

# Utmost Good Faith: Legislative Developments under English Law and a U.S. Perspective

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# Outline

1. Overview of the doctrine of *uberrimae fidei* in the U.S.
2. Seminal U.S. Supreme Court cases
3. Circuit Court Split: is *uberrimae fidei* judicially entrenched federal maritime law?
  - a) Fifth Circuit versus the rest
4. Recent Circuit Court case law





“The Broker Who Insisted on His Commission Being Reduced”

# The Doctrine of *Uberrimae Fidei*

- Utmost good faith
- Based on the presumption that “the party procuring insurance, is not . . . in possession of any facts, material to the risk which he does not disclose.”  
*McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 185 (1828).



# The Doctrine of *Uberrimae Fidei*

- “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.” *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 316 (1928).
- Insured must fully disclose all material facts to the insurer so the insurer may assess the risk.



## ***McLanahan v. Universal Ins. Co. (1828)***

- United States Supreme Court decision
- Adopted English doctrine of *uberrimae fidei* in the marine insurance context
- “The contract of insurance has been said to be a contract *uberrimae fidei* . . . . The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk which he does not disclose.”



## ***McLanahan v. Universal Ins. Co. (1828)***

- “If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy”
- Misrepresentations and/or non-disclosures tend to violate the duty of *uberrimae fidei*



# *Wilburn Boat Co. v. Fireman's Fund Ins. Co. (1955)*

- United States Supreme Court decision
- **Facts:**
  - Wilburn Boat Co. purchased a small houseboat to carry commercial passengers on a lake
  - Boat was insured against fire by Fireman's Fund Ins. Co.
  - Subsequently destroyed by fire
    - Fireman's Fund refused to pay
    - Argued that Wilburn Boat breached policy terms





# ***Wilburn Boat Co. v. Fireman's Fund Ins. Co. (1955)***

## ▪ **Holding:**

- “In the field of maritime contracts . . . the National Government has left much regulatory power in the States.”
- Defer to State law unless there is a “judicially established federal admiralty rule”



# ***Wilburn Boat* and the Doctrine of *Uberrimae Fidei***



- Conflict
  - Insurance law - primarily subject to state law
  - Maritime law - primarily subject to federal law
    - *Wilburn Boat*: Defer to State law unless there is a firmly established federal admiralty law
- Recall *McLanahan* (1828)
  - Doesn't this mean *uberrimae fidei* was/is firmly established?

# Circuit Split: Fifth Circuit vs. The Rest

- Nearly every Circuit Court has held that the doctrine of *uberrimae fidei* is federally entrenched maritime law
  - Exception: The Fifth Circuit



# Circuit Split: Fifth Circuit vs. The Rest

- 1991: *Albany Ins. Co. v. Anh Thi Kieu* (5th Cir. 1991)
- **Facts:**
  - Vietnamese immigrant Anh Thi Kieu insured a shrimping vessel with Albany Ins. Co. and stated on application
    - 1) She regularly operated the vessel as captain
    - 2) Vessel had no damages in past five years, and
    - 3) She purchased the vessel for \$110,000
  - In reality the vessel
    - 1) Had an independent crew
    - 2) Was damaged less than five years previously
    - 3) Was purchased for just \$30,000.



# Circuit Split: Fifth Circuit versus The Rest

- **Holdings:**

- *Uberrimae fidei* is not federally entrenched
- Application of *Wilburn Boat* mandated application of state law in lieu of federal maritime law on the issue of *uberrimae fidei*



# Circuit Split: Fifth Circuit versus The Rest

- 2009:
  - Fifth Circuit declined to reverse *Anh Thi Kieu*.
  - Affirmed decision that *uberrimae fidei* is not federally entrenched maritime law. *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.* (5th Cir. 2009).





“Must everything with you be a landmark decision?”

