Utmost Good Faith in Marine Insurance—The Reports of My Death Have Been Greatly Exaggerated

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> "First, American courts are not bound by legal developments in the United Kingdom. Federal courts tasked with hearing admiralty cases should take heed of developments in English law, but they are not obliged to change course merely because Parliament acts to alter a previously entrenched principle."
>
> —*QBE Seguros v. Morales-Vázquez*

> "If there are still 'special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business' it will be interesting to see what effect the Act has on American maritime law. Maybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in and let us know what it thinks of *Wilburn Boat* today."
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> —*Travelers Property Casualty v. Ocean Reef Charters LLC*

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I. INTRODUCTION

Something momentous has been brewing around marine insurance in the first semester of 2021. In January, the First Circuit issued *QBE Seguros v. Morales-Vázquez*[1]—an opinion on the breach of "utmost good faith"—and in May, the Eleventh Circuit issued *Travelers Property Casualty Company of America v. Ocean Reef Charters LLC*[2]—an opinion on breach of a marine warranty.

Following the trail blazed in *Wilburn Boat Co. v. Fireman's Fund Insurance Co*.,[3] both courts made their analyses along the usual patterns (although the *Travelers* court did so rather reluctantly[4]): *QBE* agreed that utmost good faith is a principle firmly entrenched in American marine insurance law,[5] and *Travelers* found that there was no rule about a "crew warranty," let alone an entrenched one.[6] *QBE* applied what the court believed is federal maritime law,[7] and *Travelers* applied state law;[8] with *Wilburn Boat* still reigning sovereign.

Although on different issues, the two opinions have a common thread: both acknowledge (and *Travelers* addresses) the effects that the recent overhaul of English insurance law[9] may have on the American law of marine insurance.

In *QBE*, the question was explicitly before the court. The brief for the Defendant-Appellant, Morales-Vazquez, includes Argument Number VII

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1. 986 F.3d 1 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 424 (U.S. Nov. 1, 2021) (No. 20-1779) (holding an insurer was not required to show actual reliance on the insured's failure to disclose prior accident history for a marine insurance policy to be void under the doctrine of *uberrimae fidei*).

2. 996 F.3d 1161 (11th Cir. 2021) (holding state law rather than federal maritime law governed the effect of a breach of a captain and crew express warranty).

3. 348 U.S. 310, 1955 AMC 467 (1955).

4. Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, 996 F.3d 1161, 1171 (11th Cir. 2021) ("It may be that *Wilburn Boat* was a bad . . . decision. But we are stuck with it.").

5. QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 2, 6 (1st Cir. 2021).

6. *Travelers*, 996 F.3d at 1169.

7. *See QBE,* 986 F.3d at 5-6.

8. *Travelers*, 996 F.3d at 1171.

9. Insurance Act 2015, c.4 (UK) (hereinafter "UK ACT 2015"), http://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpga_20150004_en.pdf, [http://perma.cc/N5A2-5V2H].

titled: *The Recent British Reform of Uberrimae Fidei and Demise of Breach of Warranties in Marine Insurance Warrant Reversal of the District Court's Judgment* and used three and a half pages to argue this point.[10]

The court obliged with an equal weight of reasons and rejected the appellee's argument, affirming, both treatise-like and rather vehemently, the independence of American courts from the UK Act 2015.[11]

Later, it seemed that the wish of the *Travelers* court, "Maybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in," might be coming true.[12] A petition of certiorari was filed in the *QBE* case, and the issue of whether the UK Act 2015 should have any effect on the American law of marine insurance was explicitly before the High Court.[13]

The questions therein presented are (1) whether the doctrine of *uberrimae fidei* continues to apply in its strict form or is limited to cases in which the insurer relied on a mistake or omission when issuing the policy, (2) whether it is no longer part of federal maritime law, and (3) whether it should be modified in conformity with the law in England.[14]

At the time of writing this article it was not known if certiorari would ever be granted, but just before going to press, the Court denied the petition.[15] The issue may appear now to be moot, but a lot of reflection is deserved anyway.

This Article attempts to make an assessment of the best possible answers to the questions, if there are any—especially the last, i.e., whether the doctrine of *uberrimae fidei* should be modified in uniformity with the law in England. The preliminary question, however, is whether an "entrenched" rule of *uberrimae fidei* actually exists in the shape and nature as mandated by *Wilburn Boat*.[16] This Article begins by considering whether *Travelers* is correct in suggesting that it is *Wilburn Boat* that must be reassessed in the first place. The conclusion below is an attempt to

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10. *See* Brief for Appellant at 27-31, QBE Seguros v. Morales-Vázquez, 986 F.3d 1 (1st Cir. 2021) (No. 19-1503).

