Covered Losses, Exclusions & Burdens of Proof

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SCOPE OF COVERAGE

- For the recreational boater, named perils or all-risk type coverage terms typically provide the scope of marine yacht coverage.
- These terms determine the breadth of the applicable coverage provided by the policy.
- These terms will also likely determine the insured's and the underwriter's respective burdens to demonstrate the existence of coverage .

See, David D. Hallock, Jr., *Recent Developments in Marine Hull Insurance: Charting a Course through the Coastal States of the Fourth, Fifth, Ninth, and Eleventh Circuits*, 10, No. 2 UNIVERSITY OF SAN FRANCISCO MARITIME L.J. 277, 298 (1998)

Fortuity Requirement

The concept of fortuity is a well-embodied principle of insurance law which has naturally lent itself to marine insurance contracts. A fortuitous event is described as an event which so far as the parties to the contract are aware, is dependent on chance, or more easily stated, a happening by chance or accident. This requirement is implicit in both the traditional "named-perils" policies and the "all-risks" policies of frequent employ, and has the effect of excluding from coverage, losses which occur from inherent defects, ordinary wear and tear, and intentional misconduct.

The fortuity requirement is, therefore, an unwritten, judicially created and enforced doctrine which must be satisfied in order to recover based on "covered named-perils" and with equal application to all-risk policies notwithstanding the misnomer.

See, Madeline V. Dvorocski, *Maritime Losses Resulting From Reckless Conduct: Are They Fortuitous?*, 75 Tex.L. Rev. 1133, 1137 (1997).

See, Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424 (5th Cir. 1980); *see, also*, BLACK'S LAW DICTIONARY 589 (5th ed. 1979).
See, Reisman v. New Hampshire Fire Ins. Co., 312 F.2d 17 (5th Cir. 1963).

Fortuity Requirement (Continued)

A loss is not considered fortuitous if it results from an inherent defect in the object damaged, from ordinary wear and tear, or from the intentional misconduct of the insured. However, loss due to the operational negligence of the insured or his agents has generally been held to be fortuitous and, absent express exclusion, is covered by an all risks policy.

See, Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042, 1979 AMC 2534 (4th Cir. 1979)(citing to *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 195 S.E. 2d 545, 547-49 (1973)).

All-Risk Policy vs. Named-Perils Policy: What's the difference?

ALL-RISK POLICY

Most Recreational Marine Policies are "All-Risk" policies (insuring all risks of direct loss or damage except exclusions):

Typical: Property Damage Coverage Language:

Perils Insured Against: We will provide *coverage for accidental, direct physical loss or damage to your insured vessel* as well as salvage charges, except as specifically excluded in this policy.

See, Int'l Ship Repair & Mar. Serv., Inc. v. St. Paul Fire & Mar. Ins. Co., 944 F.Supp. 886 (M.D. Fla. 1996)(holding that an all-risk policy is one which provides coverage against all risks, covering every loss that may happen except by the fraudulent acts of the insured); *Reisman v. New Hampshire Fire Ins. Co.*, 312 F.2d 17 (5th Cir. 1963)(all-risk terms normally insure all risks of direct loss or damage, including loss due to the negligence of the insured, excepting only those risks expressly excluded from coverage).

All-Risk Policy vs. Named-Perils Policy: What are the burdens on the insured?

Q: What is the INSURED'S burden under an ALL-RISK Policy and/or Clause?

A: THE INSURED MUST SHOW (1) that the loss occurred during the coverage period and (2) that the contract encompasses the loss. *Great Lakes Reinsurance (UK) PLC v. Soveral*, 2007 U.S. Dist. LEXIS 13261 (S.D. Fla. 2007). *See, also Banco Nacional De Nicaragua v. Argonaut Ins. Co.*, 681 F.2d 1337 (11th Cir. 1982)(holding that the "plaintiff in a suit under an all-risks insurance policy must show a relevant loss in order to invoke the policy, and proof that the loss occurred within the policy period is part and parcel of that showing of a loss."); *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980)(citing to the "general rule…that the burden is upon the insured to prove that a loss occurred and that it was due to some fortuitous event or circumstance."). *See, also Hudson v. Prudential Property & Cas. Ins. Co.*, 450 So.2d 565 (Fla. 2d DCA 1984)(holding that an insured who seeks recovery under an all-risks policy has the burden of proving that a loss occurred to the insured property while the policy was in force) and *Egan v. Washington Gen. Ins. Corp.*, 240 So.2d 875, 876 (Fla. 4th DCA 1970)(holding that an insured's burden of proof under an all-risks policy "is a light one: to make a prima facie case for recovery, he must show only that a loss has occurred.").

