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ALERT

All Risk or Your Risk? When All-Risk Cargo Insurance Companies Attempt to Shift the Risk Back to You

By Diana Shafter Gliedman

Petroleum and chemical companies rely upon the safe and efficient transport of cargo. Unfortunately, while the open roads, seas and skies evoke an air of mystery and magic to adventurers, they may pose a significant threat to your cargo. Joseph Conrad and Ernest Hemingway waxed poetically about the majesty of the sea, but then, neither Conrad nor Hemingway were responsible for the safe and efficient transport of tens of millions of gallons of fuel oil.

For this reason, most chemical and petroleum companies purchase a form of cargo insurance. The majority of cargo insurance policies are "all risk" policies—insurance policies that cover *all losses*, no matter the cause, unless specifically excluded by the policy. Given this extensive breadth of coverage, most policyholders assume that in the event of a loss, their cargo will be covered. Many cargo insurance companies, however, attempt to shift the risk of loss back to their policyholders—essentially arguing that "all risk" means "your risk."

Mysterious Cause of Loss-But No Mystery Regarding Coverage

Ascertaining the precise cause of loss is often impossible, particularly when cargo is lost or damaged en route. Fortunately, numerous courts have held that it is *not* the policyholder's burden to explain what happened to its cargo. Such was the case in *Great Northern Ins. Co. v. Dayco*, 637 F. Supp. 765, 777 (S.D.N.Y. 1986). In *Dayco*, a company entered into a contract to manufacture and deliver goods to a foreign purchaser. The goods were produced, and shipped; however, it eventually became clear that *Dayco* had been the victim of a complex fraud, and the company lost millions of dollars in goods. *Dayco* submitted a claim only to have it denied by its insurance company, which posited (despite a dearth of evidence) that employees within the *Dayco* Corporation knew about the fraud, and that the loss was thereby excluded.

The Southern District disagreed, finding that

.....
"As a matter of law, a policyholder need only prove the existence of the all-risk policy and the loss... the policyholder need not establish the cause of loss as part of its case."
.....

It is not sufficient for the all risk [insurance company]'s case for them to offer a reasonable interpretation under which the loss is excluded;

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they must demonstrate that an interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion.

Dayco, 620 F. Supp. at 354 (emphasis added).

Thus, as matter of law, a policyholder "need only prove the existence of the all-risk policy, and the loss of the covered property... the [policyholder] need not establish the cause of the loss as part of its case." *Great Northern Ins. Co. v. Dayco*, 637 F. Supp. 765, 777 (S.D.N.Y. 1986) (citations omitted, emphasis added). Indeed, "[a]bsent an exclusion for mysterious disappearance, all risk policies cover the mysterious disappearance or fortuitous loss of the goods insured." *In re Balfour Maclaine Int. Ltd.*, 85 F.3d 68 (2d Cir. 1996).

Listed Perils Do Not Constitute All Perils

Insurance companies may also try to deny coverage under your all-risk policy by arguing that your cause of loss was not listed in your policy's basic perils clause. All standard American marine insurance policies contain a standard (and ancient) perils clause, enumerating the "basic perils of the sea." See Buglass, Leslie J., *Marine Insurance and General Average in the United States*, 50 (Cornell Maritime Press 1981). As times (and risks) changed, however, "new clauses were devised to cover additional perils." 1 Arthur L. Flitner and Arthur E. Brunck, *Ocean Marine insurance*, 34 (Insurance Institute of America 1992). Thus, the basic perils covered are often augmented to provide coverage for additional hazards. Such augmentation includes the inclusion of an "all-risk" provision.

As a result, all-risk open marine cargo insurance policies may contain both a perils clause and an all-risk clause. For example, in *Ingersoll Milling Machine Co. v. M/V Bodena*, 619 F.Supp. 493 (S.D.N.Y. 1985), *aff'd*, 829 F.2d 293 (2d Cir. 1987), the court recognized that the plaintiff had an all risk policy when the policy contained a standard perils clause *and* a separate clause providing all-risk coverage. Although the perils clause only provided coverage for a limited number of "perils of the sea," the court found that the policy was "an all risk policy which covered all losses that are fortuitous *no matter what caused the loss.*" *Id.* at 506 (emphasis added).

Corporations necessarily face the risk of loss when they ship or transport goods. Fortunately, *all* fortuitous risks not specifically excluded are covered by most all-risk cargo policies, no matter what your insurance company tells you. ■

We hope you have found this issue of the Petroleum and Chemical Insurance Alert informative. We invite you to contact the Group's Co-Chairs, listed below, with your questions or concerns:

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