

To: John Hare
From: Michael Nicaud
Re: Marine Insurance Ass. # 2
Date: 28, Oct., 2005

Largely due to England's Marine Insurance Act of 1906¹, over the past one hundred years the law of marine insurance has "remained static and relatively stable, and that stability has been reflected in the comparative paucity of reported marine insurance cases in most maritime jurisdictions."² This stasis has become problematic, because unlike the law, the world at large, particularly the marine insurance business, has continued to transform, creating a legal friction where parts once ran more smoothly. Recent initiatives have been undertaken by several nations to alleviate this friction by transforming the law of marine insurance in an attempt to bring it up to speed with modern business practice. The USA, Australia, New Zealand, China, and South Africa are all examples of countries which have considered or are considering reform.³

In 2004, the CMI proposed draft guidelines for the formulation of marine insurance law. The purpose of these broad reform guidelines was to: 1) 'seek harmonization of international maritime law'; 2) "help prevent a headlong dash to new and diverging national MIA's"; and 3) to "allow the marine insurance industry (and the lawyers who serve it) to play a more defined role in promoting, as a precondition of cover, basic tenets of safety at sea and environmentally friendly shipping."⁴ To limit the scope of the subject, four issues were "identified as the ones most in need of attention: the duty of good faith; the duty of disclosure; alteration of risk; and warranties."⁵ It is to these four issues that this paper will give attention, relating the guidelines specifically to issues of marine insurance law in the USA, all the while using English law as a comparison. An excursion into the law itself is necessary to determine what effect, if any, the guidelines would have.

Marine Insurance in the U.S...

Until the infamous decision of Wilburn Boat v. Fireman's Fund Insurance Co.⁶, "marine insurance was unquestionably governed by the general maritime law in the United States."⁷ This

¹ Marine Insurance Act, 1906, 6 Edw. 7, ch. 41, s 1 (Eng.) (hereinafter MIA).

² John Hare, "The CMI Review of Marine Insurance Report to the 38th Conference of the CMI Vancouver 2004," CMI Yearbook 2004, at p. 248. This statement is limited to those non-civilian anglophile jurisdictions, which were influenced by the MIA.

³ *Id.*, generally.

⁴ *Id.* at 256.

⁵ *Id.* at 250.

⁶ 348 U.S. 310, 1955 AMC 467 (1954). (*hereinafter Wilburn*) This decision controls when marine insurance is governed by the general federal maritime law and when federal courts are obliged to apply state law. The decision is heavily criticized for its finding that a federal court should apply state law in this realm, if there is no federal law in existence. The court then went on to find that indeed there was no federal rule which governed this

meant that federal courts would have exclusive jurisdiction over the several states to decide any and all matters relating to maritime law, including marine insurance and notions of utmost good faith, warranties, etc. Since that decision, utmost good faith has been applied to most marine insurance contracts and is part of the federal maritime law in the majority of federal circuits. Sometimes, however, the states have been found to have jurisdiction and state law is applied; sometimes it is not.

Are the CMI guidelines helpful in providing a normative set of principles in a jurisdiction where the law varies from federal circuit to federal circuit, within singular federal circuits, and from state to state? Several years ago, there was a push by the Maritime Law Association of the United States (USMLA) to enact a federal statute, similar to the MIA, which would clarify these discrepancies.⁸ Enactment of a U.S. Marine Insurance Act was explored and abandoned, but the American Law Institute is considering publishing a Restatement of the Law of Marine Insurance in cooperation with the USMLA.⁹ The ALI Restatements, although not controlling, are extremely persuasive on the judiciary and are often cited by judges in their opinions, especially when the issue involves an area of the law that often necessitates some expertise. In this regard, any research conducted by the USMLA or the ALI would surely (hopefully) include any relevant CMI reports.

Good Faith, Disclosure, and Material Alteration...

“The doctrine of utmost good faith, *uberrimae fidei*, has been a prominent feature of English and American insurance law since the beginnings of the insurance industry in the eighteenth century.”¹⁰ In England, the duty of utmost good faith, although criticized¹¹ for being non-sensical (one either is either in good faith or not), is codified in section 17 of the MIA which states: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not

issue and that the court would not take it upon themselves to fashion one. It must be said, however, that it appears the court was directing Congress to enact a federal statute governing this area of the law and that to date, Congress has not taken the opportunity to do so.

