YACHT & BOATOWNER'S INSURANCE – SOME INSURERS MAY DENY COVERAGE FOR BIG LOSSES: INSURERS INTERPRET POLICIES TO EXCLUDE COVERAGE FOR RESULTING DAMAGE THAT IS IN ANY WAY CONTRIBUTED TO BY WEAR, GRADUAL DETERIORATION, CORROSION, REPAIRS OR OTHER COMMON CONTRIBUTING CAUSES TO MAJOR MARINE CASUALTIES, INCLUDING FIRES AND SINKINGS [1]

Charles M. Davis[2]
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Damage caused or in any way contributed to by "animals or marine life" is not covered.

The Tradition that Marine Insurers Offer Coverages Required by Vessel Owners Has Been Abrogated in Recent Yacht Policies

Historically, marine insurers have responded to developments in vessel construction and technology to expand coverage to provide insurance that vessel owners have required. Three primary examples are the concepts of providing coverage (1) against machinery breakdown, (2) "Inchmaree"[3]

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[2] Law Office of Charles M. Davis, 4767 Wharf Road, Bow WA 98232. Telephone 360-766-3223, fax 360-766-4014, e-mail cdavis@davismarine.com.

[3] The background of the *Inchmaree* clause is important to a discussion of how marine insurers historically have voluntarily broadened coverage to respond to the practical needs of the marine insurance marketplace. In *Thames & Mersey Marine Ins. Co. v. Hamilton Fraser & Co.*, 12 App. Cas. 484 (H.L. 1887), the House of Lords held that the non-fire bursting of a boiler was not a peril of the sea or a "like peril", so damage to the ship Inchmaree that resulted from the bursting of a boiler was not covered under the traditional hull policy. In *The Inchmaree*, a boiler burst either because a latent defect or

coverage for a number of risks that had not been covered under traditional perils policies, including explosions, repairers' negligence, negligence of crew, and resulting damage from latent defects, and (3) "liner negligence" clauses in commercial hull policies that broaden coverage for damage which results from negligence of any person. For an appropriate premium, the world's underwriters have been "contented to bear and take upon themselves" the broad risks of perils of the sea and normal vessel operations, meeting the purpose of insurance of spreading the risk of substantial economic losses among the vessel owners purchasing insurance. Exclusions from coverage have been clear, narrow and specific, usually shifting insurance of excluded perils such as war risks, capture and seizure and breaches of warranty to other insurers who are able to evaluate and underwrite those risks under specific applicable circumstances.

Although marine insurers generally have offered expanded coverage to meet the needs of insureds, they may contractually limit coverage by the language of their insurance contracts. Courts and insurers long have recognized that insurers may limit their contractual liabilities.[4]

Until recently, yacht and boatowners' policy forms generally have followed the principle that the economics of the marketplace result in coverage being offered by underwriters that meets the practical needs of prospective insureds, including insurance either under enumerated perils with *Inchmaree* coverage forms or against all risk of physical loss or damage to the insured vessels and their machinery from any external cause, plus certain "internal causes" such as resulting damage from latent defects, repairers' negligence, negligence of master and crew, and other accidental causes involving some element of fortuity. Exclusions from coverage generally have been specific and understandable by the average insured. Underwriters generally have adjusted claims within the broad concept of honoring claims which are within the reasonable expectations of coverage by consumers purchasing insurance.

With respect to yacht and boatowners' policies, in recent years I have noted a disturbing reversal of the historical principle of broad coverage and good faith adjusting of claims to meet the insurance needs of vessel insureds. Some current yacht policy forms and many boat owners' policy forms include broad exclusions from coverage which are contrary to traditional marine insurance principles. Some yacht and boatowners' policy insurers now are using policy forms with broadly worded exclusions which, without careful analysis, appear innocuous but potentially exclude risks which are not only fortuitous but ordinary insurance consumers would expect would be covered. The exclusions themselves generally are targeted at protecting insurers from claims for decreases in value of vessels due to inevitable deterioration and losses preventable by proper maintenance. But in combination with "anti-concurrent-causation" clauses added to many yacht and boatowners' policies in recent years, have

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corrosion jammed a pressure relief valve. The House of Lords held that neither latent defect nor corrosion was an insured peril under the traditional perils of the sea policy forms. Instead of clapping their hands in satisfaction for winning a coverage decision, underwriters promptly intentionally and voluntarily offered the coverage the House of Lords held did not exist. *Tropical Marine Products v. Birmingham Fire Ins. Co.*, 247 F.2d 116, 1957 AMC 1946, 1950 (5th Cir. 1957), acknowledged that the purpose of the Inchmaree clause is a substantial insurance undertaking "which history shows, was added voluntarily by underwriters, (with successive amendments to meet like conditions) to expand protection to shipowners and thereby overcome court decisions favorable to an underwriter but which, the underwriting fraternity thought unrealistic and a denial of coverage reasonable needed. *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385, 1957 AMC 655 (5th Cir. 1957), refers to the Inchmaree Clause's "rich history which reveals it and its several expansive amendments as the underwriters' response to the practical business needs of the shipping world in the face of adverse court decisions. As such its purpose is to broaden, not restrict, to expand, not withdraw, coverage."

[4] See, e.g., *Sea Trek, Inc. v. Sunderland Marine Mutual Ins. Co., Ltd.*, 757 So. 2d 805 (La. App. 2000):

> It is equally well settled, however, that subject to the rules of interpretation, insurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy.

provided grounds for insurers to deny coverage for resulting damage and ensuing loss, which not only do consumer insureds reasonably believe would be covered but often are disastrous losses of the magnitude that vessel owners cannot bear as operating expenses and are the reason they purchase insurance. If the combination of broad exclusions and anti-concurrent-causation clauses are enforced with respect to claims for damage to components of vessels damaged as a result of flooding, fire, sinking, stranding and collision, the purposes of the owners in purchasing insurance is subverted and coverage can be illusory, available at the discretion of the insurer.

The problem is aggravated by two major factors. First, as yacht and boatowners' insurances are considered marine insurance, they generally are not reviewed or approved by state offices of insurance commissioners. Second, many of these policies are sold by agencies, rather than by independent brokers, so many vessel owners are not fully advised of the potential effects of the broadly-worded exclusions and that coverage they may have had under the policy forms of past years may be denied under today's policies. In other cases, agents and brokers may not be fully aware of the potential application of the exclusions or that policies offering substantially broader coverage may be available.

