MLA Committee On Marine Insurance and General Average
NEWSLETTER

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In This Issue:

Editorial Note:

It is not often that there is "breaking news" on a 300 year old marine insurance clause, but the Committee is pleased to report on a very recent case interpreting the standard hull policy Perils Clause familiar to most marine insurance professionals. The decision holds that the Perils Clause extends cover for a vessel arrest only when done by governmental act. Commercial arrests are not covered. Joseph G. Grasso, Esq. and Michael B. McCauley, Esq. handled the matter for hull underwriters. A discussion of this case closes this edition of the Newsletter.

Next, we present a timely article by Michelle T. Castle, Esq. titled "Marine Insurance: Free of Capture & Seizure" which picks up on that discussion and provides an expanded review of how the FC&S clause is viewed by the courts. Following that is our summary of recent cases, and some notes on previously reported cases that went up on appeal, including the Supreme Court's denial of the petition for certiorari in *St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc.*, and the Eleventh Circuit's reversal of a district court decision on construction of an all-risk policy.

Marine Insurance
Free of Capture & Seizure

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A recent decision from the United States District Court for the Southern District of New York addresses the age-old issue concerning the meaning of the phrase "Arrests, Restraints and Detainments" in a marine insurance policy. *Swift Spindrift, Ltd. v. Alvada Ins., Inc.,* 2016 U.S. Dist. LEXIS 41895 (S.D.N.Y., March 29, 2016). The case addresses the complexities of coverage found in marine hull and war risk policies. The Hull Clauses contained a Perils Clause, which purported to cover a certain set of risks, but the Hull Clauses also contained a War Exclusions Clause, which excluded many of those same risks from coverage. The War Risks and Strikes Clauses, however, restored coverage to most of the excluded risks. The decision of the Court eventually focused on the grant of coverage provided in the Perils Clause of the marine hull policy. The clause provided:

> Touching the Adventures and perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

Swift owned and operated the cargo vessel SWIFT SPINDRIFT. The vessel transported cargo from Argentina to Tripoli, Libya, and was arrested by the importer of cargo carried on board the vessel at the destination port. The Libyan importer had filed a multi-million dollar lawsuit and arrested the vessel in Tripoli as a means of securing its claim. A Libyan Court issued a writ of arrest (or, writ of attachment) requiring the posting of security in order to release the vessel. Difficulties with the posting of proper security resulted in the vessel being arrested for a period of several months. Swift filed a claim against its hull insurers for a constructive total loss of the vessel and sue & labor expenses.

The Court held that the initial grant of coverage in the Perils Clause of the hull policy only provided insurance for government arrests, not for commercial seizures. The Court explained that the marine hull policy did not "cover 'commercial' arrests, i.e., arrests that are the result of legal proceedings brought by private commercial parties." The Court also decided that the events in Libya were not covered because the arrest of the SWIFT SPINDRIFT was not an exercise of sovereign authority and was merely a standard commercial arrest.

The *Swift* case addressed "named perils" coverage often found in marine hull policies. The type of coverage frequently found in marine cargo policies, however, is not limited to "named perils" coverage, and is generally written on an "all risks" basis. Consequently, the focus shifts to the exclusions from coverage found in the clause referred to as "The Free of Capture and Seizure Clause."

The insuring terms and conditions in a standard marine cargo insurance policy provide "all risks" coverage, but do not provide coverage with respect to any loss, damage or expense arising out of capture, seizure, arrest, restraint or detainment, according to the following clause:

<u>*FC&S Warranty (April 3, 1980)*</u>
NOTWITHSTANDING ANYTHING HEREIN CONTAINED TO THE CONTRARY THIS INSURANCE IS WARRANTED FREE FROM:

> A. capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise;

A standard cargo policy also expressly provides that the "FC&S Warranty":

> "shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provision refers to the risks excluded by these Warranty(ies) and expressly assumes the said risks."

The Free of Capture and Seizure Clause was developed during the Napoleonic Wars, as a "precaution against Baltic ports becoming hostile to the insured vessel after she sailed." KENNETH J. GOODACRE, MARINE INSURANCE CLAIMS 788 (2d Ed. 1981*).* An early distinction between "seizure" and "capture" is found in *Cory v. Burr,* [1882-'83] 8 App. Cas. 393 (H.L.). "'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture' and goes beyond it, and may reasonably be interpreted to embrace every act of forcible possession either by a lawful authority or by overpowering force." *Cory, supra* at 405.

The FC&S Warranty is not a true warranty and must be construed as an exclusion from coverage. Pursuant to the FC&S clause, the assured "warrants" that the goods shall be free from capture or seizure. This "warranty" is actually an exclusion from coverage for losses arising out of such an event, and the phrasing of the clause as a "warranty" does not require the insured to ensure that the cargo will not be captured. *Resin Coatings Corp. v. Fidelity and Casualty Co. of New York*, 489 F. Supp. 73, 74 (S.D.Fla. 1980); *Intermondale Trading Co. v. North River Ins. Co. of New York*, 100 F. Supp 128, 132, 1951 AMC 936, 939, (S.D.N.Y. 1951).

The FC&S Clause is prefaced by the phrase: "Notwithstanding any average terms contained herein . . . ." The plain meaning of the phrase indicates that this exclusion overrides any and all other coverage provisions in the policy. *See Caribbean Lumber Co. v. Phoenix Assurance Co.,* 227 Ga. App. 236; 488 S.E.2d 718 (Ga. App. 1997); *Kimta v. Royal Ins.,* 2001 AMC 708 (Wash. Ct. App. 2000). The FC&S Clause remains in full force and effect during terms of coverage provided by the Warehouse to Warehouse and Marine Extension Clauses, and supersedes those clauses. For example, a detention of cargo is not covered as an interruption of transit beyond the control of the insured because it is excluded from coverage under the FC&S Clause which, by its own terms, takes precedence over the Marine Extension Clauses. *Northern Feather International, Inc. v. Those Certain London Underwriters Subscribing to Policy No. JWP108 through Wigham Poland, Ltd.*, 714 F. Supp. 1352, 1989 AMC 1805 (D.N.J. 1989).

