [84]

Interestingly, under some circumstances, the insurer's obligation of good faith can even be used to its advantage. In Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc. (Lloyds I), the district court relied upon the reciprocal duty of good faith in determining that the insurer had not waived its right to declare a policy void but, rather, had acted consistently with its ***uberrimae fidei*** obligation. [85] In Lloyds I, the insurer brought suit for voidance of a marine insurance pollution policy, arguing that the insured had failed to disclose prior losses. In response, the insured argued that once Lloyds was advised of the first prior loss, it nonetheless renewed the policy on the quoted

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75 *982 F. Supp. 310, 1998 AMC 717 (S.D.N.Y. 1997).*

76 ***Id. at 311, 1998 AMC at 718.***

77 ***Id. at 312-13, 1998 AMC at 719.***

78 ***Id. at 311-12, 1998 AMC at 718.***

79 ***Id., 1998 AMC at 718-19.***

80 ***Id. at 312, 1998 AMC at 719.***

81 ***Id. at 313, 1998 AMC at 721.***

82 ***Id., 1998 AMC at 721-22.***

83 ***Id. at 314, 1998 AMC at 722.***

84 ***Id., 1998 AMC at 723.***

85 *389 F. Supp. 2d 1145, 1173, 2005 AMC 2307, 2342 (D. Alaska 2005),* aff'd, *518 F.3d 645, 2008 AMC 305 (9th Cir. 2008).*

terms. [86] Lloyds had been notified of the loss, to a vessel owned by the insured but not covered under the policy, just one day prior to the renewal. The court pointed out that "the doctrine of ***uberrimae fidei*** is a two-way street: it requires both parties to a marine insurance policy to accord the other the highest degree of good faith." [87] Because the policy was a renewal, the court reasoned, the insurer had an ongoing obligation to act in the utmost good faith. This obligation included conducting a complete investigation into the disclosed loss before deciding not to renew, especially in light of a state law requiring forty-five days' notice before refusing to renew a commercial policy. "The doctrine of ***uberrimae fidei*** left Lloyds no such option with respect to renewal on August 28, 2002: it had to renew or risk violating the doctrine of ***uberrimae fidei***." [88] Thus, the court found that the insurer acted consistently with its obligation of good faith, but the insured's material nondisclosures breached its obligation and resulted in the voidance of the policy. [89]

In HIH Marine Services, Inc. v. Fraser, the court seemed to take a more traditional approach to the duty issue, maintaining that the burden fell on the insured to provide information material to the risk, **[*1179]** rather than for the insurer to seek out such information. [90] In HIH Marine, a vessel owner and sightseeing tour company entered negotiations in which the tour company would assume custody and control of the vessel pursuant to a charter agreement that the tour company agreed to draft. [91] Prior to drafting the agreement, the tour company sought an endorsement of its preexisting policy for coverage of the new vessel, to which the insurer agreed. [92] It was also agreed that the vessel owner would be included as a named insured for hull coverage. [93] Due to other pressing business, the endorsement was not formally executed. During charter party negotiations and prior to the execution of a final charter agreement, the vessel caught fire and was destroyed. [94]

The insurer denied coverage, claiming that the insured had failed to disclose that it was not in custody of the vessel and that there was no formal charter agreement. The insured argued, however, that HIH had knowledge that the vessel was not owned by the tour company and, therefore, had its own obligation to request the charter agreement or other information relating to the nature of the agreement between its insured and the vessel owner. [95] While the opinion does not couch this argument in terms of enacting the reciprocal duty, it appears that this is precisely what the insured intended. The court, however, disagreed, relying instead on the heavy burden imposed on the insured in disclosing facts within the insured's knowledge. "The central principle of ***uberrimae fidei***, however, is that the insured bears the burden of full and voluntary disclosure of facts material to the decision to insure." [96] As a result of the insured's material misrepresentations, the policy was declared void ab initio. [97]

Likewise, in North American Specialty Insurance Co. v. Savage, the injured party in a vessel personal injury case sought to impose the ***uberrimae fidei*** duty of good faith against the insurer for perceived wrongs during claims

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[86] ***Id. at 1171, 2005 AMC at 2339.***

[87] Id.

[88] ***Id. at 1172, 2005 AMC at 2340.***

[89] ***Id. at 1173, 2005 AMC at 2342.***

[90] ***211 F.3d 1359, 2000 AMC 1817 (11th Cir. 2000).***

[91] ***Id. at 1361, 2000 AMC at 1818.***

[92] Id.

[93] Id.