⁷ Edward Cattell, “An American Marine Insurance Act: An Idea Whose Time Has Come”, 20 Tul. Mar. L.J. 1, at 3.

⁸ *Id.* generally.

⁹ Michael Sturley “Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem” JMLC Vol 29 No 1 (1998) 41 – 58.

¹⁰ Thomas Schoenbaum, “Misrepresentation, Non-disclosure, and the Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law.” available in Shipping Law Unit.

¹¹ The Appellate Division of the Supreme Court of South Africa has stated “*uberrimae fides* is an alien, vague, useless expression without any particular meaning in law. It cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of the contract of insurance. Our law of insurance has no need for *uberrimae fides* and the time has come to jettison it”. See John Hare, “Good Faith, Disclosure, Misrepresentation and the Omnipotent Warranty:

South African Perspective.” Paper presented to the British Maritime Law Association Tulane Conference, London, May, 2000. *citing* Mutual and Federal Insurance Co. Ltd v. Oudtshoorn Municipality, 1985 (1) SA 419 (SCA) at 431

observed by either party, the contract may be avoided by the other party."¹² Predating the MIA, the notion of *uberrimae fidei* can be traced back to Lord Mansfield in Carter v. Boehm¹³ who stated:

Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed lies most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist.¹⁴

In the United States, the duty of utmost good faith was a requirement in all aspects of insurance law until the case of Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co., 72 F. 413, 434 (6th Cir. 1896). In that case, Judge Taft ruled that in non-marine insurance "no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with *intent to conceal* ...; that is, unless the nondisclosure was *fraudulent*."¹⁵ Soon to follow this, state legislatures utilized their authority reserved for them by the U.S. Constitution¹⁶ to enact legislation, which mirrored this judgment and limited the consequences of a lack of good faith save where fraud or malicious intent was involved. Marine insurance, however, was a federal matter and not within the ambit of the several states' jurisdiction.

In more modern times, the concept of good faith is still viewed by some as a necessity in the field of marine insurance because it "fosters a high standard of care, economic efficiency, and lower premiums for assureds."¹⁷ Utmost good faith requires that "the parties to contracts of marine insurance must not only avoid fraud and misrepresentation, but they are required to voluntarily disclose 'every material circumstance.'"¹⁸ It appears then, that at least part of the requirement of utmost good faith entails an element of misrepresentation and disclosure, as well as an element of materiality.

The duty of disclosure is a mutual obligation on both parties and only entails a pre-contractual duty. While good faith extends beyond the pre-contractual duties of disclosure, it

¹² See MIA, § 17.

¹³ (1766) 3 Burr. 1905.

¹⁴ *Id.* at 1909.

¹⁵ *Id.* at footnote 5., (*emphasis added.*) This also seems to be the case in South Africa as is illustrated by the case of Videtsky v Liberty Life Insurance Association of Africa Ltd 1990 (1) SA 386 (W).

¹⁶ The States' power in large part stems from the catch-all 10th Amendment to the U.S. Constitution which provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. 10.

¹⁷ Schoenbaum, *supra* note 10 at, 48. Others have argued that there is no longer a necessity for utmost good faith due to modern social and economic conditions, coupled with the fact that in some areas of marine insurance, risk is no longer individually calculated. See generally, Thomas 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, at 3-4. (*citations omitted*)(hereinafter "Good Faith".)

¹⁸ *Id.* at 1.

is usually a pre-contractual misrepresentation or concealment, which forms the nucleus of most litigation. Under both American and English law it appears that after the contract is entered into, the duty of utmost good faith and disclosure, is a much less onerous one than it's pre-contractual sibling.¹⁹ In The Sea Star, the House of Lords recently decided, "that there is, in essence, no post-contract duty to disclose material facts or circumstances unless the contract is being varied to add new risks."²⁰ American courts have gone so far as to hold that "the insured's duty to disclose material information terminates altogether once the contract is formed."²¹ While others have found that "[o]nce policy coverage has commenced, the doctrine [of utmost good faith] imposes an equally strict, continuing obligation on the vessel owner to ensure that the vessel will not, through either bad faith or neglect, knowingly be permitted to break ground in an unseaworthy condition."²² The majority of courts find that there is some post-contractual duty, but that it does not extend as far as the pre-contractual one.

