

NO. A08-1402

State of Minnesota  
**In Court of Appeals**

Jarvis & Sons, Inc., et al.,

*Respondents,*

vs.

International Marine Underwriters, et al.,

*Appellants,*

and

Dolliff, Inc.,

*Respondent,*

v.

Kim Brown,

*Respondent.*

**RESPONDENT DOLLIFF, INC.'S BRIEF**

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## LEGAL ISSUE

Did an Ocean Marine Insurance Policy (the “Policy”) issued by Appellants International Marine Underwriters and Northern Assurance Company of America (collectively “IMU”) to Respondents Jarvis & Sons, Inc. and Afton-St. Croix Company (collectively “Jarvis”) impose a duty to defend and the obligation to indemnify the Jarvis Respondents against the claims alleged by Respondents Susan Schreiner and Ronald Schreiner (collectively “Schreiners”) in a matter entitled *Susan Schreiner, et al. vs. Jarvis & Sons, Inc. et al.*, Washington County District Court (File No. 82-C5-07-000-731) (hereinafter “Schreiner Litigation”)?

The District Court held in the affirmative.

## STATEMENT OF FACTS

Jarvis is the owner and operator of the motor vessel Afton Princess. In the early afternoon of October 22, 2005, the Afton Princess was tied to her mooring berth at the Afton Marina. Dolliff Appendix at A3, ¶ 17, hereinafter “Dolliff Apx. \_\_\_”. It was the intent that later that day the Afton Princess would be moved from her mooring dock to Afton public docks, and thereafter begin a cruise on the St. Croix River. Prior to that cruise and while the Afton Princess remained moored, Susan Schreiner, who was scheduled to be on that cruise, came aboard and fell through an open hatch suffering a

personal injury. Appellant Appendix at A72, ¶ VI, hereinafter “App. Apx. \_\_\_”.<sup>1</sup>

The Schreiners commenced the Schreiner Litigation against Jarvis in which they alleged that Jarvis was liable for “negligently creating and/or allowing a hazardous condition (an open hatch in the floor) to exist onboard the Afton Princess, and in negligently failing to eliminate or warn of the hazardous condition.” App. Apx. A72-A77, ¶ XVI; *see also* ¶¶ XIX and XXII.

Jarvis and Dolliff made demands on IMU for indemnification and the defense of the Schreiner Litigation under the Policy. IMU demurred on the grounds that at the time of the accident Jarvis was in violation of a “lay-up warranty” in the Policy. Appellant Brief at 2, hereinafter “App. Br. at \_\_\_”. Jarvis commenced this declaratory judgment action to establish both coverage and the duty to defend. Jarvis asserted an alternative theory of liability against its former insurance agency, Dolliff, Inc.<sup>2</sup> Respondents and Appellants either brought or joined in cross motions of summary judgment on the coverage and the duty to defend issues. Jarvis also moved for summary judgment on its claim against Dolliff, which Dolliff opposed. The District Court held that IMU improperly denied coverage and the tender of defense, and entered judgment against

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<sup>1</sup> Appellants’ brief incorrectly cites to the exhibit numbers in their summary judgment moving papers. This brief will correct those citations to appropriate Appendix references.

<sup>2</sup> While not litigated below and irrelevant to this appeal, Jarvis alternative claim was that Dolliff’s employee, Respondent Ms. Kim Brown (“Brown”), was asked to obtain extended coverage for cruises on several dates, including October 22, but negligently failed to do so for the October 22 cruise. Jarvis’ alternative theory was that if IMU’s denial of coverage was sustained, this extended coverage would have cured any deficiency in coverage for that date. Dolliff brought a third party action against Ms. Brown should this liability be established.

IMU. IMU appeals from that judgment.

