

MARINE CARGO INSURANCE: WARRANTIES, REPRESENTATIONS, DISCLOSURES AND CONDITIONS

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Introduction to Warranties

Under the Law of England, the attributes of maritime warranties may be conveniently studied in a statutory form. Such laws are relevant to our understanding of warranties due to the fact that U.S. precedent is guided by these U.K. principles. The United States Supreme Court has stated that there are special reasons for keeping in harmony with the marine insurance laws of England and to “accord respect to established doctrines of English maritime law.” [\[1\]](#) The English law with respect to warranties has been codified in the Marine Insurance Act of 1906. Section 33 defines a warranty as follows:

1. “A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
2. A warranty may be expressed or implied. “
3. A warranty, as above defined, is a condition which must be exactly complied with whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any “liability incurred by him before that date.”

Section 34 relates to excuses for non-compliance with a warranty:

1. Non-compliance with a warranty is excused when, by reason of a change in circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.
2. Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

3. A breach of warranty may be waived by the insurer.

Section 35 addresses the formation of express warranties:

1. An express warranty may be in any form of words from which the intention to warrant is to be inferred.
2. An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.
3. An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

Any form of language from which an intention to warrant may be inferred will suffice to constitute a warranty. Using the word “warranted” in the policy, however, does not necessarily mean that what follows is a true warranty. Although it may be equivalent to a condition precedent, it may also indicate merely an exception to the overall coverage provided by the policy such as, for example, “warranted free of capture and seizure” or “warranted free of strikes, riots, etc.” Labeling a statement a warranty does not necessarily create a warranty.[\[2\]](#)

A statement of fact contained in a policy invariably will be construed as a warranty. A warranty may be either a condition precedent or a condition subsequent. There is a material distinction between a warranty and a mere representation. A representation may be equitably and substantially answered, while a warranty is a condition or contingency which, unless performed, abrogates the contract. It is immaterial for what purpose a warranty is introduced, but after having been inserted in the contract, the contract does not exist, unless it be literally complied with. A warranty may also be either express or implied, but an express warranty does not exclude an implied warranty unless it is inconsistent therewith.[\[3\]](#)

A warranty must be exactly complied with whether the warranty is material to the risk or not. If not complied with, and the breach is not waived by the underwriter, the underwriter is discharged from liability as of the date of the breach, but without prejudice to any liability incurred under the policy prior to the breach.^[4] A mere intention to breach a warranty, without actually doing so, is not a breach of the warranty. Also strict performance of the warranty is not dispensed with by an unavoidable necessity preventing it.^[5]

In *Commercial Union Insurance Co. v. Flagship Marine Services*^[6] the court provided a modern day analysis of warranties:

“A warranty” is a promise “by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.” Leslie J. Buglass, *Marine Insurance*. A warranty, whether express or implied, stands in contrast to an exclusion, which does not represent a promise on the part of the insured, but merely “define[s] the coverage limits” [by] clarify[ing] and defin[ing] the types of events an insurer does not intend to cover.”

New York’s Insurance Law defines a “warranty” as any provision of insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer’s liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract.

N.Y. Ins. L. §3106(a). As a general matter, warranties represent a promise by the insured to do or not to do some thing that the insurer considers significant to its risk of liability under an insurance contract.^[7]

The Effect of a Breach of Warranty

Under federal maritime law, strict or literal compliance with a warranty is required. The admiralty rule requires literal fulfillment with every policy warranty and breach of any warranty bars recovery even though the breach is not material and in no way contributed to the loss.

In 1955, however, the Supreme Court decided *Wilburn Boat v. Fireman's Fund Insurance Co.*^[8] The *Wilburn Boat* decision concerned marine insurance on a small house boat being operated on an inland lake between Oklahoma and Texas owned by the Wilburn brothers. The Wilburn brothers sold the boat to a corporation in which they were the sole stock holders. The boat was mortgaged, and instead of being utilized for private pleasure purposes, it had been chartered and used to carry passengers for hire. The insurance policy in issue contained warranties that (1) the insurance would be void in case the policy or the insured interest was sold, assigned, transferred or pledged without the consent of the underwriters; (2) that the vessel would be used solely for private pleasure purposes during the currency of the policy and (3) that the vessel would not be hired or chartered unless permission was granted by the underwriters by endorsement on the policy. The boat was destroyed by fire while moored in the lake. The corporate owner brought suit on the policy. The assured contended that under Texas law, the claimed policy breaches were immaterial unless they contributed to the loss. The insurance company argued for a strict or literal compliance with the warranties in accordance with maritime law. The trial court held that the assured could not recover because the established admiralty rule required literal fulfillment of every policy warranty and that a breach of any warranty barred recovery even though the breach in no way contributed to the loss. The Court of Appeals affirmed the Trial Court.^[9]

The Supreme Court reversed the decision of the lower courts. The court held that there was no statutory or judicially established admiralty rule governing the warranties involved in the instant case. In the absence of such an entrenched federal admiralty rule, the court held that the issues were governed by appropriate state law.^[10] Consequently, the effect of a breach warranty is dependant upon state law in situations where entrenched federal maritime precedent does not exist. For example, in New York strict performance of warranties appears to be the rule.^[11] In Florida, state statutes apply which generally require that a breach must increase the hazard by any means within the control of the assured, according to section 627.409(2) of the Florida Statutes.^[12] In *Commercial Union v. Flagship*,^[13] the court analyzed the effect of a breach of warranty under federal as well as state law.

“In all areas of insurance other than maritime insurance, an insured’s breach of warranty does not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage, or injury within the coverage of the contract.” *Id.* § 3106(d). In other words, if an insured breaches a warranty that is collateral to the risk that is the primary concern of the contract, the insured will not be precluded from recovery. This is generally not the rule in maritime insurance contracts.

Under the federal rule and the law of most states, warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract, if the insured is to recover. See Buglass at 27-28, 34; Patrick J.S. Griggs, *Coverage, Warranties, Concealment, Disclosures, Exclusions, Misrepresentations, and Bad Faith*, 66 Tul. L. Rev. 423, 431-32 (1991). The rule of strict compliance with warranties in marine insurance contracts stems from the recognition that it is peculiarly difficult for marine insurers to assess their risk, such that insurers must rely on the representations and warranties made by insureds regarding their vessels’ condition and usage. See *O’Connor Transp. Co. v. Glens Falls Ins. Co.*, 189 N.Y.S. 612, 614 (2 Dept 1921), *aff’d*, 233 N.Y. 659 (1922); see also *In Re Balfour MacLaine Int’l Ltd.*, 1996 AMC 2266, 2282-85; 85 F.3d 68, 80-81 (2d Cir. 1996) (discussing maritime doctrine of

uberrimae fidei, or utmost good faith, which requires the party seeking insurance to disclose all circumstances known to it which materially affect the risk); *Knight v. U.S. Fire Ins. Co.*, 1987 AMC 1, 5-6, 804 F.2d 9, 13 (2 Cir. 1986) (*same*).

New York's Insurance Law, for example, specifically carves out a maritime exception from its general rule regarding breach of warranty. See N.Y. Ins. L. §3106(c) ("This section [stating that breach of collateral warranties shall not preclude recovery] shall not affect the express or implied warranties under a contract of marine insurance."); *Levine v. Aetna Ins. Co.*, 1944 AMC 62, 64, 139 F.2d 217, 218 (2d Cir. 1943 *per curiam*) (interpreting predecessor statute of N.Y. Ins. L. §3106(c) and holding that "[c]ompliance with the warranty was a condition precedent to liability [under the contract of marine insurance] and afforded a complete defense irrespective of any question of causation"); *Advani Enters., Inc. v. Underwriters at Lloyd's* 1997 AMC 1851, 1856, 962 F.Supp. 415, 419-20 (S.D.N.Y. 1997), *vacated on other grounds*, 1998 AMC 2045, 140 F.3d 157 (2d Cir. 1998) (New York Ins. L. §3106, like federal rule, requires strict compliance with warranties in marine insurance contracts).

Florida also treats maritime insurance contracts differently than it does other insurance contracts. See FL ST §627.409(2) (setting forth distinct approach to marine insurance contracts). However, unlike New York and the majority of states, Florida does not require strict compliance with all warranties, but it does preclude recovery where the "breach or violation increased the hazard by any means within the control of the insured." *Id.*; see Hallock, 10 U.S.F. Mar. L.J. at 303 (noting that Florida, Texas, Hawaii, and Washington, unlike the majority of states, require "that the insurer demonstrate a causal connection between a breach of warranty and the loss in order to avoid coverage"). This rule was "designed to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss." *Windward Traders, Ltd. v. Fred S. James & Co. of New York, Inc.*, 855 F.2d 814, 818 (11 Cir. 1988) (quoting *Pickett v. Woods*, 404 So.2d 1152, 1153 (Fla. App. 1981)).

