

3. This is an action for declaratory relief within the admiralty and maritime jurisdiction of the United States District Court and is brought within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure governing admiralty and maritime claims.

4. This Court has subject matter jurisdiction over this matter under diversity jurisdiction as plaintiffs and defendant are residents of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

5. Venue is proper in this district in accordance with 28 U.S.C. § 1391(b)(2) because the insured boat at issue was registered and home ported in the State of Rhode Island and a substantial part of defendant's events or omissions giving rise to this suit occurred here.

THE PARTIES

6. Plaintiff, National Liability, is a Connecticut corporation with a principal place of business at 100 First Stamford Place, Stamford, Connecticut.

7. At all relevant times, National Liability was in the business *inter alia* of issuing policies of marine insurance through BoatU.S.

8. Plaintiff, BoatU.S., is a Virginia corporation with a principal place of business at 880 South Pickett Street, Alexandria, Virginia.

9. At all relevant times, BoatU.S. was in the business *inter alia* of marketing and selling policies of marine insurance to recreational boaters and was a managing general agent for National Liability, administering certain claims under policies issued by National Liability.

10. Defendant Nathan Carman, upon information and belief, is a resident of Vermont with a residence at 3043 Fort Bridgman Road, Vernon, Vermont.

FACT SUMMARY

11. National Liability issued Yacht Policy No. 3985989-15 (“the Policy”) to Nathan Carman, as owner, covering his 1974 built JC 31 foot Cruiser, Hull Identification No. MSZMT502J303, (the “Boat”), with an agreed \$85,000 value covering the Boat & Boating Equipment at the time it allegedly sank on September 18, 2016.

12. Coverage under the Policy commenced on December 22, 2015 and ended on December 22, 2016.

Defendant’s Insurance Claim No. 1607671

13. On September 27, 2016 Carman reported Claim No. 1607671 under the Policy.

14. He reported that he and his mother, Linda Carman, had left Ram Point Marina, in South Kingstown, Rhode Island, in the boat around midnight on September 17-18, 2016 first fishing around Block Island but then heading south to Block Canyon. Arriving there around sunrise, they trolled north for about five hours.

15. Carman suddenly discovered the bilge was nearly full of water, observing that neither the aft bilge pump nor the port bilge pump was functioning. He did not check the transom area. He told his mother to reel in the fishing lines and never saw her, spoke with her, or heard from her again.

16. Preparing for the possibility of abandoning ship, Carman neither radioed for help nor activated the boat’s EPIRB. He says the boat quickly sank, with Carman surviving for a week in a life raft, but on information and belief his mother is deceased.

Defendant’s Examination Under Oath

17. As provided under the Policy, Carman agreed to be “examined under oath” (“EUO”) on December 16, 2016 and was represented by counsel during it and vouched for him.

18. During his EUO, Carman testified that on the day before the sinking, on September 17, 2016, he replaced the boat's port bilge pump and never confirmed the boat's aft bilge pump functioned correctly.

19. Carman also testified that later that day he removed the boat's trim tabs, opening up four silver dollar sized thru-hull holes in the transom, just above the waterline, and attempted to repair and fill those holes with an epoxy putty stick.

20. Carman also testified that at some point prior to that he had removed a forward structural bulkhead from below the boat's deck and determined the "stuffing box wasn't sealed to the hull properly."

21. Plaintiffs retained a naval architect, Eric Greene of Annapolis, Maryland, to assess whether Carman's repair of the transom holes was satisfactory.

22. Plaintiffs retained a marine surveyor, Michael McCook NAMS CMS, to assess what effect Carman's removal of the bulkhead, removal of the trim tabs, and unsatisfactory repair of the transom holes would have on the boat's structural integrity, stability and trim, and watertight integrity.

23. By January 27, 2016 letter plaintiffs cancelled and voided Carman's Policy and declined coverage of Carman's claim, based on his EUO, Greene's opinion regarding Carman's unsatisfactory repair of the transom holes, and McCook's opinion regarding Carman's changes to the boat. A true and correct copy of plaintiffs' letter and its enclosed Greene and McCook opinions are attached as Exhibit A.

COUNT I
THE POLICY IS CANCELLED
Vermont Endorsement

24. Carman's Policy states in its Vermont Endorsement to the Policy:

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.

25. Carman measurably increased the risk plaintiffs originally accepted because he removed one of the boat's structural bulkheads.

26. Carman measurably increased the risk plaintiffs originally accepted because the day before the boat sank he removed its trim tabs.

27. Carman measurably increased the risk plaintiffs originally accepted because the day before the boat sank he opened four half dollar sized holes in the hull near the waterline and attempted on his own to fill them, which was not satisfactory.

28. Because of the above, and among other Policy violations and reasons specified by law, plaintiffs have canceled Carman's Policy as of September 17, 2016.

COUNT II
THE POLICY IS VOID
Uberrimae Fidei

29. Plaintiffs re-allege and incorporate paragraphs 1-28.

30. Under the established rule of maritime law governing marine insurance policies known as the doctrine of *uberrimae fidei*, Carman had a continuing duty of utmost good faith to disclose material information about the risk to plaintiffs.

31. Carman failed to disclose material information about the risk including that he removed one of the boat's structural bulkheads and determined the "stuffing box wasn't sealed to the hull properly."