Going back to good faith, under both American and English law, "breach of the duty of utmost good faith...involves proof of misrepresentation or omission of a material fact."²³ Technically misrepresentation is different from non-disclosure, but they are often treated as the same because "every misrepresentation involves a non-disclosure."²⁴ Although misrepresentation and non-disclosure/concealment are both elements of good faith on both sides of the Atlantic, the tests for what constitutes a material fact are quite different.

In M'Lanahan v. Universal Insurance Co.²⁵ Justice Story first adopted the British concept of utmost good faith, but tailored it to fit more in line with American public policy. Instead of following the strict English approach of what he termed "extreme diligence", he created a "due and reasonable diligence standard" that should be determined on a case-by-case basis by a jury.²⁶ In addition to this, he adopted a different standard for the test of materiality. In the U.S., "[t]he test of materiality is 'whether the risk be increased so as to *enhance* the premium,' which is 'an inquiry dependent upon the judgment of underwriters and others ...

¹⁹ See generally Martin Davies, "Insured's Post-Contract Duty Ubertimae Fidei: Manifest Shipping Co., Ltd V. Uni-Polaris Shipping Co., Ltd (The Star Sea), [2001] 1 All E.R. 743 (House Of Lords),

²⁰ *Id.* citing Sea Star at 761, per Lord Hobhouse.

²¹ *Id.* at 506, citing Ralrod Transp. Co. v. Continental Ins. Co., 727 F. 2d 851 (9th Cir., 1984), in which the Ninth Circuit Court of Appeals applied California law.

²² *Id.* citing Windsor Mount Joy Mut. Ins. Co. v. Giragosian., 57 F. 3d 50, 55 (1st Cir., 1995), with the court going on to state, "Whatever the exact extent of the applicability of the strict uberrimae fidei standard, we cannot believe that in these times it requires a pleasure boat owner to notify the insurer every time the craft takes on a small amount of water, or has engine trouble, at pain of losing coverage." The implied warranty of seaworthiness is discussed further, below.

²³ Schoenbaum, "Good Faith".

²⁴ *Id.* at 15.

²⁵ 26 U.S. (1 Pet.) 170 (1828).

²⁶ See generally Schoenbaum, *supra* note 10, citing J.Story in M'Lanahan at 186.

conversant with the subject of insurance.”²⁷ This test has been referred to as the “decisive influence” test, and most probably is in accord with what the law was in England before the passage of the MIA. For a fact to be material, it must be one that “influenced the underwriter’s decision.”²⁸

Contrast this to the much-debated English position on materiality which finds that “[e]very circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”²⁹ The interpretation of this verbiage involved a heavily contested debate that included two cases³⁰ and several appeals, which culminated in a divided decision by the House of Lords. The outcome is a test for materiality in England that is referred to as a “mere influence” test. This test provides that “the duty of disclosure extend[s] to all matters which would have been taken into account by the underwriter when assessing the risk (ie the 'speculation') which he was consenting to assume.”³¹ Thus, unlike in America, which requires that a material fact be one that would ultimately lead to an enhancement of the premium, and therefore an assumedly higher risk, the English threshold is a much lower one, only requiring circumstances to influence the underwriter in assessing the risk.

After M’Lanahan, the issue of utmost good faith was heard and upheld again in Sun Mutual Insurance Co. v. Ocean Insurance Co.³², which stated further that the duty of good faith is “independent of the intention and is violated by the fact of concealment even where there is *no design to deceive*.”³³ With these two cases, federal courts upheld the applicability of utmost good faith in marine insurance contracts as part of federal maritime law, until the case of Wilburn Boat.³⁴

As stated earlier, Wilburn muddled the waters of maritime practice in the United States and confused everyone, least of which was the admiralty bar. The Court in Wilburn

²⁷ *Id.*

²⁸ *Id.* at 25 (*citations omitted*.) Who this underwriter is has caused some judicial confusion as well. Is this a subjective or objective standard? Some courts in the U.S. state that this is an objective test, while others blur the distinction between objective and subjective aspects of the test. *See generally* Schoenbaum “Good Faith”.

²⁹ *See* MIA §§ 18(1) and 20(2).

³⁰ *See* Pan Atl. Ins. Co. v. Pine Top Ins. Co., [1994] 3 All E.R. 581(H.L.), Container Transport International Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd’s Rep. 178 (Q.B.), *rev’d*, [1984] 1 Lloyd’s Rep. 476 (C.A.).

³¹ Pine Top, at 604.

³² 107 U.S. (17 Otto) 485 (1883).