## ARGUMENT

### A. Applicable Legal Standards

This appeal presents a classic insurance coverage claim based upon a set of undisputed facts. The sole issue on appeal is the correctness of the District Court's legal conclusion that the Policy imposed coverage and the duty to defend the Schreiner Litigation - an issue of law which this Court reviews *de novo*. *Auto Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 698 (Minn. 1996) citing *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 886-87 (Minn. 1978).

Under the familiar legal standards for assessing insurance coverage disputes the initial burden of proving coverage rests upon the insured. "In an action to determine coverage, the initial burden of proof is on the insured to establish a prima facie case of coverage." *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). Once that burden is met "the burden of establishing the applicability of exclusions rests with the insurer." *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 736 (Minn. 1997). Here IMU does not dispute that Jarvis has met its initial burden under the Policy's Protection and Indemnity Clause. App. Apx. 54. (the Policy broadly insures against "[l]oss of life of, or injury to, or illness of, any person" and imposes the duty to pay "[c]osts and expenses incurred . . . defending any claim or suit against the assured arising out of a liability or alleged liability . . .").

The burden upon IMU to establish an exclusion from coverage is substantial. As with any contract, the Policy's terms are given their plain and ordinary meaning.

*Ostendorf v. Arrow Ins.*, 182 N.W.2d 190, 192 (1970). However, this Court must interpret provisions granting coverage broadly, and those IMU asserts exclude coverage narrowly. *Continental Cas. v. Reed*, 306 F. Supp. 1072, 1076 (D. Minn. 1969). Any questions of coverage or ambiguity are to be construed strongly against IMU giving all benefit of the doubt to Jarvis. *American Commerce Ins. Brokers v. Minnesota Mut. Fire & Casualty*, 551 N.W.2d 224, 227 (Minn. 1996); *Columbia Heights Motors v. Allstate Ins.*, 275 N.W.2d 32, 36 (Minn. 1979). In addition, under the reasonable expectations doctrine there is a “strong policy of extending coverage rather than allowing coverage to be restricted.” *Columbia Heights*, 275 N.W.2d at 36; *Hennen v. St. Paul Mercury Ins.*, 312 Minn. 131, 136, 250 N.W.2d 840, 844 (1977).

The burden upon an insurer seeking to avoid a policy’s duty to defend is even more substantial. Once a carrier is aware of a claim, it must provide a defense. To avoid this duty an insurer must meet the “heavy burden” of establishing that no part of the claim can even arguably fall within the scope of coverage with any doubt being resolved in favor of the insured. *In re Liquidation of Excalibur Ins. Co.* 519 N.W.2d 494, 497 (Minn. Ct. App. 1994); *Crum v. Anchor Cas. Co.*, 119 N.W.2d 703, 711 (Minn. 1963).

**B. IMU’s Basis for Denial of Coverage and Defense of the Schreiner Litigation.**

IMU sole basis for denial of coverage and defense of the Schreiner Litigation is its claim that at the time of the Schreiner accident the Afton Princess was not “laid up and out of commission” in breach of the following lay up warranty in Policy Endorsement No. 2:

It is warranted the vessel(s) hereby insured shall be laid up and out of commission from October 1<sup>st</sup> until April 30<sup>th</sup>, both dates inclusive, as per Port Risk Endorsement 57A-5 attached.

Any breach of these warranties shall render this policy void for the period of such breach.

App. Br. at 3-4 citing App. Apx. 58.

**C. IMU's Basis for Denial of Coverage and Defense Should Be Rejected.**

**1. The denial should be rejected because of the absence of Endorsement 57A-5.**

Endorsement No. 2 provides no definition of “laid up and out of commission” but does state that condition must be “as per Port Risk Endorsement 57A-5 attached.” *Id.* However, while the Policy contains an Endorsement No. 4 entitled “American Institute PORT RISK ENDORSEMENT (January 18, 1970)” there is no Policy endorsement entitled “Port Risk Endorsement 57A-5.” The District Court noted, but did not base its holding upon this fact. Court Opinion at 2, hereinafter “Op. at \_\_\_”. This Court’s *de novo* review of this dispute need not be as generous<sup>3</sup>.