Under the Florida rule, recovery is barred if the breach "increased the potential hazard or risk of loss over and above that which [the insurer] had agreed to insure"[and] is not a mere technical violation of the policy but significantly alters the risk of loss [the insurer] would be called on to bear." *Fireman's Fund Ins. Co. v. Cox*, 1990 AMC 908, 910, 742 F.Supp. 609, 611 (M.D. Fla.), *aff'd*, 1990 AMC 3000, 892 F.2d 87 (11 Cir. 1989). Florida thus treats

warranties made pursuant to a maritime insurance contract the way New York treats warranties outside of the marine context “ i.e., the insurer is relieved of liability only if the breach results in an increase in the risk assumed by the insurer. See N.Y. Ins. L. §3106(b).” [\[14\]](#)

Procedure for an Insurer to Assert a Breach of Warranty

In light of the fact that a breach of warranty may be waived or barred by estoppel, underwriters should consider commencing an action for rescission and/or for declaratory judgment seeking to avoid the policy. A necessary element of commencing such an action includes the tendering, and/or return of, premium.

It should be noted that, under New York law, a condition of coverage such as “insurable interest” or “duration of the risk” may not be waived.[\[15\]](#) Only defenses to, or exclusions from, coverage may be waived.[\[16\]](#) Although actions by the underwriter may be deemed to create waiver or estoppel issues,[\[17\]](#) express provisions of the “sue and labor clause” may provide for certain actions to proceed on a “without prejudice” basis.[\[18\]](#) Of course, any investigations, actions or instructions by the insurer with respect to the cargo and any stated positions regarding declination of coverage should be accompanied by an express “without prejudice” statement reserving rights under the policy or otherwise.

Common Warranties, Representations, Disclosures and Conditions

As previously discussed, not all “warranties” related to cargo policies are true warranties and are more appropriately identified as “representations” or “exclusions.” Other critical terms in a cargo policy are actually “conditions of coverage.” Finally, during the negotiation process and prior to the inception of the policy, the application of the “implied warranty of good faith” is

more appropriately identified as a principle applying to “Representations and Disclosures.” The following discussion will attempt to analyze some common examples of these principles.

The Implied Warranty of “Utmost Good Faith”

A marine insurance policy is “uberrimae fidei” “ of the utmost good faith “ and may be avoided by the injured party where the other party fails to exercise the utmost good faith required. The Marine Insurance Act of 1906, Section 17, states the rule as follows: “A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.[\[19\]](#)

The burden of proof is upon underwriters when they raise the defense of concealment or non-disclosure. The rules with respect to what must be “disclosed” by the assured are set forth in Section 18 of the Marine Insurance Act of 1906. Section 18 reads in its entirety:

1. Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
2. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
3. In the absence of inquiry the following circumstances need not be disclosed, namely:
 - a. Any circumstance which diminishes the risk:
 - b. Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
 - c. Any circumstance as to which information is waived by the insurer;

- d. Any circumstance which it is superfluous to disclose by reason of any express or implied warranty;
4. Whether any particular circumstance, which is not disclosed, be material, or not is, in each case, a question of fact.
5. The term “circumstance” includes any communication made to, or information received by, the assured.

Section 20 of the Act covers “representations” pending the negotiation of the insurance contract, and reads:

1. Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.
2. A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
3. A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.
4. A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.
5. A representation as to a matter of expectation or belief is true if it be made in good faith.
6. A representation may be withdrawn or corrected before the contract is concluded.
7. Whether a particular representation be material or not is, in each case, a question of fact.

A representative case concerning the implied warranty of utmost good faith is the Second Circuit decision in *Knight v. U. S. Fire Insurance Company*.[\[20\]](#) The assured, Knight, purchased 222 antique stone and bronze statues for approximately \$65,000.00 between 1976 and 1979 in Thailand. In 1980, an appraiser hired by Knight valued the collection at approximately \$20

million. The same appraiser revised his estimate to \$30 million in September of 1981. Knight had transported the statuary from Thailand to Singapore. In February of 1981, Knight obtained insurance from London Underwriters in the amount of \$20 million for shipment of the collection from Singapore to Holland. Thereafter, he obtained an additional \$10 million in coverage for the voyage from the same underwriters. In June of 1981, however, after approximately \$30 million in risk had been placed, Knight's insurance broker received two anonymous phone calls reporting that Knight was planning to perpetuate a fraud. The broker conveyed the information to the lead London Underwriters who in response ordered their own appraisal of the statuary. The broker thereafter sent a telex to Knight informing him that Underwriters had voided his policy because of his material nondisclosures and misrepresentations regarding the collection. The broker stated in the telex that, based on the appraisers inspection of some of the statues, the Underwriters believed that the collection was grossly overvalued. In October of 1982, Knight approached a different broker and obtained \$30 million in coverage claiming that he was preparing to ship the statues to a purchaser in Greece. The broker succeeded in placing \$30 million of risk for the voyage from Singapore to Greece with several American insurance companies. These are the policies contested in the law suit. On February 7, 1983, the ship sank in the India Ocean and the statues were lost.

After the loss of his statues, Knight attempted to collect on the insurance provided by the American underwriters. Underwriters refused to pay and instead voided the New York policy *ab initio* because of Knight's alleged material nondisclosures and misrepresentations. Thereafter, Knight brought a lawsuit. Underwriters moved for summary judgment before the lower courts, and after a granting of the motion in insurer's favor, an appeal followed. The lower court granted summary judgment for the insurers' in the case, because Knight had failed to inform

them of a material fact. The court ruled that Knight's nondisclosure of the prior London cancellations, together with the cancelling underwriters' opinion that the statues were overvalued and inauthentic, justified defendant underwriters' avoidance of the policy *ab initio*. The judge also found that there was no genuine issue as to any material fact with respect to the nondisclosure, and therefore granted summary judgment as a matter of law.

In evaluating whether the particular facts were material, the Court of Appeals analyzed the substantive law governing marine insurance. The court held that it was well established under the doctrine of *uberrimae fidei* that the parties to a marine insurance contract must accord each other the highest degree of good faith. The court described the doctrine as follows:

“This stringent doctrine requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured. Since the assured is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, rather than wait for the underwriter to inquire. The standard for disclosure is an objective one, that is, whether a reasonable person in the assured's position would know that the particular fact is material. To be material the fact must be “something which would have control the underwriter's decision” to accept the risk. The assured's failure to meet this standard entitles the underwriter to void the policy *ab initio*.”

Knight contended, however that an assured's duty to disclose a prior cancellation is not triggered where the cancellation was based on fictitious or false information. The assured asserted that false information cannot materially affect a risk. He argued that the prior cancellation was caused by anonymous telephone calls that were entirely groundless and an inspection that was performed by an unqualified appraiser. The Court of Appeals held that the fact of the prior cancellation and the stated reasons therefore would have materially affected the underwriter's decision to provide \$30 million in coverage. The court commented as follows:

“Although Knight devotes a substantial portion of his briefs to argue that the prior cancellation was unfounded, that issue does not affect the materiality of the admitted disclosure. Regardless of the justifiability of the prior cancellation the fact remains that the cancellation occurred because the London Underwriters believed that the statues were overvalued and inauthentic. A reasonable assured in Knight’s position would know that other insurers providing virtually the same coverage for the same statues would not take on the risk or maintain the same premium without at least investigating the prior cancellation, if informed of it and the stated reasons therefore.”[\[21\]](#)

Under such circumstances, the nondisclosure was held to be material. The court explained that the materiality of the nondisclosure does not depend on what an investigation would have revealed. The insurer should be afforded the opportunity to investigate prior to its acceptance of the risk.

Finally, the court noted that although materiality of the nondisclosure is a factual issue that usually may be decided only by a jury, in this instance the only possible outcome as a matter of law, even if a trial had been conducted, is in favor of insurers.