11. *QBE*, 986 F.3d at 6-7.

12. *Travelers*, 996 F.3d at 1171.

13. *See* QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 2, 6 (1st Cir. 2021), *appeal docketed*, No. 20-1779 (U.S. June 24, 2021).

14. Petition for Certiorari at i, QBE Seguros v. Morales-Vázquez, No. 20-1779 (U.S. June 17, 2021).

15. *QBE*, *cert. denied*, 595 U.S. ___ (Nov. 1, 2021) (No. 20-1779).

16. Wilburn Boat Co. v. Fireman's Fund Insurance Co. 348 U.S. 310, 314-16, 1955 AMC 467 (1955).

assess what to make of and what to do in the situation of deep conflict that the Court has left existing, if not reinforced.

II. THE FIRST CIRCUIT'S "TEA PARTY"

A. A Plea for Change

From the brief of Morales-Vazquez:[17]

> As a matter of first impression at the national level and consonant with the Supreme Court's exhortation to the federal courts sitting in admiralty for harmony and uniformity between English and American marine insurance law, the instant appeal provides a unique opportunity to adopt the recent English marine insurance reforms that resulted in the jettisoning of the doctrines of *uberrimae fidei* and breach of warranties enacted in England because their underlying policies no longer exist. The unfair advantage afforded to insurers by the doctrines—the prerogative to void a policy of marine insurance regardless of the circumstances—is unwarranted in modern times. These doctrines afford unjustified protections to insurers, even when underwriters fail to employ due diligence in assessing risks or do not actually rely on the insured's nondisclosures and/or misrepresentation in the application for coverage.[18]

The argument is based on copious citations to an article by this author, written shortly after the UK Act 2015 was passed.[19] That Restatement Article made a comparative review of American marine insurance law as developed by the U.S. courts under the influence of *Wilburn Boat* in light of the extensive reconstruction of British insurance law made by the UK Act 2015, with its deep departure from historical practice.

The take of our restatement article is that the UK Act 2015 produced a profound divergence with American law, especially in the area of utmost good faith, and that a solution of the divergence should be found.

Given that the U.S. Congress had not (and perhaps could not) find it, the restatement article submitted that at least one solution had been suggested by Professor Michael Sturley: to create a restatement of Marine Insurance law.[20]

The Restatement Article concluded by advising that there is no need to inconvenience the American Law Institute ("ALI") because the

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17. *QBE*, Brief for Appellant at 16.

18. *Id.*

19. Attilio M. Costabel, *The UK Insurance Act 2015: A Restatement Of Marine Insurance Law*, 27 ST. THOMAS L. REV. 133 (Summer 2015) (hereinafter "Restatement Article").

20. *Id.* at 168-69.

decades-long preparation of the UK Act 2015 is the functional equivalent of an ALI restatement,[21] as more amply explained below.

B. A Misguided Declaration of Independence

The First Circuit went to great pains in stating loudly that the UK Act 2015 does not have any influence at all on American law of Marine Insurance.[22] That statement is based mostly on two premises:

- American courts are not bound by a decision of the British Parliament to override established principles of maritime law (although they should take heed of them).[23]
- "Abandoning the doctrine of *uberrimae fidei* in marine insurance cases would have rebarbative consequences [by]
    - both upending settled law and
    - disrupting an industry that has long been premised on insureds telling the whole truth to insurers."[24]

Neither proposition withstands critique.

1. There Is No "Established Principle" to Override; No "Settled Law" to "Upend"

As the certiorari petition correctly points out, the doctrine of *uberrimae fidei* may be established in the First Circuit, as well as in the Third, Ninth, and Eleventh, but is found in a limited edition in the Second and the Eighth and is not recognized at all in the Fifth (one of the most important for maritime law uniformity).[25] Additionally, the Eleventh Circuit may approach the doctrine with a hint of doubt, judging by its opinion in *Travelers*,[26] which dealt with the companion issue of marine warranties, an issue that shares with *uberrimae fidei* the legal traits of strict compliance and "all or nothing" remedies.

