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Theft and Severe Weather: A Storm for **Marine Cargo Insurance**

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In recent years thieves have become uncannily adept at using technology as a means to steal—whether it's money, private information, or proprietary trade information. Computer thieves are also taking their act on the high seas, highways, and elsewhere to steal cargo.

Over the past couple of years, industry surveys have reported a number of alarming cargo heists accomplished by means of tracking devices, hacks, fraudulent electronic communications, and computer generated (fake) shipping documents.

Another recent contributor to shipping risk is increasingly volatile and unpredictable weather. While what qualifies as "severe weather" may be open to some interpretation for purposes of shipping law, weather conditions certainly may have a much greater bearing going forward on whether cargo makes it safely to its destination.

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These fast-evolving perils may have serious implications for whether a policyholder and other stakeholders have cargo insurance protection. Some cargo insurance companies are adding cyber exclusions and/or weather exclusions (or warranties) to their policies.

Cargo Insurance Protection For Theft

Under New York law (and the law of most other jurisdictions), the peril of theft is covered under an

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all-risk insurance policy. As the case law makes clear, it does not matter what form the theft takes, e.g., fraud, trickery, deceit, or false pretenses. See, e.g., *Buckeye Cellulose v. Atlantic Mut. Ins.*, 643 F. Supp. 1030, 1036 (S.D.N.Y. 1986) (recognizing that a policy insuring "against all risks of physical loss or damage from external cause " would provide coverage against conversion); *Great N. Ins. Co. v. Dayco*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985) (holding an insured "who takes out an 'all risk' policy which does not exclude theft has a right to assume he has purchased coverage for loss by theft" including "theft by trick or false pretense").

Even where one is uncertain as to the actual cause of the loss to cargo, marine insurance coverage should provide insurance protection where thefts are so sophisticated that they leave no trace as to the disappearance of the goods. In *N. Am. Foreign Trading v. Mitsui Sumitomo Ins. USA*, 499 F. Supp. 2d 361, 374 (S.D.N.Y. 2007), modified in part on other grounds, 292 F. App'x 73 (2d Cir. 2008), the court held that the policyholder did not need to prove the cause of loss under an all risk cargo policy as urged by the insurance company. Instead, the court held that absent a mysterious disappearance exclusion, all risk marine insurance covers mysterious disappearance losses. Similarly, in *Farr Man Coffee v. Chester*, No. 88 Civ. 1692, 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y. June 28, 1993), the court held that an all risk policy covered larceny by trick where the cargo shipment of coffee was never delivered to the policyholder.

Where theft is enabled by computers and associated technology, all-risk policies should cover such risks, absent a specific and unambiguous exclusion. In a recent case, *AGCS Marine Ins. Co. v. World Fuel Services*, No. 1:14 cv 05902 (S.D.N.Y May 17, 2016), the court presided over an insurance company's lawsuit seeking to evade insurance coverage for cargo (marine gasoil) stolen by an imposter that had emailed a solicitation to purchase from the policyholder. The emails were demonstrated to have been fraudulent solicitations to enable the cargo theft. The court found that the loss of the cargo was covered under the all risk cargo insurance policy.

Fast-evolving perils may have serious implications for whether a policyholder and other stakeholders have **cargo insurance protection.**

Policyholders and insurance brokers need to be very careful going forward, given that cyber-related exclusions are already making their way into some cargo insurance policies. Generally speaking, there is a move well afoot in the insurance industry to move cyber-related claims to stand-alone cyber insurance policies. For cargo protection, this is especially problematic as a number of these cyber stand-alone insurance policies have exclusions for loss or damage to tangible property. Furthermore, most versions of cyber-related insurance exclusions (even those that promise not to gut protection for all cyber-related perils) have not been tested in court. This has left a great deal of uncertainty in the marketplace for almost all commercial policyholders.

Coverage Issues for Weather-Related Cargo Loss

It is particularly important to mind the weather forecast when negotiating coverage for marine cargo risks. One example of a case where representations concerning the weather nearly drastically impacted coverage is *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, No. 98 Civ. 7840 (HB), 2000 U.S. Dist. LEXIS 7803 (S.D.N.Y. June 7, 2000), rev'd in part, 266 F.3d 112.