“It is a matter of indisputable fact that a prior underwriter’s avoidance of a \$30 million insurance policy on antiquities of dubious origin on the grounds that the goods were grossly overvalued and inauthentic would have been material to any subsequent underwriter’s decision to accept the risk” No reasonable juror could conclude, under the facts of this case, that defendants would not have declined to embrace plaintiff’s requested \$30 million policy had they known of the prior London cancellation and of the incriminating contents of the telex from the London Broker “at least not without subsequent opportunity for defendants to make their own investigation and perhaps adjust” the amount insured.[\[22\]](#)

Implied Warranties of Seaworthiness

Although this warranty is crucial in matters involving hull insurance, the issue is largely insignificant with respect to cargo insurance. Cargo policies almost universally contain a “seaworthiness admitted” clause by which the cargo underwriters admit the seaworthiness of the vessel in which the goods are carried, thus negating the effect of the implied warranty as to cargo insurance.^[23] In *Escombia Treating Company v. Aetna Casualty and Surety Company*,^[24] the insurer attempted to avoid the policy by claiming that the cargo owner (and voyage charterer of the vessel) had a duty of disclosure in spite of a “seaworthiness admitted” clause in the marine cargo policy. The insurer argued that the “seaworthiness admitted” clause should not apply when an insured has constructive knowledge of the unseaworthiness and the ability to control the conduct of the voyage.

The insurer asserted that loss of the cargo was caused when the chartered barge capsized as a result of an earlier listing of the vessel. The insurer asserted that the assured, as charterer of the vessel and cargo owner, should have notified the underwriters of the earlier listing of the vessel. The insurer argued that the cargo owner, as voyage charterer, could have compelled the termination of the voyage.

The court held that a duty of disclosure arising under the “seaworthiness admitted” clause does not apply to unseaworthiness of a vessel developing after the policy has been issued. The court stated:

“Once the policy is issued, coverage cannot be affected by the insurers assessment that the risk was greater than he believed at the time the contract was made.”^[25]

This analysis is similar to the line of cases analyzing the avoidance of a policy for breach of the implied warranty of utmost good faith. Utmost good faith principles of disclosure and representation apply only during the negotiating process prior to the inception of the policy.

The Implied Warranty of Lawfulness

Section 41 of the Marine Insurance Act, 1906, addresses the warranty of legality:

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

Where a voyage is illegal, an insurance upon such a voyage is invalid. The warranty amounts to a stipulation that the trade in which the insured will engage shall be lawful for the purpose of protecting the property insured, and that it shall not become unlawful by the misconduct and neglect of the insured. The privity of the insured with respect to the illegality, however, is significant.^[26] Apparently, the breach of foreign revenue laws, however, will not vitiate the insurance.^[27]

Additionally, cargo policies may contain an Illicit Trade warranty such as:

‘Warranted free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, or the violation of any port regulation.’^[28]

Insurable Interest

This issue of whether or not an assured has an “insurable interest” is a matter which is to be considered independently of the terms of the particular policy and determined by the law of the applicable jurisdiction. As insurance is a contract of indemnity, it is the existence of an

insurable interest which distinguishes indemnity from mere gaming or wagering contracts. These contracts are interdicted by Section 4 of the Marine Insurance Act of 1906.^[29] The law in the United States is similar, although usually founded on the basis of public policy. In *China Union Lines, Ltd. v. American Marine Underwriters, Inc.*^[30] the court explained that the rule requiring an insurable interest in the subject matter of insurance at the time of the loss is based on the public policy against wagering:

“It has been feared that if it were possible to take out “insurance” on goods or vessels through the destruction of which the insured stood to lose nothing, the marine policy, instead of serving the indemnification function for which it was devised, might become a means of gambling on the misfortunes of others, and might even give the “insured” an interest in the loss of marine property.”

But, the public policy rule of “insurable interest” is not a rule designed to serve the purpose of a technical defense to an otherwise valid contract between parties who know exactly what is involved. For this reason the insured need not be the owner of the property insured, but must simply show a lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.^[31] In the law of marine insurance, insurable interests are multiform and very numerous. The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lien holder may insure to the extent of his own interest in that to which such interest relates.^[32] Moreover, great liberality is indulged in determining whether a person has anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest.^[33]

In *Groban v. The S.S. Pegu*,^[34] while analyzing an “insurable interest” issue with respect to cargo insurance the court stated that “any person has an insurable interest in property,

by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself.”

[35] If an assured has a contract under which the title of a cargo would accrue to him upon delivery and he would suffer from loss of the goods prior to the delivery, an insurable interest exists. This includes goods under an F.O.B. contract, prior to the delivery of the goods to the F.O.B. carrier. The assured need not have title to or legally enforceable *in rem* rights in the property insured to have an insurable interest. If any economic advantage from the continued existence or pecuniary loss from the destruction or damage of the insured property results to the assured, he has an insurable interest.[36]

Insurable interest disputes have frequently arisen in the context of fraudulent receipt and/or bill of lading cases. In *Curacao Trading Company, Inc. v. Federal Insurance Company*, [37] the insured sued on a floating import policy insuring against physical loss or damage from any external cause including non-delivery. By a certificate issued in accordance with the usage of the trade, the policy applied to a lot of cocoa beans described by bag numbers and quality marks copied into the certificate from warehouse receipts issued by the warehouse. The warehouse was adjudicated a bankrupt, and title and right to possession to all of the cocoa beans in it, were determined to belong to others than the insured. The insured admitted that the warehouse receipts, issued earlier than the insured's, covered all the cocoa beans bearing the marks recited in his receipts and asserted no rights or interests under any of the earlier receipts.

The court held that whether the insured had an insurable interest on the date of the loss was a question of law. If the insured did not have an insurable interest on said day, then the

policy was invalid. The court reasoned that the certificates issued to the plaintiff gave him no interest in any cocoa beans in the warehouse. They were nullity as documents evidencing any right to possession or ownership of any of the merchandise described therein, and merely constituted choses in action that made the warehousemen liable for damages. The insured therefore had no lawful interest in the safety or preservation of the cargo. Consequently, the court held that the fraudulently issued receipt did not give the insured any insurable interest in of the cocoa cargo.

Such a decision, however, must be distinguished from modern day cargo policies wherein specific clauses provide coverage with respect to the issuance of fraudulent bills of lading. In *Chemical Bank v. Affiliated F.M. Insurance Company*,^[38] the court held that cargo underwriters insured the issuance of fraudulent bills of lading irrespective of the fact that the cargo was never in existence and was never shipped pursuant to the bills of lading. The court explained that an endorsement in the policy expressly provided coverage for loss caused by the acceptance of false bills of lading:

“This policy covers loss or damage occasioned through the acceptance by the assured of fraudulent bills of lading and/or shipping receipts and/or messenger receipts and/or warehouse receipts and/or truckman receipts.”

The court reasoned that such a clause affirmatively provided coverage beyond the basic coverage provided in the policy which was expressly limited to physical loss or damage to cargo. As a result of the decision in *Chemical Bank v. Affiliated F.M. Insurance Company*, the cargo insurance market has amended so-called “fraudulent bills of lading clauses,” so that such

coverage is limited to circumstances where physical loss or damage occurs to existing cargo.

The Condition of Duration of Risk

The “duration of risk” condition addresses the issues of commencement of transit, “due course of transit,” and termination of transit. Various clauses must be analyzed in order to consider the issue of “duration of the risk.” These clauses include the Attachment clause, the Voyage clause, the Consolidation of Containers clause, the Warehouse to Warehouse clause, and the Marine Extension clause. Additional specifically tailored clauses may also have an impact on the “duration of risk” issue.

Due Course of Transit

In *Ore and Chemical Corp. v. Eagle Star Insurance Company*,^[39] the Second Circuit held that:

“the true test . . . appears to be not whether movement was interrupted overnight, or over a weekend, but whether the goods, even though temporarily at rest, were still on their way, without any stoppage merely incidental to the main purpose of delivery In the final analysis, the outcome of a case such as this should be determined not by precise semantic shadings of terms of art, but by common-sense appraisal of the overall situation An interruption in the course of transport does not in itself remove the goods from coverage . . . that result will depend upon the extent and the purpose of the interruption.” ^[40]

Concerning the issue of “due course of transit,” the applicable insuring provisions and legal precedent usually require that any interruption in transit be within the privity or control of the assured, in order to constitute a termination of insurance. In *Switzerland Insurance Company v. Hualey Knitweaves*,^[41] the disappearance of a container, after an eight day stop over in a

California trucking company's yard at the assured consignee's request, constituted an "interruption or suspension" of transit from Taiwan which was excluded from coverage under the Warehouse-to-Warehouse clause. The court held that it was immaterial that the container was scheduled for ultimate delivery to the consignee's premises.