"Uniformity, whither goest thou?" asked Professor Force after *Yamaha Motor Corp. v. Calhoun*,[27] and we may repeat the question here. What we have today is not an entrenched rule but an entrenched conflict.

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21. *Id.* at 168-170.
22. *QBE*, 986 F.3d at 6-7.
23. *Id.* at 7.
24. *Id.* (alterations introduced by author).
25. Petition for Certiorari at 10-18, QBE Seguros v. Morales-Vázquez, No. 20-1779 (U.S. June 17, 2021).
26. *See* Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, 996 F.3d 1161 (11th Cir. 2021).
27. *See generally* Robert Force, *Post-Calhoun Remedies For Death And Injury In Maritime Cases: Uniformity, Whither Goest Thou?*, 21 TUL. MAR. L.J. 7 (1996).

2. The Decision of the British Parliament is Not Capricious

In the words of the *QBE* court, "the fact that federal common law has the capacity to evolve does not mean that it is captive to the vagaries of Parliament (or any foreign legislature, for that matter)."[28]

The word "vagaries" throws a shade of dark light on the whole argument of the circuit. No one argues that American courts are bound by foreign precedents or legal developments, but to refuse appropriate consideration to a work product of the British Parliament spanning decades by calling it a "vagary" sounds borderline to insult.

Already in 1957,[29] the English Law Reform Committee issued a report recommending reform of insurance law, followed in 1980 by a report of the Law Commission, No. 104, which is particularly important. The 1980 report, 174 pages long (and thus, not a "vagary"), addressed a substantial portion of the issues and problems of the insurance industry of the time: not just marine, but also aviation, transport, life, intermediaries and reinsurance with important findings and recommendations.[30]

Sixty pages (i.e., about 35% of the report) deal with a proposed reform of the law of disclosure, concluding: ". . . defects in the present law provide a formidable case for reform."[31]

The 1980 report examined, among many others, issues of the connection between disclosure and the loss and the consequences of breach of the duty of disclosure,[32] and contained an analysis of the state of the law on warranties with a similar, critical approach.[33]

In 2002, the British Insurance Law Association recommended that the Law Commissions study a possible reform of insurance law, and the Law Commissions started a joint review of insurance contract law in 2006.

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28. *QBE*, 986 F.3d at 7.

29. Law Reform Comm., FIFTH REPORT: CONDITIONS AND EXCEPTIONS IN INSURANCE POLICIES, Cm. 52, (1957) (Eng.).

30. *See* THE LAW COMM'N, LAW COMM'N NO. 104, INSURANCE LAW: NON-DISCLOSURE AND BREACH OF WARRANTY (1980), http://www.bailii.org/ew/other/EWLC/1980/104.pdf.

31. *Id.* at 27 (emphasis added).

32. *Id.* at 19-72.

33. *See id.* at 79-90.

A first report was released in 2007,[34] followed by a second in 2011[35] and a third in 2012 (hereinafter "CP3").[36] The final report of the two commissions, released in July 2014,[37] (hereinafter the "2014 Report") sums up and epitomizes all the developments of the project to date and is an invaluable source for interpretation and understanding of the statute.

By coincidence, *Wilburn Boat* dates to 1955, and the first recommendation of the English Law Reform Committee dates to 1957, so the dissatisfaction with the rigidity of the traditional doctrines governing marine insurance law was brewing on both sides of the pond contemporaneously. *Wilburn Boat*, after all, was not the heretical decision that recent U.S. courts have been seeing, excepting the other heretic, *Anh Thi Kieu*.[38]

3. And No "Rebarbative Consequences"

The main concern of the *QBE* court seems to be that abandoning utmost good faith would ". . . disrupt[] an industry that has long been premised on insureds telling the whole truth to insurers."[39] The First Circuit may be reassured.

a. Reactions of the Industry

The report of the UK and Sottish Law Commissions show that a large segment of the insurance industry had been invited to submit comments, and the responses were in large proportion positive about the reforms.

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34. The Law Comm'n & The Scottish Law Comm'n, Law Comm'n No. 182 & Scot. Comm'n No. 134, INSURANCE CONTRACT LAW: MISREPRESENTATION, NON-DISCLOSURE AND BREACH OF WARRANTY BY THE INSURED (2007), http://www.scotlawcom.gov.uk/files/6412/7892/7069/dp134.pdf.

