

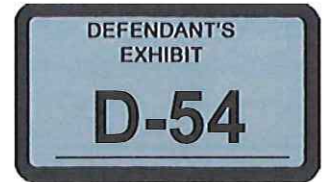


BoatU.S. Marine Insurance Program Claims
Administrative Office
880 South Pickett Street
Alexandria, VA 22304
24 hr. Claims: 800-937-1937
Fax: 703-461-2843
Direct Dial: 800-262-8082

January 27, 2017

Certified Mail RRR and email via ncarman10@outlook.com

Nathan Carman
3043 Fort Bridgman Road
Vernon, VT 05354-9451



Re: National Liability & Fire Insurance Company
Insured: Nathan Carman
Insured Yacht: 1974 JC 31' Cruiser, HIN MSZMT502J303
Date of Loss: 9/18/2016
Claim No. 1607671
Policy No. 3985989-15

Dear Mr. Carman:

We write regarding the above claim you submitted in connection with your boat. National Liability & Fire Insurance Company insured it under Yacht Policy No. 3985989-15, effective December 22, 2015 through December 22, 2016 (the "Policy").

You reported Claim No. 1607671 to us on September 27, 2016 following an alleged sinking. After your Examination Under Oath we asked naval architect Eric Greene to assess and he issued a report dated January 19, 2017 (enclosed) and we asked marine surveyor Michael McCook to assess and he issued a report dated January 23, 2017 (enclosed).

POLICY LANGUAGE

Your Policy in pertinent part provides in the Vermont Endorsement on page 3:

Cancellation...

We may cancel for one or more of the following reasons...

2. Material misrepresentation or fraud by you with respect to any material fact affecting this policy or in the submission of any claim under this policy;
3. You violated any of the terms or conditions under this policy;
4. The risk originally accepted has measurably increased;
5. Any other reason specified by law.

In addition, your Policy in pertinent part provides in Coverage A – Boating & Boating Equipment:

Types Of Losses Covered

We will pay for property damage to the insured boat, its engines and items listed in “What is Covered” from any accidental cause... All coverages are subject to the limitations and exclusions of the policy.

These specified exclusions in the Policy are not covered:

Exclusions

This insurance does not cover:...

- D. any loss, damage, expense or cost of repair caused directly or indirectly by incomplete, improper or faulty repair except as provided by the “Repair Guarantee”...
- F. any loss, damage or expense caused intentionally by, with the knowledge of, or resulting from criminal wrongdoing by any insured.

For the reasons set forth below, we must cancel and void your Policy effective September 17, 2016. Alternatively, and in any event, we must deny your claim because it is not covered under the Policy.

EXAMINATION UNDER OATH

As provided by your Policy, we appointed Attorney David J. Farrell, Jr. to take your Examination Under Oath (“EUO”) on December 16, 2016, which your attorney attended.

You removed one of your boat’s bulkheads

You testified that you “had taken out two halves of the bulkhead that was forward of the engine room and aft of the anchor locker.” EUO at 14. You did this so you could stow fishing rods below deck. *Id.* at 15. You stated that you did not know if this bulkhead was part of the boat’s original design, but that “what [you] removed was clearly installed by Brian Woods when he did the refit of the boat.” *Id.* at 14.

Your boat’s bilge pumps

You testified that you replaced your boat’s port bilge pump the day before it sank. EUO at 28. Your boat had two bilge pumps, one aft, accessible from the stern hatch and the other amidships accessible from the port hatch. *Id.* The day before the sinking, “the port bilge pump was not sucking water. The pump would turn on, but it would not pump water

out of the bilge.” *Id.* at 33. That day you installed a new bilge pump that you purchased from West Marine in Middletown, RI. *Id.* at 33-34, 126. After the installation, you claim that the “water in the bilge...was pumped out, which indicated that the pump was working.” *Id.* at 35. However, you never tested the after bilge pump in any way to ensure it was sucking water from the bilge or discharging water overboard. *Id.* at 35-36.

You opened four half dollar sized holes in your boat’s transom

You testified in your EUO that you removed your boat’s trim tabs the day before it sank. EUO at 14, 98. Your boat’s trim tabs were installed and fully operational, as reflected in Bernard J. Feeney’s survey report, which you submitted to BoatU.S. as part of your insurance application. *Id.* at 52, Ex. 2. You stated that you removed the trim tabs, because you “never found an occasion where they did any good...they were serving no purpose.” EUO at 55. You “assumed...they were increasing the drag...and thereby probably reducing performance, reducing speed, making it harder to get up on plain [sic] and reducing fuel efficiency.” *Id.* However, you never discussed this with any marina personnel, Mr. Feeney, Mr. Woods, or anyone else. You conducted no internet research and did not consult any boating literature regarding the removal of the trim tabs. *Id.* 55-58.

