BULLIVANTHOUSER

Marilyn Raia
San Francisco,
Shareholder

Direct Dial: 415.352.2721
Fax: 415.352.2701
Email Attorney

Some Maritime Terms Explained — Part 4

By Marilyn Raia

This is the last in a multi-part series in which the meaning of some terms commonly used in marine insurance and maritime contracts is explained.

Proximate Cause

The proximate cause or "efficient proximate cause" is that cause which sets others in motion to result in loss or damage. It is not necessarily the cause closest in time to the occurrence of the loss or damage.

Efficient proximate cause must be determined when loss or damage may be attributable to multiple causes, not all of which are covered perils under an insurance policy. Courts are to use "common sense and reasonable judgment" to isolate a single cause as the efficient proximate cause of the loss, and then determine whether that cause is a covered peril. A frequently cited case illustrating the analysis is *Commodities Reserve Co. v. St. Paul Fire & Marine Insurance Co.* 879 F.2d 640 (9th Cir. 1989). In that case, shipments of chickpeas and cumin from Turkey were carried aboard a vessel bound for Venezuela. During the voyage, the vessel took on a shipment of munitions. The vessel was detained by Greek authorities because of the violation of Greek regulations regarding the carriage of munitions in Greek waters. The vessel owner refused to release the chickpeas and cumin for forwarding, without a waiver of liability. The cargo owner eventually obtained a court order for release of the shipments which were then transloaded onto another vessel. No infestation of the chickpeas and cumin was noted at that time. The cargo owner then sought reimbursement from its cargo insurer for various expenses associated with the transloading, arguing they were incurred to prevent infestation, a covered peril under the cargo policy. The court held the proximate cause of the transloading expenses was the detention of the vessel, a peril not covered by the policy. Accordingly, there was no coverage for the transloading expenses. However, the court held the proximate cause of the expenses incurred to obtain the court order to release the cargo was not the detention of the vessel, but the vessel owner's refusal to release the cargo, a covered peril.

Reinsurance

Reinsurance is insurance bought by an insurance company from a reinsurance company as a way to shift the risk of loss to the reinsurer. The insurance company and reinsurance company enter into a reinsurance agreement, the terms of which provide the circumstances under which the reinsurance company will reimburse the insurer for a loss that the insurer is obligated to pay. Sometimes reinsurance companies buy reinsurance from other reinsurance companies as a means of further shifting the risk of loss.

There are two types of reinsurance an insurance company can buy: 1) treaty; and 2) facultative. Treaty reinsurance is an agreement between an insurer and a reinsurer that all risks of a certain type will be automatically reinsured as soon as the insurer agrees to insure them in the first instance. The amount of the treaty reinsurance may be all or a percentage of the underlying amount insured.

Facultative reinsurance involves an individual risk that might not fall within the types of risks covered by treaty reinsurance. The insurance company seeking facultative reinsurance offers a risk to the reinsurance company, which has the option of accepting it or rejecting it. When a reinsurance company buys its own reinsurance, it can also buy treaty or facultative reinsurance.

Subrogation

In the insurance context, subrogation is an equitable right acquired by an insurer upon the payment of a claim. When an insurer pays its insured's claim, and to the extent of the amount paid, the insurer acquires all of the rights its insured had against the party causing the loss or damage giving rise to the claim. The insurer may pursue recovery in its own name from the wrongdoer. When seeking a recovery from the wrongdoer, the insurer is said to "stand in the shoes" of its insured. That means the insurer has no greater rights against the wrongdoer than its insured had, and the insurer is subject to the same defenses the wrongdoer could have asserted against the insured.

There are some circumstances in which an insurer may not pursue its subrogation rights. An insurer may not subrogate against its own insured. That is, an insurer may not sue the insured whose claim it paid on the theory the insured caused its own loss or damage. Nor may an insurer sue another of its insureds who was the wrongdoer. When doing so, the insurer would be shifting the consequences of a loss from one insured to another which amounts to an impermissible favoring of one insured over another.

An insurer also may not subrogate when its insured has entered into a contract containing terms providing for a waiver of subrogation rights. Such provisions are commonly found in leases of real property but also are commonly found in towing contracts. Maritime law does not permit the parties to a towing contract to contractually exculpate themselves from liability. However, courts have held that a clause requiring each party to 1) have an insurance policy naming the other as an additional insured; and 2) waive subrogation rights against the other, does not violate the prohibition against exculpatory clauses.

Sue & Labor Clause

A sue and labor clause is commonly found in cargo and hull insurance policies. It obligates the insured to take steps to avoid a loss from a covered peril that is imminently threatened, or to minimize a loss from a covered peril that has already occurred. It also obligates the insurer to pay, in addition to the policy limits, the reasonable expenses incurred by the insured to avoid or minimize a loss due to an insured peril. In the case of a threatened loss, the insured cargo or hull need not have been actually damaged for sue and labor expenses to be payable under the insurance policy. Conversely, the insurer may be obligated to reimburse sue and labor expenses even if the insured's efforts were not successful in avoiding or minimizing a covered loss.

The failure of the insured to fulfill the duty to sue and labor may result in reduced, or no coverage at all, under the policy. For example, in *McGrath v. Reliance Insurance Co.,* 671 F.Supp. 669 (N.D. Ca 1987), the insured vessel struck a submerged object but the insured took no steps to immediately haul, inspect, and repair the vessel. The vessel took on water for several months thereafter and eventually sank. The surveyor retained by the insurer attributed the damage to the failure of the insured to repair the damage caused by the submerged object, and the failure of the insured to maintain the hull and protect it from marine borers. The court held there was no coverage for the sinking because the insured failed to comply with the policy's sue and labor clause which required reasonable steps to be taken to protect the vessel when a loss occurred.

There are many different types of expenditures that may be recovered from an insurer under a sue and labor clause. For example, the expenses incurred to recondition and repackage cargo damaged by an insured peril, to enable the cargo to be sold as intended, are normally recoverable as sue and labor expenses under a cargo policy. And, the expenses incurred to pump a vessel taking on water are normally recoverable as sue and labor expenses under a hull policy. The recoverability of expenses incurred by an insured under a sue and labor clause primarily depends on whether the peril necessitating the expense is a covered peril and whether the expenses were reasonably incurred.

Uberrimae Fidei

Uberrimae fidei is a Latin phrase meaning "the utmost of good faith". It is the motto of Lloyds of London. Unlike other types of insurance, marine insurance is subject to the longstanding doctrine of uberrimae fidei. Under the doctrine, the insured has a duty, even if not asked, to reveal every fact within his knowledge that is material to the risk, and to provide accurate information on the application for insurance. To be material, the misrepresented fact must be something that would have controlled the insurer's decision to insure the risk. The theory behind the doctrine is the greater knowledge the applicant has about the risk to be insured and the practical inability of the marine insurer to personally verify every material aspect of it.

Under federal maritime law, the failure to disclose material information, whether intentional or not, allows the insurer to void the policy. Many courts have held marine policies void when the insured failed to disclose or misrepresented what might seem to be an inconsequential fact. Moreover, many courts have held marine policies void even if the concealed or misrepresented fact is not causally related to the loss.

Marilyn Raia is of counsel in the San Francisco office of Bullivant Houser Bailey. She specializes in maritime and transportation-related matters. She can be reached at marilyn.raia@bullivant.com.