Problems with Many Current Yacht Policies Forms

In recent years, many insurers have issued yacht and boatowners' insurance in "plain language" policy forms that have incorporated language from homeowners' policy forms with respect to both lists of exclusions from coverage and anti-concurrent-causation clauses.[5] The problem is that many yacht/boatowners' insurers have omitted from their boat insurance forms the "ensuing loss" clauses that are included in homeowners policies.[6]

Using the analogy of a nursery rhyme:

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.

there would be no coverage under policy of insurance on the kingdom if a contributing cause of the loss of the horseshoe nail was wear, gradual deterioration, or corrosion of any type or definition.

My specific complaints with some current yacht policy forms are:

(1) the longstanding principle of providing coverage for "resulting damage" that result from fortuitous events such as fire, sinkings and flooding, and collision that indirectly are contributed to be causes such as wear and tear, latent defects, marine life, unusual chemical or electrolytic action that

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[5] See, *e.g.*, Insurance Services Office homeowner's form HO-3, a standard form approved by insurance commissioners of most if not all states.

[6] The ISO HO-3 form states:

> We do not insure, however, for loss ... caused by ... wear and tear, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself ... smog, rust or other corrosion ...vermin, rodents, or insects ... [but] any ensuing loss ... not precluded by any other provision in this policy is covered.

Section I, Coverage A.

technically can be called "corrosion", repairers' negligence, and negligence of the master or crew have been abrogated by policy forms of many insurers;

(2) the exclusion of coverage by "anti-concurrent-causation" clause language such as "any loss or damage caused or contributed to by any excluded clause" may result in denial of coverage for resulting damage which virtually every boat owner would expect to be covered;

(3) defects in design or manufacture or by defective repairs or maintenance often result in major or total loss not only of value to the vessel, but, due to fire, sinking, collisions and stranding to other components of the vessel, but many policies exclude coverage for these risks;

(4) the concept of providing insurance for losses caused by the insured's own negligence[7] has been abrogated by some insurers, with some policies including warranties that the insured vessels shall be maintained at all times in seaworthy condition (with no allowance for due diligence);

(5) the fact that many yacht policies and most boatowners' policies are not placed through independent brokers may result in insureds being deprived of independent advice on what coverages they need and comparisons of what coverages may be available under competing policy forms (this last complaint assumes that independent brokers universally are competent and knowledgeable about the relative coverages offered under the policies of various insurers); and

(6) irrespective that the policy forms are not clear that they exclude coverage for "resulting damage" or "ensuing loss",[8] some insurers are denying claims for resulting damage to otherwise undamaged components of the vessels.

Examples of Elimination of Traditional Coverage

Traditional yacht policies have provided very broad coverage, as construed by courts and as adjusted by underwriters. As mentioned above, traditional yacht policies have been either "enumerated risks" policies which provide hull and machinery coverage either against perils of the sea and other specific risks, or "all risks" policies which provided coverage against "all risks of physical loss or damage from any external cause". Both types of traditional policies also have included some form of Inchmaree coverage for resulting damage from latent defects, repairers' negligence, crew negligence (provided that such loss or damage has not resulted from want of due diligence of the Assured, but masters and crew are not to be considered owners). Subject to specific express warranties such as navigation limits, layups, specific masters, number of crew and other operating criteria to control exposure to loss, most fortuitous losses to hull and machinery have been covered (in cases of latent defects, excluding the cost of repairing the defective component part).

The tradition of yacht insurers providing broad coverage clearly has changed. Some current policies include language defining a "latent defect" much narrower than the definitions developed by courts in the context of Inchmaree clauses:

> If it was not discoverable prior to departure for sea by all known and customary tests, it was latent and covered under the policy. ... The Court concludes that a "person of competent skill" should not mean that an owner is

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[7] One of the earliest marine insurance cases in United States Jurisprudence, *Citizen's Ins. Co. v. Marsh*, 41 Pa. 386 (1862), held that one of the purposes of insurance is to protect the insured against losses by mere negligence and carelessness, short of misconduct by the insured.

[8] The term "resulting damage" comes from construction of coverage under the Inchmaree clauses that, until recently, were used not only in enumerated perils policy forms for commercial vessels and larger yachts, but in all-risks insurances for yachts and smaller pleasure boats. The term "ensuing loss" has been used in homeowners policies.

> held to a standard that if a shipbuilder, naval architect, composites expert, engineer, or other expert could have discovered the defect then the defect is patent. The Court concludes that a "person of competent skill should be defined and interpreted to mean the competency of the Owners, crew, master, etc, and then placed in the context of activities surrounding the maintenance, safety procedures, and sailing of the [vessel]."

Gray v. Certain Underwriters at Lloyd's, 1999 AMC 939 (E.D. La. 1999). Washington courts define a "latent defect" as "one which could not have been discovered by inspection."[9] In comparison, some current policy forms narrowly redefine "latent defects" as limited to

> a flaw in the material of the Insured Yacht's hull or machinery existing when the Insured Yacht or its components were built and not discoverable by common means of testing. Latent Defect does not include wear and tear, gradual deterioration, corrosion rust, electrolysis, osmosis, weathering or inherent vice.

[For purposes of this paper, I do not identify specific policy forms]. Under this definition, resulting damage from many defects which classically would and could be considered "latent defects", including design defects plus hidden and undetectable defects which result from errors in construction, repairs, prior damage, or other defects which did not exist as flaws "in the material" at the time of original manufacturer would be excluded from coverage. It is not hard to imagine a hidden defect causing a fire or a sinking, which, under this restrictive definition, would not be a covered casualty.

Although traditional policies specifically provide coverage for loss or damage caused by repairers' negligence which occur without want of due diligence of the insureds, some current policies *specifically exclude* "loss to the property" ... "resulting in any manner from" ... "repairing, renovating, servicing or maintenance." Wow! **NO COVERAGE FOR DIRECT OR RESULTING DAMAGE CAUSED BY REPAIRERS**! What if a repairer negligently allows the vessel to be stolen? What if a repairer negligently drops the vessel from a crane? What if a repairer negligently causes a fire or the vessel to sink? What if negligent repairs cause a mechanical failure and the vessel allides with a dock or collides with another vessel or strands? The exclusion applies wether the damage is direct or "resulting"! So if a yacht burns or sinks or is stolen or is involved in a collision as a result of the negligence of a repairer, under these policies potentially there is no coverage.