[94] ***Id., 2000 AMC at 1819.***

[95] ***Id. at 1363, 2000 AMC at 1821.***

[96] Id.

[97] ***Id. at 1364, 2000 AMC at 1822.***

adjusting. [98] In Savage, Ms. Carillo was injured while on a vessel owned and operated by Mr. Savage, the insured. The insurer declined coverage for Ms. Carillo's injuries based on material **[*1180]** misrepresentations made by the insured vessel owner regarding his driving record. [99] Ms. Carillo argued that the insurer failed to exercise the utmost good faith by failing to make a timely investigation of the insured's driving record and for failing to provide timely notice of rescission of the policy. The insurer acquired Mr. Savage's driving record six weeks after binding coverage (one month after the accident), and notified him of rescission almost two months after learning of his misrepresentations. [100] However, the court found that Ms. Carillo failed to provide any evidence that such delay was unreasonable or that the insurer acted in bad faith. [101] The court also noted that Ms. Carillo "has not shown that she is entitled to raise the doctrine in the absence of good faith on the part of Mr. Savage." [102] Based on these observations, the court ruled that the insurer had not acted in bad faith and denied Ms. Carillo's motion for summary judgment. [103]

The HIH Marine and Savage opinions appear to follow the lead of numerous cases in which courts have held the insured to a higher standard than the insurer in the ***uberrimae fidei*** context. As seen in Flagship Marine, courts seeking to apply the duty of good faith against insurers most often do so in the context of the insurer's failure to further investigate upon the providing of certain information. A number of cases view this failure, though, as evidence of a waiver or estoppel, rather than a breach of the insured's good faith obligation. The Flagship Marine court did not interpret the insurer's actions in those terms, although a good argument could be made that that is precisely what the insurer had done. This distinction is important when discussing a remedy, as the insurer typically seeks recission of a policy, whereas the insured typically seeks to prove a waiver or estoppel in order to block the insurer's recission.

These opinions take divergent views of the nature of the ***uberrimae fidei*** duty, especially as applied (or, more frequently, not applied) to the insurer. In Flagship Marine, the court repeatedly expressed its exasperation with the insurer for requesting documentation and failing to adequately read that very information, which would have clarified the nature of the insured risk. The court seemed displeased with the insurer's assertion that the insured would not only be required to present information to the insurer, but actually **[*1181]** pinpoint the precise location of whatever particular information the insurer might find material. By the same token, however, the court seemed to overlook the fact that the insured's written application, prepared by its insurance broker, contradicted the information in those supporting documents. [104] In Lloyds I, while the court implicitly recognized the insurer's duty to investigate information and respond to the insured in good faith, it did so in a manner which ultimately benefitted the insurer.

In HIH Marine and Savage, by contrast, the courts paid little attention to any duty that the insurer might have to take a closer look at the interest it was requested to insure. The courts were not concerned with the insurer's actions, instead focusing on the nature of the disclosure by the insured. In HIH Marine, for instance, it would seem reasonable to think that an insurer, when insuring a vessel that it knows is not owned by the insured, might require a copy of the executed charter agreement prior to binding coverage. The court, however, maintained the onus on the insured to fully disclose such information in an upfront manner to the insurer.

In viewing the foregoing cases, it appears that although the outcomes differed, the courts consistently applied the doctrine of ***uberrimae fidei*** in light of its underlying driving force of economic efficiency. In Flagship Marine, the insurer took an additional step of requiring certain documentation. The insured complied, but it was the insurer who

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98 ***977 F. Supp. 725, 1998 AMC 769 (D. Md. 1997).***

99 ***Id. at 727, 1998 AMC at 770.***

100 ***Id. at 732, 1998 AMC at 778.***

101 Id.

102 Id.

103 ***Id. at 732-33, 1998 AMC at 778.***

104 *Commercial Union Ins. Co. v. Flagship Marine Servs., 982 F. Supp. 310, 312, 1998 AMC 717, 719 (S.D.N.Y. 1997).*

did not follow through in the most efficient manner by reviewing documents in its possession. In those cases in which an insured might provide certain information relative to a risk, but not the ultimate material fact that affects the risk, courts seem reluctant to impose any kind of additional duty on the insurer to investigate.

