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To Disclose or Not to Disclose: A Contradictory Interpretation of Uberrimae Fidei in *XL Specialty Ins., Co., v. Prestige Fragrances, Inc.*

I. INTRODUCTION

Prestige Fragrances is a cosmetic and fragrance wholesale distributor, importing around half of the goods that it sells and storing them in a warehouse in New Jersey.[1] This warehouse was burglarized in June 2010, resulting in Prestige reporting the burglary to its marine cargo insurance provider and its commercial property insurer.[2] Both insurers settled Prestige's loss claims in full.[3] Prestige's loss history does not end with this warehouse theft, however, as in March 2012 and January 2013 there were two separate instances of cargo loss and mishandling.[4] In September 2014, Frenkel & Company, a marine insurance broker, "began soliciting Prestige for its marine cargo insurance business."[5] Prior to contacting Prestige, Frenkel entered into an "Insurance Producer Agreement" with XL Specialty, a marine cargo insurer.[6] This Producer Agreement stated that Frenkel does not bind or cancel coverage on behalf of XL Specialty and that Frenkel acts as "an agent of the insured and not an agent of XL Specialty."[7]

In accordance with this Producer Agreement, Frenkel facilitated discussion in September 2014 between Prestige and an underwriter at XL Specialty to procure an insurance policy.[8] This policy, known as the 2014

1. XL Specialty Ins., Co. v. Prestige Fragrances, Inc., 420 F. Supp. 3d. 172, 175-76, 2019 AMC 2719 (S.D.N.Y. 2019).
2. *Id.* at 176.
3. *Id.*
4. *Id.*
5. *Id.* at 177.
6. *Id.* at 176.
7. *Id.* at 176-77.
8. *Id.* at 177.

Insurance Policy, was an "Ocean Marine Cargo" Policy, extending coverage to Prestige's maritime shipment goods and its New Jersey warehouse.[9] Initially, Frenkel employees did not receive any loss history from Prestige, nor did Prestige alert Frenkel of any prior claims while the quote for the 2014 policy was being drafted.[10] The underwriter at XL Specialty, however, continued to request a more detailed loss history.[11] XL Specialty would accept this information as a list of loss runs, detailing prior claims made, or via a letter with Prestige's letterhead, discussing Prestige's loss history.[12] XL Specialty eventually bound the 2014 policy; but five months later, in February 2015, the underwriter still requested a letter confirming no losses or a "five-year loss run from the previous cargo insurance carrier," as well as contact information to initiate a survey of Prestige's New Jersey warehouse.[13]

Frenkel employees alerted XL Specialty in March of 2015 that they would follow up regarding Prestige's loss history, but no new information was provided, and eventually discussion for the renewal of the 2014 insurance policy began.[14] Prestige did not report the 2010 burglary, nor the 2012 cargo loss, and maintained that there were "'no known or unreported losses'" during the period of the 2014 policy.[15] The 2015 policy, bound in September, "is substantively identical to the 2014 policy," and was based on the most recent information provided by Frenkel on behalf of Prestige.[16] Several months later, in April 2016, "XL Specialty arranged . . . to conduct a survey of Prestige's warehouse."[17] The Surveyor asked about the security measures at the warehouse, as well as any loss history, to which Prestige discussed the 2010 burglary and how Prestige has since attempted to improve security.[18] The surveyor recorded a loss of about $200,000 from a theft "about 4 years ago," and filed the report with XL Specialty in May of 2016.[19] Several employees at XL Specialty accessed the survey report, especially in August 2016 when the policy renewal began but did not account for any loss in the quote.[20] The 2016 policy,

9. *Id.* at 180-81.
10. *Id.* at 178.
11. *See id.* at 178-79.
12. *Id.* at 180.
13. *Id.* at 182.
14. *Id.*
15. *Id.*
16. *Id.* at 183.
17. *Id.*
18. *Id.* at 183-84.
19. *Id.* at 184.
20. *Id.*

bound in September of 2016, differs from the previous policies "in that the limit of liability for coverage under the Warehousing Coverage Endorsement" and Prestige's premium have both increased.[21]

