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Navigating the Murky Waters of Marine Cargo Insurance

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Attempting to recover insurance dollars for a marine cargo loss might be like the ill-fated voyage for which coverage was purchased. Arcane insurance policy provisions and maritime law doctrines lie, like submerged reefs, in the path of the unsuspecting policyholder. There are, however, a few basic markers that the policyholder can look to in order to chart a course through those murky and hazardous waters.

Policyholder's Obligations Under a Marine Cargo Policy

In order to obtain a recovery, a policyholder must satisfy the three primary obligations imposed under a marine cargo policy: (1) full disclosure of all material facts; (2) reasonable efforts to prevent or minimize a loss; and (3) prompt notice and proof of loss. Failure to satisfy these requirements can lead to the forfeiture of coverage.

Full Disclosure. The full disclosure requirement has been entrenched in the law of marine insurance for centuries under the doctrine of *uberrima fides*, or utmost good faith. Under this doctrine, the policyholder must do more than truthfully answer questions put to it by the underwriter. The policyholder must voluntarily provide any additional information which might reasonably bear upon the underwriter's decision to accept the risk. This disclosure requirement does not end after the issuance of the insurance policy, but is ongoing, which may be particularly important under an open cargo policy that covers numerous shipments.

It may be difficult for the policyholder to predict what underwriters consider "significant." Certain facts will be obviously significant—such as disclosing that a vessel was in a dangerous state of disrepair if the policyholder was aware of the vessel's condition at the time in question. An open cargo policy does require that the policyholder report every shipment of goods. Unless the policyholder can demonstrate that the omission was inadvertent, failure to report a shipment will result in the forfeiture of coverage for that cargo. However, there is no all-inclusive checklist that indicates what information must be disclosed.

When in doubt, it is best to err on the side of disclosing more than what you believe is required. Failure to disclose all material facts may result in forfeiture of coverage, even if an undisclosed fact did not contribute to the loss. Since the law of marine insurance is largely uniform throughout the world, it would be difficult, if not impossible, to find a safe haven from the duty of utmost good faith.

The Sue and Labor Clause: Preventing and Minimizing Loss. The policyholder's obligation to take reasonable steps to avoid losses is contained in the Sue and Labor clause which requires the policyholder to "sue, labor and travel for, in and about the defense, safeguard and recovery of the property or interests insured, or any part thereof without prejudice to this insurance...." As with the duty of utmost good faith, no firm criteria have been established for determining compliance with this requirement, but one court described the obligation as follows:

> [A]n assured has the duty toward his underwriter to exercise the care of a prudent uninsured owner to protect insured property in order to minimize or prevent the loss... for which the insurer would be liable...." *Reliance Ins. Co. v. The Escapade* (5th Cir., 1960)

Courts have allowed reimbursement for a variety of costs as Sue and Labor expenses, including legal fees incurred to preserve cargo, the costs of salvage operations and the removal of cargo for safe keeping, cargo discharge fees, barging and demurrage costs, as well as certain travel expenses. However, courts have carefully limited recovery to costs incurred to prevent or mitigate a loss.

Other costs are not covered, even if they result in a benefit to the insurance company. One court ruled that because litigation costs were not incurred to protect the insured cargo, they were not recoverable even though the insurance company would have been required to pay diversion costs if the policyholder had not prevailed in its contract dispute with the buyer. (*International Commodities*, S.D.N.Y., 1988) The court did, however, allow recovery of litigation costs incurred to obtain release of the cargo from the carrier, reasoning that those expenses were incurred to prevent conversion of the cargo, a covered peril.

Prompt Notice and Proof of Loss. Prompt notice of loss and the filing of a proof of loss are required under marine cargo policies. Many policies specify that notice must be provided in writing to the nearest office of the insurance company or its registered claim again. Policies often state that failure to report losses promptly or to file a proof of loss shall result in a forfeiture of coverage, and courts often agree.

Requisites for Recovery

Even where the policyholder has satisfied the above obligations, disputes may arise as to whether a loss is excluded from coverage. Then, the policyholder must successfully navigate additional obstacles in order to obtain a recovery.