My concern is not theoretical. Many current policies exclude from coverage losses caused or contributed to by "marine life." I have litigated coverage where relatively large yachts have sunk as a result of muskrats entering their exhaust systems and chewing through the rubber fittings. Virtually all current policy forms exclude damage caused or contributed to be rust or corrosion.[10] I have litigated coverage for a sinking where the owner allegedly "failed to properly maintain" a vessel although it was professionally maintained and the owner had no knowledge that there was any problem with rust buildup in the engine exhaust system that the insurer contended was a contributing cause to flooding/near sinking when the vessel was underway. One insurer of a yacht under an all risks policy denied coverage for a sinking on the grounds the insured failed to maintain the vessel in a "seaworthy condition" at all times when afloat, irrespective that the owner had the yacht professionally maintained and had no knowledge that a through hull fitting might have been defective.[11] Similarly, I am aware of several fires being

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[9] *Rottinghouse v. Howell*, 35 Wn. App. 99, 108 (1983).

[10] A claim I presently am litigating involves the breaking of a stainless steel bolt that secured a clamp on an engine exhaust system. The resulting loose clamp allowed a large leak of very hot exhaust gasses into the engineroom, which would have started a fire but the heat triggered the boat's halon fire suppression system. The soot from the exhaust and the released halon ruined the boat's engines. Coverage was denied on the grounds of microscopic analysis of the bolt indicated that there was a type of "corrosion" between the molecules of the stainless steel alloy of the bolt that reduced its tensile strength.

[11] *Allstate Ins. Co. v. Heil*, 2007 U.S. Dist. Lexis 90029 (D. Hi. 2007) (settled pending appeal), held that a express warranty of that a yacht would be "kept in a safe and navigable condition whenever afloat" was a warranty that a vessel be maintained in a seaworthy condition at all times, and breach of that warranty terminated coverage irrespective of a causal

caused by "corrosion" or chaffing of electrical wires or latent defects in the design or construction of electrical wiring, fittings and appliances.[12] Some policies exclude coverage for any loss caused by any "illegal activity" by the insured. Considering that ordinary negligence in the operation of a vessel not only is illegal but is criminal under federal law,[13] the results of virtually any collision or allision can be (and have been) deemed excluded from coverage.[14]

Anti-Concurrent-Causation Clauses

Most current boatowners' and yacht policies not only include broad exclusions from coverage, but, without clear warning or explanation, **extend the effect of the exclusions to resulting damage "caused or contributed to by any excluded cause."** Most of the exclusionary provisions do not highlight or warn insureds of the potential application of what may appear to consumers (who understandably usually do not have a very high degree of insurance sophistication) to be boiler-plate language not inconsistent with their expectations of what would be covered. For example, the exclusions clause of one current policy provides:

> "We" will not pay for loss or damage caused by or resulting from any of the following, regardless of whether any other cause or event contributed concurrently or in any sequence or in any way to the loss:
>
> 1. wear and tear, gradual deterioration, rust, corrosion, electrolytic or galvanic action ....;
> 2. mechanical breakdown;
>
> ...
>
> 6. insects, vermin, animals or marine life; ...

Virtually all consumer insureds would be very shocked if their insurer denied their claims for major damage to their yachts from a fire which resulted from unexpected and unpreventable by normal maintenance and inspections of the following examples, which are just of few of the dozens of foreseeable causes of fires, sinkings, floodings, collisions and allisions:

1. unobservable chaffing through the insulation of electrical wiring;

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relationship between the breach and the cause of loss. In that case, a plastic through hull fitting failed and the vessel sank. The vessel had been professionally inspected without notice of any problem with the fitting installed by the builder, and had been professionally maintained.

[12] An example is a recent fire in the engineroom of a passenger ferry that was found to be the result of a vibration-induced fatigue fracture of a fuel oil gauge pipe, allowing pressurized fuel to spray onto the hot engine exhaust manifold. This was covered under a standard enumerated perils hull policy, but the cause and resulting damage could be deemed excluded under most current yacht policies.

[13] 18 U.S.C. § 1115, the "seaman's manslaughter statute", has been interpreted as criminalizing ordinary negligence. *United States v. O'Keefe*, 426 F.3d 274, 2005 AMC 2805 (5th Cir. 2005); *United States v. Ryan*, 364 F. Supp. 2d 338, 2005 AMC 1281 (S.D. N.Y. 2005). 46 USC § 2302(b), makes operation of a vessel in a "negligent manner than endangers the life limb or property of a person" unlawful.

[14] See, *e.g.*, *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1, 2005 AMC 1779 (1st Cir. 2004). In *Foremost Ins. Co. v. Thorson*, W.D. Wa. Cause No. C07-0243, the insurer denied coverage not only for hull damage but for liability coverage in a simple case of a pleasure boat alliding with another vessel while entering a marina where the operator plead guilty to a non-criminal "infraction" of negligent operation of the vessel, where the policy excluded coverage for "bodily injury or property damage arising out of the illegal acts" of the insured. In *Foremost*, the insurer contended there was no coverage for "illegal activity", whether or not the activity resulted in an arrest or a conviction. In *Northern Ins. Co. of New York v. Lamm*, 2007 AMC 901 (11th Cir. 2005), applying Illinois law, the court determined that the term "illegal acts" is ambiguous as to whether it excludes coverage for loss while the vessel is engaged in illegal activity or loss caused by illegal activity, and, further, whether the vessel was engaged in illegal activity at the time of the loss.

2. unobservable corrosion of fuel piping;
3. destruction of a vessel which drifts onto a reef after a mechanical breakdown;
4. sinking of a boat from unexpected corrosion of a through-hull fitting or water piping;
5. collision with a whale;
6. a colony of sea lions decides to sun themselves on the deck;
7. expensive mechanical damage which results from sucking kelp into the cooling system;[15]
8. as a result of corrosion of a steering or engine control cable, a vessel collides with another vessel or allides with a dock;
9. hidden design defect or manufacturing defect causes fire or sinking.