In July 2017, Prestige's New Jersey warehouse was burglarized, with over 1.2 million dollars' worth of stolen goods.[22] When Prestige informed Frenkel of the theft, who in turn informed XL Specialty, XL "denied Prestige's claim and rescinded the insurance policies it had issued to Prestige."[23] XL Specialty claimed that Prestige had misrepresented their loss history and "failed to disclose material information" to the XL underwriter, thus losing coverage under XL Specialty's terms.[24]

XL Specialty brought suit against Prestige the same day it denied Prestige coverage, seeking that the court declare the 2014, 2015, and 2016 insurance policies void *ab initio*.[25] Prestige filed a counterclaim, alleging that "XL Specialty is obligated to cover Prestige's losses from the [July 2017] theft" and also asserted breach of contract.[26] "While XL Specialty's motion was *sub judice*," the court allowed for XL to submit an amended complaint and for Prestige to file an amended answer and counterclaim in response.[27] XL Specialty subsequently moved for summary judgment on Prestige's amended answer and counterclaim, alleging that the doctrine of *uberrimae fidei* required Prestige to disclose all material facts to XL Specialty that could have affected XL's risk of providing Prestige coverage.[28] The United States District Court for the Southern District of New York *held* that insurance policies are maritime contracts, but ultimately, due to issues of genuine, material fact, could not decide on (1) whether the parties contracted out of *uberrimae fidei*; (2) whether the insurance broker acted as an agent of the insured; and (3) whether survey reports constitute sufficient disclosure of material facts. *XL Specialty Ins., Co. v. Prestige Fragrances, Inc.*, 420 F. Supp. 3d. 172, 192, 195-97, 2019 AMC 2719 (S.D.N.Y. 2019).

21. *Id.* at 185.
22. *Id.*
23. *Id.* at 186.
24. *Id.* at 185-86.
25. *Id.* at 186.
26. *Id.*
27. *Id.*
28. *Id.*

II. HISTORICAL BACKGROUND

Federal district courts are afforded jurisdiction over all admiralty and maritime cases by the U.S. Constitution as well as the U.S. Code.[29] This judicial authority extends to "claims arising from maritime contracts."[30] Despite this certainty in jurisdiction, there is less clarity on what differentiates a maritime contract from a non-maritime contract.[31] Generally, contracts are not considered under admiralty jurisdiction if the contract is not "wholly maritime in nature."[32] However, the U. S. Court of Appeals for the Second Circuit established two exceptions to this rule.[33] First, when a contract contains both maritime and non-maritime components, "a claim under [the] maritime portion of [the] contract will sustain admiralty jurisdiction where the maritime obligations can be 'separately enforced without prejudice to the rest.'"[34] Second, admiralty jurisdiction will prevail "where the non-maritime elements are merely 'incidental' in an otherwise maritime contract."[35] The Second Circuit then established a threshold inquiry to further address this concern by encouraging federal courts to "determine whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."[36] The Supreme Court, however, disputed this analysis by the Second Circuit, concluding that a contract is maritime when the "principle objective of [that] contract is maritime commerce."[37] This resulted in the Second Circuit altering its evaluation of maritime contracts to now emphasize a contract's "principal objective" instead of "whether the non-maritime components are properly characterized as . . . 'incidental' . . . to the contract."[38]

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29. U.S. CONST. art. III, § 2; 28 U.S.C. § 1333(1) (2018).

30. D'Amico Dry Ltd. v. Primera (Hellas) Maritime Ltd., 886 F.3d 216, 223, 2018 AMC 666 (2d Cir. 2018).

31. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23, 2004 AMC 2705 (2004) ("Our cases do not draw clean lines between maritime and nonmaritime contracts.").