In construing the exclusionary defense strongly against IMU, as the law directs, this Court has no obligation (a) to guess the contents of missing “Port Risk Endorsement 57A-5,” (b) to assume, as did the District Court, that Endorsement No. 4 is the same or even similar to that missing endorsement, or (c) to create a binding contractual policy

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<sup>3</sup> In a letter to the Judge Schurrer asking leave to file a motion to reconsider the Order, IMU argued that Judge Schurrer misread the Policy since “Port Risk Endorsement 57A-5” and “Endorsement No. 4” are really one in the same. App. Apx. 238-9. Judge Schurrer replied that he had not misread the Policy, but that in considering the parties’ arguments and in issuing his Order he concluded that it was “the language of Endorsement No. 4/Endorsement 57A-5 that is important, not the title.” *Id.* at 244-5.

term by accepting IMU's claim of its unilateral intent that Endorsement No. 57-A actually be called Endorsement No. 4.

Rather this Court can conclude that the Policy (applying IMU's theory of exclusion) warranted the Afton Princess would be "laid up and out of commission . . . . as per Port Risk Endorsement 57A-5 attached" during the lay up period. IMU had the opportunity to attach Port Risk Endorsement 57A-5 and thus include policy terms which might have excluded the Schreiner Litigation from the Policy's general indemnification and duty to defend provisions, but it did not. This omission means IMU forfeited its ability to insert applicable exclusionary language into the Policy and its defense must be rejected.

IMU's treatment of this omission is somewhat extraordinary. It criticized the District Court for stating that the Policy made reference to a missing Port Risk Endorsement 57A-5 because, according to IMU, it was so obvious the Policy was referring to Endorsement No. 4. App. Br. at 6. But when the District Court did read Endorsement No. 4 as part of the policy as a whole, IMU criticized the District Court (incorrectly as will be discussed below, *infra* at 8-9) for doing so, and for using its language to deny IMU's exclusionary defense.

But even more extraordinary is the approach IMU urges this Court to follow and which it criticizes the District Court for not following. The District Court utilized the classic legal formula for addressing issues of contract interpretation. It looked at the Policy as a whole giving meaning to all of its terms and it reinforced its conclusion by addressing IMU's own assertion that the meaning of "laid up and out of commission"

was dictated not by the Policy but by “local custom.” The District Court noted that under the undisputed record in this case the Afton Princess was laid up and out of commission according to local custom and thus IMU’s exclusion of coverage must fail. Op. at 2-4, citing A7-A10 (Appleby deposition) and A1-A3 (Jarvis affidavit).

IMU would have this Court bypass this analysis and adopt a definition of “laid up and out of commission” IMU has created out of whole cloth by trying to stitch together a few case citations, which when examined in depth below (*infra* at 14-18) are remarkable only for their lack of applicability to this Policy’s language. App. Br. at 12-15. What IMU requests is a rewrite of a Policy term which says “laid up and out of commission . . . as per Port Risk Endorsement 57A-5” to read “laid up and out of commission . . . as per [opps, its not there so judge please look at some cases my lawyer found]”. The law does dictate that IMU face the consequences of failing to attach Port Risk Endorsement 57A-5. It does not sanction the approach IMU urges in its brief.

**2. The District Court’s analysis establishes a separate basis for rejecting IMU’s denial of coverage and defense.**

As noted above, the District Court ignored the lack of Port Risk Endorsement 57A-5 by assuming it was Endorsement No. 4. It then evaluated the merits of IMU defense that at the time of Mrs. Schreiner’s accident, the Afton Princess was in a condition which violated the navigation lay up warranty in Policy Endorsement No. 2. The District Court concluded that the condition which would have violated that warranty was placing the Afton Princess into navigation, but that that warranty was not violated while the Afton Princess was moored at her berthing dock. Had Mrs. Schreiner’s

accident occurred after the “Afton Princess left the port on October 22, 2005” the Policy would have been voided “[h]owever, that [was] not the case, as the Afton Princess was clearly moored in the marina approximately one hour prior to departing on a cruise, when the injury to Mrs. Schreiner occurred.” Op. at 3. This conclusion was correct for several reasons.