Traditional policies either provide coverage for such "resulting" losses directly, or provide coverage for resulting damage if their masters and crews in their vessel-operating capacity negligently fail to discover defects and minimize damage.[16] In looking over some older policy forms, I see one policy which has an exclusion for damage caused by "gradual deterioration including marine life". This seems fair and appropriate, as the exclusion is for loss or damage "due and confined to" wear and tear, gradual deterioration, etc., and the policy form does provide coverage for resulting damage. But to not provide coverage for "resulting damage" including total loss of the yacht from an accidental cause beyond the control of the insured clearly does not meet the insurance needs of most yacht owners.

One company's policy form, at page 2, states that the "physical damage coverage" "provides you with coverage against all risk of physical loss to your watercraft unless stated otherwise or an exclusion applies." If an insured read this far, it would appear to provide comprehensive coverage. But at page 13, the policy form defines "caused by" as meaning "any loss that is contributed to, made worse by, or in any way results from that peril". That form, until recently, also at page 13, excluded coverage for

> ... any loss caused by wear and tear, marine life, deterioration, electrolysis, lack of maintenance, or fiberglass osmosis or blistering. .... **But we do insure ensuing covered loss unless another exclusion applies**.

My emphasis. The policy form now has been revised: it now omits the "ensuing covered loss" coverage.

For comparison, two policy forms which I think illustrate how some competitive policies offer much broader coverage make it clear that the exclusions for latent defect and wear and tear, etc., do not apply to resulting damage:

The first form states:

> This insurance does not cover: ...
>
> The cost of repairing or replacing any part of the boat defective or repairing mechanical breakdown. **However we do cover loss resulting from such mechanical breakdown or latent defect in the hull or machinery.**
>
> The cost of repairs or replacing any part of the boat defective by reason of wear and tear, gradual deterioration, osmosis, mechanical breakdown, wet or dry rot, corrosion, weathering, marring, scratching, denting, vermin, pets, or marine life, or electrolytic or galvanic action.

The second provides:

> You are insured against All Risks of accidental and direct physical tangible loss of or damage to the *Insured Property* from any external cause ... excluding the following loss or damage caused or resulting from:
>
> A) Wear and tear, gradual deterioration, faulty repair or faulty workmanship, ... corrosion, ... electrolysis, galvanic action, or any inherent vice, insects, vermin or marine life: however **we will**

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[15] See, *e.g.*, *Jefferson Ins. v. Roberts*, 349 F Supp. 2d 101 (D. Ma. 2004) (engine damage caused by a plastic bag, not kelp).

[16] See, *e.g.*, *Ferrante v. Detroit Fire & Marine Ins. Co.*, 125 F. Supp. 621, 1954 AMC 2026 (S.D. Ca. 1954); *Carter Tug Service, Inc. v. Home Ins. Co.*, 345 F. Supp. 1193, 1972 AMC 498 (S.D. Il. 1971).

> **cover consequential property damage resulting from any fire, sinking, submersion, demasting, collision or stranding;** ...
>
> C) Defect in manufacture or construction, nor will we pay for the cost of repairing or replacing any part which fails as a result of a defect in manufacture or construction, however, **we will cover consequential physical damage that results from such failure if not otherwise excluded**.

Bold emphasis added.

Some contemporary policies exclude any loss or damage "resulting in any manner from" criminal acts of an insured person. Some policies exclude coverage for any "willful act" of the insured.[17] In view of decisions which hold that "willful misconduct" includes the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences, even if the damage involved was not intended, coverage may be illusory under such policies.[18]

Some policies also exclude "any loss caused by any person who uses your watercraft without permission from you". I can understand not providing liability coverage to a non-permissive user, but to exclude first party property damage coverage which occurs during a theft or other non-permissive use contravenes principles of first party property insurance: if insureds need hull insurance or liability insurance at all, they need insurance against loss or liability if someone steals their yachts or damages their yacht while operating it without their permission.

Also of concern is some current yacht and boatowners' policies include express warranties of seaworthiness. This is counter to principles of marine insurance and good sense. English law and usage does not impose any specific duty on an insured to maintain his vessel in a seaworthy condition.[19] In contrast, some current yacht and boatowners' policies expressly impose an absolute duty on insureds to maintain their vessels in seaworthy conditions "at all times". For example, one policy form states

> **Seaworthiness Warranty**. You warrant that your watercraft will be kept in a safe and navigable condition whenever afloat and/or being operated.

An underwriter imposing a "due diligence" requirement on its insured may be appropriate, but an absolute express warranty that the vessel shall in no way ever be defective makes insurance illusory[20]

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[17] In a case under a pollution insurance policy that excluded coverage for "willful acts" of the insured, *United States v. Water Quality Ins. Syndicate*, 2005 U.S. Dist. Lexis 7128 (D. Me. 2005), upheld denial of coverage for a spill that was caused by intoxication of a crewmember, holding that "intoxication" is a "willful act".

[18] *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1 (1st Cir. 2004), determined that criminal liability based on ordinary negligence could justify denial of coverage under a policy which excluded coverage for "any loss, damage or expense arising out of or during any illegal activity on your part or on the part of anyone using the insured's property with your permission," where the insured had been found guilty of negligent homicide as a result of negligent operation of the vessel. The policy also excluded coverage for "any loss, damage, or liability willfully, intentionally, or criminally caused or incurred by insured". A recent case has held that "ordinary negligence" of a vessel operator is sufficient for a conviction of manslaughter under the "seaman's manslaughter" statute, 18 USC § 1115, *United States v. O'Keefe*, 426 F.3d 274 (5th Cir. 2005), so an insured whose ordinary negligence causes the death of any person may not only be charged with manslaughter, but may not have insurance coverage under some yacht policies.

[19] English law does not imply a warranty that the vessel shall be seaworthy, but provides that if the vessel is sent to sea in an unseaworthy state with the privity of the insured, the insurer is not liable for any loss attributable to the unseaworthiness. Marine Insurance Act §39(5). American law implies a warranty of seaworthiness at the inception of a time insurance policy, plus recognizes a warranty that the insured shall not, from bad faith or neglect, knowingly permit the vessel to depart a safe port in an unseaworthy condition.