You first removed the four triangular shaped “connectors” which attached the hydraulic pistons to the hull. *Id.* at 85-88. You removed the “connectors” by unscrewing them from the hull (12 total screws removed). *Id.* You were “not able to establish whether or not” the twelve screw holes went all the way through the hull or not. *Id.* at 171. You then cut the four hydraulic lines, and pulled them into the boat prior to removing them altogether. *Id.* at 88-89. Then you detached the actual trim tabs by striking one end of each trim tab with a hammer until they both slid out of their respective brackets. *Id.* at 93-94. You stated each trim tab was “probably 18 inches in length by maybe eight or 10 inches in depth.” *Id.* at 97. You finished this “late afternoon, early evening.” *Id.* at 122.

This left four “half dollar sized holes...” in the transom “maybe four inches or so” above the waterline, and “about two inches” above the bottom paint (as you approximated, while the boat was docked). *Id.* at 83-84, 123, Ex. 16. You acknowledged that underway, your boat’s bow would go up and the stern would go down, bringing the holes “downwards” and “closer to the water.” EUO at 84-85.

You then proceeded to purchase epoxy putty, marine sealant, and a fiberglass repair kit from West Marine in Narragansett, RI. *Id.* at 97, 131-132. Once you returned to your boat, you used the marine sealant to seal the twelve screw holes. *Id.* at 123. You attempted to use the fiberglass repair kit but:

That was unsuccessful because the fiberglass resin that I was putting in the holes according to the instructions in the kit kept flowing out because it was still liquid and as I was pouring it in the hole, I wasn’t able to seal the hole on the outside well enough to keep it from flowing out until it hardened. And so I gave up on using the fiberglass kit and

instead used the J.B. Weld – the J.B. Weld-like material with which I was familiar.

Id. at 123.

The “J.B. Weld-like material” that you used was a West Marine Epoxy Putty Stick. *Id.* at 130, Ex. 6. You made four “inch in diameter...sphere[s] that [you] then compressed and tried to force into the hole[s].” *Id.* at 127. However, you did not know the thickness of the transom, estimating it to be “a little more than three quarters of an inch thick.” *Id.* at 27-28, 87. You testified that you never entered the water while conducting this work, instead you only leaned over the transom. *Id.* at 90, 136. You did not use any backing on the inboard side of the hole except for some paper towel. *Id.* at 127-128. You got the paper towel backing idea from the fiberglass repair kit; this technique was not suggested in the epoxy putty instructions. *Id.* You stated, “I don’t think I used all of [the epoxy putty stick],” *id.* at 177, and that you think “just an inch or two...,” *id.* at 178, of a “six to eight inches in length” epoxy putty stick was unused and left over after you finished filling the four holes, *id.* at 179.

Your boat’s final trip

With your mother aboard you departed the dock at Ram Point Marina, on the trip during which your boat sank, sometime between 11:00 p.m. on Saturday September 17, 2016 and 12:30 a.m. on Sunday September 18, 2016, “approximately six hours” after finishing your repair of the holes with the epoxy putty stick. *Id.* at 146. You transited to the southeast of Block Island, striper fishing for “an hour or so.” *Id.* at 148-150. You then proceeded to Block Canyon around 3:00 a.m., arriving at approximately 7:00 a.m. *Id.* at 151-52. You then began trolling north at varying speeds between four and six knots.” *Id.* at 154, 158. You stated the “weather conditions... were clear, the sea conditions were not rough” but with approximately a four foot swell, and that you trolled north for approximately five hours before the boat sank. *Id.* at 158, 163.

You claim that you “did not notice any maneuvering characteristics on the vessel change” while you were trolling north prior to realizing the bilge was flooded. *Id.* at 160. You “turned the boat off and powered it down.” *Id.* at 120. The water was “up to the battery boxes” and “above the level of the seacocks” and only “three inches” below the deck. *Id.* at 108-110. You asked your mother to “bring in the lines,” *id.* at 120, which she acknowledged, and you never communicated with, *id.* at 117-18, 165, or saw her again, *id.* at 144.

After you discovered water in the bilge you testified:

Q. Is it fair to conclude that with the presence of all the water, that the bilge pumps were not functioning correctly?

A. Yes.

Id. at 113.