32. Atl. Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd., 968 F.2d. 196, 199, 1993 AMC 1097 (2d Cir. 1992); *See* Ins. Co. v. Dunham, 78 U.S. 1, 29, 1997 AMC 2394 (1870) ("And whether maritime or not depended . . . on the subject-matter of the contract.").

33. *Atl. Mut. Ins. Co.* 968 F.2d. 196 at 199, 1993 AMC 1097.

34. *Id.* (quoting Compagnie Francaise de Navigation a Vapeur v. Bonnasse, 19 F.2d 777, 779, 1927 AMC 1325 (2d Cir. 1927)).

35. *Id.* at 199.

36. *Id.* at 200.

37. *Kirby*, 543 U.S. 14 at 25, 2004 AMC 2705.

38. Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307, 315, 2005 AMC 1747 (2d Cir. 2005).

There has been some debate as to whether insurance policies constitute maritime contracts under admiralty jurisdiction since insurance policies tend to be broader than certain maritime contracts, such as charter parties.[39] However, insurance contracts "sprang from the law maritime, and derive all [their] material rules and incidents therefrom."[40] In a "contract of insurance . . . the rights of the parties arising therefrom are affected by and mixed up with all the questions that can arise in maritime commerce . . ."[41] Thus, if the "principle objective" of a marine insurance contract is maritime commerce, it falls within admiralty jurisdiction.[42] Moreover, "[m]aritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations."[43] Consequently, marine insurance contracts covering shipping to and from warehouses, which are "land-based," similarly align with the definition of maritime commerce.[44]

When an insurance policy is determined to be a maritime contract subject to admiralty jurisdiction, questions regarding the enforcement of its insurance policies, the agency relationship between an insurance broker and the insured, and any obligations of the parties as a result of the insurance policies can all arise. For instance, in New York, "an insurance broker is considered the agent of the insured, not the insurance company;" thus, "notice to the broker is not deemed notice to the insurance company."[45] Yet, an insurance broker is believed to be the agent of the insurer when there is "some evidence" that the broker acted on behalf of the insurer, or that there are "facts from which a general authority to represent the insurer may be inferred.'"[46] In the context of a marine insurance contract, a party's obligations may be impacted depending on whether there was an insurance broker and what that broker's agency relationship is with what party. Moreover, the contractual doctrine of

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39. *See Dunham*, 78 U.S. 1 at 27, 30, 1997 AMC 2394.

40. *Id.* at 31-32. *See generally* Elizabeth Germano, *A Law and Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs*, 47 ST. MARY'S L.J. 727, 731-32 (2016) (discussing the Court's findings in *Dunham*).

41. *Dunham*, 78 U.S. 1 at 30, 1997 AMC 2394.

42. *See id.* at 27, 30; *See also* Germano, *supra* note 40, at 730-31.

43. *Kirby*, 543 U.S. 14 at 25, 2004 AMC 2705.

44. *See Dunham*, 78 U.S. 1 at 27, 1997 AMC 2394 (quoting Menetone v. Gibbons, 3 Term R. 269) ("'If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity.'").

45. MTO Assocs., Ltd. P'ship v. Republic-Franklin Ins. Co., 21 A.D.3d 1008, 1008 (N.Y. App. Div. 2005).

46. *Id.* (quoting Rendiero v. State-Wide Ins. Co., 8 A.D.3d 253, 253 (N.Y. App. Div. 2004)).

uberrimae fidei, one of the most essential elements of a marine insurance contract, can also be at issue.[47]