35. The Law Comm'n & The Scottish Law Comm'n, Law Comm'n No. 201 & Scot. Law Comm'n No. 152, INSURANCE CONTRACT LAW: POST CONTRACT DUTIES AND OTHER ISSUES (2011), http://www.scotlawcom.gov.uk/files/3113/2429/7329/dp152.pdf.

36. The Law Comm'n & The Scottish Law Comm'n, Law Comm'n No. 204 & Scot. Comm'n No. 155 INSURANCE CONTRACT LAW: THE BUSINESS INSURED'S DUTY OF DISCLOSURE AND THE LAW OF WARRANTIES (2012), http://lawcommission.justice.gov.uk/docs/cp204_ICL_business-disclosure.pdf.

37. The Law Comm'n & The Scottish Law Comm'n, Law Comm'n No. 353 & Scot. Law Comm'm No. 238, INSURANCE CONTRACT LAW: BUSINESS DISCLOSURES; WARRANTIES; INSURER'S REMEDIES FOR FRAUDULENT CLAIMS; AND LATE PAYMENT (2014) (hereinafter "2014 Report"), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_Print_Ready.pdf.

38. Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991). For a discussion of why *Anh Thi Kieu* is an anomaly, *see* Brief in Opposition to Issuance of Writ of Certiorari at 15-23, QBE Seguros v. Morales-Vázquez, No. 20-1779 (U.S. Sept. 21, 2021).

39. QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 7 (1st Cir. 2021).

The Scottish Commission in particular has a large list of positive reactions from industry players supporting the reform, summarized as follows[40]:

> (1) 80% of consultees (36 of 45) agreed with the need to reform the law relating to the business policyholder's obligation to provide information when buying insurance and the insurer's remedies if the policyholder fails to provide accurate information.
> (2) 88% of consultees (36 of 41) agreed that the law of insurance warranties required amendment.
> (3) 87% of consultees (34 of 39) agreed that insurers should have a contractual obligation to pay valid insurance claims within a reasonable time.
> (4) 92%, 75% and 94% of consultees (out of 38) agreed with the Commission's core proposals relating to insurance fraud.
> (5) The remaining balance of consultees did not necessarily disagree with the proposals. They sometimes proposed alternative solutions or sought clarification.
> (6) The Association of British Insurers ("ABI") members were largely supportive of the Law Commission's proposals as set out in the Draft Insurance Contracts Bill.
> (7) Airmic, in response to consultation, said that the draft clauses represent a significant advance on those provisions of the Marine Insurance Act 1906 ("MIA") covered by the consultation.
> (8) The International Underwriting Association commented that the Law Commission had, by and large, come to a balanced and proportionate review of insurance contract law, maintaining suitable flexibility for business parties to come to their own arrangements as required. This approach is crucial in recognizing the bargaining power and expertise utilized by wholesale (re)insureds and their advisors and ultimately supports the efficiency of the London market as a renowned global insurance center.

40. The points from (1) to (8) in the following text are taken from the 2014 Report, 1.53 to 1.57. *See supra* note 37.

b. On the Contrary, It is Maintaining the American Status Quo That Would Have Bad Consequences

In their response to CP3, Mactavish[41] commented that "the corporate insurance market was characterized by too much coverage uncertainty, too many disputes, too much leverage of dispute potential in negotiation and too little work to narrow the scope for dispute at the placement stage."[42]

But once again, it is the prerogative of the Scottish Commission to strike a convincing note that it is keeping the law as it was before the UK Act 2015 (and not the change of it) that will produce negative consequences for industry and consumers alike, based upon evidence received from UK businesses that the current law is adding to insurance disputes. In this regard, the words of the Scottish Commission deserve to be quoted at length:

> The duty of disclosure has been subject to major criticisms over many years, including reports from the Law Reform Committee in 1957, from the Law Commission in 1980 and from the British Insurance Law Association in 2002 . . . There is continuing evidence that the duty does not work well. In particular:
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> (1) The duty is poorly understood—and often appears so onerous that policyholders do not know how to go about complying with it.
>
> (2) Medium to large companies in particular do not know how to judge what the company "knows or ought to know." They do not know how to go about gathering information for disclosure.
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> (3) Although there are exceptions in section 18(3), these are written in archaic language and not well known.
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> (4) The statute appears to allow insurers to play a passive role, without asking questions about relevant issues. This encourages "underwriting at claims stage," where insurers ask questions only when a claim arises, and then use that information to threaten refusal of the claim.
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> (5) Avoidance is an "all or nothing" remedy, which leads to adversarial disputes. It can be overly harsh, allowing insurers to refuse the whole claim even if, had they known the full information, they would still have accepted the risk but at a slightly higher premium.[43]

41. "Mactavish is a research and advisory service specializing in insurance and risk." *See id.* at 1.34.