C. English Case Law Addressing Insurer's Duty of Good Faith

While American law is somewhat lacking in guidance as to what is required of an insurer under the ***uberrimae fidei*** doctrine, English law provides a bit more direction as to the nature of the obligation of good faith with respect to the insurer. The case of Drake Insurance PLC v. Provident Insurance PLC, while perhaps raising more questions than it answers, highlights the issues inherent in applying the duty of good faith to insurers. [105] Drake Insurance involved issues of good faith **[*1182]** in the context of policies of car insurance, but the court interpreted and relied upon section 17 of the British Marine Insurance Act; therefore, its discussion of the reciprocal duty of good faith is instructive. In Drake Insurance, the insured's wife was in a car accident in which she hit a motorcyclist, causing serious injury. [106] Because he owned the vehicle, the insured made a claim under his car insurance policy with Provident Insurance. [107] However, Provident declined coverage and notified him that the policy would be voided due to alleged nondisclosure of a prior incident. [108] Drake, which carried a liability policy in favor of the insured's wife, accepted the defense and settled with the injured party; it then sought contribution from Provident. [109]

Drake argued that Provident's right to void the policy was limited by the duty of good faith because it did not inquire whether the prior accident had been settled in the insured's favor prior to voiding the policy. The court analyzed prior cases touching on the insurer's duty of good faith and summarized the conflict as one of economic efficiency versus proportionality. [110] The court was bothered by the notion that, although the insurer may not have acted in outright bad faith, the result of voidance of the policy seemed like an unduly harsh punishment under the circumstances. "In my opinion it would be consonant with these views [mutuality of good faith obligation] that the doctrine of good faith should be capable of limiting the insurer's right to avoid in circumstances where that remedy, which has been described in recent years as draconian, would operate unfairly." [111] Thus, English courts seem open to the prospect of limiting an insurer's right of rescission pursuant to ***uberrimae fidei*** where the insurer does not act with a reciprocal measure of good faith.

D. Consequences for Breach of Duty of Good Faith

Perhaps the most obvious reason why there is not more litigation where insureds assert breach of good faith by the insurer is the remedy. The proper measure of damages for breach of the duty of ***uberrimae fidei*** is rescission of the insurance policy, with return of the premiums **[*1183]** to the insured. [112] U.S. law does not currently provide a mechanism for recovery of monetary damages beyond this remedy. While Drake Insurance seems to suggest an opening for potential claims based on breach of the duty outright, no such cases have done so. To the contrary,

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[105] [2003] EWCA (Civ.) 1834, [2004] 1 Lloyd's Rep. 268 (U.K.).

[106] Id. at [11], [2004] 1 Lloyd's Rep. at 274.

[107] Id. at [5], [11], [2004] 1 Lloyd's Rep. at 274.

[108] Id. at [12], [2004] 1 Lloyd's Rep. at 275.

[109] Id. at [25]-[28], [2004] 1 Lloyd's Rep. at 278.

[110] Id. at [87]-[89], [2004] 1 Lloyd's Rep. at 288.

[111] Id. at [87], [2004] 1 Lloyd's Rep. at 288.

[112] See, e.g., *N.H. Ins. Co. v. C'Est Moi, Inc., 406 F. Supp. 2d 1077, 2006 AMC 25 (C.D. Cal. 2005),* aff'd, *519 F.3d 937, 2008 AMC 931 (9th Cir. 2008),* cert. denied, ***129 S. Ct. 639 (2008);*** Schoenbaum, supra note 3, at 35.

U.K. courts have rejected the contention that an insured could be entitled to damages for the insurer's breach of the duty of good faith as judicial creation of a new type of tort. [113]

Rescission of an insurance contract is likely not something that an insured would invite, as such an action would forfeit continuing coverage. If an insured is victorious in proving the insurer's breach, the insured will be without insurance coverage. While the return of paid premiums could be an incentive for invoking the doctrine, it will likely not be sufficient in most cases to truly compensate the insured for an insurer's breach of its good faith duty. For this reason, the reciprocal duty will likely continue to be seen as a kind of affirmative defense to the insurer's claim of breach, rather than something that the insured takes upon herself to assert. Another permutation of the proper remedy for an insurer's bad faith is in the case where no loss has occurred. It remains to be seen whether an insured could seek the rescission of an insurance contract, and the resulting return of premium, in the absence of a loss altogether, such as where the insured discovers that the insurer acted in bad faith after the risk has passed.

Many insureds have argued that an insurer has waived or is estopped from arguing an insured's breach of the duty of good faith. The duty of good faith in marine insurance contracts not only places an arguably onerous burden on the insured, but it has also been interpreted as overriding any arguments of waiver or estoppel where the insured has been found to have made a material misrepresentation. [114] For instance, the court in Gulfstream Cargo Ltd. v. Reliance Insurance Co. addressed whether an insured could rely on such arguments, but the precedent relied on was largely English case law, and the court found that the facts did not support a finding of **[*1184]** waiver. [115] In Gulfstream Cargo, the court found that although the insurer was aware that the vessel was in need of repair, it was not "given the critical information … that an acknowledged expert considered the vessel wholly unfit and in need of major repairs to make her reasonably fit." [116] Therefore, it appears that even the use of these standard affirmative defenses may not be sufficient to overcome the insured's burden of disclosure where it is determined that the insured made a material misrepresentation or otherwise breached its duty of good faith, despite the insurer's actions.