Uberrimae fidei, also known as "utmost good faith," is the "mutual duty between the parties to a marine insurance contract to perform their duties according to the highest standard of good faith."[48] This doctrine originated in eighteenth-century English marine insurance law when insurance underwriters only received information from merchants and shipowners, and subsequently had to rely on its accuracy.[49] One of the earliest examples of the doctrine is found in *Carter v. Boehm*, a 1766 English case involving an insurance policy covering the loss of an overseas, English-built fort.[50] There, Lord Mansfield introduced the doctrine of *uberrimae fidei* by explaining that insurance contracts are speculative.[51] Since the parties to the contract know all the "special facts" about their position, they need to disclose them; otherwise, it would be fraudulent and the policy would be void.[52] In 1828, the doctrine was adopted by the U.S. Supreme Court in *McLanahan v. Universal Insurance*, which involved several instances of concealment regarding the sailing, arrival, and description of a brig.[53] In *McLanahan*, the Court explained that an "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; and that no known loss had occurred, which by reasonable diligence might have been communicated to him."[54] Similar to Lord Mansfield, the Court emphasized that the omission of any material fact is a "manifest fraud" resulting in the "avoid[ance of] the policy."[55]

Unlike many common law contractual principles, there is no consensus as to whether or not parties can contract out of *uberrimae fidei*,

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47. *See generally* Mitchell J. Popham & Chau Vo, *Misrepresentation and Concealment in Marine Insurance Contracts: An Analysis of Federal and State Law Within the Ninth Circuit*, 11 U.S.F. MAR. L.J. 99, 103-04 (1999) (examining the origins and importance of *uberrimae fidei*).

48. Germano, *supra* note 40, at 740; *e.g.*, Puritan Ins. Co. v. Eagle S.S. Co. S.A., 779 F.2d 866, 870, 1986 AMC 1240 (2d Cir. 1985).

49. Germano, *supra* note 40, at 740; Popham & Vo, *supra* note 47, at 103; *e.g.*, Stecker v. Am. Home Fire Assur. Co., 299 N.Y. 1, 6-7, 1949 AMC 813 (1949) ("The reasons which brought into being the strict marine insurance law doctrine as to disclosures, go far back into the early days of marine insurance, when sailing ships in faraway seas were insured in London by underwriters who could get no information except from the shipowners.").

50. Carter v. Boehm [1766] 97 Eng. Rep. (HL) 1162, 1164, 3 Burr 1909, 1909.

51. *Id.*

52. *Id.*

53. McLanahan v. Universal Ins. Co., 26 U.S. 170, 178, 1998 AMC 285 (1828).

54. *Id.* at 185.

55. *Id.*

as circuits are split or hold no opinion; thus, "contracting out" is not the root of litigation involving *uberrimae fidei*.[56] However, since "parties to contracts of marine insurance must not only avoid fraud and misrepresentation" but must also "disclose voluntarily 'every material circumstance,'" materiality, reliance, and disclosure are the most commonly litigated aspects of the doctrine.[57] Material facts include any facts that "would have controlled the underwriter's decision" when evaluating a potentially insured party's risks.[58] Thus, the party that wants to be insured must disclose to the proposed insurer all known situations "which materially affect the[ir] risk."[59] Materiality, however, is not contingent on the intent to disclose all material information, but rather, that there was a material misrepresentation.[60] Some examples of material facts include "prior loss history, poor condition of the insured vessel, and cancellation of a prior insurance policy."[61]

Disclosure of all material facts is necessary to comply with the doctrine of *uberrimae fidei*.[62] Sufficient, full disclosure "call[s] the attention of the underwriter in such a way that" if the underwriter wants more information, then the underwriter can request it.[63] The burden of full disclosure lies with the insured because the insured knows its own business and circumstances better than the insurer; moreover, investigation would be highly expensive and time-consuming for the insurer.[64] Disclosure should occur before an insurance policy is issued so the insurer can decide whether or not to accept the insured's risks.[65]

Finally, *uberrimae fidei* "does not require the voiding of the contract unless the undisclosed facts were material *and* relied upon."[66] Thus,

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56. *See XL Specialty Ins.*, 420 F. Supp. 3d. 172 at 191-92, 2019 AMC 2719.