³³ Graydon Staring, “Uberrima Fides And Concealment In The Marine Insurance Policy Application,” MLA report available at: <http://www.mlaus.org/article.ihtml?ID=572>, *citing* Sun Mutual at 510.

³⁴ This paper will not attempt to undertake a comprehensive analysis of this decision, as it is far beyond the scope of this paper. If interested, a full critique can be found in multiple sources including, most notably, Joel Goldstein’s critique, “The Life and Times of Wilburn Boat: A Critical Guide (Parts I &II)”, 28 J. Mar. L. & Com. 395 and, 28 J. Mar. L. & Com. 555 respectively.

decided that in absence of a well-settled rule of federal admiralty law, federal courts should apply state law, if such a rule exists and can apply. By doing so, the Court undermined one of the most salient features of maritime and federal law: the concept of uniformity. Since Wilburn federal courts have applied the law in a variety of ways. The Fifth Circuit has used various approaches within the Circuit itself.³⁵

The Fifth Circuit case of Albany Ins. Co. v. Anh Thi Kieu has gone the furthest along these lines. The Fifth Circuit Court of Appeals applied Texas state insurance law and found that “the uberrimae fidei doctrine, in sum, is a rule which this Court has recognized, but never applied. We therefore, conclude, albeit with some hesitation, that the uberrimae fidei doctrine is not 'entrenched federal precedent.’”³⁶ This case has been heavily criticized and is not indicative of the majority of the federal approach. What can be gleaned from this is that there is a definite confusion in the courts and legislatures as to the nature of marine insurance itself and the reasons why it should be viewed differently from regular indemnity insurance.

As often happens, when these state statutes were being debated, the concepts of warranty and the duties of good faith were lumped together and the separate duties that stem from them were confused into one category. Seeking to protect consumers, “[s]tate legislatures...created statutes to limit insurers' ability to deny coverage for *technical* breaches of duty, to insure that legal remedies remain available for the enforcement of insurance contracts, and to punish insurers for bad faith practices.”³⁷ It is to these technical breaches, which were often unrelated to the loss at hand in any causative manner that state legislatures designed to address. What they really sought to alleviate was a growing environment where these “technical breaches” rendered contracts voidable at the option of the insurer. “Insurance policies became ‘overgrown with a wilderness of warranties, many of the most trivial

³⁵ Goldstein provides that: *Whereas many cases announce that state law applies absent entrenched federal law on a subject, (Fireman's Fund Ins. Co. v. Wilburn Boat Co., 300 F.2d 631, 633 (5th Cir. 1962)), others interpret Wilburn as endorsing state law more routinely. (See, e.g., Gulf Fleet Marine Operations, Inc. v. Wartsila Power, Inc., 797 F.2d 257 (5th Cir. 1986); S.E.A. Towing Co., Inc. v. Great Atl. Ins. Co., 688 F.2d 1000 (5th Cir. 1982), cert. denied, 460 U.S. 1038 (1983)). Some impose a multi-factor test to determine whether to apply an acknowledged federal rule. (See Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir.), cert. denied, 502 U.S. 901 (1991)). Others seek consensus between federal and state law. See, e.g., Trotter Towing, 834 F.2d 1206. Finally, an occasional lonely precedent suggests that Wilburn requires courts to fashion federal admiralty law to satisfy any need for a uniform rule. Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 461 n.7 (5th Cir. 1982).”*

³⁶ Robert Bocko, et al. “Marine Insurance Survey A Comparison Of United States Law To The Marine Insurance Act Of 1906”, 20 Tul. Mar. L.J. 5, citing Albany Ins. Co. v. Anh Thi Kieu.

³⁷ Jeffery Struckhoff. “The Irony Of Uberrimae Fidei: Bad Faith Practices In Marine Insurance”, 29 Tul. Mar. L.J. 287, at 298.

character, in which the rights of the policyholder, however honest and careful, were in grave danger of being lost.”³⁸

Marine Insurance Warranty (Express):