You began moving safety and survival gear to the bow to prepare for the possibility of abandoning ship; however, despite entering the cabin three times you did not make a distress call on your VHF radio or take the EPIRB from its cradle and activate it. *Id.* at 111-12, 117-18, 121. “The EPIRB was mounted in the cabin immediately above where the flares and other safety gear was kept,” *id.* at 106, and the VHF radio’s microphone was above and within a few feet of the safety gear inside the cabin as well, *id.* at 112. Despite your repairs the day before, you never checked the transom of your boat for water ingress. *Id.* at 166. The boat sank, bow first you said, *id.* at 114-115, while you were carrying safety and survival gear to the bow at around midday on September 18, 2016, *id.* at 120-121.

Thus, your boat sank in open ocean south of the Ambrose to Nantucket Traffic lane where you had never been roughly 24 hours after you replaced the port bilge pump and roughly 18 hours after you attempted to repair four half dollar sized holes your opened in the transom just above the waterline. *Id.* at 121, 146. You had previously removed a bulkhead forward of the engine compartment below deck. *Id.* at 14-15.

YOUR POLICY IS CANCELLED AND VOID

We have closely considered all the facts including your EUO testimony and Mr. Greene’s and Mr. McCook’s opinions in view of the Policy language and established maritime law and conclude that your Policy is cancelled and void.

You breached the Vermont Endorsement to your Policy and the established maritime law doctrine of uberrimae fidei

Your Policy’s Vermont Endorsement to the Yacht Policy states that BoatU.S. may cancel your Policy if “The risk originally accepted has measurably increased.” *Supra* at 1. This term is akin to the established rule of maritime law *uberrimae fidei* which is the duty of utmost good faith of the insured to disclose material information about the risk. *Catlin at Lloyd’s v. San Juan Towing & Marine*, 778 F.3d 69, 83 (1st Cir. 2015):

Under *uberrimae fidei*, when the marine insured fails to disclose to the marine insurer *all* circumstances known to it and unknown to the insurer which “materially affect the insurer’s risk,” the insurer may void the marine insurance policy at its option.... In other words, the policy becomes voidable.

Clearly, your removing your boat’s trim tabs and opening four half dollar sized holes in the hull near the waterline was material information regarding the risk associated with your marine insurance Policy. Mr. McCook found that the “removal of the trim tabs and the totally inadequate and improper repair of the 4 holes left in the transom, both separately to be major alterations which would affect the ability of the vessel to safely be used for its intended purpose (coastal fishing and cruising); thus material changes of the risk.” Furthermore, removing one of your boat’s structural bulkheads was obviously material information affecting your insurer’s risk. Mr. McCook stated the bulkhead “was

fiber glassed (tabbed) to the hull which contributed to the overall structural integrity of the hull.”

Your duty to disclose is not only at the inception of the Policy, but survives throughout its term.

The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss; he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void.

McLanahan v. Universal Ins. Co., 26 U.S. 170, 185 (1828).

BoatU.S. concludes that you breached your duty of utmost good faith and thus violated the doctrine of *uberrimae fidei* and the express term in your Policy’s Vermont Endorsement prohibiting your measurable increase in the risk originally accepted, and elects to void and cancel the Policy from the date you had knowledge material to the risk, September 17, 2016.

Furthermore, insofar as you knew and had established that “the stuffing box wasn’t sealed to the hull properly,” EUO at 170, that too constitutes an increased material risk supporting our decision to void and cancel your Policy effective prior to your departure on the trip during which your boat sank.

YOUR CLAIM IS NOT COVERED UNDER THE POLICY

We have closely considered all the facts including your EUO testimony and Mr. Greene’s and Mr. McCook’s opinions in view of the Policy language and established maritime law and conclude in any event that there is no coverage for your Claim No. 1607671 under the Policy.

The loss of your boat was not fortuitous or accidental

Your Policy is an all risk policy, and it covers the “fortuitous loss” of the insured vessel, *Markel American Ins. Co. v. Pajam Fishing Corp.*, 691 F.Supp.2d 260, 265 (D. Mass. 2010), and losses from “any accidental cause,” *supra* at 2. “A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured.” *Markel*, 691 F.Supp.2d at 265, *quoting Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d. Cir. 1987). Furthermore, the loss must be caused without intention or design, and be unexpected, unusual and unforeseen. *St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1202 (1st Cir. 1994).