Although the acts of pirates were probably the types of acts originally contemplated by the drafters of the Clause, the FC&S Clause has been construed broadly, including within its purview all types of seizures and detentions. Virtually any governmental seizure will be found an excluded risk under the "warranty." *Pan American World Air, Inc. v. Aetna Cas. & Sur. Co.,* 505 F.2d 989, 1009 (2d Cir. 1974) *(*governments, de facto governments, military and usurped powers).

In *International Multifoods Corporation v. Commercial Union Insurance Company,* 2002 AMC 2939 (2nd Cir. 2002), the insured cargo owner suffered a fortuitous loss when its cargo was seized by the Russian government, for a matter not involving the owner of the cargo. The owner could not regain control of the goods, despite efforts to do so. The court ruled that the assured sustained a loss due to the fact that the owner had lost control of the goods; it did not matter that the ultimate disposition of the cargo was unknown. The FC&S clause was held to exclude coverage by the mere fact of the seizure, without proof of the ultimate disposition of the cargo.

The Court explained that the marine cargo policy contained a standard FC&S Clause which provided that: "Notwithstanding anything herein contained to the contrary, this insurance is warranted free from … seizure … and the consequences thereof … **whether in time of peace or war** and whether lawful or otherwise." [emphasis added] The Court held that the FC&S clause trumped any other provisions of the cargo policy and that the Clause unambiguously applied to peace time seizures.

Numerous detentions under peaceful circumstances have been held excluded from coverage:

> *Blaine Richards & Company, Inc. v. Marine Ind. Ins. Co. of Am.*, 635 F.2d 1051, 1981 AMC 1 (2d Cir. 1980) (detention of cargo by the Food & Drug Administration); *Northern Feather Int'l v. Underwriters, supra* (detention by Customs for improper visa entry classification)*; Resin Coatings Corp. v. Fidelity & Casualty Co., supra* (Customs detention for suspected improper declaration of value); *Intermondale Trading Co. v. North River Insurance Co, supra* (detention of a vessel for suspected illegal transportation to Palestine resulting in the sale of the vessel and cargo).

"Detainment" includes any detainment by a government official, such as United States Customs, including any "hold" on the goods exercised by Customs while awaiting the submission of proper paperwork by cargo interests needed for Customs clearance. *Blaine Richards, supra.; see Northern Feather Int'l, supra; Resin Coatings Corp. v. Fidelity and Casualty Co. of N.Y.,* 489 F. Supp. 73 (S.D. Fla. 1980); *Pantcho Nakasheff v. Continental Ins. Co.,* 1954 AMC 986 (S.D.N.Y. 1953). In *Northern Feathers*, the goods were being held in a bonded warehouse awaiting clearance by customs, when a fire destroyed the goods. The court held that the cargo insurance policy did not provide coverage due to the exclusion from coverage contained in the FC&S warranty.

In *Blaine Richards*, the court noted, however, that the act of detention by the Customs officials must have caused the resultant cargo damage. In *Blaine*, the goods had previously been damaged by fumigation of beans for the sea voyage; and because of said fumigation, the goods were then detained by U.S. Customs. The court held that any damages caused by the Customs detention, such as loss of market value or extra expenses to transport the goods, were not covered by the policy due to the FC&S exclusion; but that damages to the beans caused by fumigation for the sea voyage were covered.

This commonly litigated issue is whether the seizure or detention was the force which actually or legally caused the loss. Proximate cause in marine cases is defined as "that cause which is most nearly and essentially connected with the loss as its effectual cause." *Standard Oil Co. v. United States,* 340 U.S. 54, 588, 1951 AMC 1, 4 (1950); *see Pan American World Air., Inc., v. Aetna Cas. & Sur. Co*., 505 F.2d 989, 1008 (2d Cir. 1974) (subsequent damage after loss of control due to a "taking" of property). The cause nearest in time to the event is not necessarily the proximate cause. *Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co.*, 302 U.S. 556, 562-63, 1938 AMC 1, 5-7 (1938).

When ascertaining the legal cause of loss for insurance purposes, a court must look to the "real efficient cause" of the occurrence rather than the single cause nearest in time to the loss. *Blaine Richards, supra* at 1054.

Determination of proximate cause is a matter of applying common sense and reasonable judgment as to the source of the losses alleged. *Id.* Where a loss results from a combination of causes, one of which is excluded from coverage, courts generally isolate a singe peril as the dominant or efficient one. 1 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 413 (1987).

In *Kimta v. Royal Insurance,* 2001 AMC 708 (Wash. Ct. of Ap. 2000), the M/V BIKIN was transporting a cargo of fish and crab from Russia to Korea. Russian authorities arrested the vessel for failure of the captain to comply with orders of Russian authorities to return to port, as well as the fact that the ship was not carrying a required permit. Russian authorities confiscated the cargo and sold it at auction. It was undisputed that the seizure would not have occurred without the negligence of the master.

The cargo policy contained "all risk" coverage and an "INCHMAREE" clause providing coverage for loss caused by negligence of the master. The policy also contained a "paramount" Free of Capture and Seizure Warranty. The Court analyzed existing precedent as follows:

> "Federal courts have consistently interpreted this warranty as providing that a loss is due to seizure even if the seizure resulted from an insured peril such as the negligence of the master, so long as the insured peril did not endanger the cargo independently of the seizure. *See Blaine Richards & Co., Inc. v. Marine Indem. Ins. Co. of America,* 1981 AMC 1, 7, 635 F.2d 1051, 1055 (2d Cir. 1980). ("In cases involving detention, courts have generally not followed losses back to prior events…the common sense understanding [is] that the temporary physical loss of the beans was caused by detention."); *Commodities Reserve*, 879 F.2d at 644 ("The dominant cause of the potential loss from infestation was the detention in Crete. Commodities Reserve forwarded the cargo only because it was detained. No danger from infestation existed apart from the detention").