42. *Id.* at 1.38.

43. *Id.* at 3.11 (Emphasis added, internal citations omitted).

4. Even QBE European Operations Approved the UK Act 2015

An introductory guide to the Insurance Act 2015, published online by the British Insurance Brokers' Association[44] has a contribution by David Hall, Managing Director of Retail for QBE European Operations:

> QBE has been fully engaged with the Law Commission's work and is supportive of the Insurance Act 2015, as we believe that it will address existing anomalies, providing greater certainty, and delivering positive outcomes for clients. We recognize that the transition to a new legal framework will present challenges, for brokers especially, and we are committed to supporting brokers and clients through this period of change.[45]

In a separate blog, QBE itself even supplied a report meant to be a clear guidance on the Duty of Fair Presentation that has substituted that of utmost good faith.[46]

III. A LITTLE ANCESTRY WOULD HELP

Interestingly, the *QBE* court did not reject the time-honored proposition of Justice Holmes that "[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business;"[47] rather the court repeated it word-for-word,[48] yet showed a fierce hostility to oblige. How can this contradiction be explained? We submit that this may be due to a couple of reasons: mis-intended ancestry and reaction to *Wilburn Boat*.

A. Finding Your Roots

Professor Henry Louis Gates, the host of the television series *Finding Your Roots*, may be the best person to help understand the apparent contradiction. The First Circuit, and all the concurring ones, appear to share a jealousy for the English law touching American law, as though American law is the property, if not progeny, of the American courts.

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44. Brit. Ins. Brokers' Ass'n & Mactavish, *Insurance Act 2015: An Introductory Guide*, QBE EUROPE (2015), https://qbeeurope.com/document-library/news-events/reports/insurance-act-2015-an-introductory-guide/.

45. *Id.* at 3.

46. QBE Eur. Operations, *Insurance Act New Policy Wording*, QBE (2017), https://qbeeurope.com/document-library/products/trade-credit/qbe-policy-enhancements-explained-september-2017/.

47. Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493, 1924 AMC 107 (1924).

48. QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 6 (1st Cir. 2021).

American marine insurance law may be the property of American law, but it is not its biological child.

The doctrine of utmost good faith, in particular, was born out of British wombs, as best recognized by the Supreme Court in *Stipcich v. Metropolitan Life Insurance Co.*,[49] where Justice Stone stated at footnote 1: "The rule (i.e., the doctrine of utmost good faith) '[b]ecame first established in early British marine insurance. Its adoption here followed as cases presenting the question arose.'"[50]

M'Lanahan[51] relied on *Watson v. Delafield*,[52] which in turn held that the doctrine (i.e., of utmost good faith) dates back to the *nisi prius* cases of Lord Mansfield[53] as well as Scottish[54] and English cases.[55]

Most of the U.S. cases holding that *uberrimae fidei* is an entrenched principle of maritime law rely on this chain of authorities: back to *M'Lanahan* and to *Watson*, and ultimately to English precedents.

One perfect example: *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*[56]: "*Uberrimae fidei* was first recognized in 1766 by Lord Mansfield and was codified in English law in 1906. Writing for the court, Justice Story incorporated the rule into American maritime insurance law in 1828. M'Lanahan, 26 U.S. at 176." (citations omitted).

B. A DNA Test

Inlet Fisheries contains additional notes useful to reconcile *uberrimae fidei* with *Wilburn Boat*. In the words of the *Inlet Fisheries* court:

> In *Wilburn Boat*, the Supreme Court signaled a major shift in the approach to marine insurance cases. Before *Wilburn Boat*, we would have simply looked to our admiralty precedent; absent a clear rule, the Supreme Court directed us to look to English law, because of "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. Following *Wilburn Boat*, if extant federal admiralty law does not contain an applicable rule, courts are instructed to look to state law, rather than fashioning a new federal admiralty rule or adopting one from British

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49. 277 U.S. 311 (1928).
50. *Id.* at 317 n.1.
51. M'Lanahan v. Universal Ins. Co., 26 U.S. 170, 185 (1 Pet.), 1998 AMC 285 (1828).
52. Watson v. Delafield 2 Cai. R. 224 (N.Y. Sup. Ct. 1804).
53. *See id.* at 230-31.
54. Grieve v. Young (Ct. of Session, 1782), reprinted in John Millar, ELEMENTS OF THE LAW RELATING TO INSURANCES, p. 65-68 (1787).
55. Fitzherbert v. Mather, 1 T.R. 12, 99 Eng. Rep. 944 (KB. 1785).
56. 518 F.3d 645, 650, 2008 AMC 305 (9th Cir. 2008).