In a claim under an all-risks policy, the insured is not required to prove the inapplicability of the policy exceptions in order to recover. *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980). *See, also B&S Assoc., Inc. v. Indemnity Cas. & Property, Ltd.*, 641 So.2d 436 (Fla. 4th DCA 1994)(citing to *Morrison's* holding that "[i]t would seem to be inconsistent with the broad protective purposes of 'all-risks' insurance to impose on the insured…the burden of proving precise cause of loss or damage.").

All-Risk Policy vs. Named-Perils Policy: What are the burdens on the insured?

Q: What is the INSURED'S burden under a NAMED-PERILS Policy and/or Clause?

A: **THE INSURED MUST PROVE that the loss occurred by the named peril.** *Opera Boats, Inc. v. La Reunion Francaise*, 893 F.2d 103 (5th Cir. 1990); *See, also Continental Ins. Co. v. Lone Eagle Shipping Ltd. (Liberia)*, 952 F.Supp. 1046 (S.D.N.Y. 1997)(holding that the "insured has the burden of proving that the loss was 'proximately caused' by the peril insured against and claimed under."); *Ferguson v. State Farm Ins. Co.*, 2007 U.S. Dist, LEXIS 34030 (E.D. La. 2007)(holding that under a named-perils clause, the plaintiff/insured is required to prove by a preponderance of the evidence that their personal property was lost or damaged due to a specified covered risk (peril) named in the policy).

All-Risk Policy vs. Named-Perils Policy: What are the burdens on the insurer?

Q: What is the INSURER'S burden, under an ALL-RISK Policy and/or Clause, after the insured has met his/her prima facie burden?

A: **THE INSURER MUST SHOW that an exception to coverage applies.** *Morrison*, 632 F.2d at 430. *See, also Great Lakes Reinsurance (UK) PLC v. Soveral*, 2007 U.S. Dist. LEXIS 13261 at [*7] (holding that the insurer must prove that an exclusion in the contract applies after the insured has met his/her initial burden). Once the insured establishes a loss is within the terms of an "all risks" policy, the burden shifts to the insurer to prove that the loss arose from a cause which is excepted. *Castillo v. State Farm Fla. Ins. Co.*, 2007 Fla. App. LEXIS 16297 (Fla. 3d DCA 2007); *Hudson v. Prudential Property & Cas. Ins. Co.*, 450 So.2d 565, 568 (Fla. 2d DCA 1984); *B&S Assoc., Inc. v. Indemnity Cas. & Property, Ltd.*, 641 So.2d 436 (Fla. 4th DCA 1994).

The insurer's burden is heavier under an all-risk policy as it must prove that the loss was caused by an excluded risk. *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. 3d DCA 1988).

All-Risk Policy vs. Named-Perils Policy: What are the burdens on the insurer?

Q: What is the INSURER'S burden under a NAMED-PERILS Policy and/or Clause?

A: THE INSURER MUST PROVE the applicability of any asserted exclusion by a preponderance of the evidence. *Ferguson v. State Farm Ins. Co.*, 2007 U.S. Dist, LEXIS 34030 (E.D. La. 2007).

EXCLUSIONS

- **Part A: Property Damage Coverage – Exclusions:**

  We do not provide coverage under Part A: Property Damage Coverage against loss or resulting damage from:

a. wear and tear, gradual deterioration, weathering, insects, mold, animals or marine life; however, coverage is provided for accidental damage resulting from zebra mussels, but only applies to engines, generators, and pumps that are attached to the insured vessel:

b. marring, scratching or denting;

c. osmosis or blistering;

d. manufacturer's defects or defects in designs;

e. the cost of replacing or repairing any item having a latent defect that causes damage to your insured property, however, resulting damage would be covered;

f. corrosion, except electrolytic (stray current) corrosion.

If you have a loss that is covered under the Recreational Marine Policy, is there coverage where the loss resulted from an excluded event?

NO

Courts have uniformly denied recovery under a policy of marine insurance where the ultimate cause of a vessel's damage is excluded from coverage. *Tillery v. Hull & Co., Inc.*, 876 F.2d 1517, 1519 (11th Cir. 1989). *See, also Ope Shipping, Ltd. v. Allstate Ins. Co.*, 687 F.2d 639 (2d Cir. 1982)(affirming the district court's conclusion that the vessel's damages were caused by an excluded event, i.e., seizure, and, thus there was no coverage); *Republic of China v. Nat'l Union Fire Ins. Co.*, 151 F.Supp. 211, 231 (D.Md. 1957), *aff'd*, 254 F.2d 177 (4th Cir. 1958)(where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on other grounds).

Causation in Admiralty

- Admiralty law requires the strict construction of express warranties in marine insurance contracts.

See, Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364, 1366 (11th Cir. 1988).

- Breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss. *Id.*; *see, also Florida Mar. Towing, Inc. v. United Nat'l Ins. Co.*, 686 So.2d 711, 713 (Fla. 3d DCA 1997)(holding that breach of a "navigational warranty releases the insurance company from liability even if compliance with the warranty would not have avoided the loss."); *Aetna Ins. Co. v. Dudney*, 595 So.2d 238, 239 (Fla. 4th DCA 1992)(citing to established federal maritime law that holds "[A] breach of an express taking or navigational warranty releases the insurance company from liability even if compliance with the warranty would not have voided the loss.").