The Court in *Kimta* held that the FC&S Warranty excluded coverage. The judge noted that there was no allegation that the negligence of the vessel's master or the charter company caused any independent and distinct damage to the cargo, apart from the fact that their conduct resulted in confiscation. The Judge stated that there was no evidence that the cargo would have been lost or damaged in any way if the seizure had not occurred. The misconduct of the master may have caused the seizure, but was too remote to be considered a proximate cause of the loss of the cargo. Under federal maritime law the efficient proximate cause of the loss is the seizure. *Id.* at 715.

Of course, federal maritime law applies if the insurance policy is a marine contract and there is established federal maritime precedent with respect to the disputed issue. The principle purpose of the insurance is determinative as to whether the insurance contract in issue constitutes a maritime contract. *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.,* 413 F.3d 307 (2d Cir. 2005). If the insurance contract is a maritime contract, the court will then examine whether there is established federal maritime precedent with respect to the particular legal issue. If no established federal precedent exists, the construction of an insurance policy is a matter of state law. *Commercial Union Ins. Co. v. Flagship Marine Services, Inc.*, 190 F.3d 26 (2d Cir. 1999). Fortunately, courts have recognized that there is established federal maritime law with respect to the FC&S Clause and the issue of proximate causation.

Unfortunately, the *Swift* court recognized that the syntactical structure of the "Perils Clause" in a standard marine hull policy is difficult to decipher and may be construed as ambiguous. The Court found, however, that the clause must be considered in light of marine usage and legal precedent. Marine policy wording must be construed from "the perspective of 'a reasonably intelligent person . . . who is cognizant of the customs, practices, usages and terminology as generally understood in' the marine insurance industry." The *Swift* judge commented as follows:

> For about as long as the language of the Perils Clause has been in use, courts and commentators have recognized that its phrasing makes deciphering the risks covered a difficult proposition. See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 19-10 (5th ed. 2011) (quoting a 1791 case that "described the [Lloyd's] S.G. Policy as an 'absurd and incoherent instrument"); see also William D. Winter, Marine [*32] Insurance: Its Principles and Practice 140 (1919) ("Read without reference to the wealth of legal lore referring to this particular part of the policy [i.e., the 'Perils' clause], the document is vague, misleading and perhaps unintelligible."). Fortunately, however, "practically every word in the paragraph has been weighed in the judicial balance and its own meaning and its meaning in relation to the context has been determined." Winter, supra, at 140.

As illustrated above, the modern marine practitioner must keep abreast of recent developments in the law, but must not forget the historical context.

RECENT CASES OF INTEREST

OTHER INSURANCE

In re Deepwater Horizon
***Cameron International Corp. v. Liberty Insurance Underwriters*, 807 F.3d 689 (5th Cir. 2015)**

The latest decision generated by the *Deepwater Horizon* disaster arose out of the coverage dispute between the manufacturer of the blowout preventer, Cameron International Corp. ("Cameron") and one of its insurers, Liberty Insurance Underwriters ("Liberty"). As with the dispute between BP and Transocean, this branch of the litigation also involved a complicated arrangement of indemnification agreements and insurance "towers." In this case, Cameron had $500 million insurance tower in place in which Liberty underwrote a $50 million layer and an indemnification agreement with Transocean.

After the spill and the ensuing deluge of lawsuits, Cameron entered into a settlement with BP, the well owner. Under the terms of that agreement, BP would indemnify Cameron in exchange for $250M, but only if Cameron's insurers agreed to waive their subrogation rights and if Cameron agreed to waive its indemnification rights against Transocean so that BP could avoid being "back doored" into litigation on an indemnity claim. Alone among Cameron's insurers, Liberty objected to the settlement and declined to pay its layer. Liberty contended that its liability under the policy had not been triggered by virtue of the Other Insurance Clause which read: "[i]f other insurance applies to a "loss" that is also covered by this policy, this policy will apply excess of such other insurance." Cameron executed the settlement, contributing $50M of its own to fill the gap left by Liberty's denial of coverage, and litigation followed. On cross motions for summary judgment, the district court granted summary judgment in favor of Cameron on its breach of contract claim and its claim for damages under the Texas Insurance Code. The court denied Cameron's request for attorney's fees.

Cameron and Liberty cross appealed to the Fifth Circuit Court of Appeals. Four issues were before the Appeals Court. First, the chief issue was whether the "other insurance" clause applied and rendered Cameron's claim premature since Cameron was "not yet entitled to coverage because Cameron had not exhausted that indemnification [under the Transocean contract] or obtained a judicial determination that it is not entitled to indemnification." In essence, Liberty argued that the Court should read the word "potentially" into the other insurance clause to support its position that it did not have to indemnify Cameron until there was a final adjudication that Transocean was not legally obligated to indemnify Cameron. Cameron countered that the clause was properly interpreted by the district court to mean that Liberty's policy is excess of other insurance (Transocean) but only if the other insurance actually and presently applies. Thus, because Transocean refused to indemnify Cameron, Liberty's policy was triggered. The Fifth Circuit agreed with Cameron and affirmed the district court's finding. The Fifth Circuit found that Liberty's position required the court to rewrite the policy contract to include language the parties could have, but did not, include. The Court also found that adopting Liberty's interpretation would transform the other insurance clause from a protection against double insurance into a clause that made Liberty's policy a "policy of last resort."

Second, the Court also found that Cameron did not vitiate its coverage rights by waiving subrogation when it settled with BP. The Court determined that because Liberty was already in breach of the policy before Cameron settled with BP by "constructively denying" Cameron's claim and failing to comply with the clause requiring it to "promptly pay" claims, Liberty could not assert this ground as a defense. "[E]ven if Cameron violated [the subrogation clause] in its settlement with BP – a question that we do not reach – Liberty breached first."

Third, the Fifth Circuit certified to the Supreme Court of Texas the question of whether a cause of action under the Texas Insurance Code existed where the insurer wrongfully denied coverage but caused no damages other than those denied benefits. Finally, the Court also reversed the District Court's ruling that Cameron waived its right to attorney's fees and it remanded the action for a determination of the proper amount.