The specific language of Endorsement No. 2, upon which IMU relies, is entitled “NAVIGATION LAY-UP”<sup>4</sup> and states:

It is warranted the vessel(s) hereby insured shall be laid up and out of commission from October 1<sup>st</sup> until April 30<sup>th</sup>, both dates inclusive, as per Port Risk Endorsement 57A-5 attached. (Emphasis added) App. Apx. 58.

This endorsement refers the reader to another part of the Policy by the phrase “as per Port Risk Endorsement 57A-5 attached.” IMU criticized the District Court for turning to Endorsement No. 4, but as the District Court noted, not only does Endorsement No. 2 direct such a review, but Endorsement No. 4 states “[t]he clauses set forth below shall prevail over any Policy provisions inconsistent therewith” meaning that any interpretation of Endorsement No. 2 must be subject to the provisions of Endorsement No. 4.

Endorsement No. 4 states in pertinent part:

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<sup>4</sup> The reader can also look to paragraph 1 of Endorsement No. 2 entitled NAVIGATION WARRANTY, which states: “the vessel(s) herein insured shall be confined to the use and navigation of the following waters: St. Croix and Mississippi Rivers . . .” This language as well as Endorsement No. 4 and other Policy provisions draw a clear distinction between the acts of “navigation” on the rivers and being in the “port of Afton, MN. App. Apx. 58.

(1) The Vessel shall be laid-up in the port of Afton, MN with liberty to shift (in tow or otherwise) between . . . cargo or fitting out berths<sup>5</sup> within said port **prior to commencing or proceeding on a voyage. . . .**

If the Vessel commences, or proceeds on, a voyage during the term of this insurance, the Policy shall there upon terminate **as soon as the Vessel leaves her moorings to depart from the above named port.** (Emphasis added). App. Apx. 61.

The District Court looked to a second form of endorsement (Endorsement No. 10) used by IMU when Jarvis wished to undertake a single day cruise during the lay up period.<sup>6</sup> This form of endorsement read in pertinent part:

“Effective October 18, 2005, it is mutually understood and agreed that in consideration of premium charged, the “Afton Princess” is allowed to **navigate<sup>7</sup> for one day (10/18/05)** outside their navigation lay-up warranty.” (Emphasis added). App. Apx. at 67.

The acts alleged in the Schreiner Litigation consisted of permitting Mrs. Schreiner to board the Afton Princess when Jarvis had negligently left open a hatch about which she was not warned, and through which she fell and was injured. App. Apx. A72-A77. Nothing in Endorsement Nos. 2, 4 or 10 prohibited Jarvis or voided coverage simply because Mrs. Schreiner was invited on board the Afton Princess. Indeed, as the record indicates and as the District Court noted, Ms. Roberta Appleby, IMU’s Senior

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<sup>5</sup> Berth – “the place where a ship lies when at anchor or at a wharf.” Merriam-Webster Dictionary. The “cargo” for a cruise vessel is the passengers and supplies necessary for a voyage.

<sup>6</sup> The alternative claim against Dolliff brought by Jarvis was that Dolliff’s employee did not obtain this endorsement for October 22. See also note 1 *supra*. Contrary to IMU’s argument the knowledge that such an endorsement was necessary before navigation on the cruise was commenced is not an acknowledgement that coverage terminated for the entire day of October 22. App. Br. at 11-12.

<sup>7</sup> Navigate – “to sail over, on, or through.” Merriam-Webster Dictionary.