The lack of an adequate remedy for insureds with respect to an insurer's failings is likely the reason that most insureds decline to invoke the seemingly weak reciprocal duty of ***uberrimae fidei*** and opt instead to file state bad-faith claims against the insurer. Typically, when an insured wishes to accuse an insurer of bad faith, it will do so under a state bad-faith law or statute. As there is no recognized general maritime law rule relating to the award of punitive damages for an insurer's bad faith, courts often recognize the applicability of state statutes which provide for this type of award. [117] Successful bad-faith claims can result in punitive damage awards, in addition to attorneys' fees and costs.

Furthermore, under the general maritime law, the courts have inherent power to assess attorney's fees against any party who "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." [118] No court has yet decided

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[113] See Schoenbaum, supra note 3, at 37 (discussing Banque Keyser Ullmann S.A. v. Skandia (U.K.) Ins. Co., [1990] 1 Q.B. 665 (C.A.) (U.K.), aff'd on other grounds sub nom. Banque Financiere de la Cite S.A. v. Westgate Ins. Co., [1991] 2 A.C. 249 (H.L.) (U.K.)).

[114] ***Progressive N. Ins. Co. v. Bachmann, 314 F. Supp. 2d 820, 2004 AMC 1745 (W.D. Wis. 2004);*** *Certain Underwriters at Lloyds, London v. Giroire, 27 F. Supp. 2d 1306, 1998 AMC 2153 (S.D. Fla. 1998).*

[115] *409 F.2d 974, 982, 1969 AMC 781, 792-93 (5th Cir. 1969).*

[116] *Id., 1969 AMC at 793.*

[117] See generally Michael K. Clann, Brit T. Brown & Sylvia J. Sydow, Judicial Interpretation of Insurance Contracts in Maritime Law: The Duty of Good Faith in Handling Claims, *66 Tul. L. Rev. 479 (1991).*

[118] *Griffith v. Am. Nat'l Fire Ins. Co., 1997 AMC 2745, 2761 (D. Del. 1996)* (citing *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 129 (1974); Vaughan v. Atkinson, 369 U.S. 527, 530-31, 1962 AMC 1131, 1133-34 (1962);* ***Sosebee v. Rath, 893 F.2d 54, 56, 1990 AMC 1601, 1604 (3d Cir. 1990)).***

whether an insurer's failure to satisfy its duty of utmost good faith in the marine insurance context would entitle the insured to attorneys' fees. However, it is possible that, as ***uberrimae fidei*** has been consistently recognized as a unique admiralty rule, the courts could well award such damages in the proper case.

In addition, as a unique admiralty concept, a court may be willing to assess punitive damages for an insurer's breach of its duty of utmost good faith. With respect to punitive damages under the general maritime law, however, the Supreme Court's recent opinion in Exxon Shipping Co. v. Baker would seem to limit the extent of such punitive **[*1185]** awards in maritime cases, as even the imposition of a punitive award on a 1:1 ratio could be a great hardship for any underwriter. The Court in Exxon reduced a punitive damage award to an amount equal to the $ 507.5 million figure for compensatory damages determined by the trial court. [119] The Supreme Court ultimately determined that parties contemplating a course of conduct should have "some ability to know what the stakes are in choosing one course of action or another." [120] However, as noted by Justice Ginsberg's dissent, this ruling was limited to punitive damages for reckless conduct and left the door open for larger awards where the defendant acted maliciously or in pursuit of financial gain. [121]

Probably the insured's most effective use of the reciprocal duty for the present is as a mechanism for pressuring the insurer where the insurer has affirmatively asserted the doctrine. By raising the reciprocal obligation of good faith, the insured reminds the trier of fact that the insurer should not be permitted to rest on its haunches while the insured attempts to anticipate any potentially "material fact" that the underwriter might use against it at a later date. Instead, the trier of fact has a method for comparing the actions of both parties to the contract and leveling the playing field. This was the method taken by the insured and adopted by the court in Contractor Realty.