> law. Thus, the Supreme Court acknowledged the leading role of states in governing insurance policies, including marine insurance policies.[57]

Thus, the Supreme Court acknowledged the leading role of states in governing insurance policies, including marine insurance policies.

However, *Wilburn Boat* did not utter the words "*or adopting one from British law.*" These words are literally put in the mouth of *Wilburn Boat* by the *Inlet Fisheries* court. *Wilburn Boat* only said "Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?"[58]

These words make us note that *uberrimae fidei* was "adopted" from English law by American law. The word "adoption" also carries a meaning in family law; that of a child born from biological parents who is taken over by adoptive parents who give the child the legal status of their own child. This parodic analogy can be used for the saga of *uberrimae fidei*.

That is to say the doctrine of *uberrimae fidei* is like a child adopted by American federal law, to whom it belongs so long as its legal status, or vital statistics I.D., confirms that the child is "entrenched" with its adoptive parent. If it loses this status, custody of the child would pass to a foster parent, "state law," a result that horrifies the First, Third, Ninth, and Eleventh Circuits.[59]

However, the child has grown up rather differently from what it was. From a salutary element of certainty in transactions and good moral principles, it is now viewed by its biological parents (i.e., English law) as detrimental to industry and consumers and prone to allow practices like "underwriting at claim stage," that are, if not immoral, at least ethically questionable.

The biological parent has toiled for decades to understand the child and to find solutions that are practical, beneficial, and ethical. The adoptive parents (i.e., American law) still refuse to acknowledge and admit this reality that is in plain sight for all to see.

But again, they do not do it in bad faith. On the contrary, they are in pursuit of what they perceive as a good avoidance of the evils of *Wilburn Boat*. *Inlet Fisheries* fell into this misunderstanding when it wrote that

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57. *Id.* at 649 (citations omitted).

58. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314, 1955 AMC 467 (1955) (Emphasis added).

59. *See* Pet. for Cert., *supra* note 25.

Wilburn Boat does not allow an American court to "adopt[] [a rule] from British law."[60]

C. Travelers *May Be Useful for a Conclusion on* QBE

These two opinions address the same issue of strict compliance, the first with warranties, the second with concealment. Both followed *Wilburn Boat*, but came to different results (*QBE* found an entrenched rule of strict compliance[61] and *Travelers* did not[62]), using the same method: following *Wilburn Boat*. How could the same method of analysis bring different results?

Under *Wilburn Boat*,[63] when asked to decide whether federal maritime law or state law applies, the courts are allowed to apply federal maritime law on two conditions:

> Condition (1): "Is there a judicially established federal admiralty rule governing these warranties?" (hereinafter the "Finding Method")
>
> Condition (2): "If not, should we fashion one?" (hereinafter the "Fashion Method").

American courts appear to fear the Fashion Method, which involves taking responsibility for creating a new rule, not existing before, out of the void; and to do so by identifying a purpose, designing its shape, and most of all its use—that is, the remedies.

Instead, the courts have found it comfortable to "find" (i.e., pretend to find) a rule already made by somebody else, and, most importantly of all, "established."[64]

The alternative of Justice Black (i.e., "*Should we fashion one?*") does not appear to have been commonly used. In fact, to the best of our knowledge, the only court that has courageously declared fashioning one

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60. *Inlet Fisheries*, 518 F.3d at 649.

61. QBE Seguros v. Morales-Vázquez, 986 F.3d 1, 2, 6 (1st Cir. 2021).

62. Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters, 996 F.3d 1161, 1169 (11th Cir. 2021).

63. *Wilburn Boat*, 348 U.S. at 314.