Underwriter, had confirmed to Jarvis in earlier e-mail correspondence that “coverage would apply (as long as the vessel is properly laid up and out of service during the layup period) for a claim for someone injured on board while being shown the vessel for a prospective future charter.” Op. at 3; App. Apx at A142. Thus, by IMU’s own admission, having Mrs. Schreiner or anyone else on board had nothing to do with whether the Afton Princess was laid up and out of commission.

The District Court correctly read the Policy as directing the reader to the terms of Endorsement No. 4 to define what could and could not happen during the period the vessel was to be laid up and out of commission. What could happen is that the vessel while “in the port of Afton [can] shift (in tow or otherwise) between . . . cargo or fitting out berths within said port prior to commencing or proceeding on a voyage.” What could not happen is “[i]f the Vessel commence[d], or proceed[ed] on, a voyage during the term of this insurance, the Policy shall there upon terminate as soon as the Vessel leaves her moorings to depart from the above named port.” This is reaffirmed by the Endorsement No. 10, which in effect removed for a single cruise what could not be done without violating the Policy’s lay-up warranty by stating “the ‘Afton Princess’ is allowed to **navigate** for one day . . . outside their navigation lay-up warranty.” (Emphasis added).

The dictionary definition of navigation and the descriptive language of the Policy (“commencing or proceeding on a voyage” and “the Vessel leav[ing] her moorings to depart from the above named port”) support the same conclusion. The risk the Policy sought to exclude from coverage and thus the condition which would have violated the Policy’s lay-up warranty was placing the Afton Princess into navigation by having her

leave her moorings and depart the port of Afton. Since that had not happened when Mrs. Schreiner was injured, coverage and the duty to defend were not voided.

**3. IMU's arguments as to why the District Court was wrong and should be rejected.**

IMU makes three arguments as to why the District Court's analysis should be rejected: (a) the District Court did not understand the intent of Endorsement No. 4, (b) "laid up and out of commission" means the Afton Princess was incapable of operation, and (c) there is case law supporting its reading of the Policy. None of these arguments are meritorious.

**(a) The District Court correctly applied Endorsement No. 4.**

According to IMU the District Court "failed to understand" the intent of Endorsement No. 4, because that endorsement had nothing to do with establishing coverage but simply defines "permitted activities during the lay-up period."<sup>8</sup> App. Br. at 6. That statement makes no sense.

Coverage is established by the Policy's Protection and Indemnity Clause; exclusions are defined by the Policy's endorsements. The District Court correctly looked at the Policy as a whole to define the scope of any exclusion. Both the "as per" language of Endorsement No. 2 and the statement in Endorsement No. 4 that "[t]he clauses set

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<sup>8</sup> IMU's argument has changed over time. In its summary judgment brief, IMU argued Endorsement No. 4 "is designed to restrict the activities of the insured vessels *during* the lay-up period specified by the remainder of the Policy (in this case, Endorsement No. 2)." (Emphasis in original). App. Apx. at 167. When the District Court looked at Endorsement No. 4 as defining restrictions during the lay-up period, IMU changed its tune. Now according to IMU the endorsement does not address the scope of the exclusion, it is a list of actions that are acceptable.

forth below shall prevail over any Policy provisions inconsistent therewith,” mandate that Endorsement No. 4 be reviewed to assess the scope of such exclusions.

In addition to correctly concluding that the scope of the exclusion was tied to whether or not the Afton Princess had been placed in navigation, *supra* at 8-10, the District Court could have concluded that the provisions of Endorsement No. 4, standing alone as an endorsement “prevail[ing] over” other Policy terms, refute IMU’s reading Endorsement No. 2. Specifically Endorsement No. 4 states “[t]his insurance is subject to the following warranties,” which means these warranties must prevail over any inconsistent warranties in Endorsement No. 2. Endorsement No. 4 also addresses both (a) the subject of lay up (“[t]he Vessel shall be laid up in the port of Afton, MN) and (b) the degree to which the Afton Princess must be out of commission or, as IMU states it, inoperable (the vessel had the “liberty to shift (in tow or otherwise) between . . . cargo or fitting out berths within said port prior to commencing or proceeding on a voyage”). Finally Endorsement No. 4 addresses the subject of when coverage is voided for violating these warranties (“[i]f the Vessel commences, or proceeds on, a voyage during the term of this insurance, the Policy shall there upon terminate as soon as the Vessel leaves her moorings to depart from the above named port.”)