In *Tradeline*, New York Marine & General Insurance Company denied coverage for the loss of over 49 metric tons of fertilizer that Tradeline (the policyholder) sold to Deepak, an Indian import business, and shipped from Mexico to India. The denial was based primarily on the ground that Tradeline had failed to inform the insurance company of the severe weather that was predicted at the time Tradeline purchased additional coverage for rainwater. The salient facts of the case are as follows.

When the shipment of fertilizer arrived at Kandla, its destination port, and Deepak began unloading the fertilizer onto barges to be transported to the wharf, Deepak's

handling and forwarding agent informed Deepak that there was a risk of rain and that it was necessary to purchase insurance for such weather. Deepak, in turn, informed Tradeline, who purchased rainwater coverage to add to its existing coverage, but failed to inform its insurance broker of the impending storm. 266 F.3d at 118.

A few days later, while the fertilizer was still being offloaded, a cyclone stuck the port, "involving cyclonic wind and rain forces, tidal waves and rising waters." 266 F.3d at 119. Deepak's losses totaled over $1.5 million. Much of the fertilizer was lost or damaged at the port as a result of the storm. Other portions of the fertilizer had been damaged by rainwater after being diverted to a port of distress. Deepak also incurred costs for mitigating its damages due to salvage operations. Id. at 119.

New York Marine denied liability for Deepak's losses. Specifically, New York Marine argued that the policy was void ab initio because Tradeline and Deepak had failed to inform it of the severe weather that had been predicted when Tradeline purchased the rainwater coverage and this violated the principle of uberrimae fidei—the principal which "places the obligation of utmost good faith on the insured precisely because those who operate on the high seas are in the best position to determine the potential for risk to their vessels and cargo … ." 2000 U.S. Dist. LEXIS 7803 at *25.

Although the district court rejected New York Marine's argument that the *entire* policy was void, it found that Deepak and Tradeline were not entitled to rainwater coverage

> because they violated the duty of utmost good faith by not disclosing the weather conditions to New York Marine … . Therefore, the district court awarded to Deepak that part of the claim covered by the Policy and the original SMPs (367 and 368) [the Special Marine Policy certificates evidencing coverage for the fertilizer shipments], which, the district court concluded, amount[ed] to $410,879.70."

Id. at 120. This amount represented the fertilizer "lost due to the sinking of the lightering barge in the port of Kandla" and the fertilizer "lost during discharge … at the port of distress." Id. at 126.

On appeal, the Second Circuit agreed "that the prediction of severe rainy weather in the Kandla area [was] a material fact that would have affected New York Marine's decision whether to issue the extended coverage at all or to do so at a higher premium. Deepak, therefore, had a duty to disclose this information when seeking rainwater coverage." Id. at 123 (internal citation omitted). However, the Second Circuit found that Deepak had sufficiently informed New York Marine of the impending weather because it had communicated information concerning the storm risk to Tradeline, who, the court found, was New York Marine's agent. Id. at 123. Therefore, the fertilizer was covered by the terms of the "ICC(C) provisions, with the addition of rainwater damage as a covered risk." Id. at 125.

But the Second Circuit's decision concerning rainwater coverage did not secure coverage for all of Deepak's losses. The court determined that coverage terminated at the time Deepak offloaded the fertilizer to its handling and forwarding agent so any damage to the fertilizer after that point was not covered. Id. at 127-28. In addition, the court found that Deepak's expenses incurred in diverting the fertilizer shipment to the port of distress were not covered because they were not incurred "as a result of" a covered loss as "neither port closure nor cyclones" were covered under the policy. Id. at 129.

Tradeline highlights the limitations of marine cargo insurance in the context of weather-related loss. It also shows the importance of disclosing information concerning the weather forecast to your marine cargo insurance company at the time coverage is purchased. Even in the face of commercial pressure to transport cargo on time, given the prevalence of severe weather these days, it would be a shame to lose insurance coverage due to a weather issue based upon a "disclosure" argument, an exclusion, or a warranty that certain measures of weather severity not be exceeded.

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