Termination of Transit

In *Royal Insurance Company v. Sportswear Group, LLC*,^[42] the court analyzed coverage in a cargo policy concerning the term, "whilst the goods are in transit and/or awaiting transit until delivered to the final warehouse . . ." and "in warehouse at locations listed." In a declaratory judgment action brought by cargo underwriters against the insured cargo owner, the court held that coverage under the policy had ceased at the time the goods were stolen, so that underwriter's motion for judgment on the pleadings was granted. The goods were no longer "in transit" at the time of the theft from the yard at the final warehouse. The decision was based on the finding that the consignee had actually accepted delivery of the container at the yard. The court held that transit had ended, irrespective of the fact that the goods had not yet been loaded into the warehouse in accordance with the "Warehouse-to-Warehouse" clause. The warehouse endorsement also did not provide coverage, as the goods were stored outside the warehouse at the time of the loss.

In *St. Paul F&M v. Sun Micro Systems*,^[43] the court held that an open cargo policy insuring goods while "in transit" does not cover theft by a fraudulent consignee after delivery of the goods at destination. In *Jomark Textiles v. International F&M Insurance*,^[44] the court held that imported goods had been delivered to the consignee's destination warehouse prior to destruction by fire and therefore they were no longer "in transit" within coverage of the cargo

policy. In *New York Marine & General Ins. Co. v. Tradeline*,^[45] the court held that cargo safely discharged ashore was no longer in the ordinary course of transit as Clause 8 of the ICC (c) terminates coverage upon delivery to any site, either to or at the named destination, used for storage, distribution or allocation.

Delivery to a Customs warehouse at destination, however, is problematic. In *Eupatoria-San Juan*,^[46] the court held that taking goods to a customs warehouse as required by law for the purpose of clearance, although no duty is payable thereon, does not accomplish safe deposit in the consignee's or other warehouse within the meaning of the Warehouse-to-Warehouse clause, in the absence of some act or neglect of insured indicating an intention to adopt the Customs warehouse as a place of storage.

Commencement of Transit

Concerning the issue of “when transit commences,” legal precedent varies considerably in light of court interpretation of various policy clauses. In *City Stores v. Sun Insurance*,^[47] the court considered an American Importers Open Cargo Policy which contained a Warehouse-to-Warehouse clause. The court held that the policy did not cover goods destroyed in an Italian warehouse fire while being stored for consolidation by the assured's agent preparatory to ocean transportation. As “transit” had never commenced, there was never any “shipment,” as required by the policy and, in any case, the interruption of transit was not “due to circumstances beyond the control of the assured.”

In *Farr Man Coffee, Inc. v. Arthur Henry Chester and Underwriter at Lloyd's of London*,^[48] the court held that the Warehouse-to-Warehouse clause, the Marine Extension clause, and the Voyage clause considerably broadened the “duration of risk” coverage beyond

ordinary transit. The Warehouse-to-Warehouse clause was interpreted to cover risks arising in storage pending imminent transit, during transit, and storage immediately following transit. The Marine Extension Clause extended the assured broader coverage than that provided under the Warehouse-to-Warehouse clause, including losses occurring prior to storage pending shipment and transit. The voyage clause extended coverage even further so as to provide coverage of pre-shipment risks, as well as coverage of transit risks, as long as plaintiffs maintained an insurable interest in the coffee. [\[49\]](#)

The court in *Farr Man* analyzed a Voyage clause which provided that coverage attached “from the time the subject matter becomes at the Assured’s risk or the Assured assumes interest and continues whilst the subject matter is in transit and/or in store or elsewhere and until the assured’s interest ceases and/or until finally delivered to final destination as required.” Under the Voyage clause, the court held that coverage attaches not upon transit, or even upon storage immediately preceding transit, but when the insured is at risk for the coffee. “Once risk attaches, coverage continues until the goods reach their final destination or the insured’s interest ceases regardless as to whether the goods are in storage or transit.”[\[50\]](#)

Other issues concerning preshipment condition have also been analyzed in terms of “duration of the risk” or “attachment of the risk.” In *Continental Insurance Company v. Chemical Oil Corp.*,[\[51\]](#) the court held that a defect which preexists the policy period, but is discovered during it, is not covered. Therefore, the court held that a bunker supplier’s all risk policy covering physical damage “from the time the goods become the risk of the insured” does not apply where evidence is established that the oil was already contaminated when the assured

took title to it. Such an analysis would also apparently apply to other preshipment conditions such as improper packaging and inherent vice.

Warranted Free of Particular Average[\[52\]](#)

Warranted free from Particular Average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty these Assurers are to pay any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. The foregoing warranty, however, shall not apply where broader terms of Average are provided for hereon or in the certificate or policy to which these clauses are attached.

This F.P.A. Clause, commonly found in cargo policies, had its origin in of the Memorandum Clause first used by London underwriters over 200 years ago. The intention of the F.P.A. Clause is to limit the liability of the underwriter to “total loss” coverage only, unless the loss is due to general average, or otherwise qualified by the policy wording.

Articles warranted free of particular average are insured only against an actual total loss, and no liability is assumed for a constructive total loss. “There can be no actual total loss where a cargo has arrived in whole or in part, in specie, at the port of destination” [\[53\]](#) The warranty’s “purpose was to limit the insurance to actual total loss”. [\[54\]](#)

“The memorandum [F.P.A.] clause does not operate as an enlargement of the perils underwritten against; it merely operates to exempt the underwriters from certain losses within those perils.”[\[55\]](#) In construction of the policy, it must be construed as a whole and where there is no evidence that the partial loss resulted from a peril excepted from particular average terms, there can be no recovery under the Sue and Labor Clause for expenses incurred by the assured in connection with a particular average loss.[\[56\]](#) The Sue and Labor Clause does not operate as an enlargement of the perils underwritten against and does not permit recovery where the policy

holders failed to discharge their burdens of showing the cause of the damage to shipments because this clause is “tied irrevocably to the insured perils coverage.”^[57]

The effect of the warranty in the absence of limiting language, is to exempt the insurer from a total loss of a part only, even if the part consisted of one or more entire packages.^[58] However, “where there is a total loss of an entire package or parcel separately valued and insured, it is a total loss of such part even though the article is free from particular average”, and insurer is liable. ^[59]

Particular average warranties generally appear in two distinct clauses: Free of Particular Average, English Conditions (FPAEC), and Free of Particular Average, American Conditions (FPAAC). Representative clauses follow:

a. UNDER DECK shipments are insured:

Warranted free from Particular Average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty, the (insurance) company is to pay any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. The foregoing warranty, however, shall not apply where broader terms of Average are provided for hereinafter.

b. ON DECK shipments are insured:

Warranted free of particular average unless caused by the vessel and/or interest insured being stranded, sunk, burnt, on fire or in collision with another ship or vessel or with ice or with any substance other than water, but liable for jettison and/or washing overboard, irrespective of percentage. The foregoing warranty, however, shall not apply when broader terms of Average are provided for hereinafter.

The above clauses represent the most limited conditions of insurance for “under deck” and “on deck” shipments of cargo. It is the rare policy that is not written to cover shipments under broader conditions of insurance. Consequently, ample space is provided in most cargo policies to provide broader terms than those cited in (a) and (b) above.

The under deck provisions in clause (a) are referred to as the FPAEC conditions (Free of Particular Average, English Conditions). The key words in the FPAEC clause are “unless the vessel be.” Unless the vessel strands, or sinks, or burns, there will be no payment for partial loss or damage to particular or single interests resulting from or occasioned by one or more of the perils enumerated in the perils clause. However, the stranding, sinking, or burning does not have to be the proximate cause. It is only necessary that one of the listed perils occurs.

The on deck provisions in clause (b) are referred to as the FPAAC conditions (Free of Particular Average, American Conditions). The key words in the FPAAC clause are “caused by.” The proximate cause of the loss or damage must be a stranding or a sinking, or a burning, etc. of the vessel. On such an occurrence, the free of particular average warranty is voided, and underwriters become liable for any partial loss or damage resulting from the perils enumerated in the perils clause.[\[60\]](#)

In modern cargo policies, the Free of Particular Average provisions are usually restricted to On Deck shipments. In *Ingersoll Milling Machine Company v. The M/V Bodena*,[\[61\]](#) the court considered a Free of Particular Average, English Conditions, clause which purported to apply to on deck shipments of containers. The assured apparently instructed that the goods be shipped under deck, however, the container in question was carried on the deck of the M/V Bodena. During the voyage, the container in question sustained heavy damage as a result of rolling and pitching from storms. Seventeen boxes of cargo were broken and others were thoroughly soaked by seawater. The cargo sustained a partial loss and required repair. The insurer denied coverage on the basis that the applicable terms and conditions provided no coverage for partial losses to cargo carried on deck. The court, however, in analyzing the terms of the particular average warranty held that the language was ambiguous. The court explained that

the clause may be interpreted to apply to containers actually stored on deck in a physical sense; or to containers intended to be stored on deck within the assured's knowledge or in accordance with the contract with carriage. The assured contended that the cargo was not intended to be carried on deck and that it had no knowledge that the containers was in fact carried on deck. The court therefore found that the policy was ambiguous, construed the policy against the insurer, and applied the all risk coverage provisions of the policy which covered all risk of loss in case of under deck shipments. The court reasoned that it is irrelevant whether the cargo actually traveled below deck, or whether the cargo was shipped pursuant to an under deck bill of lading, or as in this case pursuant to an unauthorized on deck bill of lading. The place of physical storage, or the bill of lading, is not determinative of coverage; it is the contract of carriage that governs. As long as the shipper intended the cargo to be stored below deck, and so manifested its intent in the contract of carriage, the all risk provisions regarding under deck storage apply.