32. Carman failed to disclose material information about the risk including that the day before the boat sank he removed its trim tabs.

33. Carman failed to disclose material information about the risk including that the day before the boat sank he opened four half dollar sized holes in the hull near the waterline and attempted on his own to fill them, which was not satisfactory.

34. Therefore Carman violated the doctrine of *uberrimae fidei* and the Policy is void as of September 17, 2016.

**COUNT III
NO COVERAGE
No Accidental Cause**

35. Plaintiffs re-allege and incorporate paragraphs 1-23.

36. The Policy provides Boat & Boating Equipment coverage per Coverage A:

Types Of Losses Covered

We will pay for property damages 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.

37. Specified exclusions in the Policy are set out immediately below and 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.

38. Under established maritime law, all risk marine insurance policies cover fortuitous losses that are not excluded by the policy.

39. Among other reasons, Carman's loss was not fortuitous because he had previously removed a structural bulkhead from the boat, because he had previously determined the boat's "stuffing box wasn't sealed to the hull properly," because he never determined the boat's aft bilge pump functioned correctly, and because several hours before departing from Ram Point Marina he removed the boat's trim tabs and thereby opened four half dollar sized holes in the hull near the waterline and did not fill them in a satisfactory fashion.

40. Plaintiffs have no obligation under maritime law for Carman's claimed loss because it was not fortuitous and/or had no accidental cause and therefore his Claim No. 1607671 is denied.

**COUNT IV
COVERAGE EXCLUDED
Policy Exclusion D**

41. Plaintiffs re-allege and incorporate paragraphs 1-23 and 35-40.

42. Carman is not entitled to coverage for Claim No. 1607671 because the loss of his boat was caused by incomplete, improper, and faulty repairs he conducted the day before it sank.

43. Plaintiffs have no obligation under the Policy for loss, damage, or expense caused directly or indirectly by Carman's incomplete, improper, and faulty repairs on or before September 17, 2016 and his Claim No. 1607671 is denied under Exclusion D

**COUNT V
COVERAGE EXCLUDED
Policy Exclusion F**

44. Plaintiffs re-allege and incorporate paragraphs 1-23 and 35-43.

45. Carman is not entitled to coverage for Claim No. 1607671 because the loss of his boat was caused intentionally by and/or with the knowledge of Carman.

46. Plaintiffs have no obligation under the Policy for loss, damage, or expense caused by Carman's intentional and/or knowing actions and inactions on or before September 17-18, 2016 and his Claim No. 1607671 is denied under Exclusion F.

COUNT VI
NO COVERAGE
Breach of the Negative Implied Warranty of Seaworthiness

47. Plaintiffs re-allege and incorporate paragraphs 1-23 and 35-46.

48. Carman's Policy includes a negative implied warranty of seaworthiness each time the vessel leaves the safety of port for the open sea which invalidates coverage for loss or damage proximately caused by an unseaworthy condition known by the insured.

49. Carman knew his boat was unseaworthy when it departed Ram Point Marina.

50. The boat's unseaworthy condition proximately caused its sinking.

51. Therefore because Carman breached the negative implied warranty of seaworthiness, there is no coverage for claims under the Policy.

WHEREFORE, Plaintiffs National Liability & Fire Insurance Company and Boat Owners Association of the United States pray:

A. That this Court exercise its subject matter jurisdiction to determine the rights and liabilities of the parties to Yacht Policy No. 3985989-15, pursuant to 28 U.S.C. § 2201.

B. That this Court declare and adjudge that Yacht Policy No. 3985989-15 is void and cancelled, effective September 17, 2016.

C. That this Court declare and adjudge that there is no coverage under Yacht Policy No. 3985989-15 for defendant's Claim No. 160761 for any claims made by any party, including

but not limited to defendant's Claim No. 160761, and that plaintiffs have no further obligations to defendant.

D. That process in due form of law issue against defendant, citing him to appear and answer under oath all and singular the matters alleged in this Complaint for Declaratory Judgment, failing which default judgment be entered against him as set forth herein, plus attorneys' fees and costs.

E. That plaintiffs have such other, further relief as the Court deems just, proper, and equitable.

RESPECTFULLY SUBMITTED January 27, 2017.

Plaintiffs
National Liability & Fire Insurance Company and
Boat Owners Association of the United States
By Their Attorneys



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EXHIBIT A



Boat U.S. Marine Insurance Program Claims
Administrative Office
880 South Pickett Street
Alexandria, VA 22304
24 hr. Claims: 800-937-1937
Fax: 703-461-2943
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.

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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

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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 Narraganset, 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

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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.

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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

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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).

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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.

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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
Marine Insurance Claims
1-800-262-8082 Ext. 3875

Encs

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



High Technology Naval Architecture and Marine Engineering
www.EricGreeneAssociates.com

Opinion

Boat US
c/o David J. Farrell, esq.
Farrell, McAleer & Smith, LLP
2355 Main Street
S. Chatham MA 02659

January 19, 2017

Re: 1973 JC31 prototype, ex-“*Chicken Pox*”
Insured: Nathan Carman
D/L: 09/18/2016
T/L: Sinking
Claim: 1607671

BACKGROUND

The subject vessel sank apparently somewhere north of the Block Canyon fishing area on September 18, 2016. On September 17, the trim tabs were removed by Mr. Carman. The removal of the trim tab mounting brackets left exposed holes in the transom that Mr. Carman attempted to repair.

