

Utmost Good Faith

Marine Insurance

By Frederick B. Goldsmith

Historically, and even into the present day, marine insurance underwriters rarely have the opportunity to themselves inspect, or even see a written marine survey report on a vessel they are asked to consider insuring. Commercial vessels, in particular, are, if they are working, constantly on the move, at sea, in transit on the rivers, or in distant ports. They are rarely tied-up for weeks or months and available for an underwriter or surveyor to inspect them.

This is why the general maritime law and the law of many U.S. states has developed the doctrine of *uberrimae fidei*, translatable to “the duty of utmost good faith.” It means the vessel owner, the potential insured, has a legal duty to not only truthfully answer the insurer’s questions about their vessel, but also a duty to come forward and voluntarily disclose other material features of their vessel or its operation which may impact the risk the insurer is being asked to assume.

The doctrine of *uberrimae fidei* is grounded in the concept that as between insurer and insured, the insured is in a better position to know the risks associated with insuring the vessel. The idea is the marine insurer should be entitled to rely on the vessel owner to tell

the truth about their vessel, including features such as its key equipment, its maximum speed or the horsepower of its engines, its purchase price, in which waters it will be operated, or who will man or captain it, to enable the marine insurer to decide if it wishes to take on the risk of insuring the vessel, and if so, what dollar limits it will offer and agree to pay in the event of a loss, and in exchange for what amount of premium dollar.

The failure of the insured to be candid with the marine insurer can have grave consequences. If the marine insurer takes on the risk of insuring the vessel based on the information the insured provided, a loss incurs, and the marine insurer’s investigation reveals the insured has concealed or misrepresented material facts (facts which were material to the insurer’s decision whether, and for what amount of premium dollar, to underwrite the risk), then under the wording of most marine insurance policies and the law of most states, the insurer is entitled to void the policy “ab initio,” or from its inception, as though the policy never existed.

The public policy rationale is obvious: in the marine insurance marketplace, where candor and full disclosure of risk is essential for



USCG Photo of grounded vessel

the marketplace to function efficiently, where an insured conceals or misrepresents the risk to the insurer, it should have to pay a high price — voiding of the policy and thus forfeiture of insurance coverage — if the insured has breached its duty of candor to the insurer.

Here are some excerpts from court decisions on this issue to give you a feel for the law in this realm:

- “Generally, insurance policies may be voided ab initio when an insurer issued a policy in reliance on a material misrepresentation in the application ...Materiality is determined by considering whether, given the circumstances of the case, the information omitted could reasonably have affected the determination of the acceptability of the risk ...The misrepresentation must actually have been relied on in issuing the policy or setting the premium in order for it to be material.”
- “Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer’s option; an insured, making application for insurance, is bound by all the representations and warranties contained in the application even though he does not answer them specifically; having signed the application, he adopts and ratifies all statements appearing above his signature.”
- “there exists a special relationship between an insured and an insurer requiring the parties to act with the utmost good faith. In the making of a contract for insurance, the parties are held to the utmost of good faith; the assured is presumed to know the condition of the property, and the dangers attending it; and is not at liberty to withhold information on an important and material matter known to increase the risk.”
- “A party’s intent to conceal, or lack thereof, is irrelevant to the uberrimae fidei analysis ...a material misrepresentation, even if it is a result of mistake, accident, or forgetfulness, is attended with the rigorous consequences that the policy never attaches and is void ... The only thing that matters is the existence of a material misrepresentation.”

Here are examples of misrepresentations insureds have made which courts have found sufficiently material to allow the marine insurer to void the policy from inception:

- Misrepresenting the purchase price of a yacht as \$600,000 when it was only \$400,000.
- Failure to disclose on insurance application details of a prior loss that the vessel had previously sank in ten feet of water.
- Insured’s agent checked “no” on application question about whether boat was to be used for racing and the boat was later damaged while insured was attempting to qualify for a race.
- Failure of insured to disclose true age of vessel.
- Representing on insurance application that cruising limits would be “Inland Lakes and Rivers” as opposed to the more expensive “Coastal Waters” coverage, then operating vessel in coastal waters.

If you are applying for marine insurance, even on a pleasure boat, tell the insurer, directly or through your insurance agent or broker, the whole truth. Answer all questions on the insurance application

fully and accurately. If you believe there are features of your vessel or its operation which are unusual or which may increase the risk to the insurer of insuring your vessel, come forward and in writing disclose these to the insurer. If you fail to follow these directives, the consequences may be severe: your policy may be voided from inception and there will be no coverage for a loss, be it a personal injury, a death, a collision, a fire, or a sinking.

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