Timely Suit. Like other forms of property insurance, marine cargo policies often contain a contractual suit limitation, which requires that any lawsuit against the insurance company be commenced within twelve months of the loss at issue. Most marine cargo policies provide that the insurance company must pay covered losses within 30 days "from the day claims adjustment is complete and the validity of the claim is established."

Even if the insurance company acts with all reasonable dispatch, the claims handling and payment process can take months to complete. Several months, or more, of the 12-month period may have expired before the policyholder has even begun to consider whether or not to file suit. As this period runs out, the policyholder should obtain a written waiver of the deadline from the insurance company, or file a lawsuit.

Place and Time Limits on Coverage. Typically, cargo policies provide warehouse-to-warehouse coverage. The coverage starts when goods leave the premises of the seller, and continues until the goods arrive at the warehouse or other specified receiving point of the consignee (the buyer or buyer's agent). Under the Marine Extension Clause, the policy also covers interim storage and unforeseen delay in transit or final acceptance upon delivery of up to 15 or 30 days, as long as the delay was caused by circumstances beyond the policyholder's control.

Whether a loss occurred within the parameters of a warehouse-to-warehouse or marine extension clause depends upon whether the court considers that the cargo was "in transit" at the time of the loss. Insurance companies will argue there is no coverage if a loss took place at a time when cargo arguably was not "in transit." *Grobans v. S.S. Pegu* (S.D.N.Y., 1971) The policyholder should remember that marine cargo policies, like other insurance policies, are to be broadly construed to promote coverage.

Proof of Fortuity. Marine Cargo insurance typically provides coverage for "fortuitous" losses. Fortuitous losses are described in terms of external causes while non-fortuitous losses are attributed to "inherent vice," such as the loss of a shipment of bananas due to rotting.

The question of who has the burden of proof on the fortuity issue can be important in cases where the cause of the loss is unclear. When coverage is provided under policies other than "all risk" policies, the policyholder must establish that the loss was fortuitous. However, this burden is minimal. The policyholder need not demonstrate the actual cause of loss. Rather, it must only prove that the loss was not caused by inherent vice. Once this burden has been met, the burden shifts to the insurance company to demonstrate that the loss falls within a policy exclusion.

Proximate Cause. An insurance company's attempt to fit a loss within a coverage exclusion often gives rise to an issue of what caused the loss. Coverage is provided under marine cargo policies when the "proximate" cause of the loss is a covered peril. Proximate cause has been defined variously by the courts as the "dominant" or "efficient" cause of the loss, or simply the event which common sense dictates caused the loss. Given this lack of precision, it is not surprising that policyholders and insurance companies often disagree over what constitutes proximate cause in a particular context.

When addressing a proximate cause issue, the policyholder may be aided by the general rule that coverage is provided where a loss is caused by an insured peril acting in concert with an uninsured peril. This rule allows the policyholder a potent argument even when an insured peril is only a possible contributing cause of loss.

Litigation Costs Recoverable from Insurance Company

If the insurance company refuses to pay a claim when a covered cargo loss occurs, the policyholder may pursue claims against the insurance company, the carrier, or both. Policyholders often decide that they must sue the carrier while litigating against the insurance company. The policyholder who pursues this strategy need not fear that the litigation costs incurred in the lawsuit against the carrier will, in effect, nullify its recovery against the insurance company. Costs incurred in such a lawsuit against the carrier, including attorney's fees, are recoverable if the policyholder prevails in its lawsuit against the insurance company. Those litigation costs are recoverable from the insurance company because, under maritime insurance law, they are considered damages which are a direct and foreseeable consequence of the insurance company's breach of contract.

Conclusion

The venerable world of marine insurance is moving into the modern era of "take no prisoners" claims-handling tactics by insurance companies. Policyholders need to prepare for these battles by not committing technical violations of policy obligations, and by learning from the experiences of others who have taken on their insurance companies and prevailed. ■

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