

SAIL AMERICA CONFERENCE 2015 **(NEWPORT, RI)**



- **ETHICS AND THE LAW PANEL DISCUSSION**
- **CURRENT TRANSACTIONAL ISSUES FACING BROKERS AND DEALERS**
- **PANEL DISCUSSION MODERATED BY DAVID M. BOHONNON**

Panel: Vin Petrella, Don Finkle, Rick Dieterich, Steve Clark



- **The purchase and sale of pleasure vessels presents a host of ethical and legal considerations that confront yacht brokers and dealer's everyday in their transactional practice.**
- **It is essential that brokers understand the ethical protocol as well as potential local, state, federal and international legal trappings which might apply to your set of facts.**

CODE OF ETHICS & BUSINESS PRACTICE
(AS APPROVED BY THE YBAA BOARD OF DIRECTORS
AUGUST 17, 2007)



- YBAA member brokerage firms, and their brokers, agree to fully comply with the YBAA Code of Ethics & Business Practice, as a condition of membership and in furtherance of their commitment to maintain the highest industry professional standards

CODE OF ETHICS & BUSINESS PRACTICE



- 1.3 - It is the duty of the Broker to protect the public, to the best of his/her ability, against fraud, misrepresentation and unethical practices.

CODE OF ETHICS & BUSINESS PRACTICE



- 1.7 - The Broker, for the protection of all parties with whom he/she deals, will see that financial obligations and commitments regarding yacht transactions are in writing, expressing the exact agreement of the parties and that copies of such agreements, at the time they are executed, are placed into the hands of all parties involved.

CODE OF ETHICS & BUSINESS PRACTICE



- 2.1 - In accepting employment as an agent, the Broker pledges him/herself to protect and promote the interests of the clients. The obligation of absolute fidelity to the clients' interest is primary, but does not relieve the Broker from the obligation of dealing fairly with all parties in the transaction.

CODE OF ETHICS & BUSINESS PRACTICE



- 2.2 - The Broker will neither acquire an interest in, nor purchase for him/herself, for any member of his/her immediate family, for his/her firm or any member thereof, nor for any entity in which he/she has a substantial ownership interest, vessels listed with him/her or his/her firm, without making the true position known to the listing owner. In selling any vessels owned by him/her, or in which he/she has such interest, all such facts should be revealed to the purchaser.

YACHT BROKER DISCLOSURE

- General Guidance:
 - Best Practices – DISCLOSE IT
 - Knowledge of vessel accident/defect/issue
 - Material issue which affects value of yacht
 - Vessel Listing with selling points
 - Remove puffery language from the Listing which now becomes an exhibit to the contract

“AS IS” Clauses & Disclaimers

- “AS IS” Disclaimers will not necessarily protect sellers and brokers
 - The now well known HMY Yacht Sales Case
- Instances negating the protections afforded by “AS IS” Clauses vary by state, but they may include:
 - Unfair Trade Practices
 - Fraud
 - Negligent Misrepresentation

Unfair Trade Practices

- Connecticut Unfair Trade Practices Act (“CUTPA”) - C.G.S.A. § 42-110b:
 - Broadly defined - no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.
 - Trade or commerce, in turn, is broadly defined as ‘the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.’ General Statutes § 42-110a (4)
 - A CUTPA claim may be brought by “any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b” General Statutes § 42-110g (a).
- See Service Road Corp. v. Quinn, 241 Conn. 630 (1997)

Fraudulent Misrepresentation

- Under Connecticut law:
 - false representation must be made as to a statement of fact
 - statement was untrue and known by defendant to be untrue
 - the statement was made to induce the plaintiff to act
 - the plaintiff acted on the false representation to its detriment
- See Khan v. Danse, 1998 WL 910230

Negligent Misrepresentation

- As set forth in Section 552 of the Restatement (Second) of Torts:
 - One who, in the course of his/her business, profession or employment supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he/she fails to exercise reasonable care or competence in obtaining or communicating the information.
- In Connecticut, a claim for negligent misrepresentation must allege that:
 - (1) the defendant made a misrepresentation; and
 - (2) the plaintiff reasonably relied upon such misrepresentation.

Negligent Misrepresentation

- While parties are free to contract for whatever terms on which they may agree, including the right to contract for the assumption of known or unknown hazards and risks ("AS IS" Clauses & Disclaimers), Connecticut case law has consistently held that where a negligent misrepresentation was made, an "AS IS" Disclaimer is only effective IF the plaintiff had knowledge of the alleged defect
- In Connecticut, a yacht contract may not effectively insulate the broker from potential liability with exculpatory language ("AS IS, WHERE IS") where a negligent misrepresentation has been made
- The courts in Connecticut may hold a yacht broker to a higher standard as agent to disclose material facts (known defects, etc.) to both buyer and seller, even without a dual agency agreement

Additional Potential Disclosure Issues

- Dual Agency by Brokers – broker acting as agent for both buyer and seller
 - Agent is required to act in the best interests of the principals and to disclose all known material information
 - Material Information includes:
 - Market value of yacht
 - Description of yacht
 - Title/documentation

Dual Agency

- Inform and Consent
 - Buyer and Seller must be fully aware of and consent to the dual representation by the broker in the transaction
 - Principals must consent to the fact that the broker will not be able to provide the full range of agency duties to the buyer and seller
 - Failure to comply could result in zero commission from either principal and/or rescission of the contract by either principal
 - It may be fraud to fail to disclose known defects, conceal defects, or give misinformation to conceal known defects
 - In the event of fraud, broker may be liable for damages to both principals

Additional Disclosure Issues

- Yacht Broker receives finder's fee for the placement of financing with a specific mortgage broker without proper disclosure to the client
- Yacht Broker referral of a specific Surveyor or Appraiser in order to secure a needed value or condition of the vessel to secure vessel financing – may be construed as collusion / bank fraud
 - Example: Connecticut criminal indictment of mortgage brokers, appraisers and attorneys for conspiring to commit bank fraud



- Thank you for your time and interest
- Please contact us with any questions:

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