[20] I have mentioned that some of the exclusions in many yacht policies, without coverage for resulting damage, make coverage "illusory" in that a reasonable insured may have believed he had purchased insurance against such risks of loss. This may not be sufficient to raise the doctrine of illusory coverage which would result in voiding of exclusionary

against many risks of loss or damage that may result from simple negligence not only of the insured, but of designers, builders and repairers, and from latent defects under any definition. Some collisions and groundings that are caused by operational negligence of the operators may result in losses to "seaworthy" vessels, but most fires, sinkings and floodings result from unseaworthy conditions, many of which will not be detected and prevented by reasonably diligent Sunday sailors.

Inherent or Implied Coverage for Resulting Damage/Ensuing Loss Unless Specifically Disclaimed

The history of anti-concurrent-causation clauses is they were introduced in homeowners' policies in the 1980s. As stated above, anti-concurrent-causation clauses in standard homeowners policies do not apply to the "wear, tear, deterioration, latent defect, rust or corrosion" exclusions: those policy forms specifically provide coverage for ensuing loss resulting from those causes. Anti-concurrent-causation clauses in ISO HO-2 and HO-3 policies forms are included only in the Section I exclusions, which exclude coverage for loss due to ordinance or law, earth movement, water damage from flood or subsurface water, war, intentional loss, and earthquake. Entirely different from the pleasure boat policies that are the subject of this paper, losses from these risks are very specifically excluded, homeowners purchasing insurance are aware that they are excluded, and supplemental or separate coverage for these risks is available in the marketplace.[21] In some cases, supplemental insurance, such as for flooding, is required by lenders. A few years after the introduction of anti-concurrent-causation clauses in homeowners' policies, some of the same language began appearing in proprietary pleasure vessel policies, but specific language recognizing coverage for ensuing loss often was not included. Never-the-less, custom and practice has been that coverage for ensuing losses has been accepted and claims for resulting damage routinely have been paid. There have been very few exceptions, some of which have resulted in litigation, apparently all of which have been resolved by settlement or unreported decisions. I am not aware of any jurisprudence that denies coverage under a pleasure vessel policy for resulting loss that may have as a contributing cause an "excluded" cause such as wear and tear, rust or corrosion. This custom and practice is an important consideration (1) in interpreting whether coverage for resulting damage is implied in such policies, (2) that such policies are ambiguous whether they exclude coverage for resulting damage, and (3) that such coverage is within the reasonable expectations of consumer insureds.

Other Issues with Current Forms of Yacht Policies

Some policies also make it practically difficult and/or expensive for an insured to enforce a claim. Many policies have arbitration clauses which require that the insured bear 50% of the costs of litigating coverage (sometimes requiring three arbitrators). Other insurers have policy forms that are even more

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language on a public policy basis where policy limitations and exclusions defeat the precise purpose for which the insurance is purchased. The doctrine of illusory coverage usually applies when there is no real coverage against any risk of loss or if there is actual coverage it is extremely minimal and affords no realistic protection to any group or class or insureds. If the insurance in issue does provide realistic protection of some group or class of insureds, the doctrine usually doesn't apply. See, *e.g.*, *National Union Fire Ins. Co. v. Dixon*, 141 Id. 537, 112 P.3^{d} 825 (2005).

[21] These factors are not the case with pleasure vessel insurance: buy back coverage or separate insurances are not generally available; insureds are not aware and are not informed that coverage for potentially calamitous losses that they reasonably expect will be covered are not in fact covered; and the basis for the exclusion is so vague, ambiguous and obtuse that even most marine claims adjusters believe there is coverage for resulting damage.

potentially abusive: some contractually designate that any litigation or arbitration be brought subject to foreign law and in a foreign forum.[22]

The basic principle of consumer insurance is to provide coverage against fortuitous losses, including negligence of the insureds, which the insureds are willing to pay a premium to an insurer to bear the risk of financial loss. For the most part, yacht owners are not experts on marine insurance coverage or on the design and maintenance of their yachts. They reasonably expect broad coverage against fortuitous losses, at least to the extent that they do not expressly, after full explanation of any exclusions, elect to forgo specific coverages. The forms of some yacht and boatowners' insurers provide illusory coverage and do not meet the insurance needs of insurance consumers and their lenders. This problem is aggravated by the present system of marketing yacht and boatowners' insurance: with most yacht owners placing insurance through agents rather than independent brokers, they might not receive professional advice on alternatives, so competitive market forces are not effective to force some of the insurers to narrow contractual exclusions.

LEGAL ISSUE I: CONSTRUCTION OF EXCLUSIONS: AMBIGUITIES AND REASONABLE EXPECTATIONS OF INSURED

In addition to the general rule that ambiguities in contracts, including insurance policies, will be construed against the draftor,[23] the courts of many states recognize a rule that coverage will be construed in accordance with the "reasonable expectations" of a layman insured as to what risks will be covered. Policy language will be given the same fair, reasonable and sensible construction as will be given to the contract by the average person purchasing insurance.[24] Courts will not blindly apply esoteric commercial

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[22] See, *e.g.*, *Intermetals Corp. v. Hanover Int'l*, 188 F. Supp. 2d 454, 2001 AMC 2417 (D. N.J. 2001). *McAlleer v. John Does 1 - 10*, 1996 AMC 2868 (Mass. Sup. Court 1996), interpreted a Massachusetts statutory invalidating of choice of law and choice of forum clauses on Massachusetts interests as not extending to policies entered into in other jurisdictions, holding that the state rule does not rise to the level of an expression of substantial public policy. *Advani Enterprises, Inc. v. Underwriters at Lloyd's*, 140 F.3d 157, 1998 AMC 2045 (2nd Cir. 1998), enforced a clause in a policy requiring application of English law and practice.

[23] The rule that insurance policies are to be construed in favor of the insured is most rigorously applied in construing the meaning of exclusions incorporated into a policy of insurance or provisions seeking to narrow the insurer's liability. See, e.g., *The Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 1988 AMC 223, at 242-43 (2nd Cir. 1987); *Royal Ins. Co. v. Delaware Operating Co.*, 904 F.2d 696, 1990 AMC 2792 (3rd Cir. 1990); *Kalmbach, Inc. v. Insurance Co. of the State of Pennsylvania*, 529 F.2d 552 (9th Cir. 1976).