The English law of warranty in the field of marine insurance is applied in the United States in as many different ways as this sentence has syllables. Without going into detail of the historical origins of warranty in the common law of England, it suffices to say that in the field of marine insurance, one can once again look back to Lord Mansfield for a premier and novel approach in application.³⁹ In this regard, “he sharply distinguished a breach of warranty from misrepresentation, holding that a warranty is part of the contract, while a misrepresentation is a collateral statement which is not part of the policy.”⁴⁰ He further found “that representations are judged by the standard of whether they are material to the risk, but warranties must be strictly complied with.”⁴¹ It is this rule of strict or literal compliance that draws the most criticism, for the law of warranty is often unnecessarily harsh and unjust. Traditionally non-compliance with the technical requirements set forth in the warranty resulted in a breach, regardless of what caused that breach and regardless if that breach was a cause of the loss. “Although the loss may not have been in the remotest degree connected with the breach of warranty, the Underwriter [was] nonetheless discharged in that account from all liability for the loss”⁴²

The law here also feels the pervasive impact of Wilburn Boat. Pre-Wilburn, judicial federal uniformity was a national concern, indeed the field of marine insurance particularly strived for international accord. “As a matter of American judicial policy, the British [warranty] rule was carried forward into U.S. cases in order to keep American marine insurance law in harmony with that of England.”⁴³ Since Wilburn, U.S. courts have taken at least three approaches to the strict compliance rule.⁴⁴ “One line of authority follows the teaching of Wilburn Boat and applies state law to warranties in marine insurance contracts.”⁴⁵

³⁸ *Id. citing* William R. Vance, “The History of the Development of the Warranty in Insurance Law”, 20 Yale L.J. 523, 534 (1911).

³⁹ Thomas Schoenbaum, “Warranties in the Law of Marine Insurance: Some suggestions for reform of English and American Law,” 23 Tul.Mar.L.J. 267 at 278. (hereinafter “Warranty”)

⁴⁰ *Id. citing* Pawson v. Watson, 98 Eng. Rep. 1361, 1362-63 (K.B. 1778); De Hahn v. Hartley, 99 Eng. Rep. 1130, 1131 (K.B. 1786).

⁴¹ *Id. citing* Vance, *supra* note 27 at 527-28.

⁴² Edward LeBretton and Marc Summers, “Express Warranties”, available at: <http://www.mlaus.org/article.ihtml?id=574&committee=160> *citing* Arnould, “Law of Marine Insurance and Average”, 16th Ed., Vol. 2 at pp. 682-683; Marine Insurance Act, § 33(3);

⁴³ LeBretton, *citing* Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487 (1924).

⁴⁴ *See* Schoenbaum “Warranty” *supra* note 39, at 284.

⁴⁵ *Id. citing e.g.* Assoc. Ltd. v. Continental Ins. Co., 983 F.2d 662, 1993 AMC 1453 (5th Cir. 1993) (applying Missouri law); Graham v. Milky Way Barge, Inc., 824 F.2d 376 (5th Cir. 1987) (applying Louisiana law); Newark Ins. Co. v. Blair, No. CIV.92-1648, 1994 WL 4410, at 1, 1994 AMC 1061 (S.D.N.Y. Jan. 3, 1994)

“A second line of decisions holds that the strict compliance rule still applies to warranties as a matter of federal law.”⁴⁶ “A third line of cases, most numerous of all, apply the strict compliance rule as a matter of both federal and state law.”⁴⁷ This demonstrates that even though there is a choice of law ripple that must now be preliminarily decided in these cases, strict compliance has survived as part of the locus of U.S. law. To this day modern courts still apply the rule, finding that “[n]o cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse the non-compliance with an express warranty’ by an assured who has violated it.”⁴⁸

But the inconsistency certainly does exist. Take for example two very recent (2005) decisions that have come out of the First and Second Circuits. In Commercial Union Ins. Co. v. Pesante⁴⁹, the insurance policy contained a warranty that the vessel in question was only to be used for lobstering. The fisherman/assured also used the vessel for gill net fishing. The assured’s vessel collided with another boat injuring several people. The insurer refused to pay because of the breach of warranty. The court agreed that the assured was in breach of the warranty, but as the vessel was not engaged in gill net fishing at the time of the accident, the insurer was “not entitled to rely on the warranty to avoid coverage for the accident.”⁵⁰ Thus an element of causation was added into the equation and the insurer had to pay.

Contrast this to New Hampshire Ins. Co. v. Dagnone,⁵¹ in which the assured’s 42-foot boat damaged the vessel itself, as well as two other nearby vessels when it went adrift in a storm. The vessel’s engines were not winterized and it was not put up in dry storage. Under a “lay up warranty” provision of the insurance contract, the yacht was to be “laid-up and out of commission during the

(applying New York law); United States Fire Ins. Co. v. Liberati, 1989 AMC 1436 (N.D. Cal. 1989) (applying California law); Continental Sea Foods, Inc. v. New Hampshire Fire Ins. Co., 1964 AMC 196 (S.D.N.Y. 1963); Kron v. Hanover Fire Ins. Co., 246 N.Y.S.2d 848, 1964 AMC 1467 (N.Y. Sup. Ct. 1964) (applying New York law).