Thus even if read wholly apart for Endorsement No. 2 as IMU urges, the superseding language of Endorsement No. 4 supports that coverage is voided only by placing the vessel into navigation during the lay-up period, not by letting Mrs. Schreiner on board or planning a cruise for later in the day.

**(b) IMU's argument that the Policy voids coverage if the Afton Princess was not operational should be rejected.**

IMU second argument is based upon a statement by Jarvis' principal, Gordon Jarvis, that at the time of the accident the Afton Princess' water tanks were not drained of water. App. Br. at 4. According to IMU, the phrase "laid up and out of commission" meant the Afton Princess must be non-operational; but Mr. Jarvis statement shows that it was operational. That argument should be rejected for three reasons.

First, nothing in the Policy states that the vessel could not be operational. Second, that argument is inconsistent with the Policy's terms. Endorsement No. 4 states that during the navigation lay-up period the Afton Princess had "liberty to shift (in tow or otherwise) between . . . cargo or fitting out berths." (Emphasis added). App. Apx. 61. The ability to move the vessel within the port of Afton "in tow or otherwise" clearly anticipates that it could be moved under its own power meaning it could be operational.

Third, IMU's own Senior Underwriter repudiated this argument. As noted by the District Court, Ms. Appleby testified that "laid up and out of commission" does not have a single meaning, but is based upon laying up and placing a vessel out of commission according to "local custom." Ms. Appleby acknowledge she did not know the local custom in Afton, but that Mr. Jarvis was "knowledgeable about the local conditions and would be able to reasonable interpret how the Afton Princess would be placed out of commission." Op. at 3-4, Dolliff Apx. A7-A10. Mr. Jarvis provided uncontested affidavit testimony that at the time of Mrs. Schreiner's accident the Afton Princess was laid up and out of commission according to the local custom. Dolliff Apx. at A1-A3.

- (c) **The cases cited by IMU are either not applicable to this dispute or do not support IMU's defense.**

IMU brief (at 8-17) cites to a number of cases which it asserts support its denial of coverage; however, this Court's assessment of those decisions is tied to one unavoidable fact. This case involves a specific insurance policy with specific terms. Any review of the cases cited by IMU raises a threshold question. Are the policies being discussed by those cases identical to the Policy at issue here? The conclusion must be no, either explicitly because that policies described in those decisions are obviously different or implicitly because IMU (and thus its unique policy form) was not a party to any of those cases. Dolliff Apx. A6 (Ms. Appleby testified that Endorsement No. 2 was an "IMU specific form" not an "industry form").

1. **There is no case law definition of laid up and out of commission.**

In addition none of the cases cited stand for the proposition advanced by IMU that there is some type of uniform rule of maritime law that defines (and thus preempts) the terms of this particular Policy. In *Port Lynch, Inc. v. New England Int'l Assurity*, 754 F. Supp. 816 (W.D. Wash. 1991), cited for the proposition that federal maritime law should determine navigational limits (App. Br. at 9), the federal court, citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L.Ed. 337 (1955), actually held that state law should apply to insurance issues unless there is a controlling federal statute or established rule of federal admiralty law. The Court went on to hold that there was admiralty law covering certain misrepresentations on an insurance application, in that case the violation of a navigation warranty by being 1,000 miles from where the insured

said the boat would be operated. The case said nothing about lay-up warranties and IMU cites no federal statute or rule defining the phrase laid up and out of commission. Accordingly, state law should control.