[24] Although a number of states have recognized the "reasonable expectations" doctrine, there are not many cases construing the doctrine in the context of yacht policies. *Lewis v. Aetna Ins. Co.*, 505 P.2d 914 (Or. 1972), held that, at least with respect to a policy issued to a lay insured, an insurance policy is to be construed to provide the coverage which a layman may reasonably expect, given his interpretation of the policy's terms. In *Lewis*, a yacht sank at its covered moorage because of leaks in the hull, but the cause of the leaks could not be determined: there was no rotten wood and the caulking did not seem to be deficient. The insured contended that the leaks were caused by a "latent defect" within the coverage of the Inchmaree clause in a "peril of the seas" yacht policy. The concurring opinion of Judge Bryson states at 505 P.2d 918-19:

> Today, when the typical owner of a pleasure craft seeks marine ... insurance, his objective is financial protection form all or most of the risks which reasonably flow from ownership and operation of his craft. ... He bargains with the salesman about little concerning his coverage, pays his premium, and receives a printed policy. The policy itself is seldom read, and almost never understood, because the content is complicated and filled with confusing legal terminology. Nevertheless, the boat owner believes that when the contract is executed and the premiums and paid he is "covered." He may be wholly unaware of the exact type or extent of coverage, or any qualifications or exceptions to the policy coverage about

marine standards to a yacht policy: if there are ambiguities, the courts will resolve them consistent with "reasonable expectations of the average insured".[25]

LEGAL ISSUE II:
FIDUCIARY DUTIES OF AGENTS AND BROKERS TO RECOMMEND "BEST TERMS" TO INSUREDS

Obviously, yacht insurance policies are not fungible commodities, to be selected on price only. But most yacht-owning customers are not aware that some policies exclude important coverages or even that there are substantial differences between policies. Does a captive agent of an insurance company owe any duty to a prospective customer to explain to the customer that the only yacht policy the agent can offer does not provide the coverage the customer should have? How about an independent agent who may place policies with several companies – does an independent agent owe a duty to assist an insured in selecting coverage that best meets the customer's needs? What about a broker who may be

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which he has not been warned. ...

...

> The difficulty is with the term "latent defect." In this case, the term is stretched to embrace and unknown, unexplained something that caused the Manatee to sink at its mooring. This interpretation does violence to the language but justice to the case. The phrase may have served a proper function in 1889 but today it only confuses courts and policyholders and frustrates the reasonable expectations of the insured, a result which courts have historically disfavored. ... We would reach an unreasonable result if we denied the plaintiff policy-holders the coverage which they reasonably assumed they had purchased because they cannot explain an inexplainable sinking.
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> "When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. ... Where particular provisions, if read literally, would largely nullify the insurance, they will be severely restricted so as to enable fair fulfillment of the stated policy objective. ..." *Kievit v. Loyal Protect. Life Ins. Co.*, 34 N.J. 475, 482-83, 170 A.2d 22, 26 (1961).

In *Barber v. Chatham*, 939 F. Supp. 782 (D. Hi. 1996), the court applied Hawaii law, under which it is the court's duty "to enforce 'the objectively reasonable expectations' of parties claiming coverage under insurance contracts, which 'are construed in accord with the reasonable expectations of a layperson'".

The only federal appellate decision of which I am aware on this issue is *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 169 F.3d 43, 2001 AMC 1320, 1327 (1st Cir. 1999), which in a *dictum*, stated: "In examining the language of the policy, we consider 'what an objectively reasonable insured, reading the relevant policy language, would expect to be covered' [citations to non-marine cases omitted]". That said, the court held that an exclusion for losses caused by "malicious acts or vandalism" was not ambiguous and would provide a defense to a claim for fire damage if the fire was caused by malicious acts of a third party, remanding for trial on that issue.

Also, see Parks, THE LAW & PRACTICE OF MARINE INSURANCE & AVERAGE, 1987, pp. 135-137, for a discussion of the "reasonable expectations" doctrine.

Washington case law recognizes the doctrine in determining whether ambiguities exist in exclusions from coverage:

> An insurance policy must have meaning to the average individual. As such, the policy language must be interpreted the way it would be understood by the average person. ... In interpreting exclusions, we have held exclusions from coverage of insurance are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer.

Stuart v. American States Ins. Co., 134 Wn. 2d 814, 818 -19 (1998)(internal citations omitted).

[25] *Farmers Home Mutual Ins. Co. v. Ins. Co. of North America*, 20 Wn. App. 815, 583 P.2d 644, 1979 AMC 2549 (1978).

able to place coverage with a number of insurers, but may be influenced by the reality that some insurers offer higher commissions than others, and/or that it may be necessary to share commissions with a specialty broker or London broker in order to access some markets?

The law as to the obligations to insureds of "captive agents" of insurers varies from state to state. Most states do not impose the same duty to obtain "adequate insurance" on agents of the insurers as is imposed on brokers.[26] Brokers owe contractual and, in a majority of states, fiduciary duties to their clients. The contractual duties of agents run to their insurers, not the insureds.[27]

The courts have developed three lines of decisions on the issue whether insurance brokers owe a fiduciary duty to their clients to compare policy terms and recommend policies that best meet the needs of their insureds. Some states essentially hold that brokers are mere "order takers" responsible only for accepting premiums and completing forms. Others impose duties of professional experts to take all reasonable steps to further the client's goals, including advising the client of insurances necessary to provide adequate coverage for the client's needs. For example, New York courts hold that a broker owes no duties to its clients except to obtain agreed-upon coverage,[28] but New Jersey courts impose on brokers standards of professional specialists, similar to accountants and lawyers, to determine what the client requires and to recommend alternatives, not just to perform what the client requests.[29] The third line of cases is that brokers and agents who hold themselves out as providing expertise or offering special services may have liability for properly recommending necessary insurance coverage to the extent insureds rely on the representations of the brokers. *AGA Fishing Croup Limited v. Brown & Brown, Inc.*[30] held that a broker has no obligation to recommend that a vessel owner increase its P & I coverage limit after 15 years. Applying Massachusetts law, the First Circuit stated:

> There is no general duty of an insurance agent to ensure that the insurance policies procured by

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[26] See, *e.g.*, D. Sakall, *Can the Public Really Count on Insurance Agents to Advise Them? A Critique of the "Special Circumstances" Test.* 42 ARIZ. L. REV. 991 (2000).

