



## **Tug's H&M Insurer Must Reimburse P&I Club's Defense Payment in Bridge Allision**

Jason P. Minkin, Jonathan A. Cipriani and Nicole M. Gallagher of BatesCarey LLP in Chicago write:-

When a tug boat leads a towing operation, the tug, through its "dominant mind," is responsible for the safe navigation of the entire flotilla and "has the duty to exercise such reasonable care and skill as navigators would exercise under similar circumstances." See *Cont'l Ins. Co. v. L&L Marine Transp., Inc.*, Civ. No. 14-2967 (consolidated with Civ. No. 15-4423), 2017 WL 1405703, at \*4 (E.D. La. Apr. 19, 2017).

In *L&L Marine*, the United States District Court for the Eastern District of Louisiana applied this concept in conjunction with the language of the lead tug owner's hull and machinery policy (the "hull policy"), to find that the hull insurer was required to reimburse the tug owner's protection and indemnity ("P&I") insurer for the cost of defending an underlying lawsuit arising from the Sunshine Bridge allision in St. James Parish, Louisiana. The court's decision has been appealed. We summarize the decision and the arguments on appeal below.

### **The Allision**

On December 29, 2013, the M/V *Angela Rae*, a tug owned by L&L Marine Transportation, Inc. ("L&L"), was the lead tug in a four-vessel flotilla. The M/V *Angela Rae* and another tug, the M/V *Freedom*, were positioned behind a barge, the FSB-101. Another tug, the M/V *Miss Dorothy*, was positioned in front of the barge. When the flotilla approached the Sunshine Bridge in St. James Parish, Louisiana, the M/V *Miss Dorothy* allided with the bridge and sank.

### **The Coverage Dispute**

The insurers of the M/V *Miss Dorothy* filed a lawsuit against L&L, as the owner of the M/V *Angela Rae*, alleging that L&L was responsible for the allision and the loss of the M/V *Miss Dorothy*. L&L sought coverage from its hull insurer, Atlantic Specialty, and its P&I insurer, P&I Underwriters. Atlantic Specialty denied coverage, while P&I Underwriters agreed to fund the defense. P&I Underwriters then sought reimbursement of the defense payment from Atlantic Specialty contending that the underlying lawsuit arose out of towage, in which case Atlantic Specialty, as the hull insurer, was obligated, but failed, to pay the defense costs.

P&I Underwriters contended that Atlantic Specialty was obligated to reimburse the defense costs P&I paid to L&L, pursuant to the hull policy's "Collision and Tower's Liability" provision:-

if the Vessel hereby insured shall come into collision with any other vessel, craft or structure, floating

or otherwise (including her tow); or shall strand her tow or shall cause her tow to come into collision with any other vessel, craft or structure, floating or otherwise, or shall cause any other loss or damage to her tow or to the freight thereof or to the property on board, and the Assured, or the Surety, in consequence of the insured Vessel being at fault, shall become liable to pay and shall pay by way of damages to any other person or persons any sums, we, the Underwriters, will pay the Assured or the Surety, whichever shall have paid, such proportion of such sum or sums so paid as our subscriptions hereto bear the value of the Vessel hereby insured, provided always that our liability in respect of any one such casualty shall not exceed our proportionate part of the value of the Vessel hereby insured....

P&I Underwriters argued, and the court agreed, that under Louisiana law, the law governing the interpretation of the marine insurance contracts at issue, the question of whether coverage exists under the hull policy was based solely on the allegations in the underlying property damage complaint against L&L, and not whether the M/V Angela Rae actually caused the damage to M/V Miss Dorothy. The issue was whether the M/V Miss Dorothy was being towed or whether it was leading the tow along with the M/V Angela Rae. The relevant allegations in that complaint, the court noted, were directed toward the M/V Angela Rae as the lead tug responsible for coordination of the tow. The complaint alleged that L&L was responsible for the loss of the M/V Miss Dorothy, that the M/V Angela Rae was responsible for the coordination of the tow, that it failed to discharge that duty, and that it caused the M/V Miss Dorothy to allide with the Sunshine Bridge and sink.