A contrary decision was reached in *Morrow Crain v. Affiliated F&M Insurance*,[\[62\]](#) however, due to submission by the underwriter of additional proofs. Evidence was submitted that, although the shippers freight forwarding agent was expressly instructed to ship all cargo under deck, the agent had apparent authority vis-vis the ocean carrier to accept bills of lading permitting on-deck storage. In the shipper's action against its cargo underwriter to recover for partial damage caused by on-deck storage, the court held for the defendant underwriter. The court stated that the cargo policy clearly precluded recovery for partial losses of cargo shipped on deck, and the shipper through its agent, chose to permit this method of carriage.

**Free From Capture and Seizure Warranty
Strike, Riot & Civil Commotion Warranty
SR&CC Endorsement**[\[63\]](#)

Form: (American Institute - April 1, 1966)

F.C. & S. Warranty The following Warranties 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 included refers specifically to the risks excluded by these Warranties and expressly assumes the said risks:

A) Notwithstanding anything herein contained to the contrary, this insurance is warranted free from 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; also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter or by any mine or torpedo, also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this Warranty shall not exclude collision or contact with aircraft, rockets or similar missiles or with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather, fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purposes of this Warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

B. S.R. & C.C. Warranty Warranted free of loss or damage caused by or resulting from strikes, lockouts, labor disturbances, riots, civil commotions or the acts of any person or persons taking part in any such occurrences of disorder.

B. S.R. & C.C. Endorsement

THIS INSURANCE ALSO COVERS:

1. Damage, theft, pilferage, breakage or destruction of the property insured directly caused by strikers, locked-out workmen,

or persons taking part in labor disturbances or riots or civil commotions; and,

2. Destruction of or damage to, the property insured directly caused by vandalism, sabotage or malicious act, which shall be deemed also to encompass the act or acts of one or more deemed also to encompass the act or acts of one or more persons, whether or not agents of a sovereign power, carried out for political, terroristic or ideological purposes and whether any loss, damage or expense resulting therefrom is accidental or intentional; PROVIDED that any claim to be recoverable under this subsection (2) be not excluded by the FC&S warranty in the policy to which this endorsement is attached.

While the property insured is at risk under the terms and conditions of this Insurance within the United States of America, the Commonwealth of Puerto Rico, the Canal Zone, the Virgin Islands and Canada, this insurance is extended to cover damage, theft, pilferage, breakage or destruction of the property insured directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operation of military or naval armed forces in the country where the described property is situated.

Nothing in this endorsement shall be construed to include or cover any loss, damage, deterioration or expense caused by or resulting from:

- a. change in temperature or humidity.
- b. the absence, shortage, or withholding of power, fuel, or labor of any description whatsoever during any strike, lockout, labor disturbance, riot or civil commotion.
- c. delay or loss of market
- d. hostilities, warlike operations, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, except to the limited extent that the acts of certain agents acting secretly have been expressly covered above
- e. any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

The Assured agrees to report all shipments attaching under this cover and to pay premiums therefore at the rates established by the Assurer from time to time.

This endorsement may be cancelled by either party upon forty-eight hours written or telegraphic notice to the other party,

but such cancellation shall not affect any risks which have already attached hereunder.

Free of Capture and Seizure

This clause was developed during the Napoleonic Wars, as a “precaution against Baltic ports becoming hostile to the insured vessel after she sailed.” [64] An early distinction between “seizure” and “capture” is found in *Cory v. Burr*, [65] “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 v. Burr*. [66]

Pursuant to the F.C.&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 either event, and the phrasing of the clause as a “warranty” does not require the insured to ensure that the cargo will not be captured. [67] The F.C.&S. clause remains in full force and effect during terms of coverage provided by the Warehouse to Warehouse and Marine Extension Clauses, and supercedes 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 F.C.&S. clause which, by its own terms, takes precedence over the Marine Extension Clauses. [68]

Generally, courts read the F.C.&S. clause broadly, including within its purview seizures and detentions beyond the acts of pirates which were probably the types of acts originally contemplated by its drafters. Virtually any governmental seizure will be found an excluded risk under the “warranty.” [69]

Seizures under peaceful circumstances have been held excluded from coverage. Detention of an entire vessel by Greek authorities with a resultant infestation of some of the cargo on the vessel “the bean cargo” was held not covered;^[70] Various other detentions have been excluded from coverage: detention of cargo by the Food & Drug Administration;^[71] detention by customs for improper visa entry classification;^[72] Customs detention for suspected improper declaration of value;^[73] detention of a vessel for suspected illegal transportation to Palestine resulting in the sale of the vessel and cargo.^[74]

Another 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.” ^[75] The cause nearest in time to the event is not necessarily the proximate cause.^[76] 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.^[77] Determination of proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the losses alleged.” ^[78] Where a loss results from a combination of causes, one of which is excluded from coverage, courts generally isolate a single peril as the dominant or efficient one.^[79]

In *International Multifoods Corporation v. Commercial Union Insurance Company*,^[80] 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 had 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. Thus, the FC&S clause was held to exclude coverage by the mere fact of seizure without proof of the ultimate disposition of the cargo.

This case raised several issues on contract interpretation with respect to two insurance policies that protected Multifoods against risks associated with a shipment of frozen food sent by the plaintiff, Multifoods, to Russia. Multifoods claimed against two all risk cargo underwriters: 1) Indemnity Insurance Company of North America and 2) Commercial Union.

The applicable clause in the Commercial Union policy was: London Institute Frozen Meat Clauses (A) 24 Hours Breakdown Clause 324 (1.1.86). Clause Six of the “War Exclusion Clause” provided:

6. Which in no case shall this insurance cover loss damage or expense caused by:
 - 6.1 war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or hostile act by or against a belligerent power;
 - 6.2 capture seizure, arrest, restraint or detainment (piracy excepted) and the consequences thereof or any attempt thereat;
 - 6.3 derelict mines torpedoes bombs or other derelict weapons of war.

To the right of clause 6.1 appeared bold language identifying clause 6 as the “War Exclusion Clause.” Second, a “Special Note,” at the end of the London Form stated: “This insurance does not cover loss damage or expense caused by rejection, prohibition or detention by the government of the country of import.” CU relied on the “War Exclusion Clause” and the Special Note to argue that the Multifoods loss was excluded from coverage under the CU policy due to the free of capture and seizure wording found in the clause. On the other hand, Indemnity Insurance Company of North America, relied on the standard Free of Capture and Seizure clause

found in the IINA policy. The clause provided: “Notwithstanding anything herein contained to the contrary, this insurance is warranted free from ”capture, seizure, arrest, restraint” and the consequences thereof” whether in time of peace or war and whether lawful or otherwise.”

The lower court had held that the Commercial Union clause was ambiguous and therefore the insured was entitled to judgment in its favor. The Court of Appeals however, reversed and remanded the case. The Court explained that once a court concludes an insurance provision is ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract. Therefore, the Court remanded the case for a determination of the intent to the parties with respect to the meaning of the “War Exclusion Clause.” The District Court was instructed to consider any evidence that is probative of the parties intent, including parole evidence and evidence of custom and usage. The Court of Appeals held that the District Court was proper in granting summary judgment to IINA. The Court held that the FC&S clause trumped any other provisions of the IINA policy and therefore summary judgment was appropriate in light of the fact that the FC&S clause unambiguously applied to peace time seizures.