UTMOST GOOD FAITH

***St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc., slip op.* 14-2234, Aug. 20, 2015, 798 F.3d 715, 2015 U.S. App. LEXIS 14671, 2015 AMC 2416 (8th Cir. 2015).**

On March 28, 2016, the U. S. Supreme Court denied St. Paul's petition for certiorari seeking to overturn the Eighth Circuit Court of Appeals decision that the doctrine of *uberrimae fidei strictissimi* not only obligates an insurer to prove that the insured misrepresented material information when obtaining the policy, but it also requires the insurer to prove that the individual underwriter actually relied upon the misrepresented information when issuing the policy. A summary of the Eighth Circuit's decision was reported in the Spring 2015 edition of this Newsletter.

***Gamez v. Ace American Insurance Company*, 2016 U.S.App. LEXIS 206 (11^{th} Cir. Fla. Jan. 8, 2016), 2016 WL 97490.**

This case was originally reported in the Fall, 2014 edition of this Newsletter. In January 2016, the Eleventh Circuit heard Plaintiff's appeal of the lower court's decision after trial denying Plaintiff Gamez's motion for judgment as a matter of law and the alternative motion for a new trial. The case arose out of the mysterious disappearance of a new 32' Glasstream fishing yacht that Gamez said he loaned to a recent acquaintance for a fishing trip. Neither the yacht nor acquaintance were heard from again. Insurer Ace American Insurance Company ("Ace") denied coverage for the loss. The case was tried to a jury which determined that while Gamez had proved his claim, he was barred from recovery because Ace proved that Gamez had misrepresented material facts in the application for the policy related to the vessel's location, its ownership, the identity of the primary operator and the ownership of prior vessels. Gamez moved to set the verdict aside and for judgment as a matter of law under F.R.C.P. 50(b) or alternatively for a new trial under F.R.C.P. 59(a). The trial court denied those motions and Gamez appealed.

On appeal, the Eleventh Circuit rejected the Plaintiff's strained construction of Florida statutory law governing (1) misrepresentations in an application for insurance and (2) breach of warranty. Gamez urged the court to adopt a construction of the statute that conflated the terms of two separate provisions, an interpretation that the appeals court noted was "simply contrary to the structure and clear wording of the statute." The judgment of the district court was affirmed.

MYSTERIOUS DISAPPEARANCE

***St. Paul Fire & Marine Insurance Co. v. Britt*, 2016 Ala. LEXIS 10 (Ala. Jan. 29, 2016).**

This coverage action arose out of the mysterious disappearance of a sailboat and its owner, Michael Britt, in September of 2011 on a voyage from West Palm Beach to Jacksonville. Despite search efforts by the USCG and his family, neither Britt nor the sailboat were ever found. The subsequent investigation revealed that the USCG had boarded the vessel for a "cold hit" inspection when Britt was approximately one (1) mile off the coast of Cape Canaveral and found the vessel seaworthy. That same day, Britt telephoned his family to advise his ETA in Jacksonville. The USCG investigation also revealed that Britt's last phone call was made to a debt collection agency holding a lien on the vessel. The location of the call indicated that Britt was traveling south, away from Jacksonville at the time.

Britt's father, as conservator of his estate, made claim on the all-risk policy issued by the St. Paul for payment of the $85,000 policy limit, which St. Paul denied on the basis of the policy's "mysterious disappearance" clause. Britt filed suit seeking coverage and damages for bad faith. The trial court entered summary judgment in favor of Britt on the breach of contract claim. This appeal ensued.

On appeal, the St. Paul argued (1) that Britt failed to carry his burden of proof that the claim fell within the coverage provided by the policy and (2) that the loss fell within the mysterious disappearance exclusion. The Alabama Supreme Court dispatched the first argument by holding that the all-risk policy covered the loss unless it was excluded or resulted from the insured's fraudulent conduct and stating that it assumed, without deciding, that Britt carried his burden of proof that the loss was covered unless excluded. The Court then held that the loss was excluded by the mysterious disappearance clause.

Noting that the Alabama courts had not previously defined "mysterious disappearance" in the context of an insurance policy, the Court adopted the definition of the Supreme Court of North Carolina, which first defined "mysterious disappearance" as "any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity or speculation, or circumstances which are difficult to understand or explain." *Davis v. St. Paul Mercury & Indem. Co.*, 227 N.C. 80, 83, 40 S.E.2d 609, 611 (1946). The Alabama Court then explained that a disappearance was "mysterious" if a person of ordinary intelligence would find the loss to be unknown, puzzling, baffling or inexplicable. On the other hand, a loss was not mysterious when evidence existed to support a logical inference as to what happened to the insured property, even if the evidence was inconclusive. Applying this test to Britt's missing sailboat, the appeals court found that the St. Paul had carried its burden of proof that the loss was excluded.

The Court rejected Britt's argument that the clause was ambiguous and conflicted with the "30 Day Provision" which provided that "if the boat is totally destroyed or lost for more than thirty (30) days, we will pay the amount of Boat and Boating Equipment Coverage shown on the Declarations Page." The Court found support for its position in an unfortunately worded sentence in Britt's brief in which Britt argued that "[i]f a boat has been lost for more than [30] days, it must have disappeared. But not all disappearances are mysterious disappearances." The Court found that this sentence summed up the reason why the two clauses were not contradictory. The decision of the trial court was reversed.

DUTY TO DEFEND/BREACH OF MARITIME WARRANTY

***Markel American Insurance Co. v. Vantage Yacht Club, LLC*, _ F. Supp. 3d _ (N.D.Ill. 2016), 2016 U.S. Dist. LEXIS 8490, 2016 WL 305413.**

Markel American Insurance Co. ("Markel") issued a policy to Vantage Yacht Club ("Vantage"), a boat rental company in the business of taking passengers for hire on pleasure cruises. In this case, a Vantage employee, who was not a licensed captain, took a group of patrons for a tour on a Markel insured vessel. No fee was charged and no rental agreement was signed. After the vessel returned to the dock, one of the passengers fell into the water and drowned, leading to a wrongful death action filed against Vantage in state court. Vantage sought a defense from Markel, which filed an action in federal court seeking an order that it was under no duty to defend Vantage in the underlying state court case.