Neither party, according to the court, disputed whether the allegations in the complaint controlled which policy would be implicated for defense payments and coverage. Atlantic Specialty, however, pointed to other allegations in that complaint to suggest that the M/V Miss Dorothy was assisting the M/V Angela Rae with her towage of the barge, instead of being towed by the M/V Angela Rae. The Collision and Tower's Liability clause in the hull policy provided coverage in the following circumstances, none of which, according to Atlantic Specialty, were at issue here: (1) the insured vessel collides with another vessel, craft, structure, or her tow; (2) the insured vessel strands her tow; (3) the insured vessel causes her tow to collide with another vessel, craft, or structure; or (4) the insured vessel causes any other loss or damage to her tow, or to the freight thereof. According to Atlantic Specialty, because the M/V Angela Rae did not collide with the M/V Miss Dorothy or the Sunshine Bridge, and because the M/V Miss Dorothy was not "in the tow" of the M/V Angela Rae, none of the four coverage areas were implicated.

The court rejected Atlantic Specialty's arguments. While Atlantic Specialty was correct that the property damage complaint against L&L alleged that the M/V Miss Dorothy was assisting the M/V Angela Rae and the M/V Freedom in towing the FSB-101, the M/V Angela Rae was also alleged to be the "lead tug and was responsible for coordination of the tow." The court noted that this particular allegation was agreed to by the parties.

The court then applied the "dominant mind" doctrine, which provides that, where damages arise from a casualty involving a tow or an entire flotilla, only the vessel controlling the operation is liable. The court found that the M/V Angela Rae, as the lead tug, owed a responsibility to the entire flotilla - which included a duty to the M/V Miss Dorothy. Based on this duty, the court determined it was the insurance policy covering the M/V Angela Rae for damage caused during her tow that was liable to the damaged vessel. Contrary to Atlantic Specialty, the court found that the hull policy's coverage - where the "'insured vessel causes her tow to collide with another vessel, craft, or structure[.]" - was implicated by the allision. There was no dispute that the M/V Miss Dorothy allided with the Sunshine Bridge while part of the flotilla. As the lead tug, the M/V Angela Rae was, according to the court, liable for causing her tow (i.e., the M/V Miss Dorothy) to allide with a structure (i.e., the Sunshine

Bridge). The court stated: "[g]iving the policy terms [their] textual meaning, the Miss Dorothy's allision with the Sunshine Bridge comports with a specific coverage term of Atlantic's hull policy as well as this Circuit's concept of the dominant mind."

Finally, the court also agreed with P&I Underwriters that, while the P&I policy is "technically broader" than the hull policy, it was only intended to effect coverage in this particular situation after the hull policy limits were expended, pursuant to an endorsement to the P&I policy. Because the hull policy limits were not expended, the P&I policy was not implicated.

Conclusion

The court in L&L Marine examined the role of the lead tug in determining which vessel's coverage is implicated where multiple vessels are involved. The court found that the lead tug owed a duty to the entire flotilla, even though other tugs may have assisted with the tow. The hull policy was implicated based on its language providing coverage where the "insured vessel causes her tow to collide with another vessel, craft, or structure." For these reasons, Atlantic Specialty, as the hull insurer, was liable to reimburse the defense payments made by P&I Underwriters.

Atlantic Specialty has since appealed the L&L Marine decision. On appeal, Atlantic Specialty argues that (1) the M/V Miss Dorothy was not being towed by the M/V Angela Rae, and thus, a predicate to coverage under the Atlantic Specialty policy is not met; and (2) the "dominant mind" doctrine is a presumption of fault used in tort, and should not have been applied to the interpretation of the insurance contract. According to Atlantic Specialty, the lower court erred by looking beyond the plain and ambiguous terms of the hull policy. As briefing on the appeal has not yet concluded, it will likely be at least several months before a decision is rendered.