64. Many courts that follow the strict rule focused on whether *uberrimae fidei* was "an *Entrenched* Precept of Federal Admiralty Law" or "an *established* rule of maritime law," as the *Catlin* court wrote, adding "for marine insurance contract cases, we only apply federal maritime rules that are *established and settled*; otherwise we would look to state law." Catlin at Lloyd's v. San Juan Towing & Marine, 778 F.3d 69, 80, 2015 AMC 694 (1st Cir. 2015) (*citing* Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37-38, 2006 AMC 2113 (1st Cir. 2006)). *AGF v. Cassin* uses the words "well established," citing to *Puritan* and many others, who use the past tense, meaning the "finding" of an existing rule, already made and entrenched. AGF Marine Aviation & Transp. v. Cassin, 544 F.3d 255, 263, 2008 AMC 2300 (3d Cir. 2008)).

of its own was the Sixth Circuit in *Aasma v. American Steamship Owners P&I Club*.[65] That court held that under maritime law there was no direct action against a protection and indemnity club.[66] *QBE* and *Travelers*, however, made no exception; both followed the Finding Method.

The glitch of the Finding Method is that the courts that used it restricted their searches to a limited population of circuits and then reached a "finding" only in their own circuit, which is the antithesis of what federal maritime law should be. Justice Frankfurter, in his concurring opinion in *Wilburn Boat*, admonished that the federal rule must be uniform.[67]

The issue for the Supreme Court in *QBE* was about the existence and the remedies of a doctrine under the name of *uberrimae fidei*, and in resolving that issue, the Finding Method cannot be used, for there is no established rule that is to be found nationwide: there is only a conflict to resolve.

In summary, the only way *uberrimae fidei* may become an established and entrenched doctrine of American maritime law it is to "fashion" it, because otherwise it cannot be found. This is what the *Travelers* court is trying to tell us in its final words: "it will be interesting to see what effect the [UK] Act [2015] has on American maritime law."[68] Finally, someone has noticed that marine insurance law is no longer in 1782, 1804, or 1828, but in the totally new landscape of the UK Act 2015, and had a healthy reflection on the continued viability of *Wilburn Boat*.

IV. CONCLUSION

Pages of scholarly arguments by legendary scholars, decades of probes by the British Commissions, models of updated legislation in the "cradle" of marine insurance law, were all wiped out with two words: "*petition denied*."[69] Why? We may never know the reasons, as the Court decided without an opinion.

It is in order, however, to attempt some guess, most of all to face a brutal reality: a deep conflict remaining unsolved, and to ask, what is there to do now?

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65. Aasma v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n, Inc., 95 F.3d 400, 404, 1997 AMC 1 (6th Cir. 1996).

66. *Id.*

67. *Wilburn Boat*, 348 U.S. at 323.

68. Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 996 F.3d 1161, 1170 (11th Cir. 2021).

69. QBE Seguros v. Morales-Vázquez, 986 F.3d 1 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 424 (U.S. Nov. 1, 2021) (No. 20-1779)

First and most importantly, we must resist the impulse to call the Court's decision whimsical on the one side, or to overstep in our guessing, on the other. Our conclusion is that there may be very good reasons for the cryptic decision of the Court. After all, it also took the Scottish Commission and the British Parliament only two words to wipe out utmost good faith.

The utmost good faith principle had statutory status at Section 17 of the Marine Insurance Act 1906, reading originally:

> A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.[70]

The Scottish Law Commission made the recommendation:

> In Section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from "and" to the end are omitted.[71]

After the Insurance Act 2015, the Marine Insurance Act now reads "[a] contract of marine insurance is a contract based upon the utmost good faith"[72] without anything more. In fact, the Insurance Act 2015 even has a Section 14, titled "Good Faith" reading:

> (1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the *utmost good faith* has not been observed by the other party is abolished.[73]

The phrases "*Petition denied*," "*are omitted*," "*is abolished*," are pairs of words worth a thousand pictures. Yet, while the Supreme Court stopped there, the Insurance Act 2015 went way ahead. Part Two of the Insurance Act 2015 is titled "The Duty of Fair Presentation," containing an entirely new set of rules of law and of practice (the Section titles only are reproduced below):

> Part 2: The Duty of Fair Presentation
>
> (2) Application and interpretation
>
> . . . .

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70. Marine Insurance Act 1906, 8 Edw. 7 c.41 (UK).