57. Thomas J. 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, 1 (1998); Germano, *supra* note 40, at 750-51.

58. *Puritan Ins. Co.*, 779 F.2d 866 at 871, 1986 AMC 1240 (quoting Btesh v. Royal Ins. Co., Ltd., 49 F.2d 720, 721, 1931 AMC 1044 (2d Cir. 1931)); *e.g.*, Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13, 1987 AMC 1 ("This stringent doctrine requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured.").

59. *Puritan Ins. Co.*, 779 F.2d 866 at 870, 1986 AMC 1240.

60. Germano, *supra* note 40, at 753.

61. Christopher W. Nicoll, *Uberrimae Fidei: The Doctrine That's on Everyone's Lips*, 21 U.S.F. MAR. L.J. 1, 7 (2009).

62. *Puritan Ins. Co.*, 779 F.2d 866 at 870, 1986 AMC 1240.

63. *Id.*; *e.g.*, Germano, *supra* note 40, at 757 ("The general rule is the insured has to supply sufficient information to call the underwriter's attention to the matter in such a way so he can ask for additional information.").

64. Germano, *supra* note 40, at 759.

65. *E.g.*, *Knight* 804 F.2d 9 at 14, 1987 AMC 1; Germano, *supra* note 40, at 759.

66. *Puritan Ins. Co.*, 779 F.2d 866 at 871, 1986 AMC 1240 (emphasis added).

reliance in a marine insurance policy "cannot be voided for misrepresentation where the alleged misrepresentation was not relied upon and did not in any way mislead the insurer."[67]

III. COURT'S DECISION

In the noted case, the United States District Court for the Southern District of New York addressed an important issue in marine insurance law. Initially, the court granted part of XL Specialty's motion for summary judgment, finding that the 2014, 2015, and 2016 insurance policies regarding marine cargo and warehouse storage coverage were maritime contracts.[68] However, the district court also found there were several issues of genuine material fact. First, with respect to whether XL Specialty and Prestige could contract out of *uberrimae fidei*.[69] Second, whether Frenkel was acting as an agent of XL Specialty.[70] Finally, whether the auditor's report of Prestige's warehouse was considered a disclosure of loss to XL Specialty.[71] As a result, the court ultimately denied the remainder of XL Specialty's motion for summary judgment.[72]

The district court first considered whether maritime law applies to the 2014, 2015, and 2016 insurance policies.[73] In light of precedent from both the Second Circuit and the U.S. Supreme Court, the district court stated that "admiralty jurisdiction will exist over an insurance contract where the primary or principal objective of the contract is the establishment of policies of marine insurance."[74] Marine insurance is determined by a policy's coverage.[75] Prestige argued that the insurance policies are not maritime contracts, as they apply to stored goods with warehouse liability limits, and thus *uberrimae fidei* does not apply.[76] However, the district court disagreed, stating that the "primary objective" of the 2014, 2015, and 2016 insurance policies is maritime commerce.[77]

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67. *Id.* (quoting Rose & Lucy, Inc. v. Resolute Ins. Co., 249 F. Supp. 991, 992, 1965 AMC 1953 (D. Mass. 1965).

68. *XL Specialty Ins.*, 420 F. Supp. 3d. 172 at 191, 197, 2019 AMC 2719.

69. *E.g.*, *id.* at 191-92.

70. *E.g.*, *id.* at 192-96.

71. *E.g.*, *id.* at 195-97.

72. *Id.* at 197.

73. *Id.* at 187.

74. *Id.* at 189 (quoting Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307, 315, 2005 AMC 1747 (2d Cir. 2005)).

75. *Id.* (quoting Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York, 822 F.3d 620, 632, 2016 AMC 1217 (2d Cir. 2016)).

76. *Id.* at 187.

77. *Id.* at 190.