In *Kimta v. Royal Insurance*,[\[81\]](#) 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 held that the F.C.&S. warranty excluded coverage and provided the following rationale:

“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*, 1989 AMC at 2416, 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”). In *Tillery v. Hull & Co., Inc.*, a 1989 case, the Eleventh Circuit affirmed the verdict of a bench trial, in which the district court found that the damage to the vessel was caused when Jamaican authorities seized her, not by the captain’s drug trafficking activities that precipitated the seizure. *Tillery*, 876 F.2d 1517 (11 Cir. 1989). As in the instant case, the policy covered losses caused by the captain’s misconduct, but the Free of Capture and Seizure Clause excluded losses due to seizure. The court followed the rule in *Blaine Richards* and held that the proximate cause for the loss was the arrest of the vessel, not the underlying cause of the arrest. The ship was not damaged by the barratry of its master; it was damaged only after it was seized by the Jamaican authorities. Such contingencies are specifically excluded from coverage. *Tillery*, 876 F.2d at 1520.

....

Here, there is no allegation that the negligence of the vessel’s master or the charter company caused any independent, distinct damage to the cargo, apart from the fact that their conduct resulted in confiscation. There is 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 is 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.[\[82\]](#)

The FC&S clause also provides exclusions from coverage for the consequences of war, warlike operations, civil war, revolution, rebellion, insurrection and civil strife.

In *Pan American World Airways* the court defined the following terms:

War - war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in nature. . . .

An undeclared de facto war may exist between sovereign states.

Insurrection - there must be an intent to overthrow a lawfully constituted regime.

. . . .

A violent uprising by a group or movement acting for the specific purpose of overthrowing the constituted government and seizing its powers.

Hostilities - connotes the idea of belligerents, properly so called, enemy nations at war with one another. [\[83\]](#)

The Strike Riot and Civil Commotion Exclusionary Warranty

The *Pan American World Airways* decision defines the terms, civil commotion and riot, in the context of an S.R.&C.C. exclusion in an all risk aviation policy.[\[84\]](#) Civil commotion has been defined as “an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is usurped power.”[\[85\]](#)

In *Pan American*, the court defined various terms as follows:

Riot - Three or more actors must gather [physically] in the same place.

....

Includes any gathering of three or more persons with a common purpose to do an unlawful act and with an apparent intention to use force or violence against anyone who may oppose this purpose.

....

It is not like conspiracy. It may not be conducted by mail, by telephone or . . . by radio.

Civil Commotion - A kind of domestic disturbance, such as occur[s] among fellow citizens or within the limits of one community.

....

Imports occasional local or temporary outbreaks of unlawful violence. [\[86\]](#)

The SR&CC “Buy-Back” Endorsement

Physical damage to the insured goods was held not to be a prerequisite to recovery under the S.R.&C.C. endorsement, pursuant to the language affording coverage for “destruction of or damage to insured property” resulting from terrorist threats as found in the America Institute 1966 clauses.[\[87\]](#)

In *New Market Investment Corp. v. Fireman’s Fund Insurance Company*,[\[88\]](#) underwriters argued that physical damage to the cargo was a prerequisite to coverage under the policy. This case is instructive concerning the manner in which a court will view each individual clause with respect to the “physical loss or damage” condition. In *New Market*, threats were received at the United States - Embassy in Santiago, Chile, stating that fruit bound for the United States had been injected with cyanide. As a result of several such threats, the Food and Drug Administration increased visual inspection levels for all Chilean fruit arriving

in the United States. After implementation of the increased inspection levels on March 12, 1989, two seedless red Chilean grapes, that had arrived in the port of Philadelphia on a ship, were reported by inspectors to have a suspicious appearance. The grapes were tested in an FDA laboratory and discovered to have been contaminated with cyanide. In response to this discovery, the FDA issued press releases announcing that they had confirmed the presence of cyanide in two Chilean grapes. The press releases advised consumers to avoid eating any fruit from Chile. Cooperative efforts on the part of the FDA and the American Produce Association, established a comprehensive inspection program for Chilean fruit. Inspection levels varied according to when the fruit was picked and packed, in relation to the terrorist threats. The inspection program continued for a period of time until the FDA issued a press release confirming the “return to norma” of Chilean fruit importation.

Despite all efforts to insure the safety of Chilean fruit as well as to restore consumer confidence, the cargo owner in question, Frupac, suffered substantial losses. Much of its fruit evidentially spoiled, was destroyed, or was so damaged by inspection that it had to be destroyed. Frupac also sustained losses when some of its customers were unable to sell fruit which had already been delivered to them. The fruit was either returned to Frupac or destroyed by the customers. Frupac notified the underwriter of its claim under the Open Marine Cargo Policy. The policy contained a SR&CC endorsement which provided coverage for acts of terrorism. The particular endorsement in question did not limit coverage to physical loss or damage to cargo, but merely required “destruction of or damage to the property insured” as a result of threats of terrorism. Underwriters argued that the policy provided coverage only for physical damage to the two grapes actually injected with cyanide. The court, however, held as a matter of law that such a requirement was not contained within the plain meaning of the policy

and therefore the assured need only prove that a loss was proximately caused by an act of terrorism when the Food and Drug Administration ordered destruction of the fruit. The court held that:

“clearly the parties knew how to limit coverage to physical damage or physical loss where that was their intent. The SR&CC Endorsement uses the words “destruction of, or damage to.” This language cannot reasonably be interpreted to mean that physical damage is a prerequisite to liability under an endorsement which purports to cover acts of terrorisms. The court will not torture the clear meaning of the words of the policy to create ambiguities were none exist.”[\[89\]](#)

A similar conclusion was reached by another court considering the same Chilean fruit fiasco in *Coexport Int’l. Inc. v. Int’l Multifoods Corp.*[\[90\]](#)

Since the advent of this decision, policy wordings have been amended to expressly limit coverage to instances of “physical loss of or damage to property directly caused by enumerated perils. [\[91\]](#)

The Delay Clause

Warranted free of claim for loss of market or for loss, damage or deterioration arising from delay, whether caused by a peril insured against or otherwise. (American Institute April 1, 1966)

This clause was introduced into American cargo policies to nullify the effect of *Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co.*,[\[92\]](#) (the *Smaragd* case).[\[93\]](#) Until the Supreme Court decided this case, it had been a fundamental principle of marine insurance, in accordance with Section 55(2)(b) of the British Marine Insurance Act of 1906, that “[u]nless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against” This view was adopted

by the District and the Circuit Courts in *Smaragd*,[\[94\]](#) but was rejected by the U.S. Supreme Court.

The case involved a shipment of bananas which became overripe and spoiled, becoming a total loss, after the SMARAGD stranded during the course of her voyage. The Supreme Court rejected underwriters' contention that inherent vice or decay (non-covered risks) proximately caused the loss.[\[95\]](#) The Court also refused to follow English precedent decided pursuant to the Marine Insurance Act. Instead, the court concluded that the loss was proximately caused by stranding, a peril of the sea for which the policy provided coverage, stating "the fruit" would have been merchantable on arrival after a normal voyage, and that had it not been for the delay caused by the stranding of the vessel, the loss would not have occurred. [\[96\]](#)

Cases discussing the application of the Delay Clause, often analyze other exceptions to coverage, so their discussions pertaining specifically to the Delay Clause are limited. In *Goldman v. Rhode Island Ins. Co.*,[\[97\]](#) five cases of women's shoes were transported and insured from Buenos Aires, Argentina to New York, and then to Wilmington, Delaware, where they arrived in a moldy condition. The court found that the shoes were properly manufactured in good condition when they left Buenos Aires, and were exposed only to ordinary and expected sea and air, temperature and atmospheric conditions during their transport. It also noted that they were delayed between their arrival in New York on September 15, 1946 and their delivery to Wilmington on December 16, 1946, which was not explained, and that their location during that time was not given. The court commented that inherent vice and delay were expressly excluded from the risks assumed by the underwriter and held that the assured had not demonstrated that the shoes were damaged by an insured peril, which precluded recovery. Using similar logic,

another court reached the same conclusion in *Coussa v. Westchester Fire Ins. Co.*,[\[98\]](#) (pistachio nuts delayed on pier in New York for 25 days).

In *Coexport Int'l., Inc. v. International Multifoods Corp.*, the court held that any Chilean fruit damaged as a result of delay would be excluded from coverage irrespective of the fact that the damage would have been covered under the SR&CC endorsement.[\[99\]](#)

The delay warranty also excludes coverage for loss of market value to cargo.[\[100\]](#)

Various Express Promissory Warranties

Cargo policies often contained tailored expressed warranties dealing with specific situations. For example, certain policies require pre-shipment certificates from the exporting country. Some policies, such as those containing the Institute Cargo Clauses 8.1 and 8.1.1, contain a warranty “full containers, door-to-door.” Other policies require that inland shipments of cargo be accompanied by armed guards while being transported in certain countries. Of course, cargo policies containing an additional endorsement for warehouse coverage at a named location frequently include express warranties concerning alarm systems.