The district court held that Markel was under no duty to defend Vantage because the policy only covered liabilities arising out of the "ownership, maintenance, or use of…" the vessel and the complaint in the underlying suit alleged that Vantage, and its employee, caused the death because they failed to take certain precautions with respect to the "boat dock" and/or the dock "premises." Vantage argued that the term "premises" as pleaded in the complaint included the insured vessel. The court disagreed and noted that the complaint did not assert that the vessel itself was a cause of the death. Absent such allegations, the incident was not within the scope of coverage of the policy. Vantage also contended that the district court could not decide whether the term "premises" included the vessel as doing so placed the district court in the position of deciding an issue of ultimate fact that could bind the parties in the underlying case. This position was deemed to be "unreasonable" in light of the fact that the complaint repeatedly used the term to refer only to the dock and not to the vessel. Thus, coverage was absent.

Markel also asserted that Vantage vitiated any coverage that might have existed when it breached certain policy warranties requiring that the insured vessel must be used pursuant to a signed rental agreement, that the vessel be seaworthy and assigned a suitable captain and crew, and that the captain be properly licensed. As noted, there was no signed rental agreement nor was the captain of the vessel licensed which would seem to support Markel's position that coverage was absent for failure to strictly comply with a marine warranty(ies). Vantage argued that the Court could not rely on these facts as they were not contained within the "four corners" of the complaint. The district court clarified that, in certain circumstances, a court may look beyond the "four corners" of the underlying complaint in order to determine whether a duty to defend exists. Citing precedent from the Supreme Court of Illinois, the appeals court held that the only time such evidence is not permitted is when it "tends to determine an issue crucial to the determination of the underlying lawsuit."

Markel also argued that Vantage's breach of its warranties voided coverage and, therefore, relieved it of a duty to defend because maritime law requires strict compliance with a warranty. The district court took note that the prevailing view under federal and state maritime insurance law was that a breach of a warranty excuses the marine insurer from payment without regard to whether a causal connection to the loss exists, but then held that: "[t]he problem with Markel's argument is that this admiralty doctrine of strict compliance – also known by the Latin phrase *uberrimae fidei*, or 'utmost good faith' – also requires that the warranty at issue concern 'facts *material* to an insurance risk.'" Markel has filed an appeal.

DUTY TO DEFEND

***Continental Insurance Co. v. George J. Beemsterboer, Inc.*, _ F. Supp. 3d _ (N.D. In. 2015), 2015 U.S. Dist. LEXIS 163949, 2015 WL 8346997.**

This coverage action was filed by Continental Insurance Co. ("Continental") against its insured George J. Beemsterboer, Inc. ("GJB") seeking a declaration that it was under no duty to defend or indemnify GJB in connection with two underlying suits, (1) a consolidated class action alleging that GJB failed to prevent petroleum coke and coal dust from contaminating nearby communities, and (2) an action filed in state court by the State of Illinois and the City of Chicago alleging GJB's storage operations and handling of petroleum coke caused damage to surrounding properties. Continental issued two (2) hull policies of insurance to GJB with limits of $1M each. GJB counterclaimed for breach of contract and breach of the duty of good faith.

The court began the complicated analysis by confirming that, under Indiana law, an insurer's duty to defend is based on the allegations in the complaint and "those facts known or ascertainable by the insurer after reasonable investigation" and that it would be appropriate to consider extrinsic evidence in assessing the duty to defend. The court then examined both the policy of insurance, the class action complaint and the state court complaint to determine if the duty to defend was triggered. GJB argued that Continental was obligated to defend as the policy provided coverage for losses to property of others resulting from loading or unloading operations performed by or for the insured and also for losses to property of others "if arising out of only those operations covered above." In response, Continental argued that the policies did not cover the property damage alleged in the underlying two complaints and that the policies were marine hull policies that only covered GJB's liability for damage to bailed property, i.e. the vessels and their cargo and property damage to others' vessels approaching and departing from GJB's dock if arising out of docking operations. At issue were the policy clauses covering "landing dock bailee liability" and damage to "property of others." On review, the court concluded that the underlying complaints did allege damage to the property of others arising, at least in part, from GJB's loading and unloading operations. However, the court then considered whether Continental could rely upon two exclusions to coverage as grounds for its position that coverage was barred and, therefore, it did not owe GJB a defense.

The first exclusion was a pollution exclusion which barred coverage for emission, spill, leakage of "petroleum products" into the seas, on land or into the air. The court found that the phrase "petroleum products" was ambiguous as to whether it included the petroleum coke at issue, therefore, it could not be a basis on which to deny coverage. The second exclusion was a respirable dust exclusion which provided that the policy did not cover bodily injury or property damage arising in whole or part from actual, alleged or threatened presence of respirable dust. As a review of the underlying complaints revealed that the claims for which GJB claimed coverage were based on petroleum coke dust, the court held that this exclusion applied and barred coverage. Because coverage was absent, the court then ruled that Continental had no duty to defend GJB in either suit. The decision has been appealed.

***Continental Insurance Co. v. L&L Marine Transportation, Inc., slip op.* 15-4423, 14-2967 (E.D.La Jan. 25, 2016), 2016 WL 301681.**

L&L Marine Transportation, Inc. ("L&L") was the owner of the M/V ANGELA RAE, the lead tug in a four-vessel flotilla which included the tug M/V MISS DOROTHY. When the flotilla approached the Sunshine Bridge in St. James Parish, the M/V MISS DOROTHY allided with the bridge and sank. The insurers of the M/V MISS DOROTHY filed suit against L&L. In response, L&L sought coverage and a defense from Atlantic Specialty ("Atlantic") under a hull policy, which was denied on two grounds: (1) that the hull policy was an "indemnity" policy which created no obligation to contemporaneously fund L&L for a defense; and (2) even if the policy did create a duty to defend, coverage was absent as the M/V MISS DOROTHY was not "in the tow." Both L&L and Atlantic relied on the "Collision and Tower's Liability" clause in support of their contradictory positions.