According to Mr. Carman, he removed the boat's trim tabs about six hours before setting out on a fishing trip at midnight. Prior to removal of the trim tab mounting brackets, Mr. Carman purchased the following products from West Marine to complete the repair:

- Fiberglass repair kit (presumably model # 14153274, which includes 8oz. polyester resin, .25oz. MEKP hardener, 3sq.ft. fiberglass cloth plus a resin spreader)
- 3M 5200 polyurethane adhesive/sealant
- Epoxy putty stick, model # 3761483 (Carman statement exhibit 6)

Mr. Carman stated that the four (4) transom holes that he attempted to repair were each the size of a half dollar, which is 1.2 inches in diameter. He estimated the transom thickness to be a little more than $\frac{3}{4}$ inches, as established using a bent wire as a feeler gage. The repairs were done from the cockpit while leaning over the transom. There was no direct access to the inside of the transom. Mr. Carman was not able to look into the holes because the boat was in the water and he was accessing the exterior of the holes from the cockpit.

According to Mr. Carman's statement, he first tried to complete the repair using the fiberglass repair kit, but the resin dripped out of the hole. He then tried to fill the holes using sections of the West Marine epoxy putty stick. However, he followed the instructions for the fiberglass repair kit, which suggested using a paper towel to prevent resin from running out the back of the holes.

Figure 1 shows the location of the trim tab support brackets that were removed. The holes were located behind the brackets. Figure 2 shows the same locations with the boat underway in a planing condition.

PURPOSE

The purpose of this investigation was to determine the efficacy of the attempted repair to the trim tab holes.

MATERIAL REVIEWED

1. Tube of West Marine Epoxy Putty Stick, Model 3761483
2. Survey report from Bernard J. Feeney, 1973 JC Boats 31 "JC No 1 Plug" dated December 9, 2015.
3. Examination under oath of Nathan Carman by David J. Farrell, Farrell, McAleer & Smith, LLP dated December 16, 2016 including exhibits 1-16.
4. "Fiberglass Boat Repair & Maintenance," 15th edition, 4/11, Gougeon Brothers Inc., Bay City, MI. <http://www.westsystem.com/ss/assets/HowTo-Publications/Fiberglass-Boat-Repair-and-Maintenance.pdf>
5. "Making practical decisions when repairing machined holes in fiberglass boats," Epoxyworks Number 21, Summer 2003, Gougeon Brothers Inc., Bay City, MI. <http://www.westsystem.com/ss/assets/project-images/Project-PDFs-2/Practical.pdf>
6. Bennett Marine BXT Installation Instructions & Reference Guide, Bennett Marine, Deerfield Beach, FL <http://www.bennetttrimtabs.com/wp-content/uploads/2015/10/BXT-Owner-Install-Manual.pdf>
7. "Epoxy putty sticks: what they can do (and what they can't do)," Polymeric Systems, Inc., Elverson, PA <http://www.polymericsystems.com/latestNews/PDF/EpoxySticksWhatTheyCanDo.pdf>

INVESTIGATION

Mr. Carman stated that there was one to two inches of epoxy stick left after he attempted to repair the holes. A West Marine Epoxy Putty Stick, Model 3761483 was cut

into sections that replicated Mr. Carman's statement, using an average of 1.5 inches as the remaining product amount. Four sections measuring approximately 1.33 inches were cut using a razor blade, as shown in Figure 3. Two 1.25 inch and two 1.125 inch holes were drilled into a piece of $\frac{3}{4}$ inch plywood, as shown in Figure 4. An oil and water mixture was rubbed into the curved surfaces of holes 2 and 4.

Pages 124-125 of Nathan Carman's statement includes the following:

So I kneaded it in my fingers until the putty was a consistent color. I then forced the putty into the hole in the transom and I – and I smoothed out – smoothed out on the outside edge and tried to force it so that it was – so that it expanded to fill the hole.

The same procedure that Mr. Carman outlined was used to test the efficacy of using the epoxy putty stick to repair 1.125 and 1.25 inch holes in $\frac{3}{4}$ inch plywood. Figure 5 shows the plywood oriented to simulate an over the transom repair attempt. Figure 6 shows the repair attempt in progress.

Figure 7 shows the results of the attempted repair. For holes 3 and 4, the putty mixture fell through the back of the plywood as it was being forced into the hole. After a 2-hour cure time, the putty mixture in hole 2 was easily dislodged with minimal force.

OPINION

It was not possible to achieve a satisfactory repair using the epoxy putty stick in the manner outlined in Mr. Carman's statement. This was confirmed by testing the attempted repair procedure described in Mr. Carman's statement.

The proper use of that product for holes this large would require a temporary backing plate, as shown in the left side of Figure 8. Figure 8 also shows what would happen if paper towels were used in lieu of a backing plate. There would be no resistance to keep the putty from being pushed through the hole without the necessary spreading required to ensure contact with the hole walls. This was confirmed when the putty fell out of the back of holes #3 and #4.