71. The Law Comm'n & The Scottish Law Comm'n, Law Comm'n No. 353 & Scot. Law Comm'm No. 238, INSURANCE CONTRACT LAW: BUSINESS DISCLOSURES; WARRANTIES; INSURER'S REMEDIES FOR FRAUDULENT CLAIMS; AND LATE PAYMENT (2014) (hereinafter "2014 Report"), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_Print_Ready.pdf. (emphasis added).

72. UK Act 2015 *supra* note 9.

73. *Id.* (emphasis added).

(3) The duty of fair presentation

. . . .

(4) Knowledge of insured

. . . .

(5) Knowledge of insurer

. . . .

(6) Knowledge: general

. . . .

(7) Supplementary

. . . .

(8) Remedies for breach[74]

And Part 5 is dedicated to the name of "Good Faith" (the Section 14 mentioned above).

In sum, what the Insurance Act 2015 has done is not just cancel the consequences of utmost good faith, but crafted entirely new rules of law, rules of practice, and entirely new remedies—that never existed before.

The doctrine of utmost good faith was created to cure what was perceived to be an unfair advantage of the insured versus the insurers. To take away the protection of the insurers by canceling out the doctrine of utmost good faith, *without substituting it with a different type of protection* would unfairly take the industry a century backwards.

The creation of duties, among other things, especially, the creation of new remedies (as the British Parliament did) takes care of that but appears too much an act of lawmaking for American courts—although a power that the British Parliament had in full.

Whether the Supreme Court has the same powers could be debated. In fact, to do this job, the Supreme Court may have had to decide whether to adjust, if not overrule, *Wilburn Boat* and go around the McCarran Ferguson Act.[75]

In full fairness, the Supreme Court, through no fault of its own, did not, and still does not, have the luxury of decades of probes, interviews, and statistics in the United States.

The certiorari petition and the original (pre-denial) version of this Article had wished that the Supreme Court would have done the same as

74. *Id.*
75. 15 U.S.C. §§ 1011-1015.

the British Parliament. Now that the sharp denial has brought us down to earth, it seems to be clear that it was just too much wishful thinking.

What remains to be seen now, is where we stand, and what, if anything, can be done. The Court has left us in a state of deep conflict. Out of eleven circuits, four have the utmost good faith rule as "federally entrenched," two have it in a different form, one is against it, and four do not have it—at least not officially.[76] Hardly a situation of uniformity as proscribed for admiralty law by *Jensen*.[77]

Is there anyone who could fix it?

Congress has been absent since the McCarran Ferguson Act and *Wilburn Boat* is still a roadblock. Also, Congress never showed any interest, let alone commitment, to study a comprehensive "Marine Insurance Act" like the UK Parliament did in 1906.

It may be that the only way is for the American Law Institute to take the initiative and the lead, engaging in a scope analogous to the one of the British Law Commissions, gathering responses from the Industry and the Professions, and ultimately issuing a *Restatement of the Law of Commercial and Marine Insurance.*

Even if not binding, the ALI would thus give the judiciary rules of guidance: to pursue the goal of "modernizing the *uberrimae fidei* doctrine 'in the manner of a common law court.'"[78] The ALI would not have any impediment following the model of the UK Insurance Act 2015 with the features and remedies of a "duty of fair presentation." The courts may then step in doing the job of adjusting the doctrine, under the conflict-solving supervision of the Supreme Court, keeping the function of makers of maritime law that *Wilburn Boat* has left with them explicitly. To use *Wilburn Boat* otherwise would be a plain misunderstanding, as the *Travelers* court suspected. Two legendary professors of admiralty law, Thomas Schoenbaum and Michael Sturley, have made such a proposal,[79] one that should be taken seriously in the situation where we find ourselves now after the Court's denial.

If the decade of British studies holds real-life alerts, it is only reasonable to fear that at least some of the same flaws remedied by the

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76. Petition for Certiorari at 10-18, QBE Seguros v. Morales-Vázquez, No. 20-1779 (U.S. June 17, 2021).

77. Southern Pacific Company v. Jensen, 244 U.S. 205 (1917).

78. Exxon Shipping Co. v. Baker, 554 U.S. 471, 489-90.

79. *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 (1998); Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41 (1998).

Insurance Act 2015 may be present at home as well, which is worth attention and remedy.

This conflict situation is not healthy and should not continue. Paraphrasing Mark Twain, utmost good faith is not dead, and reports thereof have been greatly exaggerated. However, ALI would pay a historic, invaluable service to the American law of marine insurance by keeping in harmony with the marine insurance laws of England, the "great field of this business."