BoatU.S. concludes that your loss was not fortuitous and it was not accidental. Purposefully removing parts of the boat's structure and then one of its appurtenances, and heading to sea with four inadequately filled holes near the stern's waterline, plus a stuffing box issue, with one questionable bilge pump and a new replacement on a voyage farther than you have ever been before in the boat is not fortuitous.

The loss was caused by an incomplete, improper or faulty repair

"All risk" policies such as yours issued by Boat U.S. cover the "fortuitous loss" of the insured vessel "unless such a loss is expressly excluded." *Markel*, 691 F.Supp.2d at 266, citing *In re Balfour MacLaine Intern. Ltd.*, 85 F.3d 68, 77 (2d Cir. 1996). Your loss is expressly excluded as discussed below.

Your Policy provides coverage for accidental loss subject to a few exclusions, including "Any loss, damage, expense or cost of repair caused directly or indirectly by incomplete, improper or faulty repair except as provided by the 'Repair Guarantee.'" *Supra* at 2. Mr. Greene opines that "It was not possible to achieve a satisfactory repair using the epoxy putty stick in the manner outlined in Mr. Carman's statement."

Mr. Greene's reasoning is that a "temporary backing plate" as shown in Figure 3 of his report would be necessary to properly repair the holes, because there was no resistance to ensure the putty was not pushed through the holes into the boat and that the putty actually had contact with the curved surface of the hole. Additionally, you failed to visually inspect or prepare the curved surfaces of the holes, as "epoxy requires a clean, dry surface for proper adhesion." Lastly, you "had no way to assess the overall integrity of the repair." Mr. Greene's opinion on the necessity of a "temporary backing plate" is based on having enough epoxy putty to actually fill all four holes, which he found you did not, based on your testimony. Thus, the repair was incomplete, improper, and faulty in both design and execution.

The loss was caused intentionally and with your knowledge

Another exclusion in your Policy is "any loss... caused intentionally by, with the knowledge of...any insured." *Supra* at 2.

You intentionally removed a structural bulkhead from the boat, to make it more convenient to store fishing rods, but Mr. McCook found that "this removal, a major structural alteration, without proper evaluation could have resulted in a structural failure, making the vessel not being safe and suited for her intended purpose."

Furthermore, you intentionally removed the boat's trim tabs, which Mr. McCook found even at your boat's trolling speed, would "have the effect of altering the vessel's fore and aft trim...thus lowering the holes nearer to the waterline."

You also intentionally and knowingly did not make any distress calls on your boat's VHF radio or activate your boat's EPIRB, notwithstanding the fact that three times you were within feet of both these devices at the time you were preparing for the possibility to abandon ship.

You breached the negative implied warranty of seaworthiness

Marine insurance law recognizes a negative implied warranty of seaworthiness that an "Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *See, e.g., Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385, 388 (5th Cir. 1957). You breached this warranty, as you knew unseaworthy conditions existed at the commencement of your final voyage and departed anyway, with those unseaworthy conditions the proximate cause of your boat's sinking.

CONCLUSION

As explained above, the BoatU.S. Marine Insurance Program on behalf of National Liability & Fire Insurance Company must cancel and void your Policy as of September 17, 2016, in accordance with the Vermont Endorsement and because you breached the doctrine of *uberrimae fidei*.

Alternatively, in any event we must deny your claim, because your boat's sinking was caused by your incomplete, improper, and faulty repair; the sinking was caused by your intentional acts; the loss was not fortuitous or accidental; and you breached the negative implied warranty of seaworthiness.

If you are aware of any additional facts or circumstances that might cause us to reconsider our position, or if you are aware of anything in the Policy that you believe would provide coverage for your loss, please immediately bring them to the undersigned's attention so that they can be fully reviewed and considered.

Neither this correspondence nor any future communication or investigation shall be deemed or construed as a waiver of rights or defenses available to us. All rights and defenses available to us under the terms and conditions of the Policy, at law, or otherwise are hereby expressly reserved. Furthermore, no action taken by the BoatU.S. Marine Insurance Program on behalf of National Liability & Fire Insurance Company, their agents, or representatives in the investigation of this matter is intended to be, nor is it to be construed as, an admission of liability under the Policy.

Please reference your claim number, 1607671, on all written correspondence or verbal inquiries regarding your claim. Should you have any questions, please do not hesitate to contact me. I am available from 8:00 a.m. to 5:00 p.m. (ET) Monday through Friday at the number below and can be reached via e-mail at mcharlesworth@boatus.com.

Very truly yours,
Martha Charlesworth

Martha Charlesworth, AIC
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Encs

cc. Hubert Santos, Esq. –*Via Certified Mail-RRR*