## Recent Cases

- *ALG Centennial Ins. Co. v. O'Neill* (11<sup>th</sup> Cir. 2015)
- *Catlin at Lloyd's v. San Juan Towing & Marine Services, Inc.* (1<sup>st</sup> Cir. 2015)
- *New York Marine & General Ins. Co. v. Continental Cement Co.* (8<sup>th</sup> Cir. 2014)
- *St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC* (2<sup>nd</sup> Cir. 2013)





## Recent Cases

- *SW Traders LLC v. United Specialty Ins. Co.* (9<sup>th</sup> Cir. 2010)
- *Great Lakes Reinsurance (UK) PLC v. Durham Assoc.* (5<sup>th</sup> Cir. 2009)
- *AGF Marine Aviation & Transport v. Cassin* (3<sup>rd</sup> Cir. 2008)



# ***AIG Centennial Ins. Co. v. O'Neill*** **(11<sup>th</sup> Cir. 2015)**

- **Facts:**

- Sport-fishing vessel purchase agreement for \$2.275 million (\$1.575 million cash, \$700,000 trade)
- Following inspection, renegotiated purchase price down to \$2.125 million
- Insurance agreement listed purchase price as \$2.35 million (appraised value of vessel)



# ***AIG Centennial Ins. Co. v. O'Neill*** **(11<sup>th</sup> Cir. 2015)**

- **Holding:** overstatement of purchase price by nearly \$250,000 was material
  - Failure to disclose proper purchase price was in violation of doctrine of *uberrimae fidei*



# *Catlin at Lloyd's v. San Juan Towing & Marine (1<sup>st</sup> Cir. 2015)*

## ▪ Facts:

- Aug. 2006: San Juan Towing (SJT) purchases a dry dock for \$1.05 million
- Nov. 2006: Dry dock appraised at \$1.75 million
- 2006-11: Insured with RLI Insurance Co. for \$1.75 million
  - Feb. 2011: RLI cancels insurance policy
- Apr. 2011: SJT advertises sale price of dry dock \$800,000
- SJT insures the dry dock with Catlin, valuation \$1.75 million



# ***Catlin at Lloyd's v. San Juan Towing & Marine* (1<sup>st</sup> Cir. 2015)**

## ▪ **Holdings:**

- Doctrine of *uberrimae fidei* is firmly entrenched in federal admiralty law, satisfying *Wilburn Boat* analysis
- SJT violated duty of *uberrimae fidei* by “[f]ailing to disclose the true value of the *Perseverance*, what [it] paid for the *Perseverance*, and the *Perseverance*’s level of deterioration.”



# ***New York Marine & Gen. Ins. Co. v. Continental Cement Co. (8<sup>th</sup> Cir. 2014)***

## ▪ **Facts:**

- 2008: Continental Cement considering retiring cement barge and hired engineer to conduct survey
  - “Numerous rivets appeared to have been leaking in the past,” bulkheads no longer watertight, bilge system “not even close” to functioning
- Nov. 2010: Continental applies for insurance policy with Starr Indemnity
  - Does not disclose the 2008 survey
- Feb. 2011: cement barge sinks in Mississippi River



# ***New York Marine & Gen. Ins. Co. v. Continental Cement Co. (8<sup>th</sup> Cir. 2014)***

## ▪ **Holding:**

- Doctrine of utmost good faith is judicially established federal admiralty rule
  - “[N]o rule of marine insurance is better established than the utmost good faith rule”
- Rejected insured’s argument based on Fifth Circuit’s decision in *Anh Thi Kieu*



## ***St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.* (8<sup>th</sup> Cir. August 20, 2015)**

- Muddied waters in the 8<sup>th</sup> Circuit?
- **Facts:**
  - Abhe chartered dumb barge
  - Pre-charter survey noted pinholes and valued barge at \$90,000
  - Agreed value in charter \$225,000
  - Abhe switched insurers but did not provide survey; barge insured for \$225,000
  - Barge lost in storm
- **Holdings**
  - *Uberrimae Fidei* applies
  - But, underwriters must demonstrate not only materiality, but also reliance/inducement
    - Materiality: objective?
    - Reliance: subjective?