The other cases cited by IMU also fail to articulate and indeed refute the existence of some applicable uniform standard of maritime law. In *Campbell v. Hartford Fire Ins. Co.*, 533 F.2d 496 (9<sup>th</sup> Cir. 1976)<sup>9</sup>, the Court stated “[t]he lay-up warranty [on that policy] is concerned not with the location of the vessel at a particular time, but rather the condition of the vessel during the winter months-namely, whether she has been secured, according to local custom, in a manner which protects her from the perils of inclement weather.” Thus in that case it was the perils of weather, not the condition or location of the vessel or who was on board, which drove the policy’s terms.

In *Goodman v Fireman’s Fund Ins. Co.*, 600 F.2d 1040, 1042 (1979), the court said the lay-up condition was designed to address specific conditions that would increase the risk if the vessel was not sheltered from active service. For example, in *Goodman*, which IMU cites for the proposition that to be laid up a vessel’s water tank must be drained and its sea valves closed, the Court actually held that “[w]hether a vessel is laid up during the time warranted depends upon local custom.” The appeals court accepted the district court’s finding that the local custom was to close the sea valves to prevent water from entering the vessel and freezing. That was not done, which caused pipes to burst and the vessel to sink.

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<sup>9</sup> The holding in *Campbell* did not apply the lay-up warranty but rather dealt with the applicability of another part of the policy called the “held-covered” clause which is not an issue here.

Finally, IMU cites *Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 510, 27 L.Ed. 337, 1 S.Ct. 582 (1883) for the proposition that Jarvis violated a duty of “utmost good faith” by not telling IMU that the Afton Princess was not laid up and out of commission. App. Br. at 17. While historically interesting in its prose, *Sun Mutual*, which involved whether an underwriter would want to know if a vessel was over insured, creates no generalized legal duty of good faith and has nothing to do with the facts here. If IMU, which had written and renewed the policy at issue, wanted more detail concerning the local custom for laying up the Afton Princess, there is no record its underwriters ever asked or that any such inquiry, if made, went unanswered. Neither this case nor the record supports IMU’s phantom assertion of the lack of good faith – which in effect is that Jarvis should have recognized IMU is right about the meaning of “laid up and out of commission” and thus had a good faith duty to tell IMU it was in violation of the Policy.

IMU dives from the shallows of no applicable legal authority to an unfathomable pool of unsupported conclusions. First, IMU’s asserts that since some other courts, looking at some other policies and enforcing some other “lay-up” language said nothing about the vessel leaving its mooring, this Court should conclude that the District Court got its reading of this Policy wrong. That argument ignores the well established legal principal that this Court must first and foremost apply the terms of the policy.

Second, the reasoning (repeated from earlier in its brief) that Endorsement No. 2 created a “precondition” to the Court’s reading of Endorsement No. 4 (App. Br. at 11) ignores the language of Endorsement No. 4, which says it supersedes all other Policy

terms. The basic legal premise that courts must give contractual terms their plain meaning identifies Endorsement No. 4 as the controlling Policy provision. *See also, supra* at 11-12.

Finally, the argument that because “Jarvis had scheduled a wedding cruise for *that* very day” (emphasis in original) but had inadvertently failed to obtain an endorsement that would have established coverage during that cruise somehow means there was no coverage for any part of October 22 is simply wrong. App. Br. at 11-12. The risk of loss which IMU sought to describe by the “NAVIGATION LAY-UP” warranty (Endorsement No. 2), the lay-up warranties of Endorsement No. 4, and the provision allowing navigation for one day in Endorsement No. 10, was the risk that the Afton Princess would leave her mooring at the port of Afton and be placed into navigation by commencing and proceeding on a voyage. Simply because (a) that risk was going to occur later that day, and (b) Jarvis could have prevented a loss of coverage once the voyage commenced by obtaining Endorsement No. 10 does not change the fact that Mrs. Schreiner was injured before navigation had commenced and before coverage might have been voided. Nothing in the Policy says that because a cruise was scheduled for later on October 22, no coverage existed for any part of that day.