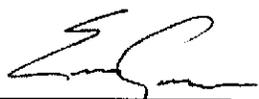
The surface of the repair could be smoothed to create a flush appearance on the outside but there would be minimal contact between the putty and the curved surface of the holes. The resulting plug of putty would not be able to adequately resist hydrostatic or other forces incurred during vessel operation. Indeed, this was the case with hole #2.

The repair was attempted while the boat was in the water, accessing the holes by reaching over the transom. Mr. Carman was not able to visually inspect the curved surfaces of the holes and there was no indication of any surface preparation done during the repair. Epoxy requires a clean surface for proper adhesion. Mr. Carman indicated that he confirmed that the epoxy putty compound had hardened but he had no way to assess the overall integrity of the repair. At a minimum, a visual inspection of the attempted repair was necessary to determine if it was adequate.

If the interior of the transom was truly inaccessible at this location, a preferable approach would have been to create a tight fitting plug that could be bonded into the hole with epoxy. A conventional fiberglass patch over the outside would complete such a repair. If one or more of the transom holes were not repaired correctly, even a 1-foot following sea would result in a substantial amount of water entering the bilge over a five-hour period.

This report is presented and was conducted without prejudice to the rights of any party, policy of insurance or provisions of law concerned. Eric Greene Associates, Inc. hereby certifies that it has no present or contemplated future interest in the subject of this report or any other interest that might prevent a fair and unbiased finding. This report is the best expression of Mr. Greene's findings and opinions and Eric Greene Associates, Inc. reserves the right to amend or extend this report upon receipt of additional information.

Eric Greene Associates, Inc.



by Eric Greene, President

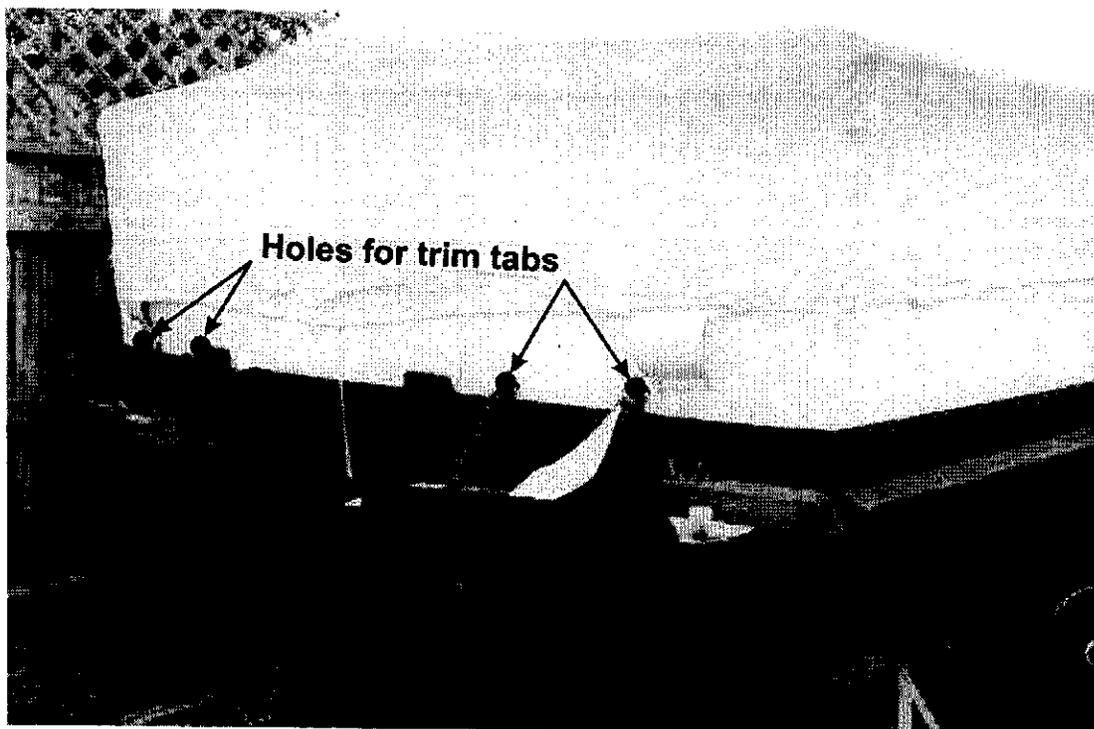


Figure 1. Location of trim tab transom holes
[exhibit 4 from Nathan Carman statement]