Moreover, the court explained that "maritime commerce has evolved" to include both the storage of goods and the shipping of those goods, and that different liability limits for land-based storage versus shipping does not change the nature of the contract from maritime to non-maritime.[78] Thus, the 2014, 2015, and 2016 insurance policies are maritime contracts, subject to the doctrine of *uberrimae fidei*.[79]

The court then briefly discussed whether the parties contracted out of their mutual duty of *uberrimae fidei*.[80] Prestige argued that the fraud notice found within the cargo policy contracts around *uberrimae fidei*, but the court is not persuaded by this argument.[81] Due to the lack of decisive precedent, the court does not resolve the issue itself but concluded that the fraud notice cannot be construed as part of the insurance policy.[82] The language of the fraud notice "provides no basis for concluding that the parties contracted around the duty of *uberrimae fidei*."[83]

The district court next decided whether Frenkel, a marine insurance broker, was an agent of XL Specialty.[84] Although New York law considers insurance brokers to be agents of the insured, the court identified some exceptions, specifically that "a broker will be held to have acted as the insurer's agent where there is some evidence of action on the insurer's part . . ."[85] However, for there to be a recognized agency relationship by the court it must be a "clear delegation of authority," with an "express agency agreement."[86] The district court explained that the producer agreement between XL Specialty and Frenkel is not an "express agency agreement" because it acknowledges that Frenkel is not XL Specialty's agent.[87] Further, the agreement does not permit Frenkel to make any binding, authoritative decisions on behalf of XL.[88] Thus, summary judgment is precluded on this issue due to conflicting evidence.[89]

78. *Id.* at 190-91.
79. *Id.* at 191.
80. *Id.*
81. *Id.*
82. *Id.* at 192.
83. *Id.*
84. *Id.* at 193.
85. *Id.* (citing Fid. & Guar. Ins. Underwriters, Inc. v. Jasam Realty Corp., 540 F.3d 133, 140-41 (2d Cir. 2008)).
86. *Id.* at 193.
87. *Id.* at 195.
88. *Id.* at 193-94.
89. *Id.* at 195.

Finally, the court discussed whether the auditor's report constituted a disclosure of loss by Prestige to XL Specialty.[90] The court begins its analysis with precedent from the Second Circuit, discussing how "an insured party complies with its obligations under the doctrine of *uberrimae fidei* where it 'discloses information sufficient to call the attention of the underwriter'" to be able to ask for more information if desired.[91] The court concluded that, although Prestige's disclosure of loss was understated on the report, it is still sufficient to "call the attention of the underwriter," at least for the underwriter to ask for more information about Prestige's losses.[92] Yet, as the court established, no underwriter requested more information and XL Specialty "still proceeded to bind the 2016 Policy" even with the knowledge of the loss from the audit report.[93] Despite the report contradicting prior statements made by Prestige about their loss history, XL Specialty failed to demonstrate that the "allegedly undisclosed facts were material and relied upon in issuing the policies."[94] Therefore, the district court concluded that this created a material issue of fact.[95] The district court ultimately held that XL Specialty's motion for summary judgment was granted in part and denied in part.[96]

IV. ANALYSIS

Although the district court makes no determination and is ruling on a motion for summary judgment, the court has misconstrued the doctrine of *uberrimae fidei*. The definition of *uberrimae fidei* requires full disclosure of material facts and does not permit limited or partial disclosure.[97] Although the doctrine has some moral purpose, specifically to prevent misleading information and fraudulent activity, the principle duty of the doctrine originates from the uniqueness of marine insurance contracts.[98] Each insurance contract is diverse, as vessels, shipping methods, warehouses, and loss history vary and are best known by the

90. *Id.* at 196.

91. *Id.* (quoting Puritan Ins. Co. v. Eagle S.S. Co. S.A., 779 F.2d 866, 871, 1986 AMC 1240 (2d Cir. 1985)).

92. *Id.* at 196.

93. *Id.* at 197.