⁴⁶ *Id. citing, e.g.,* Hilton Oil Transp. v. T.E. Jonas, 75 F.3d 627, 630, 1996 AMC 1308, 1311 (11th Cir. 1996); Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364, 1366-67, 1988 AMC 1238, 1241 (11th Cir. 1988); Home Ins. Co. v. Vernon Holdings, No. CIV.-DAVIS 92-2329, 1994 WL 791971, at 1, 3, 1995 AMC 369, 372 (S.D. Fla. May 2, 1994); Aetna Ins. Co. v. Dudley, 595 So. 2d 238, 239 (Fla. Dist. Ct. App. 1992).

⁴⁷ *Id.* at 285. *citing e.g.* Certain Underwriters at Lloyd's v. Montford, 52 F.3d 219, 222, 1995 AMC 1201, 1203-04 (9th Cir. 1995); Thanh Long Partnership v. Highlands Ins. Co., 32 F.3d 189, 194, 1995 AMC 203, 209 (5th Cir. 1994); Saint Paul Fire & Marine Ins. Co. v. Belle of Hot Springs, Inc., 844 F.2d 550, 553, 1994 AMC 302 (8th Cir. 1988); New York Marine & Gen. Ins. Co. v. Gulf Marine Towing, Inc., Nos. CIV.-A.-92-216, 92-228, 1993 WL 483548, at 1-3, 1994 AMC 976, 977-79 (E.D. La. Nov. 17, 1993); Port Lynch, Inc. v. New England Int'l Assurety of Am., Inc., 754 F. Supp. 816, 824-25, 1992 AMC 225, 237-38 (W.D. Wash. 1991); Cotton Blossom Corp. v. Lexington Ins. Co., 615 F. Supp. 87, 88-89 (E.D. Mo. 1985).

⁴⁸ LeBretton citing Campbell v. Hartford, 533 F.2d 496, 1976 A.M.C. 799, 801 (9th Cir. 1976); *see also* Hartford v. Lloyd's, 1989 A.M.C. 2576 (E.D. Pa. 1989).

⁴⁹ 359 F.Supp.2d 81 (D.R.I. 2005)

⁵⁰ *Id.*

⁵¹ 2005 WL 936929 (D.R.I. 2005)

period shown on the declarations.”⁵² Applying New York state law, the Court found the assured in breach, and as such, coverage was foreclosed, “irrespective of the relation between the breach and the damage.”⁵³ Although most insurers try to circumvent these issues with choice of law and forum selection clauses within the contract itself, it is clear that within the U.S. the law is far from stable.

(Implied):

There are distinctions within the law of warranty, which the U.S. does recognize, including implied and express warranties and the difference between promissory and affirmative warranties. The affirmative warranty affirms that a particular set of circumstances is in fact in existence, but does not extend to opinions. A promissory warranty is in essence a promise that in the future some condition will be fulfilled or act undertaken or not undertaken. Express warranties have been discussed above, and now a bit should be said about implied warranties.

Generally three types of warranties are implied in marine insurance: “(1) the warranty of the seaworthiness of the vessel, (2) the legality of the marine adventure, and (3) warranty against any deviation during the voyage.”⁵⁴ The latter two categories are relatively simple in application. The legality of a marine adventure is a warranty undertaken by the assured that the marine adventure is a legal one. Legality is adjudged by the laws of the U.S. as well as the laws of the several states. The warranty against deviation “is a promise by the assured that the voyage and adventure contemplated by the policy will be prosecuted without unreasonable deviation or delay.”⁵⁵ This excludes exceptions under which a vessel is obliged to deviate to save human life, etc. There is, however, a distinction that must be drawn in the U.S. regarding the implied warranty of seaworthiness.

The warranty of seaworthiness, it is safe to say, is governed by U.S. federal law. There is a distinction between the warranty under voyage and time policies. Under voyage policies, as in England, seaworthiness is considered as a condition precedent: “if it be not performed, the policy does not attach; and, if this condition be broken, at the inception of the risk in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void.”⁵⁶ The warranty is absolute and requires no causation between the breach and the loss to deny coverage.