In resolving the dispute, the Court reiterated that P&I policies do not ordinarily create a duty to defend and are indemnity policies, not liability policies. The court noted that liability policies typically have two components, defense and indemnity, and that while the indemnity obligation is capped by the policy limits, the defense obligation is not. In contrast, a P&I policy creates only a duty to pay covered claims, which may include defense costs, up to the policy limits. Therefore, in this case, L&L's arguments in favor of a duty to defend were rejected. As there was no duty to defend under the policy, the court then declined to consider Atlantic's second defense to coverage.

DUTY TO INDEMNIFY

***Naquin v. Elevating Boats, LLC, slip op.* No. 15-30471 (5th Cir. March 22, 2016).**

This coverage decision arose out of a personal injury suit by Larry Naquin against Elevating Boats, LLC ("EBL"). At the time of his injuries, Naquin was using a land-based crane that toppled over. Naquin sued EBL under the Jones Act and a jury concluded that Naquin was a Jones Act seaman and that EBL's negligence caused his injuries. Those determinations were affirmed on appeal. EBL then filed an action against its insurers, which denied coverage for the Naquin suit. The insurers moved for summary judgment contending that the policies did not extend coverage to Naquin's land-based incident. The district court agreed and granted the motion. On appeal the Fifth Circuit affirmed.

The appeals court held that the "Indemnity" provision of the policy covered EBL for sums that it paid "as owner of the Vessel…" and did not provide coverage for the land-based incident caused by EBL's negligence. Relying upon Fifth Circuit precedent, the court explained that there must be at least some causal operational relation between the vessel and the resulting injury. In this case, because it was EBL's actions as a crane operator that caused the harm, and not its liability as a ship owner, there was no coverage for EBL's liability to Naquin.

ARBITRATION CLAUSES IN INSURANCE POLICIES ARE ENFORCEABLE

***Galilea, LLC v. AGCS Marine Insurance Co. et al., slip op.* CV 15-84-BLG-SPW (D. Montana February 24, 2016), 2016 WL 754221.**

Plaintiff Galilea, LLC ("Galilea") is a limited liability company formed by Chris and Taunia Kittler, Montana citizens, for the sole purpose of owning the yacht GALILEA. In May of 2015 while sailing in the Caribbean, the Kittlers submitted an application for insurance to Pantaenius American Yacht Insurance ("Pantaenius") for new coverage. The coverage was bound, premium paid and a policy issued which included a jurisdiction and choice of law clause calling for the application of federal maritime law, and in the absence of maritime law, New York law. The clause also contained an agreement to arbitrate "any and all disputes arising under this policy….binding arbitration to take place within New York County, in the State of New York…" A month after the coverage was bound, the yacht grounded off the coast of Panama and the insurers denied coverage as the accident occurred outside of the policy's geographical limits. Galilea filed suit in the Kittlers' home state of Montana. The insurers sought dismissal of the action and enforcement of the arbitration and forum selection clause.

As a preliminary matter, the court had to determine which law applied – federal maritime, New York, or Montana. The court found that the insurance policy was a maritime contract, that federal maritime law applied, and that the choice of law provision was enforceable. With regard to the arbitration clause, Galilea argued that it did not agree to arbitrate, that the clause was unconscionable, that it unreasonably favored the insurers, that it deprived Galilea of the protections of Montana law and that the costs of arbitration were "exorbitant." The court rejected each of these arguments, finding instead that the Federal Arbitration Act ("FAA") and federal law favoring arbitration left the court with no discretion to invalidate the clause on the grounds posited by Galilea. The court then distinguished that "the enforceability of the arbitration clause is a separate question from the scope of the arbitration clause" and requested further briefing from the parties on whether Galilea's claims were outside the scope of the arbitration clause.

***Hill v. Assuranceforeningen Skuld et al.*, *slip op.* CV 15-00025 (D.Guam April 4, 2016).**

This coverage action arose out of the death of a seaman when a fishing vessel owned by Majestic Blue Fisheries, LLC sank. The decedent's wife, Amy Hill ("Hill") filed suit and obtained a $3.2M judgment against the vessel owner, Majestic Blue. When the judgment remained unpaid, Hill filed suit against Majestic Blue's insurer, Skuld, seeking satisfaction of the judgment. Skuld countered that Plaintiff was obligated to arbitrate her claim in Oslo, Norway pursuant to the terms of the policy's arbitration clause and the New York Convention ("Convention").

To resolve the issue, the court examined the four (4) factors generally considered in deciding whether to enforce an arbitration agreement under the Convention: (1) whether there was an agreement in writing within the meaning of the Convention; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is commercial in nature; and (4) whether a party to that agreement is not an American citizen, or that the commercial relationship has some reasonable relationship with one or more foreign states. In this case, the court found that all four factors weighed in favor of arbitration.

While the Court did note that Hill was not a signatory to the insurance policy, it found that the arbitration clause was binding on her as her Complaint asserted that she was a beneficiary of the insurance. Stating that "equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes" the court held that the Plaintiff was obligated to arbitrate in Norway.

<u>ALL RISK COVERAGE</u>

***Great Lakes Reinsurance (UK) PLC v. Kan-Do Research & Products, Inc.*, _Fed. Appx._ (11th Cir. 2016) 2016 WL 285464.**

This case was originally reported in the Spring, 2015 Newsletter. The KAN-DO was a 51' motor yacht covered by an all risk marine insurance policy issued by Plaintiff Great Lakes. The policy covered accidental damage to the "hull machinery and equipment" of the vessel under Coverage "A." When the KAN-DO flooded and sank at the dock due the failure of the bilge pump system caused by a blown fuse, Great Lakes filed suit against the vessel owner contending that the policy did not cover the loss. Great Lakes claimed that the loss, caused by the failure of the bilge pump system, was not covered because damage to "engines, mechanical and electrical parts" was excluded under clause "r" unless the damage was caused by "an accidental external event such as a collision, impact with a fixed object, lightning strike or fire." The insured contended that this exclusion was ambiguous and the loss was covered. The district court agreed, finding that exclusion "r" was inconsistent with other language in the policy providing all risk coverage, specifically Coverage "A." The Court determined that without an agreed definition of the key terms, many of the same parts of the KAN-DO fell within both Coverage "A" and exclusion "r" making the policy ambiguous. As a result, the court construed the ambiguity against Great Lakes and held that the loss was covered.

