COZEN O'CONNOR

MARITIME

Alert!

News Concerning Recent Maritime or Transportation Legal Issues

April 4, 2008

www.cozen.com

PRINCIPAL OFFICE:
PHILADELPHIA
(215) 665-2000
(800) 523-2900

NEW YORK MIDTOWN
(212) 509-9400
(800) 437-7040

ATLANTA
(404) 572-2000
(800) 890-1393

NEWARK
(973) 286-1200
(888) 200-9521

CHARLOTTE
(704) 376-3400
(800) 762-3575

SANTA FE
(505) 820-3346
(866) 231-0144

CHERRY HILL
(856) 910-5000
(800) 989-0499

SAN DIEGO
(619) 234-1700
(800) 782-3366

CHICAGO
(312) 382-3100
(877) 992-6036

SAN FRANCISCO
(415) 617-6100
(800) 818-0165

DALLAS
(214) 462-3000
(800) 448-1207

SEATTLE
(206) 340-1000
(800) 423-1950

DENVER
(720) 479-3900
(877) 467-0305

TORONTO
(416) 361-3200
(888) 727-9948

HOUSTON
(832) 214-3900
(800) 448-8502

TRENTON
(609) 989-8620

WASHINGTON, D.C.
(202) 912-4800
(800) 540-1355

LONDON
011 44 20 7864 2000

W. CONSHOHOCKEN
(610) 941-5000
(800) 379-0695

LOS ANGELES
(213) 892-7900
(800) 563-1027

WILMINGTON
(302) 295-2000
(888) 207-2440

MIAMI
(305) 704-5940
(800) 215-2137

NEW YORK DOWNTOWN
(212) 509-9400
(800) 437-7040

500 Attorneys 23 Offices

UTMOST GOOD FAITH DOCTRINE ALIVE AND WELL

By: James F. Campise, Esquire

COZEN O'CONNOR
45 Broadway Atrium • Suite 1600 • New York, NY 10006
Phone: 212.908.1203 • Fax: 212.509.9492
jcampise@cozen.com

Despite the shocking pronouncement in 1991 by the U.S. Court of Appeals for the 5th Circuit that "...the *uberrimae fide* doctrine is not entrenched federal precedent", the doctrine continues to be applied in appropriate circumstances. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), cert. denied, 112 S.Ct. 279 (1991).

In March, 2008, the U.S. Court of Appeals for the Ninth Circuit, in an opinion involving an applicant's misstatement of the purchase price of a yacht, held that the insured applicant's obligation of *uberrimae fidei* was not modified, or eliminated by a policy wording providing that intentional concealment or misrepresentation may void the policy. *See New Hampshire Ins. v C'Est Moi, Inc.*, F.3d , 2008 WL 732487 (9th Cir. 2008). The court stated that *uberrimae fidei* is well entrenched and "...protects not only the insurer but the integrity of the risk pool." Interestingly, the Ninth Circuit went so far as to admonish the Eleventh Circuit Court of Appeals for reaching a contrary result in *King v. Allstate Insurance Co.*, 906 F.2d 1587 (11th Cir. 1990), stating: "We hope ...that our colleagues there will reconsider this question the next time they have occasion to rule on it."

In yet another recent Ninth Circuit case, *Certain Underwriters at Lloyds v. Inlet Fisheries*, F.3d , 2008 WL 351688 (9th Cir., February 11th, 2008), WQIS sent a notice of cancellation to its insured due to several "pollution incidents." After receiving the notice, but before the effective cancellation date, the insured applied to Lloyd's for pollution coverage. One of the insured's vessels spilled oil and pollutants when it sank and claim was made to Lloyd's, who upon learning of the prior incidents sought to

MARITIME TERM OF THE DAY - **"YACHT"**

Can be traced to the 16th century Dutch word "jaghtschip" for fast boat or chase ship.

void the policy *ab initio* for non-disclosure of material information. The insured argued that Alaska state law required insurers to ask the question in order for information to be deemed material. The court declined to apply state law, relying instead upon the federal maritime *uberrimae fidei* standard and voided the policy.

Arguably the oldest form of insurance, marine insurance is steeped in tradition, and what some believe to be outmoded customs and practice. *See M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828) and *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 78 U.S. (11 Wall.) 1 (1870). Traditionally, written applications for marine insurance policies were seldom required or signed by the applicant, in partial reliance upon the time-honored doctrine of *uberrimae fidei*, or utmost good faith. The doctrine requires that all material facts be communicated to the insurer. Failure to fully disclose material information to the underwriter, results in forfeiture of the policy, whether that failure was willful, negligent, or from ignorance. Without all the material facts, the reasoning goes, there can be no meeting of the minds, i.e. no contract.

The doctrine has its roots in times when communication was slower and underwriters had no practical ability to investigate ships and other far away risks. *See Stecker v American Home Fire Assurance Co.* 299 N.Y. 1 (1949). Today, however, communication is at light speed and underwriters have networks of surveyors and other experts who can send a photographs and reports within seconds. Notwithstanding these technological advances, the doctrine remains viable.

Insurers seeking to avoid coverage on the basis of *uberrimae fidei*, however, should take care that the facts fit the law. The U.S. District Court for the Southern District of New York recently upheld the doctrine of *uberrimae fidei*, finding, however that the alleged misrepresentations and non-disclosures by the insured were not material and thus refused to void the coverage. *Federal Ins. Co. v. PGG Realty*, F.Supp.2d, 2008 WL 703715 (S.D.N.Y., March 13, 2008). The insurer argued that the insured failed to disclose a total of six (6) items which were material to the risk. These items included a survey report, earlier litigation involving the prior owner and yacht manufacturer, as well as an unseaworthy condition caused by non-watertight doors on the yacht. In ruling that these non-disclosures were not material to the risk, the Court examined the insurer's underwriting procedures and concluded that none of the nondisclosures would have prevented the insurer from binding the risk in question.

The import of the *Federal v. PPG* decision is that in this international economy, marine insurers have many tools at their disposal to investigate risks and although uberrimae fidea is still a valid and enforceable doctrine in marine insurance, courts may nevertheless expect insurers to employ those tools prior to binding.

For more information regarding this Alert, please contact:

JAMES F. CAMPISE
212.908.1203 • jcampise@cozen.com

DAVID Y. LOH
212.908.1202 • dloh@cozen.com

ROBERT W. PHELAN
212.908.1274 • rphelan@cozen.com

For additional information about Cozen O'Connor's subrogation practice areas, including maritime, please contact:

ELLIOTT R. FELDMAN
Chair, National and International Subrogation & Recovery Department
215.665.2071 • efeldman@cozen.com

For additional information about Cozen O'Connor's insurance litigation practice area, including maritime, please contact:

WILLIAM P. SHELLEY
Chair, National Insurance Department
215.665.4142 • wshelley@cozen.com