94. *Id.*

95. *Id.*

96. *Id.*

97. Germano, *supra* note 40, at 753 ("The fact a material misrepresentation or omission had been made is what is important to the uberrimae fidei analysis."). *E.g.*, *McLanahan*, 26 U.S. 170 at 178, 1998 AMC 285.

98. Popham & Vo, *supra* note 47, at 104.

party purchasing insurance.[99] As was the intention in *Carter* and *McLanahan*, the relationship between the insurer and the insured is vital. No one knows the facts better than the parties, so complete, unbridled disclosure is necessary for the creation of a fair and accurate insurance policy. When the district court suggests that limited disclosure is acceptable for some warehouse theft and loss history, that conflicts with the broad nature of marine insurance contracts. Every insurance policy is different and depends on the policyholder. Without information from the policyholder, an insurer cannot accurately provide coverage, as some policyholders may be more of a "risk" than others. Thus, the stringent nature of *uberrimae fidei* works well with the specialized nature of marine insurance contracts. However, the district court does not arrive at the same conclusion.

In the noted case, Prestige's loss history can be categorized as a material fact because it allows for XL Specialty and its underwriters to better understand any potential risk of loss prior to entering into a policy. Moreover, the insurer asked for the loss history on multiple occasions, emphasizing its importance for providing coverage.[100] Yet, the district court entertained the argument that regardless of the agency relationship between Frenkel and Prestige, Prestige's disclosure of some loss to the surveyor could be sufficient to satisfy the doctrine.[101] The court should not have suggested that Prestige's partial or limited disclosure of its losses to the surveyor was sufficient to satisfy the doctrine, as this interpretation contradicts the necessity of full disclosure between the immediate parties.

By implying that limited or partial disclosure is permitted, the court single-handedly changes the definition of *uberrimae fidei*. Full disclosure is fundamentally different than limited disclosure. This interpretation invalidates the definition of the doctrine and precedent regarding marine insurance contracts. For instance, in *Puritan*, the Second Circuit Court of Appeals held that the lower court properly applied the legal principle of *uberrimae fidei*.[102] There, the owners of several steamships obtained hull and marine insurance through a broker.[103] Upon insurance application, two losses were omitted and were not discovered by the insurance company

99. *Id.* ("Since this information is peculiarly within the knowledge of the purchaser, the underwriter must trust the insured's representations and that the insured will disclose any information material to the risk").

100. *XL Specialty Ins.*, 420 F. Supp. 3d. 172 at 178-79, 182, 2019 AMC 2719.

101. *See id.* at 196.

102. *Puritan Ins. Co.*, 779 F.2d 866 at 868, 1986 AMC 1240.

103. *Id.* at 868.

until several months after the policy had been instituted.[104] The insurance company overlooked the first loss, as it would not have impacted the policyholder's coverage; however, the second loss was far more substantial and was the motivation for the insurance company initially filing suit.[105] The court reasoned that the trial court did not err in its application of *uberrimae fidei* because, based on the witness testimony, the trial court had properly interpreted each witness' credibility in relation to the facts.[106] Moreover, during the court's discussion of the doctrine generally, the court noted that "[a] minute disclosure of every material circumstance is not required," and that "[t]he assured complies with the rule if he discloses sufficient [facts] to call the attention of the underwriter in such a way that, if the latter desires further information, he can ask for it."[107]

By shifting to limited or partial disclosure of loss history, the district court in the noted case creates a precedent that certain aspects of marine insurance contracts may be disclosed whereas others need not be. Although the court in *Puritan* reasoned that not every material fact is "required" to fulfill the obligation of disclosure for *uberrimae fidei*, the circumstances are different in *XL Specialty*. Unlike *Puritan*, where half of the losses would not have impacted the policy, the same cannot be said in *XL Specialty*, as the loss totaled millions of dollars. The loss history was so pertinent to coverage that XL Specialty repeatedly asked for Prestige's loss history for several years.[108] The insurance company in *Puritan* did not need to repeatedly ask the insured for their loss history. Further, the court in *Puritan* states that if more information is required, then the underwriter can ask for it. That is exactly what the underwriters did in *XL Specialty*, via numerous emails and telephone calls.[109] Therefore, Prestige's loss history was material enough, even by the standard in *Puritan*, and should have been fully disclosed before two cycles of reinsurance policies.