V. Ramifications and Practical Considerations

The reciprocal duty of good faith has not been asserted or discussed in many cases. U.S. courts appear to view the doctrine as primarily applicable against the insured, and anything less than failing to read the very documents requested will be considered "good faith" on the part of the insurer. The majority of U.S. courts have not described the doctrine of ***uberrimae fidei*** as "draconian," but rather as an efficient way of dealing with issues of disclosure in the field of marine insurance. Therefore, during this period in which several appellate courts have reiterated the endurance of ***uberrimae fidei*** as an entrenched maritime doctrine that holds insureds to a high standard of disclosure, the motivation to seek equitable results may not be as great in U.S. courts, and, thus, the actions of insurers will likely not be scrutinized as closely.

[*1186] However, the Drake opinion brings to the surface the funda-mental issue of fairness with respect to the ***uberrimae fidei*** doctrine and uses the insurer's balancing duty of good faith as a way of pointing out the potential inequity that can result where the insurer is not held to the same standard of conduct. This inequity was perhaps more understandable in an era in which access to information on a given vessel or risk was limited. In today's world, however, the underwriter is in a better position than ever to ascertain for himself or herself the information that may be relevant to a risk. The Internet is a modern tool that holds huge amounts of information on vessels, vessel owners, and marine risks. For instance, various U.S. government Web sites offer information regarding collisions or other events. There are also numerous other trade-based and public Web sites that hold basic information regarding a vessel, such as age, builder, flag, and classification data. In addition, old concerns regarding the difficulty of inspection of vessels are not as valid where modern transportation allows surveyors to reach many ports within hours. Therefore, while there may still be some expense involved in obtaining information regarding a risk, this is, after all, the business of the insurance company.

These advances in modern technology and communications raise the question of whether the insurer's duty of good faith may be reexamined by future courts. As the original motivation for the doctrine of ***uberrimae fidei*** has

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119 *Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2008 AMC 1521 (2008).*

120 ***Id. at 2627, 2008 AMC at 1543.***

121 ***Id. at 2639, 2008 AMC at 1558*** (Ginsburg, J., dissenting).

changed over centuries, one might expect courts to begin holding insurers to a higher standard of "utmost good faith" than has been seen. It may only be a matter of time before insureds begin pushing back on insurers in the context of this established doctrine, giving the court more pause before simply laying blame on the insured for a misrepresentation or lack of disclosure. Underwriters need to be aware of this potential defense in response to assertions of an ***uberrimae fidei*** breach. While, thus far, courts have been reluctant to require insurers to seek additional information upon learning of certain facts that may affect the risk, these cases are very fact-specific. The insurer should be aware of the potential for losing its right to assert an insured's breach of good faith where the insurer itself has failed to perform diligently.

Depending on whether the maritime practitioner is representing the underwriter or the insured, the reciprocal nature of the duty of good faith may be either beneficial or problematic. For the insured who finds itself confronted with a denial of coverage based on failure to disclose, its only hope may be to assert that the insurer likewise failed **[*1187]** to meet its obligation of good faith. This hurdle is great in light of the jurisprudence suggesting that once an insured has been found to have failed to disclose, arguments of waiver and estoppel are irrelevant. However, where an insured fully complies with the underwriter's requests for information and the insurer simply fails to utilize that information properly, the insured may have an argument to push back with. As English case law seems more developed on this issue, resort to English choice of law, where available, will assist the insured's defense.

However, in light of the recent trend of courts coming down in favor of insurers and showing little hesitation to void policies where a disclosure was not properly made, it seems that the doctrine of ***uberrimae fidei*** is still a weapon that will be put to greater use in the insurer's arsenal. Underwriters and claims adjusters should be aware of their minimal duty of good faith, which generally seems to materialize as a duty to read and take in the information provided by the insured where it is so provided. As long as the insurer takes these minimal steps, the reciprocal nature of the good faith duty may well continue to be relegated to the place of a general definition of a concept that has little real import.

VI. Conclusion

The duty of good faith required by the ***uberrimae fidei*** doctrine holds requirements for both the insured and the insurer. While historically the insurer has often relied upon the good faith duty of disclosure as a method of seeking avoidance of the policy, the possibility remains for this doctrine to be used against the insurer as well. U.S. courts have seen little activity in this area, but in the cases that have addressed it, it seems a door is beginning to open that could lead to more litigation against the insurer. At the very least, the reciprocal nature of ***uberrimae fidei*** leaves a potentially strong affirmative defense to this often ironclad doctrine. Courts need to be more aware of the dual nature of the good faith obligation and apply it appropriately. In the meantime, insureds will likely continue to rely upon the bad-faith causes of action in various states as a more direct route to recovery for an insurer's bad faith.

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