Under time policies the warranty of seaworthiness applies “as of the very moment of attachment of insurance.”⁵⁷ This does not require that the vessel be absolutely seaworthy throughout the pendency of the policy, it merely requires that the “[o]wner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.” In addition, a breach will

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Schoenbaum “Warranty”, at 269.

⁵⁵ *Id.*

⁵⁶ *Id.* citing The Caledonia 157 U.S. 124 (1895) at 131.

⁵⁷ *Id.* citing Saskatchewan Government Insurance Office v. Spot Pack, Inc. 242 F.2d 385, 1957 AMC 655 (5th Cir. 1957).

not void the policy under time policies; it results in a “denial of liability for loss or damage caused proximately by such unseaworthiness.”⁵⁸

ISM Code:

The ISM Code will likely have an impact on marine insurance in that it will “set standards for the assured's duty of disclosure to underwriters and for the implied warranty of seaworthiness.”⁵⁹ The ISM Code will likely have an impact on both the precontractual duty of disclosure as well as the continuing duty regarding a change in material facts. Failure to comply with the Code, such as failing to keep relevant Documents of Compliance and the failure to report this noncompliance could result in a material breach. In addition, failing to live up to the Code’s requirements, including implementing a safety management system, could result in a breach of the implied warranty of seaworthiness. This will still be a factual case-by-case determination, although the ISM Code may provide a road map and evidentiary chain for the “prudent underwriter” to follow in their evaluation.

Remedies:

“Three remedies are possible for breach of the duty of utmost good faith: (1) rescission of the contract, (2) the assessment of a proportional penalty against the assured, or (3) damages.”⁶⁰ In the current system of law, the only practical one is that the insurance policy is “voidable by either party *ab initio*”.⁶¹ This rescission usually entails the insurer repudiating the contract, and returning any premiums to the assured, with the insurer bearing no liability in regard to claims made. Of course a breach may be waived at the option of the aggrieved party and can be accomplished by a “clear and unequivocal statement.”⁶²

Regarding warranty, “traditionally, courts have held that the breach of an express warranty suspended policy coverage.”⁶³ This “majority view “holds the breach merely suspends coverage which can be reinstated if the breach is corrected by the assured.”⁶⁴ A second view, one that’s reasoning is severely criticized “simply declares that the insurer is ‘discharged’ or the policy is ‘void’ without going into detail on what this means.”⁶⁵ Waiver is also permissible.

Conclusion:

⁵⁸ *Id.*

⁵⁹ Antonio Rodriguez, “The International Safety Management (Ism) Code: A New Level Of Uniformity” 73 Tul. L. Rev. 1585, at 1608.

⁶⁰ Schoenbaum “Good Faith, at 35.

⁶¹ Staring, *supra* note 33; *citing Sun Mutual*, at 5 10; *Certain Underwriters at Lloyd's v. Montford*, 52 F.3d, at 222, 1995 A.M.C., at 1203-04; *Washington Int'l Ins. Co.*, 773 F. Supp., at 191, 1991 A.M.C.; at 998; Cal. Ins. Code §§ 331, 359

⁶² Schoenbaum, “Good Faith” at 34.

⁶³ Staring.

⁶⁴ Schoenbaum “Warranty” at 289.

⁶⁵ *Id.*

Much to Lord Mansfield's consternation, history has blurred the artificial lines he created with regard to misrepresentation, causation and the strict compliance requirement of warranty. Over the years, in the U.S., in an effort to assuage the unjust and draconian effects of the English literal compliance rule, state legislatures have drafted numerous state insurance acts, which codify these concepts in a jumble. Their efforts at consumer protection, although laudable, have, for the most part, lumped marine insurance together with the rest, confusing topics within the law itself. For reasons of equity or "constitutional due process", federal courts have splintered the uniformity that was once an explicit ambition of the federal judiciary. Could the law benefit from a new marine insurance act, or international convention, which could clarify these divergent statements of the law both within the U.S. and across the Atlantic divide? Certainly. Will it happen? At this point it seems that a Restatement of The Law of Marine Insurance is the only option being considered and although not a law in itself, such a project would be extremely beneficial in the strive towards harmony.

Below are the proposed draft guidelines published by the CMI, along with a humble commentary regarding their effects in general, as well in relation to U.S. law. The above will not be repeated.