In *Continental Seafoods v. New Hampshire*,[\[101\]](#) the policy in issue contained a warranty requiring that a shipment of shrimp be inspected by government authorities in the country of origin and that a certificate be issued certifying same. At the time, there was no such inspection facility in the country of origin (Pakistan) authorized to issue a certificate of inspection. Notwithstanding that performance of the warranty was totally impossible, under New York law, strict literal compliance was required, and the assured did not recover.[\[102\]](#)

In *Advani v. Lloyd's*,^[103] the court held that New York law on the effect of a breach of warranty is no different from federal marine insurance cases before *Wilburn* and voids a policy for breach. A warranty in a cargo policy “full containers, door-to-door,” means that the shipper will use the full space in the container from the initial to the final warehouse or place of storage. The warranty contained in Institute Cargo clauses 8.1 and 8.1.1. was breached when containers were unpacked at the Customs terminal according to Egyptian customs regulations and the contents trucked to the warehouse one mile away.^[104]

Historically, cargo policies contained express warranties of Neutrality and Good Safety. With respect to the Warranty of Neutrality, Section 36 of the Marine Insurance Act of 1906 states:

“Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.”

A forfeiture of neutrality by the willful act of the assured is a breach of warranty. Property must be neutral in fact, in appearance, and in conduct. The property must belong to neutrals and be so documented. No act of the assured or his agents may be done to compromise its neutrality.^[105] There is, however, no implied warranty as to the nationality of a ship.^[106]

Cargo policies also contained an express warranty of “good safety” on a particular day.^[107] Precedent for these clauses, as well as the neutrality clauses, generally date back to the 1800’s.^[108]

The Requirement of a Fortuity

The concept of a fortuitous event is a court imposed requirement of law pertaining to contracts of insurance.[\[109\]](#) The requirement of “fortuity” in an “all risk” policy has been referred to as a “judicially created” exclusion from coverage.[\[110\]](#) All risk is not synonymous with “all loss.” The label “all risk” is essentially a misnomer. “All risk” policies are not “all loss” policies. Indeed, the question of loss and risk are separate and distinct.[\[111\]](#) It is generally recognized that it is against public policy to allow insurance coverage on a certainty. The application the fortuity doctrine to the facts of a particular case is a question of law for resolution by the court.[\[112\]](#)

A fortuitous event has been defined as follows:

A fortuitous event . . . is an event which so far as to the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties.[\[113\]](#)

The burden of demonstrating a fortuity is not a particularly onerous one.[\[114\]](#) All risk insurance covers all losses which are fortuitous no matter what caused the loss, including the insured’s negligence, unless the insurer expressly advises otherwise. A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured.[\[115\]](#) Of course, upon principals of public policy and morals, any fraud or criminal misconduct of the assured is, in contracts of marine or fire insurance, an implied exception to the liability of the insurer.[\[116\]](#)

All losses attributable to external causes, absent specific exclusion thereof, are covered by all risk policies. In order to recover under an all risk policy, the burden of proof is on the assured to prove a fortuitous loss of the covered property. The insured however, need not prove the cause of the loss. In fact, the insured need not prove the exact nature of the accident, or casualty which, occasioned the loss.

In *Intermetal Mexicana v. Insurance Company of North America*,[\[117\]](#) the court considered a taking of property by a creditor of the owner of certain equipment. The court held that there was nothing fortuitous about the fact that a creditor would resort to the courts to obtain collateral for unpaid debts, nor was such a business dispute outside the parties realm of control. The court held that the owner of the equipment may have temporarily lost the use and enjoyment of its equipment, but only as a result of a proper order of the court which temporarily relieved the owner of its possessory rights. In the context of a commercial debtor-creditor relationship, it is to be expected that parties may resort to the courts for resolution of a dispute arising out of such relationships. Under such circumstances, the concept of risk that is inherent in all policies of insurance is lacking. Thus, the court concluded that the taking of equipment pursuant to a valid court order was not a fortuitous event.[\[118\]](#) When the creditor decided to refuse to honor the subsequent order of the court to return the equipment, however, the court decided that such action was tantamount to conversion:

“Ample authority exists for the proposition that all risk insurance covers conversion. All risks of direct physical loss have been held to include theft by false pretenses. A conversion is the deprivation of another’s right of property in, or use and possession of, a chattel, without the owners consent and without legal justification. Thus, when the parties fail to comply with the court order or in this case to return property pursuant to a valid court

order, thereby converting such a property, a fortuitous event has occurred.[\[119\]](#)

In *Youell v. Exxon*,[\[120\]](#) the court recognized that the requirement of a fortuity is an entrenched principal of federal maritime law. The court explained:

As an initial matter, we agree with plaintiffs that the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years. See *Orient Mut. Ins. Co. v. Adams*, 123 U.S. 67 (1887). In so doing, these courts have predominantly looked to federal law as precedent. See e.g. *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 1982 AMC 658, 666, 632 F.2d 424, 431 (5 Cir. 1980) (relying on Second, Fifth and Ninth Circuit cases); *Atlantic Lines Ltd. v. American Motorists Ins. Co.*, 1976 AMC 2522, 2523, 547 F.2d 11, 12-13 (2 Cir. 1976) (relying on various federal district and circuit court decisions); *Western Assur. Co. of Toronto v. Shaw*, 1926 AMC 578, 579, 11 F.2d 495, 496 (3 Cir.) (relying on federal precedent), *cert denied*, 273 U.S. 698 (1926). And, to the extent that admiralty courts have looked to other sources, they have relied on British as much as state case law authority. See e.g. *Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340-41 (9 Cir. 1988) (looking to British case law); *Goodman v. Fireman Fund Ins. Co.* 1979 AMC 2534, 2537, 600 F.2d 1040, 1042 (4 Cir. 1979) (relying on cases from Great Britain, North Carolina and federal courts). That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law. [\[121\]](#)

CONCLUSION

Marine cargo insurance has evolved from restrictive coverage terms based upon “named perils,” to broad coverage terms based upon “all risk.” The “duration of risk” has continually expanded from “ship loading to ship discharge,” then from “Warehouse to Warehouse,” and now, well beyond. Custom clauses are continually drafted by brokers to expand coverage. From

the brokers' standpoint, warranties are generally disfavored. From the underwriters' standpoint, however, warranties remain an effective tool for controlling exposure to risk.

[1] *Standard Oil Company of New Jersey v. U.S.*, 340 U.S. 54, 1950 AMC 365 (1950).

[2] Alex J. Parks, *The Law and Practice of Marine Insurance and Average*, 233 (1987).

[3] Parks at 234.

[4] *Id.* at 235.

[5] *Id.* at 236.

[6] 2000 AMC 1 (2d Cir. 2000)

[7] *Flagship* at 6.

[8] 348 U.S. 310 (1955).

[9] Parks. at 13.

[10] *Wilburn Boat Co.*, *supra* at 314-321.

[11] *Avani v. Lloyds* (1997 AMC 1851 (S.D.N.Y.) vacated on other grounds 1998 AMC 2085 (2d Cir. 1998); *New York Marngen v. Martext*, 1994 AMC 976.

[12] *Commercial Union v. Flagship*, 2000 AMC 1 (2nd Cir. 1990).

[13] 2000 AMC 1 (2d. Cir 2000).

[14] 2001 AMC at 8.

[15] *In re Balfour MacLaine Int'l, Ltd*, 1996 AMC 2266 (2d Cir. 1996); *Albert Schiff Assocs., Inc. v. Flack*, 51 N.Y. 2d 692, 435 N.Y.S.2d 972 (N.Y. 1980).

[16] *Id.*; *Farr Man*, *supra*.

[17] *Reliance v. Escapade*, 1961 AMC 2410 (5th Cir. 1961.)

[18] Parks at 460.

- [19] Parks at 216.
- [20] 1987 AMC 1(2d. Cir. 1986).
- [21] *Knight* at 7.
- [22] *Knight* at 6.
- [23] Parks at 262.
- [24] 1977AMC 1285 (ND. Fla. 1976)
- [25] Escombia at 1287.
- [26] Parks at 254; *Pacific Queen Fisheries v. Symes* 307 F.2d 700 (9th Cir. 1962) (fishing vessel carrying gasoline cargo in violation of Tanker Act).
- [27] *Id.* at 255.
- [28] *Leslie J. Bugless, Marine Insurance and General Average in the United States* 33 (2d Ed.).
- [29] Parks at 183.
- [30] 1984 U.S.Dist. LEXIS 18719 (S.D.N.Y. 1984)
- [31] Gilmore and Black, *The Law of Admiralty* at 59-62 (2d Ed. 1975).
- [32] *Id.* at 59-62.
- [33] *Id.* at 59-62.
- [34] 1972 AMC 460 (S.D.N.Y. 1971)
- [35] *Id.* at 477.
- [36] *Groban* at 476-477.
- [37] 1942 AMC 10079 (S.D.N.Y. 1972)
- [38] 815 Supp. 115 (S.D.N.Y. 1993).
- [39] 489 F.2d 455 (2d Cir. 1973).
- [40] *Id.* at 457.
- [41] 1992 AMC 1394 (S.D.N.Y. 1992).