The district court's allowance of limited disclosure, especially with regards to loss, skews the good-faith relationship between the insured and the insurer. Communication and the free flow of information is fundamental to the creation of an insurance policy, as well as reinsurance

104. *Id.* at 869.
105. *Id.*
106. *Id.* at 871-72.
107. *Id.* at 871.
108. *See XL Specialty Ins.*, 420 F. Supp. 3d. 172 at 178-79, 182, 2019 AMC 2719.
109. *Id.*

policies.[110] Since *uberrimae fidei* permits "variety" in marine insurance contracts, narrowing the doctrine would narrow the scope of the contracts, which may be detrimental to the practice of admiralty. In particular, *uberrimae fidei* "promotes economic efficiency," as it is tailored to the specific, insured party's needs and eliminates additional costs.[111] ". . . [M]arine insurance generally remains an industry where individualized risk calculations and negotiations still play a key role."[112] Therefore, full disclosure of all material facts by the party that knows them is important and preferable for any insurer considering a party's risks.[113]

Finally, the district court's alteration of the doctrine of *uberrimae fidei* impacts uniformity in marine insurance law. By accepting limited disclosure, the district court is no longer "maintain[ing] a harmonious set of commercially viable laws in a marine setting."[114] The adherence to the doctrine of *uberrimae fidei* ensures predictability, especially in an area of law that extends both nationally and internationally.[115] The district court confuses the doctrine by allowing partial disclosure, abandoning indispensable uniformity created by the doctrine. Despite this being a decision on a motion for summary judgment, the implications that the district court is making could seriously alter the definition and future interpretation of the doctrine of *uberrimae fidei*.[116]

V. CONCLUSION

The doctrine of *uberrimae fidei* was not created with the intention to provide occasional leniency. Full disclosure of material facts is required; otherwise, the doctrine would not exist, let alone function, as intended.[117] The district court in *XL Specialty* creates a dangerous implication for the doctrine by indicating that Prestige's limited disclosure through a third-

110. Paul M. Hummer, *Discovery of Reinsurance Information in Insurance Coverage Litigation*, 68 DEF. COUNS. J 339, 339-40 (2001).

111. Popham & Vo, *supra* note 47, at 104.

112. *Id.* at 105.

113. *See, e.g.*, Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1993) (discussing the importance of communication in reinsurance relationships).

114. Popham & Vo, *supra* note 47, at 105.

115. *See* Popham & Vo, *supra* note 47, at 105; *See also* Schoenbaum, *supra* note 57, at 39 (". . . because the marine insurance industry is international in scope and likely to become more so due to recent agreements at the World Trade Organization to remove barriers to trade in services, its efficient operation would be enhanced by a harmonization . . .")

116. This Note was finalized prior to the First Circuit's decision regarding *uberrimae fidei* in QBE Seguros v. Morales-Vasquez, 986 F.3d 1 (2021). Thus, the analysis does not discuss this case.

117. *See generally* Carter v. Boehm [1766] 97 Eng. Rep. (HL) 1162, 1164, 3 Burr 1909, 1909; *McLanahan*, 26 U.S. 170 at 178, 1998 AMC 285.

party surveyor is equivalent to that of telling the insurance company outright of all known losses. This decision allowing limited disclosure could adversely affect economic efficiency and uniformity in the overall field of maritime insurance. Although some loss was eventually "communicated" to XL Specialty, this amount of disclosure was not comparable to full disclosure. The doctrine of *uberrimae fidei* was designed to cultivate open, communicative, and non-fraudulent relationships between the insured and the insurer. The district court's allowance of limited disclosure makes such candor harder to reach.

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