# ***St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC* (2<sup>nd</sup> Cir. 2013)**

## ▪ **Holding:**

- Under *uberrimae fidei*, disclosures should be made so as to afford the insurer “the opportunity to investigate prior to its acceptance of the risk”
- Policy was voidable at inception because of misrepresentation regarding prior damage



# ***SW Traders LLC v. United Specialty Ins. Co. (9<sup>th</sup> Cir. 2010)***

## ▪ **Facts:**

- SW Traders, LLC applied for an insurance policy with United Specialty Insurance Co., covering a freight hauler
- SW Traders did not disclose that Reginald Gates was the owner of the vessel



# ***SW Traders LLC v. United Specialty Ins. Co. (9<sup>th</sup> Cir. 2010)***

## ▪ **Holding:**

- SW Traders did not dispute the availability of *uberrimae fidei* as a defense (in line with previous Ninth Circuit decisions holding that *uberrimae fidei* is federally entrenched)
  - Claimed failure to list Gates was immaterial
- “Ship ownership is indisputably material to an insurance company’s assessment of the risk,” therefore, the policy was voidable by the insurer



# ***Great Lakes Reinsurance (PLC) v. Durham Assoc., Inc. (5<sup>th</sup> Cir. 2009)***

## ▪ **Facts:**

- 2002: Durham purchased 48-foot motor yacht for \$100,000
- 2004: On insurance application with Great Lakes Reinsurance, Durham stated that the purchase price was \$150,000



# ***Great Lakes Reinsurance (PLC) v. Durham Assoc., Inc. (5<sup>th</sup> Cir. 2009)***

- **Holding:**

- Fifth Circuit declined to overturn previous decision in *Anh Thi Kieu*. “[I]t is settled that one panel of this court may not overrule another.”
- Case was remanded to trial to apply New York law due to a choice of law provision requiring either application of “entrenched principles and precedents of substantive United States Federal Admiralty law . . . [or] the substantive laws of the state of New York.”



# ***AGF Marine Aviation & Transport v. Cassin (3<sup>rd</sup> Cir. 2008)***

## ▪ **Facts:**

- Dec. 1997: Richard Cassin purchased an 85-foot yacht from Magnus Falk for \$400,000
  - Disputed: Cassin received a \$200,000 equity interest
  - Dist. Ct.: \$200,000 equity stake was “at best a benefit that flowed from Falk to Cassin” without consideration
- Mar. 2000: Purchase price \$600,000 in renewal application
- Nov. 2000: Yacht sank off coast of Grenada
  - AGF Marine declined coverage under the policy based on misrepresentation of purchase price



# ***AGF Marine Aviation & Transport v. Cassin* (3<sup>rd</sup> Cir. 2008)**

## ▪ **Holding:**

- The doctrine of *uberrimae fidei* is well entrenched federal admiralty law
- Adopted 9<sup>th</sup> Circuit's statement that "the purchase price of a vessel is unquestionably a fact material to the risk"



# Conclusions and Questions



“THE UNDERWRITER WHO MISSED THE TOTAL LOSS  
Showing the inside of Lloyd's, and the famous ‘Lutine’ bell,  
which is rung to announce a total loss”



# Sources

## ▪ Supreme Court Opinions:

- *McLanahan v. Universal Ins. Co.*, 26 U.S. 170 (1828)
- *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311 (1928)
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## ▪ Circuit Court Opinions:

- *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991)
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- *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236 (5th Cir. 2009)
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- *St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC*, 507 Fed. App'x 94 (2nd Cir. 2013)
- *New York Marine & General Ins. Co. v. Continental Cement Co.*, 761 F.3d 830 (8th Cir. 2014)
- *Catlin at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69 (1st Cir. 2015)
- *AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296 (11th Cir. 2015)

## ▪ Law Journals:

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- Christopher W. Nicoll, *Uberrimae Fidei: The Doctrine That's On Everyone's Lips*, 21 U.S.F. Mar. L.J. 1 (2008-09)
- Jeffery B. Struckhoff, *The Irony of Uberrimae Fidei: Bad Faith Practices in Marine Insurance*, 29 Tul. Mar. L.J. 287 (2004-05)

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