Florida differs from the maritime rule of strict construction!

Fla. Stat. § 627.409 (2007)(Representations in applications; warranties) provides in pertinent part:

(2) A breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefore does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

So what does this anti-technical statute mean???

Fla. Stat. § 627.409 – The Anti-Technical Statute

In theory, Florida's anti-technical statute imposes an additional burden upon a marine underwriter: Florida, together with Texas, Hawaii and Washington, requires that the insurer demonstrate a causal connection between a breach of warranty and the loss in order to avoid coverage.

Non-Applicability of Florida's Anti-Technical Statute

At least two Florida Courts have refused to apply Florida's Anti-Technical Statute in cases involving a breach of a navigational warranty:

La Reunion Francaise, S.A. v. Christy, 122 F.Supp.2d 1325 (M.D. Fla. 1999)(granting an insurance company's motion for summary judgment where the insureds (watercraft owners) had as a matter of law breached the navigational limits of their insurance policy when they took their watercraft across the Atlantic Ocean to the Mediterranean Sea; further agreeing with the insurance company's argument that "federal courts, including the Eleventh Circuit, construe warranties such as the navigational limitation narrowly, holding that the breach of such a warranty will release the insurance company from liability."

Aetna Ins. Co. v. Dudney, 595 So.2d 238 (Fla. 4th DCA 1992)(reversing a lower court that applied Florida law (Fla. Stat. § 627.409) in a declaratory action filed by an insurance company to determine whether coverage existed under the policy; the court held that "State law cannot be utilized to interpret a warranty in a marine insurance contract if the federal judiciary has established a rule as to the interpretation of that type of warranty."; thus, coverage did not exist even though the insured's breach of the warranty did not increase the hazard that caused the crew member's injuries.).

The trend in Florida courts is to apply federal admiralty law, and not conflicting Florida statutory law, in cases involving maritime matters. *See, ABB Power T&D Co., Inc. v. Gothaer Versicherungsbank VVAG, et al.*, 939 F.Supp. 1568 (S.D. Fla. 1996)(holding that were a "state law provision is in direct conflict with an entrenched principle of federal law, there is a general, if not mandatory preference for applying the federal law."; "state law should not be applied (in maritime cases) unless it bears a reasonable similarity to the federal maritime practice.").

Ultimate Cause of Loss

Courts look to the "ultimate" cause of damage/loss when determining whether coverage and/or an exclusion applies.

In *Tillery v. Hull & Co., Inc.*, 876 F.2d 1517 (11th Cir. 1989), the appellant insured purchased a policy of marine insurance from the appellee insurer. The insurance policy provided coverage for losses caused by acts of barratry but excluded losses caused by capture and seizure. The insured hired a boat captain who agreed to use the boat for fishing. The captain, however, sailed the boat to Jamaica to pick up a shipment of marijuana. The boat was seized by the Jamaican government who stripped the boat of its gear and equipment. The insurer paid for the release of the boat but denied the insured's claim for the physical damage that was caused by the Jamaican government. The insured filed suit to recover the full value of the policy. Judgment was rendered in favor of the insurance company. The insured appealed, and the 11th Circuit affirmed the judgment.

- The Court in *Tillery* cited to the long-standing rule of strictly applying the doctrine of *causa proxima non remota spectatur* (the immediate not the remote cause is considered) when analyzing problems of marine insurance causation.

- The Court further held that when seeking to determine the cause of a vessel's damage, they will assign greater weight to the ultimate, efficient causes than to the temporarily remote causes.

- The Court found that the ultimate cause of the vessel's damage did not flow from a covered risk, i.e., barratry, but instead flowed from an excluded risk, i.e., the capture and seizure.

  But see, Ope Shipping, Ltd. v. Allstate, 687 F.2d 639 (2d Cir. 1982)(holding that when ascertaining the legal cause of loss for insurance purposes, a court must look to the real efficient cause of the occurrence rather then the single cause nearest to the loss).

Hypothetical

An insured suffers a total loss to his yacht when a worn wire caused a short resulting in an open flame fire to erupt aboard a yacht. The insured makes a claim for the total value of the yacht pursuant to the all-risk Property Damage Clause (Part A) insuring "direct physical loss or damage to your insured vessel." Is there coverage?

Answer: The insured will be able to show that there was physical loss to the yacht. It will then be underwriters burden to show that the fire was caused by wear and tear which is expressly excluded by the policy. If underwriters can prove that the cause of the fire was a result of wear and tear, there is no coverage for the fire. However, if the insured is able to prove that the worn wire was the result of caretaker negligence as opposed to, or concurrent with, wear and tear, the loss is covered.