[27] Agents of an insurer may be liable to the insureds for the agents torts. Agents for a disclosed principal normally are not liable for contractual breaches by the principal. *Grande v. St. Paul Fire & Marine Ins. Co.*, 2006 U.S. App. Lexis 2567 (1st Cir. 2006)

[28] New York courts hold that brokers are not considered "professionals". *Highlands Ins. Co. v. PRG Brokerage, Inc.*, 2002 U.S. Dist. Lexis 83 (E.D. N.Y. 2004).

[29] *Aden v. Fortsh*, 169 N.J. 64 (2001), rejected the defense by a broker that the client had failed to read a policy and failed to detect the broker's negligence: it held that the broker is the expert, not the client, and the client is entitled to rely on the broker's professional expertise in properly performing the job the broker was engaged to perform. See also *Rider v. Lynch*, 42 N.J. 465, 476 (1964):

> One who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principle for the loss sustained thereby.

Carter Lincoln-Mercury, Inc. Leasign Division v Emar Group, Inc., 135 N.J. 182 (1994), imposed on a broker the duties to advise a client of "insurance options" and to obtain insurance that met the insured's needs, extending the duties beyond contractual duties specifically requested by the client.

[30] ____ F.3d ____ (1st Cir. 2008).

> him provide coverage that is adequate for the needs of the insured. Such a duty only arises under special circumstances of assertion, representation and reliance. ...
>
> Courts have considered length of relationship a significant factor when determining the existence of special circumstances. An insurer's public representations of expertise or public promises to provide specialized counseling, like those found on Flagship's website, could also support, based on other facts as well, a finding of special circumstances. An expanded agency agreement, arrangement or relationship, sufficient to require a greater duty from the agent than the general duty, generally exists when the agent holds himself out as an insurance specialist, consultant or counselor ... .

Internal citations and quotations omitted. Although the broker in *AGA* did advertise on its website that it had "the expertise necessary to offer the appropriate insurance services for the maritime industry" and claimed to "systematically and comprehensively examine maritime exposures", summary judgment dismissing the claims was affirmed on the facts that, although the insureds were described as naive and unsophisticated, they never asked the broker if insurance was sufficient or that they be told if insurance became insufficient, and there was no other evidence of the insured relying on the broker "based on an assertion or representation," and the insureds never consulted the website and thus did not rely on the advertised representations.

The Washington Supreme Court, without broadly holding that all brokers are held to a level of professionalism and expertise, has held that both brokers and agents who hold themselves out as having expertise have fiduciary responsibilities to the clients to have knowledge of the types of policies, their different terms, and the coverage available, and are liable to their insureds for failure to procure insurances that meet the needs as disclosed by their insureds.[31] Under a Washington precedent which does not seem to make a distinction between an agent and a broker, agents and brokers owe their insureds an enhanced fiduciary duty of care, in two situations: (1) when the agent or broker holds itself out as an "insurance specialist" and receives compensation for consultation and advice apart from the premiums paid by the insured;[32] or (2) there is "some form of interaction on the question of coverage, coupled with the insured's reliance on the expertise of the insurance agent, to the insured's detriment."[33] I think it would be very unusual for a yacht owner, other than a large business who retains risk management consultants, to pay additional compensation for advice on which yacht policy to choose. Thus, the first situation described in *AAS-DMP* seldom would apply. But I can see few situations where the second test would not apply: most requests for yacht insurance would involve "some form of interaction on the question of coverage" and "the insured's reliance on the expertise of the insurance agent." In such situations, the fiduciary obligation includes the duty to provide advice on selecting a policy that meets the insured's specific and general needs.

In this respect, one of the few reported marine insurance decisions on the issue illustrates the scope of a broker's fiduciary duties to the insured:[34]

> [A]n insurance agent is more than a "mere order taker" for the insured. His fiduciary duties include advising the client with regard to recommended coverage, investigating and ascertaining the financial condition of prospective companies, and notifying the insured of policy cancellations or terminations. Where an agent is

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[31] The primary Washington decision on this issue is discussed below.

[32] I see no situations where a captive agent of an insurer would hold itself out as providing such advise, for an additional fee. There are situations where brokers do provide risk management advise and also act as agents for the insurers.

[33] *AAS -DMP Mgmt., LP. v. Acordia Northwest*, 115 Wn. 2d 833 (2003). *AAS-DMP* involved assistance with respect to a claim, rather than with respect to selection of an appropriate policy.

[34] *Offishore Production Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224 (5th Cir. 1990), applying Louisiana law, citations omitted.

> familiar with the insured's business, has reason to know the risks against which an insured wants protection, and has experience with the types of coverage available in a particular market, we must construe an undertaking to procure insurance as an agreement by the agent to provide coverage for the client's specific concerns.

Montgomery, *Duties and Liabilities of Marine Insurance Brokers and Agents*,[35] states:

> Often the broker will be asked by the assured to give his professional opinion and advice regarding the assured's insurance needs. The broker must exercise the degree of skill and care that is expected of a prudent and experienced marine insurance broker. If the broker holds himself out as a highly skilled insurance adviser and expert, he may be held to a higher level of expertise and standard of care.

Hart v. Brink recognized that when an insurance broker holds himself out as an expert in the field of insurance, and the insurer hires him in reliance on that fact, then the broker and his insured become bound in a "special relationship" in which with the broker owes a "special duty" to the insured.

California law recognizes the same rule: an agent assumes special duties by holding himself out as having specific expertise in a field of insurance. *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.*[36] held that because the broker held himself out as an expert in a particular field of insurance, he owed a "special duty" to the insured to properly understand both the law and the policy, and that the broker had breached this duty by failing to properly explain the policy to the insured. In *Eddy v. Sharp*[37] the court held an insurance broker to have a special duty toward the insured because he undertook responsibility for finding an insurance policy specifically suited to the insured's needs:

> In this case Sharp's duty to the Eddys arose because Sharp undertook to prepare an insurance proposal for the Eddys to review prior to purchasing a policy of insurance. Sharp thus came under a duty of due care to accurately inform the Eddys of the policy's provisions.