On appeal, the Circuit Court reversed finding that there was no ambiguity in exclusion "r" just because the same terms appeared in both Coverage A and exclusion "r." The court noted that "simply because one provision gives a general grant of coverage and another provision limits this coverage does not mean there is an ambiguity or inconsistency between the two. This is the very nature of an insurance contract; exclusions in coverage are expressly intended to modify coverage clauses and to limit their scope." The Circuit Court then determined the policy provided coverage for "accidental physical damage" to engines and mechanical components and electrical parts *only if* the damage was caused by an "accidental external event," making the coverage for engines and mechanical components narrower than the general all-risk coverage because an external cause of loss was required. Appellee Kan-Do argued that the clause "accidental external event" was ambiguous because it was undefined by the policy. In response, the Circuit Court noted that while it had the ability to resolve a question of contract ambiguity in the first instance, it would remand the case to the district court for further proceedings.

SUE AND LABOR

***Collins v. A.B.C. Marine Towing, L.L.C., slip op.* 14-1900 (E.D. La Oct. 2, 2015) 2015 WL 5797793.**

This case was originally reported in the Fall, 2015 Newsletter. As noted, the suit arose out of a fatal allision of a crane barge with the Florida Avenue Bridge spanning the Inner Harbor Navigational Canal in Louisiana. The allision occurred when the tug M/V CORY MICHAEL, towing a crane barge and crane (collectively the "crane barge"), and the mast of the crane barge allided with the bridge causing the crane boom to fall on the pilot house, killing the pilot and injuring several other crew members. At the time of the incident, the owner of the tug, ABC Marine, had a Master Service Agreement ("MSA") with the owner of the crane barge, Boh Bro.'s ("Boh"). The MSC obligated Boh to maintain several insurance policies, including a hull and machinery ("H&M") policy, and to name Boh as an additional insured. ABC purchased H&M coverage from Underwriters at Lloyd's, London ("hull underwriters"). Boh claimed sue and labor expenses from ABC's hull underwriters for damage to its crane barge, which was not a scheduled vessel on the H&M policy. The parties entered into a settlement agreement, under which hull underwriters paid Boh $680,000, while specifically reserving Boh's claim for sue and labor. Boh claimed that this payment was made pursuant to the collision and tower's liability, pilotage and towage, and contractual liability provisions of the hull policy. Hull underwriters contended that they participated in the settlement as the primary Collision and Tower's liability insurer of ABC and not in their alleged status as hull underwriters of Boh, and that the settlement payment to Boh was for ABC's potential liability to Boh in tort and not by virtue of any first party coverage owed to Boh. Cross motions were filed to resolve the issue and the court held that Boh was not covered for the claimed for sue and labor expenses under ABC's hull policy.

The court noted that sue and labor clauses date back to the seventeenth century and are founded on the premise that an insured has a legal duty to prevent a loss and must use due diligence to save and preserve damaged property. The purpose of reimbursing the insured for the cost incurred is twofold: it functions as a device to encourage prevention of a loss and/or mitigation of damages if a loss occurs. That said, the expenses must have been incurred for the purpose of avoiding or minimizing a loss for which the insurer would have been liable. If an insured acts to prevent a loss that is not covered by the policy, there is no duty or benefit to the insurer. The obligation only exists when the action taken is to prevent a loss for which the insurer would be liable. Therefore, if there is no coverage under the hull policy, the insurer is under no contractual obligation to repay the sue and labor expenses.

Beginning with that premise, the court then determined that Boh was not covered for its sue and labor expenses because the crane barge was not a scheduled vessel on the hull policy. Boh argued that the hull underwriters' participation in the settlement, the text of the sue and labor clause itself and the inclusion of collision and tower's liability created coverage for the crane barge even though it was not listed as a scheduled vessel. The court rejected these arguments noting that the policy, when read as a whole, was not ambiguous, that the language of the Collision and Tower's liability provision supported hull underwriters' position that the settlement was made in connection with tort liabilities, not third party coverage and that because the hull policy did not provide first party coverage to Boh, it could not rely on that policy to recover sue and labor expenses for an unscheduled (uninsured) vessel. "To read the Policy as providing first-party hull and machinery coverage for not just scheduled vessels, but for any vessel or barge that it may from time to time be engaged to tow would be unreasonable as it would ignore the plain reading of the entire rest of the Policy." The court granted hull underwriters' motion for summary judgment and denied Boh's cross motion.

LOSS OF EARNINGS ENDORSEMENT

***Lakeshore Sail Charters, LLC v. Acadia Insurance Company,* _ F. Supp. 3d _ (N.D. Ill. 2016), 2016 U.S. Dist. LEXIS 30257, 2016 WL 861218.**

Lakeshore Sail Charters, LLC ("Lakeshore") was the owner of a 79' schooner "tall ship" which was insured by Acadia Insurance Company ("Acadia"). Lakeshore sailed the vessel to various tall ship festivals where it sold tickets for excursions. In 2013, while en route to a festival in the Great Lakes, the vessel encountered bad weather and sustained significant damage to its bowsprit. At the time, the vessel was operating under a certificate of inspection ("COI") issued in New York. The vessel could not continue the voyage until repairs were completed and, as a result, the vessel missed most of the tall ship festivals it was scheduled to attend, causing a substantial financial loss.

The policy issued by Acadia included a Loss of Earnings Endorsement and Lakeshore submitted a claim for lost profits that exceeded the limit of the coverage. Acadia denied the claim contending that the Loss of Earnings Endorsement was not in effect at the time of the accident because the policy had a requirement that the vessel obtain a new COI from the USCG on its arrival in the Great Lakes. Suit was filed and both parties moved for summary judgment.