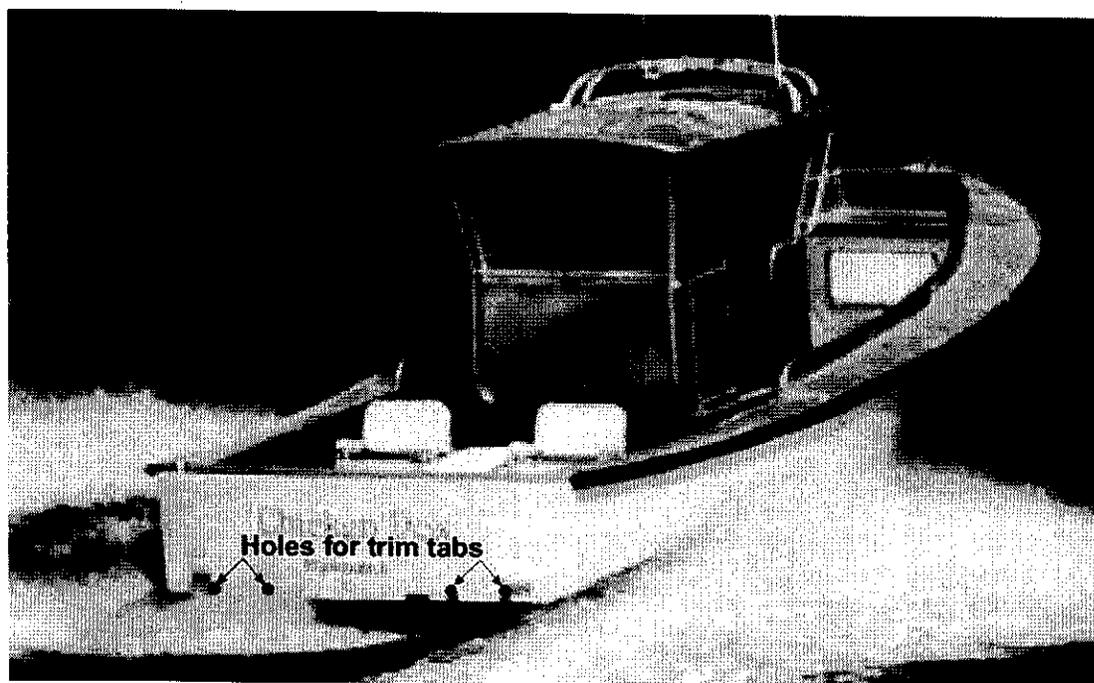


Figure 2. Trim tab hole location with boat in planing condition
[photograph by Brian Woods <http://downeastboatforum.com/free-classifieds-for-downeast-boats-marine-equipment-fishing-tackle-for-sale-or-wanted-/11236-31-je-custom-aluminum-walkaround-pilothouse.html>]

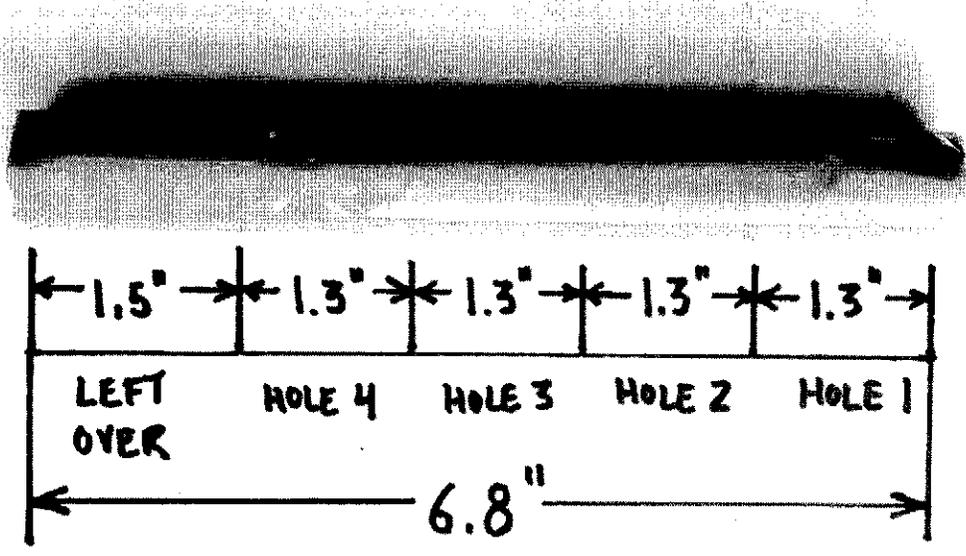


Figure 3. West Marine Epoxy Putty Stick prior to being cut into sections for investigation

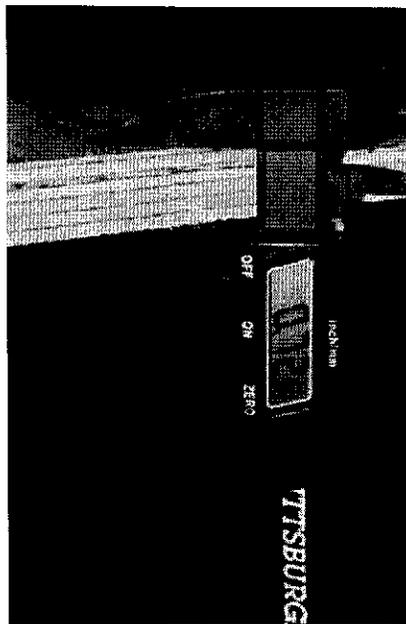
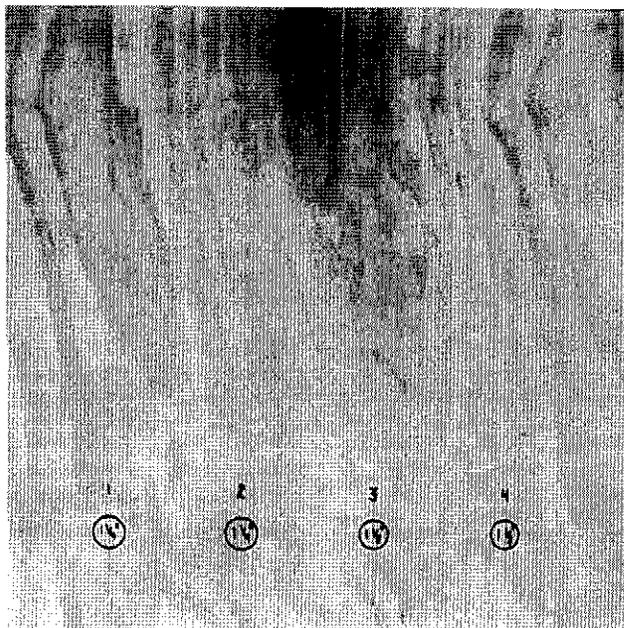