[42] 2001 AMC 154 (S.D.N.Y. 2000).

[43] 1992 AMC 2403 (N.D. Cal. 1992).

[44] 1991 AMC 1393 (S.D.N.Y. 1991).

[45] 2003 AMC 414 (2d. Cir. 2003).

[46] 1929 AMC 540 (9th Cir. 1929).

[47] 1973 AMC 44 (S.D.N.Y. 1973).

[48] 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y. 1993)

[49] *Id.*

[50] *Id.*

[51] 1989 AMC 209 (N.D. Cal. 1989).

[52] The author gratefully acknowledges the assistance of Wallace Appelson, Vice President of TM Claims Service, Inc., in the preparation of this Section.

[53] *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U.S. 1, 9, (1900).

[54] *J.A. Jones Constructions v. Niagara Fire Ins. Co.*, 170 F.2d 667, 668, 1951 A.M.C. 1401 (4th Cir. 1948); *see also, Continental Food Products, Inc. v. Ins. Co. of North America*, 544 F.2d 834, 836, 1977 AMC 2421, 2424 (5th Cir. 1977) (F.P.A. clause excludes coverage for partial losses).

[55] *Dominican Import Co. v. Lloyd's London*, 1981 AMC 2981, 2987 (E.D. Va. 1980) *aff'd* 1981 AMC 2979 (4th Cir. 1981).

[56] *Continental Food Products, Inc.*, 544 F.2d at 836-37, 1977 AMC at 2424-25.

[57] *Id.*, 544 F.2d at 837, 1977 AMC at 2424-25.

[58] *J. A. Jones Construction Co.*, 1951 AMC at 1404.

[59] *Larsen v. Ins. Co. of North America*, 252 F.Supp. at 471, 1965 AMC at 2595 (W.D. Wash 1965).

[60] 2 Brunck, *Ocean Marine Insurance* 118 (First Edition 1988).

[61] 829 F.2d 293 (2nd Cir. 1987).

[62] 1980 AMC 601 (9th Cir. 1990).

[63] See Generally, Andrew S. deKlerk, American Institute Cargo Clauses, Annotated FC&S, SR&CC and SR&CC endorsement (Maritime Law Association).

[64] Goodacre, Kenneth J., Marine Insurance Claims at 788 (2d Ed. 1981).

[65] [1882- 83] 8 App. Cas. 393 (H.L.).

[66] [1882- 83] 8 App.Cas. at 405.

[67] *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).

[68] *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).

[69] *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).

[70] *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).

[71] *Blaine Richards & Company, Inc. v. Marine Indemnity Ins. Company of America*, 635 F.2d 1051, 1981 AMC 1 (2d Cir. 1980).

[72] *Northern Feather International v. Underwriters, supra*, (Customs detention for improper visa entry classification);

[73] *Resin Coatings Corp. v. Fidelity & Casualty Co., supra* (Customs detention and sale of goods).

[74] *Intermondale Trading Co. v. North River Insurance Co, supra*.

[75] *Standard Oil Co. v. United States*, 340 U.S. 54, 588, 1951 AMC 1, 4 (1950) (quoting *Dole v. New England Mut. Ins. Co.*, 7 Fed. Cas. 837, 853 (C.C. Mass. 1864) (No. 3966)); see *Pan American World Air., Inc., v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1008 (2d Cir. 1974) (explaining subsequent damage after loss of control due to a “taking” of property).

[76] *Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co.*, 302 U.S. 556, 562-63, 1938 AMC 1, 5-7 (1938).

- [77] *Blaine Richards & Co. v. Marine Indemnity Insurance Co.*, 685 F.2d 1051, 1054 (2d Cir. 1980) (quoting *Lanasa Fruit Steamship & Importing co. v. Universal Insurance Co.*, 302 U.S. 556, 565, 58 S.Ct. 371, 375, 82 L.Ed. 422 (1938)).
- [78] *Blaine Richards & Co. v. Marine Indemnity Ins. Co.*, 1981 AMC 1, 7, 635 F.2d 1051, 1054-55 (2 Cir. 1980).
- [79] 1 Parks, *supra*, at 413.
- [80] 2002 AMC 2939 (2nd Cir. 2002)
- [81] 2001 AMC 708 (Washington Ct. of Ap. 2000).
- [82] *Id.* at 715.
- [83] *Id.* at 1005, 1012, 1017.
- [84] *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974).
- [85] Hugh A. Mullins, *Marine Insurance Digest* at 39 (1951); Parks at 338-42.
- [86] *Id.* at 1005, 10019, 1020.
- [87] *New Market Investment Corp. v. Fireman's Fund Ins. Co.*, 774 F.Supp. 909, (E.D.Pa. 1991).
- [88] 774 F. Supp. 909 (E.D.Pa. 1991).
- [89] *Id.* at 914.
- [90] 1997 U.S. Dist. LEXIS 6743 (N.D. Ill. 1991). *See also*, *Bacchus Associates v. Hartford Fire Ins. Co.*, 766 F.Supp. 104 (S.D.N.Y. 1991).
- [91] AIMU SR&CC Endorsement (March 1, 2002 and TRIA Form, February 21, 2003).
- [92] 302 U.S. 556, 1938 AMC 1 (1938).
- [93] *Kimta v. Royal Insurance* 2001 AMC at 714; *Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of New York*, 975 F.Supp 1137, 1147 (S.D.ILL.1997).
- [94] 16 F.Supp. 912, 1936 AMC 1651 (D. Md. 1936) and 89 F.2d 545, 1937 AMC 651 (4th Cir. 1937)
- [95] 302 U.S. at 562, 1938 AMC at 6.

[96] 302 U.S. at 561-62; Buglass, Leslie J. American Institute Cargo Clauses, Annotated Delay Clause (Maritime Law Association).

[97] 100 F. Supp. 196 (E.D.Pa. 1951.)

[98] 1962 AMC 1805 (S.D.N.Y. 1961).

[99] 1997 U.S. Dist LEXIS 6743 (N.D.Ill. 1991) ;see also, *Archer-Daniels-Midland v. Phoenix*, 975 F.Supp 1129, 1137, n.8 (S.D. Ill 1997).

[100] *Interpetrol Bermuda, Ltd., v. Lloyd's Underwriters*, 1985 AMC 40 (S.D.N.Y. 1984).

[101] 1964 AMC 196 (S.D.N.Y. 1963).

[102] Parks at 239.

[103] 1997 AMC 1851, *supra*.

[104] 1997 AMC 1851, *supra*.

[105] Parts at 251.

[106] *Id.* at 251.

[107] Parks at 252.

[108] *Id.* at 252.

[109] *Intermetal Mexicana v. Insurance Company of North America*, 866 F.2d 71, 76 (3d Cir. 1989); *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 431 (5th Cir. 1980); *Compagnie Des Bauxites*, 554 F.Supp. 1080, 1084 (W.D.Pa. 1983).

[110] *Intermetal Mexicana*, *supra* at 75.

[111] *Intermeta Mexicana*, *supra* at 75.

[112] *Intermetal Mexicana* at 77.

[113] *Intermetal Mexicana* at 77; *Morrison Grain* at 434.

[114] *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980).

[115] *Centennial Insurance Co. v. Lithotech Sales, LLC* 2001 AMC 1046, 1050 (D.N.J. 2001).

[116] *In Re Balfour MacLean International Ltd.*, 1996 AMC 2266 (2d. Cir. 1966).

[\[117\]](#) 866 F.2d 71 (3rd Cir. 1989).

[\[118\]](#) *Intermetal Mexicana supra* at 77-78.

[\[119\]](#) *Intermetal Mexicana supra* at 78-79; see also, *Fruehauf Corp. v. Royal Exchange Assurance of America Inc.*, 1984 AMC 1194 (9th Cir. 1983) (the enforcement of a security interest in tractors after a stay of bankruptcy had been lifted would not in itself constitute a “physical loss or damage”).

[\[120\]](#) 1995 AMC 1147.(2d Cir 1995) vacated on the grounds 516 U.S. 801.

[\[121\]](#) *Id.* at 1153.