Westrick v. State Farm Insurance[38] involved a claim against an agent for failing to obtain coverage and for failing to explain the terms of the policy. The Court stated:[39]

> A long line of California cases has recognized that a disparity of knowledge may impose an affirmative duty of disclosure. In the insurance field, the quasi-public nature of the insurer's obligation imposes upon him a duty of good faith and fair dealing, which requires the insurer to "give at least as much consideration to the [insured's] interests as it does to its own." Since "[i]t is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies ... [and t]he insured usually confides implicitly in the agent securing the insurance ...", the insurer's duty includes the duty "reasonably to inform an insured of the insured's rights and obligations under the insurance policy."

Third Eye Blind, Inc. v. Near North Entertainment Ins. Services[40] held a claim is stated on allegations that a broker failed to explain the effect of an exclusion that substantially reduced coverage.

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[35] 7 TUL. MAR. L. J. 33, 40 (1982), citing a non-maritime Washington decision, *Hardt v. Brink*, 192 F. Supp. 879 (W.D. Wash. 1961).

[36] 16 Cal. Rptr. 2d 259 (1993).

[37] 199 Cal. App. 3d 858, 865-66 (1988).

[38] 187 Cal. Rptr. 214 (1982).

[39] *Westrick*, internal citations and quotations omitted.

[40] 127 Cal. App. 4th 1311, 26 Cal. Rptr. 3d 452 (Cal. App. 2005): "The point is that [the broker] failed to alert [the insured] that the [exclusion] would give [the carrier] a viable basis for refusing coverage under some circumstances and, consequently, failed to recommend that [the insured] purchase errors and omissions insurance to ensure complete, incontestible coverage."

CONCLUSION

The past few years there have been a number of reported cases in which insurers have denied coverage under their policies because of some breach by the insureds of the doctrine of *uberrimae fidei* (both parties to an insurance contract owe the other the duty of utmost good faith).[41] When *uberrimae fidei* works to the insurers' advantage, underwriters are entitled to assert demand retroactive utmost good faith on the part of their insured, and are entitled to deny coverage if an insured is in breach of his obligations to disclose all facts material to the insurer's evaluation of the risk in determining whether to accept coverage and set premiums. In drafting exclusions to coverage under their policies, and in interpreting vaguely worded exclusions that do not put the average lay insured on adequate notice that resulting damage, including fires and sinkings, may not be covered if some contributing cause in the chain of causation is one of the excluded risks, underwriters may not be so demanding of themselves.[42]

Yacht owners and their lenders require reasonably comprehensive coverage against fortuitous major financial losses. Although it is certainly appropriate to exclude coverage for some specifically-defined causes of loss which are clearly explained to potential insureds, the fact remains that the market requires coverage for resulting damage from such causes as latent defects, repairers' negligence, crew negligence, and other fortuitous losses that cannot always be avoided by good faith efforts to properly maintain the vessels. I cannot comprehend why most marine insurers are not offering coverage their market wants and requires. If loss ratios and competition with other companies are the issues, an insurer could offer two policies at different policy rates: one with traditional coverages and one with clearly expressed exclusions and allow insured to make elections with informed consent.

There is surprisingly little legal precedent on the liability of brokers and agents who are willing to place policies that do not fully meet the needs of their insureds to fully and explicitly explain to their clients and customers the potential extent and effect of all exclusions, and that policies of other carriers may provide coverage that better meet the needs of the insureds. Relative to yacht and boatowners insurance policies in the modern insurance marketplace, many brokers and agents essentially are selling a product, rather than services.[43] The law long has imposed implied warranties in contracts for the sale of goods by merchants in goods of that kind that goods they sell shall be "fit for the ordinary purpose for which such goods are used"[44] and, when they assist their customers in selecting goods that the goods

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[41] The doctrine requires that an insured make full disclosure in connection with the negotiations for insurance of all facts which may materially affect the underwriting of the risk, whether a misrepresentation or non-disclosure in innocent or otherwise. *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, [*retro*] 1998 AMC 1191 (1883). Recently, *Certain Underwriters at Lloyd's v. Inlet Fisheries, Inc.*, ___ F.3rd ___ (9th Cir. 2008), affirmed that the doctrine is a well-entrenched rule of federal maritime law and justifies denial of coverage.

[42] *Contractors Realty Co. v. Insurance Co. Of North America*, 469 F. Supp. 1287 (S.D. N.Y. 1979), states that reciprocal to an insured's duties of *uberrimae fidei* to make full disclosure of all facts material to the insurer's evaluation of the risk, the insured has the duty

> to deal fairly, to give the assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy of "all risk" insurance. Insurance obligations must not be construed so as to render the coverage mere gossamer.

[43] If brokers are selling their "services", they should provide the services of providing comparisons of the terms of coverage under various insurers' policies and recommendations as to which policies best meet the needs of their clients. If the law does not impose obligations on company agents to provide services to their clients, that fact should be disclosed to the insurance-purchasing community.

[44] Uniform Commercial Code § 2-314(c).

shall be reasonably suitable for their intended purpose.[45] Within the extremely high standard of *uberrimae fidei*, the "sellers" of yacht insurance, whether underwriters, brokers or agents should be held to at least that standard of the marketplace with respect to the sale of nuts, bolts and other goods: that the insurance will be fit for the purpose of the insurance and meet the reasonable expectations and needs of the insureds.

A final concern is my information that some insurers offer brokers higher commissions than other insurers. It seems obvious that because a broker is the agent of the insured with respect to selecting insurance, there is a conflict of interest in not recommending a policy that has better terms for the insured but may result in a lower commission to the broker. As we all know, even New York State, which imposes very low duties on brokers, now holds brokers responsible for the consequences of steering clients towards insurers who offer higher commissions.

In most situations, agents and brokers have a responsibility to advise insureds on policy terms and conditions, including whether coverage and exclusions meet the needs of the insureds. They may have an obligation to comparatively analyze competing policies not only price but terms of coverage. My belief is that "best terms" does not mean "best price" to the insured, or "best commission" for the broker or agent. In the case of agents who have limited or exclusive markets, they may have duties to advise customers that the policies they can write may not meet the insurance needs of owners of larger yachts to whom an uninsured total loss would be a financial disaster.

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[45] Uniform Commercial Code § 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is ... an implied warranty that the goods shall be fit for such purpose.