Figure 4. Plywood used for investigation

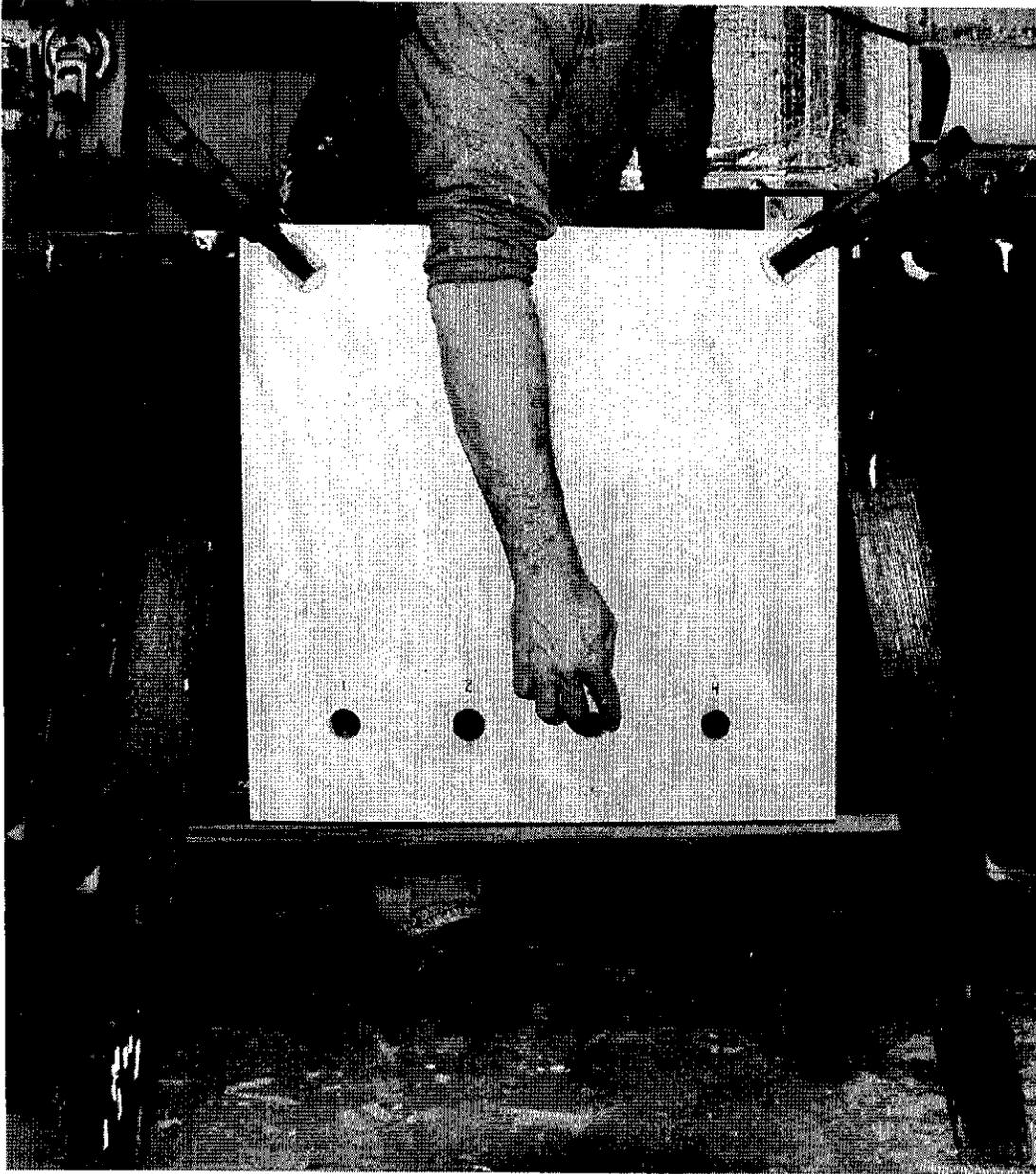


Figure 5. Orientation of plywood for investigation

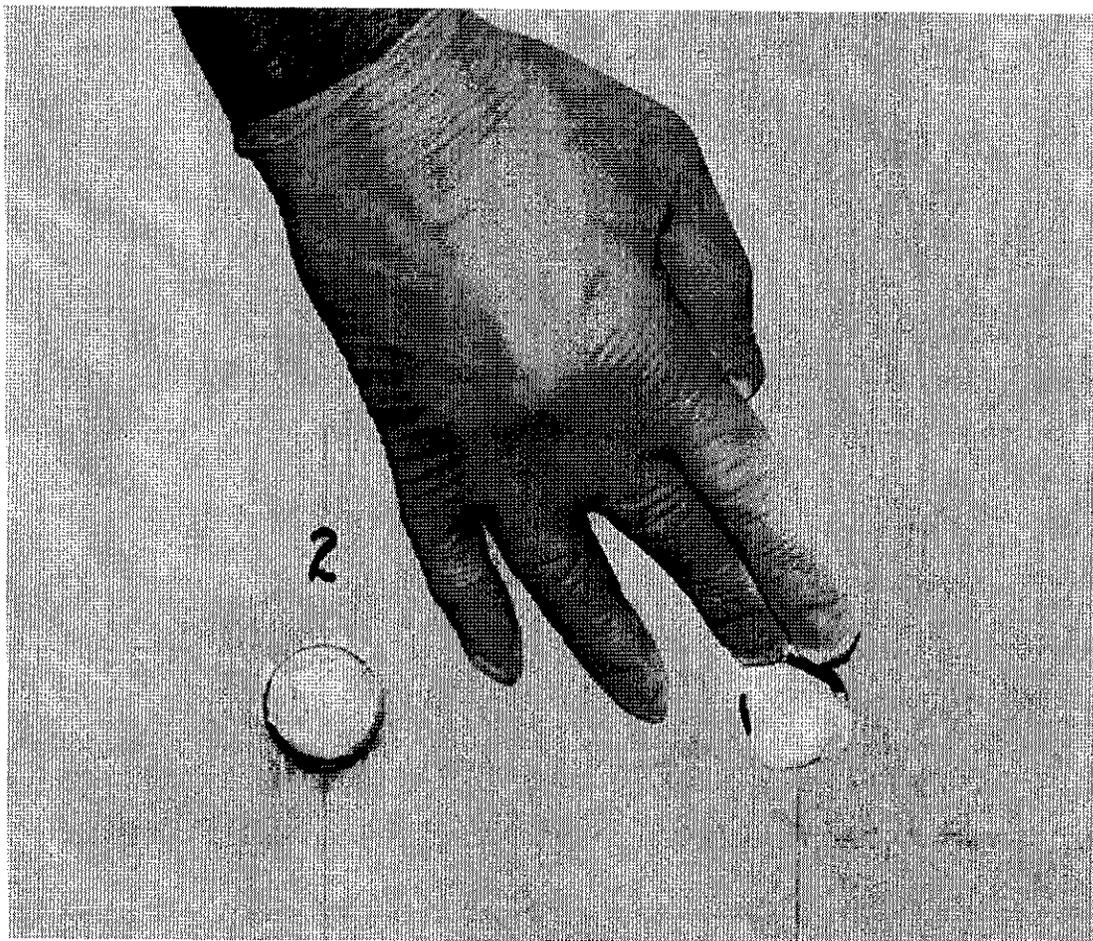


Figure 6. Attempted repair procedure in progress

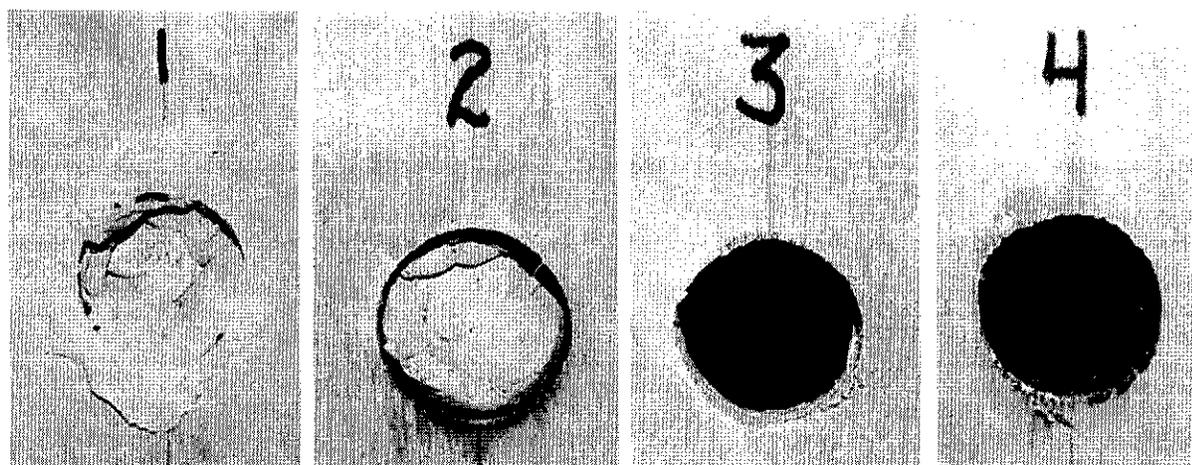


Figure 7. Results immediately after attempted repair

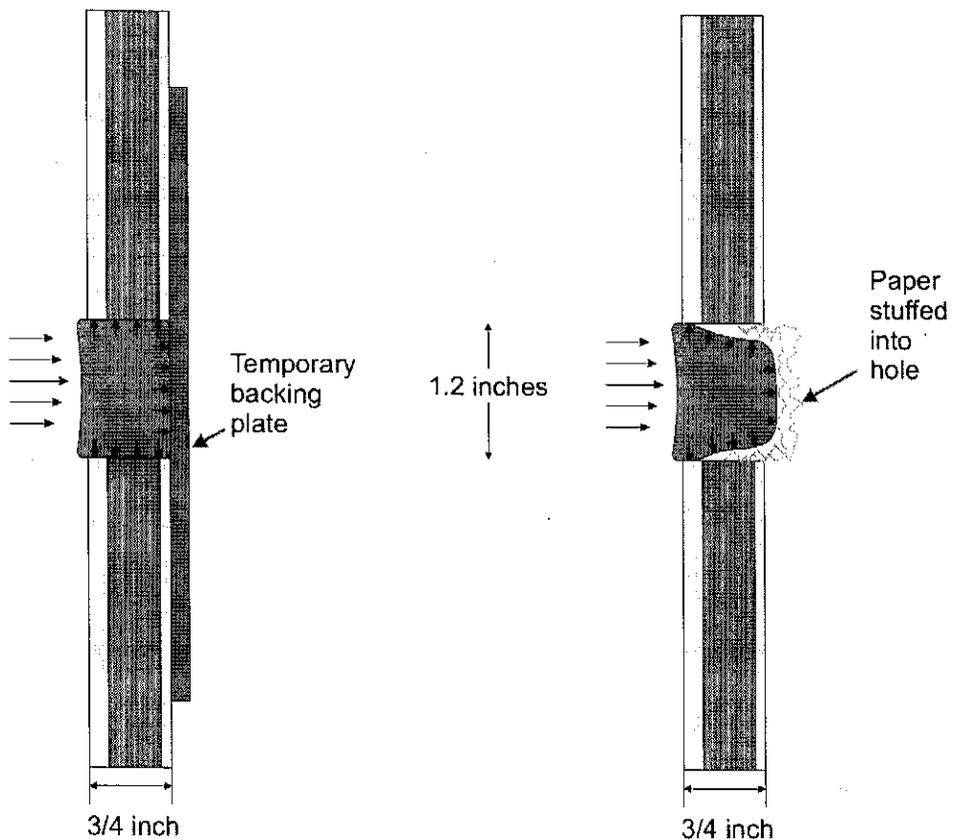


Figure 8. Illustration showing anticipated results for repair using temporary backing plate versus paper towel

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Farrell McAleer &

Smith

60 Washington Street Suite 303

Salem, MA 01970

Attn: Liam T. O'Connell

Owner: Carman, Nathan

Vessel: 1973 JC 31 prototype

Our File #: 17-M-10205

Date: 01/23/17

Preliminary Report

Dear Mr. O'Connell

As requested I reviewed the documents as sent as related to this matter:

- The Insured EUO 12/16/2016
- Survey done by Feeney 12/09/2015 and 12/16/2015
- Repair work orders and invoices from Point Judith Marina EUO Exhibit #3
- EUO exhibit #1-16
- Nathan Carmen written statement of loss