CMI Guidelines Commentary:

1) Marine insurance contracts are contracts of good faith. Good faith requires each party to conduct itself with the other party in relation to all material aspects of their insurance contract according to the objective norms recognized by the society in which they are being adjudged.

This paragraph attempts to define good faith, but like the CISG's attempt, fudges it. It does not refer to utmost good faith, and assumedly tries to do away with the concept, but it is unclear how that would be accomplished here. Further, the definition explains good faith only in relation to objective norms, which may vary by the society in which those contracts are *judged*. What about the societies in which the contracts are made/drafted/entered into? Does this mean that good faith should be viewed merely as a matter of procedural law? Isn't good faith more a matter of substantive law? This definition allows for the possibility for multiple definitions/interpretations of good faith. Defining good faith is largely unnecessary if this is the definition provided. It should be sufficient to state that marine insurance contracts are contracts of good faith and leave it at that. This definition would likely have no effect on the law of the United States, and it is very unlikely that it would have any effect on the law of any other country.

2) Acting in good faith requires each party before and at all times during the contract and in the submission of claims, to be honest in relation to all material matters, to disclose all-and not misrepresent any-material facts; and to disclose any material alteration of the risk during the currency of the policy.

This clause is a reasonable statement of the law as it in the U.S. as well as England. It draws a distinction between the pre-contractual duties of disclosure and misrepresentation in relation to material matters, and the post-contractual duties regarding material alteration after the policy is in effect. Mutuality is included as well. It does allow for leeway in the definition of materiality, which is still a divergence between English and American law.

3) Certain terms may be stated by the parties in the contract as requiring strict compliance; the contract may stipulate that in the absence of strict compliance by either party, the other party shall have the right to cancel the contract (or even that the contract shall terminate automatically), regardless of whether non-compliance caused the loss. Such should be the case in relation to safety at sea, classification, ownership, management and ISM Code compliance. The description “warranty” should not be used, and the English law warranty and its effects in law should be abolished.

This paragraph states that the English law warranty and its effects should be abolished, but basically allows parties to contract for terms, which would otherwise be warranties. It allows insurers to retain a non-causative requirement between breach and the loss. While allowing that ISM Code non-compliance should be a reason for termination of the contract, it does not limit this concept, which could lead to inequitable results. In this respect, causation should be more integrated. Obviously implied warranties would no longer exist with a potential effect on the “American Rule” with regard to seaworthiness, in that the insurer’s remedy would be cancellation of the contract instead of denial of liability for loss or damage caused proximately by such unseaworthiness. Insurers would presumably have to give their premiums back and rescind the contract. Does termination equal rescission?

4) Materiality in relation to an absence of good faith, a failure to disclose, a misrepresentation or a breach of a contractual term (not requiring strict compliance) is assessed according to a two-tier test of whether a reasonable insurer and a reasonable assured, both operating within the norms of the society and the context of the transaction in which such materiality is being adjudged, would consider the conduct to have affected the acceptance of the risk, the assessment of the premium and or the evaluation of claims by the insurer, and or the acceptance of cover by the Insured.

Does not seem to clarify the law, only that it stresses an objective standard, instead of a subjective one with regard to the prudent underwriter test for materiality. It seems to favor the English “mere influence” test, instead of the more restrictive American “decisive influence” test, although both are present,

5) Materiality requires a causative link between the breach and the loss or the claim.

This is an accurate statement of the law with regard to disclosure.

6) Any material absence of good faith or material breach of the obligation to disclose or not to misrepresent or any material breach of an essential term going to the root of the contract gives the aggrieved party the right to treat the contract at an end, effective from the date of the breach, with the right to claim damages. Material breach of a nonessential term not relating to good faith, disclosure or misrepresentation and not contractually stipulated as requiring strict compliance, suspends cover until the breach is remedied.

Regarding material breach of disclosure or good faith, the remedy of rescission or avoidance of the contract is intact. It appears that the breach may still be waived at the option of the aggrieved party. In addition, the American rule regarding suspension of cover is applied to material breaches of nonessential terms, allowing for these breaches to be remedied at which time cover would resume.

7) A non-material absence of good faith or breach of the obligation to disclose or not to misrepresent not founding a right to cancel the contract of insurance may nevertheless give rise to a claim for damages.

In addition to rescission, an aggrieved party may seek damages. Although technically possible under the current law, the award of damages is currently highly unlikely as rescission is the preferred remedy. It nevertheless allows for this possibility.