**2. IMU’s attempt to create a judicial definition of “winterize” is also incorrect.**

IMU’s final criticism of the District Court asserts that there is a recognized definition of winterizing a vessel (being non-operational according to IMU), which other courts have described through local custom, but which the District Court failed to

recognize, failed to graft into the Policy, and then failed to enforce in light of a supposed admission by Mr. Jarvis that his vessel was not winterized. App. Br. at 12-15

This argument fails on multiple grounds.

First, no court has stated that there is a judicial definition of winterizing a boat which somehow trump the Policy's terms and would prevent the District Court from reading and applying those terms, as it did in its opinion. For example, *New Hampshire Inc. Co. v. Dagnone*, 475 F.3d 35 (1<sup>st</sup> Cir. 2007) is cited for the proposition that to be laid up and out of commission an owner must "take affirmative steps to winterize their boats".

(*Id.* at 14) In *New Hampshire Inc. Co.* the policy at issue actually said:

Lay-up Warranty. Warranted [sic] that the described yacht shall be laid up and out of commission **and not used by the insured for any purpose** during the period from 10/31 (at 12:01am) to 4/5 (12:01am). (Emphasis added)

475 F.3d at 36. The Court denied coverage not because of any interpretation of the phrase "laid up and out of commission" but because the insured violated the prohibition against using the vessel "for any purpose" *Id.* at 36 ("The yacht was still 'being used' in the sense that it was in the water, having been motored to Hinkley, and awaiting hauling out").<sup>10</sup>

*Marine Charter & Storage Ltd. v. All Underwriters*, 628 F.Supp. 740 (1986) is cited for the proposition that because the Afton Princess was to be used for a cruise later in the day means it was not laid up. That case makes no such statement. In *Marine*

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<sup>10</sup> *Tasalapatas v. Phoenix Ins. Co.*, 115 S.E 2d 49 (1960) cited by IMU as supporting this same proposition does not. There the owner violated the policy by removing the boat from a boathouse where it was to be stored. Nothing concerning how it was to be winterized was discussed in the case.

*Charter* the Court explained the risk which the lay-up sought to avoid as follows:

Since the risk of casualty was substantially reduced because the vessel was to remain out of commission at a specific marina where the vessel was sheltered and not subject to the hazards of an active vessel . . . . The movement of the vessel imposes an increased risk of casualty . . .

In that case, as in the case of the *Afton Princess*, had the vessel been moored to a dock the risk of loss which the exclusion sought to avoid would not have existed.

Second, IMU is incorrect in claiming that “Jarvis’s owner admitted that winterization of the vessel required emptying of the tanks” and since the vessel was “planned [for a] wedding cruise that day” . . . “it was clearly not ‘laid-up’”. App. Br. at 15-16. As noted above, the Policy clearly says that during the lay-up period the *Afton Princess* had “liberty to shift (in tow **or otherwise**) between . . . cargo or fitting out berths.” (Emphasis added). The phrase “or otherwise” clearly encompasses the ability to move under its own power and be operational.

Also, as the District Court concluded in directly addressing this local custom argument, the record reflects that Mr. Jarvis was recognized as “knowledgeable about the local conditions and would be able to reasonable interpret how the *Afton Princess* would be placed out of commission.” His undisputed affidavit stated that at the time of Mrs. Schreiner’s accident the *Afton Princess* was winterized and out of commission according to the local customs. Dolliff Apx. A1-A3 and A7-A10.

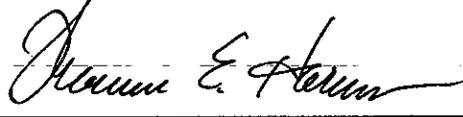
While the District Court clearly recognized that the Policy terms were sufficient to establish IMU’s duty to indemnify and defend Jarvis in the Schreiner Litigation, it also addressed IMU’s local custom argument and found it lacking.

## CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

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