



Mercante's Sea Trials



Fraud and Concealment - A Burning Issue

As has been said before, there seems to be a corollary between tough economic times and boats mysteriously disappearing, sinking, and catching fire. Now, I'm not saying that this perceived trend has anything to do with a recent loss, but sometimes, like a judge or jury, you must draw your own conclusions.

If you had a fire on your boat while you were on board, alone, for fishing, and the boat was destroyed as a result...do you think you would remember what you were doing when the fire started?

It was midnight in April when a man took out his 33-foot power boat to go fishing by himself. The anchor was dropped just a half mile off the shore of a marshy island, to begin to fish. Yet, before dropping the first bait in the water, the owner decided it was high time to go below deck to lubricate his fishing tackle with a can of WD-40 and a cabin illuminated only by candlelight. Let's just suppose that the cabin lights didn't work on this vessel.

Fire!

The owner over-sprayed the lubricant, and it, or its fumes, like a flame-thrower in the circus, came into contact with the candle flame causing a fire to erupt onboard the vessel. The man abandoned the vessel in his dinghy. He was discovered by rescue workers on a nearby shore the following morning. Prior to this solo trip, the owner had reportedly never anchored his vessel, alone, on a night fishing trip.

The Candle in the Cabin

Next...the owner filed an insurance claim for the fire damage to the vessel. As part of the claim process, an insurance investigator took a recorded statement from the owner. In the statement, the owner said he had been asleep above deck when he was awakened by smoke. His only explanation for how the fire started was that he had left a candle burning in the bathroom below deck, just in case he had a visitor. (I added the visitor part.) He concluded the statement by saying that it was "*just the candle, that's it. There's no other reason*". Apparently, the WD-40 burned out long before the candle ever did. (Elton John added that part)

A maritime attorney then took the owner's sworn statement under oath, called an "Examination Under Oath" (EUO) in most marine insurance policies. Check for this provision in

your policy.

In the EUO, the owner changed course and that is when he testified he was *not* asleep when the fire started. He revealed his wholly-new version of events that included accidentally creating the fire with WD-40 and the candle while lubricating his fishing tackle, and that he had been drinking hard liquor mixed with Coke at the time. Alas, the owner testified that he concealed how the fire started in his initial statement because 1) he was embarrassed about how the fire started, 2) he thought there might be criminal ramifications because he had been drinking, and 3) he received bad legal advice from a family friend. Oh, and he testified to throwing out the evidence, i.e. the can of WD-40, after the vessel was salvaged and returned to port.

Coverage Denied

Invoking the "*Fraud and Concealment*" provision of the marine policy (check your policy for this too), the insurer rescinded the policy based on 'material misrepresentations and concealments' the owner apparently made during the claim investigation. There was no concrete evidence to conclusively establish arson, but the insured's inconsistent and suspicious explanations gave the insurer the impetus to decline coverage under the following policy provision:

There is no coverage from the beginning of this policy if you or your agent has omitted, concealed, misrepresented, sworn falsely, or attempted fraud in reference to any matter relating to this insurance before or after any loss. ("*Fraud and Concealment Clause*")

The insurer's rescission sparked litigation. A fire aboard a vessel is a marine peril covered by any marine insurance policy. Thus, the only question became whether or not the policy could be voided when the investigation uncovered wholly inconsistent stories that cast doubt upon the owner's veracity and suspicion as to whether or not the fire was indeed accidental.

Judge to Decide

The federal admiralty court was called upon to decide whether coverage applied for the fire loss or whether the aforementioned insurance contract provision coupled with the insured's irreconcilable versions of the loss was sufficient to douse the claim for good. The fed-

eral judge looked to past cases (precedent) to determine the test to apply and found one *non-marine* state court decision that suggested that in order to void an insurance policy on this basis, the insured's false statement must have been "*material*" and made *knowingly* and *wilfully* with the *intent of deceiving* the insurer.

Interestingly, the policy provision at issue did not require or even contain the words 'knowingly, wilfully, or intent'. Typically, even a judge is not allowed to add words that do not exist in an insurance policy in an effort to create coverage.

However, in the court's view, neither of the vessel owner's versions - despite the inconsistencies - indicated that the fire was something other than an accident. In other words, according to this judge, the 'false elements' of the owner's statements did not trigger a breach of the insurance policy because both versions would have been accidental.

The judge concluded that it was unclear whether the owner's intent was to defraud the insurer, or he was simply trying to avoid embarrassment, or he had some other motivation. Accordingly, the insurer's motion to dismiss the insurance claim based upon a violation of the policy's Fraud and Concealment clause was denied. Like the overwhelming majority of civil cases, this case too was eventually settled prior to trial.

Conclusion

So, if this were a game of CLUE, what would you say was the cause of the fire...the owner in the cabin with the candlestick and mixed cocktail, or the candlestick alone in the bathroom while the owner was asleep under the stars (dreaming about fishing)? You be the judge!

And, the free legal advice the owner accepted from a family friend shows that - in law as in life - you get what you pay for!

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