The district court determined that the plain, unambiguous language of the clause required payment of Lakeshore's lost profits claim. The Court rejected Acadia's construction of the clause because it would have required the Court to re-write the clause to include language that was not present. The Court noted, "[h]ad Acadia wanted to include such a limitation on the Loss of Earnings Endorsement, it easily could have done so, but the absence of such a provision speaks volumes." The Court also rejected Acadia's argument that coverage was not in effect because the endorsement specified that there was no coverage when the business interruption was caused by a governmental suspension or termination of the insured's ability to operate. Acadia contended that because Lakeshore did not obtain a new COI in the Great Lakes, the Loss of Earnings Endorsement was not in effect. Again, relying on the plain, unambiguous language of the policy, the Court disagreed with Acadia's construction. The Court also pointed out that Acadia conceded that the vessel had a COI for the voyage to the

Great Lakes festival which undercut its argument. The Court awarded Lakeshore $250,000 representing the limits of the endorsement.

Acadia was more successful in dismissing Lakeshore's claims for consequential and statutory damages on the basis that Lakeshore failed to present legally sufficient evidence of its losses and further failed to show that any consequential damages in the form of attorney's fees were the result of "vexatious and unreasonable" conduct on Acadia's part.

OCCURRENCE BASED COVER AND CALCULATION OF DEDUCTIBLE

***Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London et al., slip op.,* No. 15-30324 (5th Cir. January 19, 2016).**

This decision concerns an interpretation of a policy of insurance covering a jack-up drilling rig owned by Seahawk Drilling, Inc. ("Seahawk"), which was in operation in the Gulf of Mexico. In February of 2010, the rig encountered severe weather and sustained damage to its legs, which were knocked out of alignment. As a result, the rig was not able to perform under a contract and a replacement rig was required. The rig then underwent repairs in dry dock, but the misalignment of the legs was not corrected due to the cost. In July of 2010, the rig again encountered severe weather and sustained further damage. After that storm, the rig was in drydock for repairs until December, 2010. The legs were not repaired. Seahawk presented a claim to its insurers in the amount of nearly $17M for physical damage and cost of repairs. Underwriters denied the claim contending that the loss was not covered since (1) the loss failed to exceed the $10M per occurrence deductible, (2) the loss was caused by wear and tear excluded by the policy and (3) the loss of contract provision was not triggered. The District Court held that because the damage was sustained as a result of two separate occurrences (i.e. the February and July storms), the claim did not exceed the deductible of $10M per occurrence, or $20M in total.

In this context, the Court of Appeals had to determine how to interpret the term "arising from" when used to determine the number of occurrences under a policy. Noting that the Supreme Court of Texas stated that the term requires a simple causal connection and not a proximate cause connection, the Fifth Circuit examined whether that state court would adopt the proximate cause analysis used by the District Court in its ruling that there were two occurrences. The Fifth Circuit then held that "[w]hen an occurrence is technically defined to include a series of losses arising from the same event, it includes only those losses *proximately caused* by that event. The Policy defines an occurrence as a series of losses "arising from" the same occurrence and thereby incorporates the proximate cause analysis. Thus, the district court applied the correct legal standard in determining the number of occurrences by analyzing whether the February storm was the *proximate* cause – not just a contributing or but-for cause – of the sequence of losses between February and December 2010."

The Court next addressed the issue of whether the district court correctly found that Seahawk had no recovery under the concurrent-cause doctrine, which applies when covered and non-covered perils combine to create a loss, and which limits a recovery to that portion resulting from a covered peril. Noting that under Texas law, "no amount of damages is even *recoverable* – let alone payable – until the insured complies with the concurrent cause doctrine," the Court then affirmed the finding below that Seahawk had not met its burden of proof under the doctrine because it presented no evidence to apportion damages between covered and excluded perils.

PERILS CLAUSE EXCLUDES COVER FOR COMMERCIAL ARREST

***Swift Spindrift Ltd. v. Alvada Insurance Inc. et al., slip op.* 09 CV 9342 (SDNY March 29, 2016).**

The principal holding of this case concludes that the traditional "perils" clause of the American Institute Hull Clauses, dated June 2, 1977 does not cover a commercial arrest, but only provides coverage for an arrest by a government entity. The Memorandum and Order are an interesting read on the history of the perils clause itself and its interplay with the War Exclusions clause and war risk insurance.

In this case, Plaintiff Swift Spindrift filed suit against the two insurers providing cover for its vessel M/V SWIFT SPINDRIFT. The vessel had been arrested in Libya in connection with a cargo dispute. Legal proceedings in Libya ensued and the vessel spent more than eighteen (18) months under arrest in Tripoli. Swift Spindrift then filed a claim against the insurers seeking payment of the vessel's agreed value of over $9M under a provision found in both policies that the vessel would be considered a constructive total loss if the vessel were subject to a covered arrest which lasted more than six (6) months. The insurers denied the claim on the basis that the perils clause only covered arrests by a government, i.e a non-commercial arrest.

In arriving at the decision, the court traced the history of the perils clause, noting along the way that the language was "dated and opaque" and the interplay of the clauses created a "messy patchwork of coverage and exclusions. Despite that, the court found that the terms had developed a particular meaning for marine insurers over the centuries and that the court could not ignore the context in which the perils clause existed. The court noted that in another context, the clause might be considered ambiguous. However, the court was obliged to adopt the perspective of "a reasonably intelligent person … *who is cognizant of the customs, practices, usages and terminology* as generally understood in the marine insurance industry." The court also notes that knowledgeable parties should be presumed to have intended that the policy's terms would be interpreted in accord with that understanding, absent an indication of contrary intent. Therefore, the perils clause did not cover commercial arrests.

Swift Spindrift attempted to convince the court that coverage for the arrest existed by virtue of the War Risks and Strikes clauses contained in each policy, the 1984 Addendum which modifies the War Risks and Strikes clauses and the Blocking and Trapping clause. These arguments were also rejected by the Court as contrary to the plain, unambiguous language of the policy and the meaning ascribed to the clauses when viewed in the context of industry customs and practices.

Finally, the Court rejected Swift Spindrift's argument that the arrest was, in fact, carried out pursuant to an exercise of sovereign authority. Plaintiff argued that the party initiating the arrest was an instrumentality of the State. In rejecting this claim, the court noted that Swift Spindrift had put forward no evidence from which a reasonable juror could conclude that the arrest in this particular case was an exercise of sovereign power. Summary judgment in favor of both insurers was granted.

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