- Report date 01/19/2017 from Eric Green

I consider the removal of the trim tabs and the totally inadequate and improper repair of the 4 holes left in the transom as a result, 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.

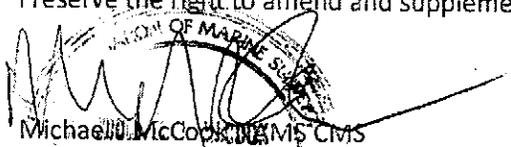
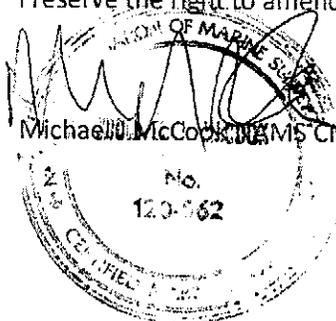
Further, the removal of the trim tabs (although most effective at planing speeds) would (at lower displacement speed; trolling) still have the effect of altering the vessel's fore and aft trim. Thus, while trolling with the trim tabs removed, the bow would be raise and the transom would drop, lowering the holes nearer to the waterline.

The Owner Carman stated he removed the partial bulkheads (see pg. 14 of insured EUO). This bulkhead was not "attached" to the deck but was fiber glassed (tabbed) to the hull which contributed to the overall structural integrity of the hull. 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.

This preliminary report is based upon a reasonable degree of certainty based on the undersigned, training and 35 years of experience as a Certified Marine Surveyor (NAMS CMS) and loss investigator.

I reserve the right to amend and supplement my opinion on receipt of additional information.


Michael D. McCook, NAMS CMS
No. 120-062


The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 National Liability & Fire Insurance Co. and Boat Owners Association of the United States

(b) County of Residence of First Listed Plaintiff Fairfield (Connecticut)
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Sean O'Leary, O'Leary Law Associates
 4060 Post Rd., Warwick, RI 02886; 401.615.8584

DEFENDANTS
 Nathan Carman

County of Residence of First Listed Defendant Windham (Vermont)
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. sec. 2201

Brief description of cause:
Declaratory Judgment/Insurance

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 01/25/2017 SIGNATURE OF ATTORNEY OF RECORD: Sean T. O'Leary, SEAN T. O'LEARY, ESQ. (#6035)

FOR OFFICE USE ONLY: RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____