INSURANCE AGENCY RISK MANAGEMENT:

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Chapter 10

Inland and Wet Marine

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§ 10:1 Introduction

On May 25, 1721, Mr. John Thompson in the American Weekly Mercury announced that he had opened at his High Street, Philadelphia location, "An Office of Publick Insurance on Vessels, Goods and Merchandises" because "the merchants of this City of Philadelphia and other parts have been obliged to send to London for such assurance, which has not only been tedious and troublesome, but even very precarious". This is most likely the first example of a marine insurance operation in the United States. In 1792, the first known marine insurance company, The Insurance Company of North America, was established in the United States. It is believed that by 1845 there were probably 75 or more American marine insurance companies in operation. However, in the period following the Civil War, marine insurance underwriting in the United States virtually disappeared. At the outbreak of World War I, approximately 75% of American marine insurance was placed outside the United States. While marine insurance underwriting has certainly grown in the United States since World War II, the foundational concepts of marine insurance can trace through origins to a time which well precedes the founding of the United States.

The most significant marine insurance market in history can trace its origins to Lloyds Coffeehouse in London. Lloyd's Coffeehouse, originally on Tower Street but relocated to Lombard Street in 1691, was the springboard for the Lloyds Insurance Syndicates. The Coffeehouse was frequented with sailors, merchants and ship owners. Parties interested in the shipping industry met there frequently to discuss insurance agreements among themselves. The London market and Lloyds in particular is still at the forefront of the marine insurance industry today. However, one has to go back even further to discover the origins of marine insurance. The original syndicate members at Lloyds were heavily influenced by insurance agreements and concepts traceable to 16th century Italy. The Romans incorporated concepts related to the principals of general average, i.e., contribution from interested parties toward marine losses, into their own civil law from the Greeks. In fact, average principals are traceable to the Island of Rhodes as far back as 900 B.C. The concept of bottomry goes back even further, with reference in the Code of Hammurabi in 2250 BC to legal protection offered to traders who were robbed of advanced merchandize through no fault of their own. For as long as merchants have sought to transport their goods to distant lands has there been a need to establish rules for what happens at the time of loss. Accordingly, marine insurance law has a historical foundation as strong and extensive as any body of law in existence.

Today, marine insurance covers risks far beyond a ship, its freight and its cargo. In fact, a marine policy might even cover an item that never gets close to water. However, from a historical perspective, the definition of marine insurance has been virtually identical in the United States and England. In 1840, Willard Phillips, an early American authority on marine insurance defined the term as follows: "Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight or cargo subject to marine risks another undertakes to indemnify him against some or all of those risks during a certain period or voyage." In England, Parliament passed the Marine Insurance Act of 1906 which provides the following definition at Section 1: "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure." Both definitions draw heavily upon common law, trade usage and industry customs.

Since British insurers have been providing marine cover to Americans since Colonial times, it is not surprising that American and English marine insurance law is similar. In fact, in *The Eliza Lines* decision,[1] Justice Holmes states: "Of course it is desirable, if there is no injustice, that the maritime law of this country and England should agree". Justice Holmes reinforced this decision with his opinion in *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*,[2] where he stated: "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. This is not to say that American and English law never diverge on points of marine insurance. However, just as England and the United States share a common language, there is likewise commonality in the approach each country takes to governing in tracks of marine insurance."

§ 10:2. The London insurance market and the Marine Insurance Act of 1906

It is hard to overstate the significance of the London insurance market and the Marine Insurance Act of 1906 as it relates to the marine industry. As mentioned previously, the birth place of organized marine insurance is the Lloyds Coffeehouse. Marine insurance became vital in the era which followed the American Revolution and Napoleonic wars. During this period of time, Lloyds assumed a dominant role in marine insurance on a global scale. Creation of Lloyds List, the publication devoted to shipping industry statistics, is one of the oldest continuing running journals in the world. It was first published in London in the 1730s. The first recorded occurrence of marine underwriting occurred at Lloyds during the 1750s. Non marine policies were not even written at Lloyds until the 1870s. Today the Lloyds market has expanded far beyond marine insurance. However, anyone wishing to learn about marine insurance contracts must be familiar with the Lloyds market.

While the market for marine insurance is inextricably linked with Lloyds of London, legal concepts related to marine insurance coverage throughout the world are similarly intertwined with the Marine Insurance Act of 1906. The passage of the Act was a monumental achievement. It successfully codified common law decisions, industry terminology and historical concepts. The Act profoundly influenced marine insurance law globally. While questions have arisen as to the applicability of certain concepts, such as the requirement that an assured exercise "the utmost good faith" (to be discussed supra), anyone seeking to better understand marine insurance law, and especially those seeking to place policies of marine insurance, should be familiar with its general contents. The act has not only been profoundly influential in the marine insurance industry but the insurance industry in general. While it would be impossible to cover the entire act in the scope of this chapter, some of the more important concepts are worth noting.

[Section 10:1]

[1]The Eliza Lines, 199 U.S. 119, 26 S. Ct. 8, 50 L. Ed 115 (1905)

[2]Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 44 S. Ct. 175, 68 L. Ed. 402, 1924 A.M.C. 107 (1924)

§ 10:3 The London insurance market and the Marine Insurance Act of 1906 --- Uberrimae Fidei (utmost good faith).

Section 17 of the Act provides as follows: "The Contract of Marine Insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." As Lord Mansfield stated in *The Carter Beohm*,[1] (1766) 3 Bir. 1905: "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and from his believing the contrary . . . the policy would be equally [void] against the underwriter if he concealed as if he insured a ship on a voyage which he probably knew to be arrived, an action would lie to recover the premium". While Lord Mansfield references the actions of an underwriter in concealing information, obviously it is far more likely that allegations would be made against an assured in failing to disclose important information. While there are divergences from this concept today, especially at the state level, it is important that the assured, when applying for insurance, not make any material misrepresentation which tends to diminish the value of the risk. All facts known to the insured which are material to the risk and are not known to the insurer must be disclosed.

§ 10:4 The London insurance market and the Marine Insurance Act of 1906 --- Valued and Unvalued Policies

Section 27 of the Act provides as follows:

Valued Policy

(1) A policy may be either valued or unvalued;
(2) A valued policy is a policy which specifies the agreed value of the subject matter insured;
(3) Subject to the provisions of this Act and the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.
(4) Unless the policy otherwise provides value fixed by the policy is not conclusive for the purposes of determining whether there has been a constructive total loss.

Section 28 of the Act defines an unvalued policy as follows:

> "An unvalued policy is a policy which does not specify the value of the subject matter insured, but, subject to the limit of the sum insured, leave the insurable value to be subsequently ascertained in the manner hereinbefore specified."

Many of the most contentious marine claim disputes arise due to the principle of value as reflected in the Act. If property values are not represented accurately, the consequences for the assured can be severe. For example, let's assume that a policy is taken out on a fleet of ships. Ship A of the fleet is damaged by a covered peril. Ship A is valued under the policy at $3 million, but its real value is $4 million. Based on these facts, the assured can only recover three-fourths of the adjusted loss from the underwriter. The loss is adjusted on this proportional basis irrespective of the total limits of cover.

[Section 10:3]

[1]The Carter Beohm (1766) 3 Bir. 1905.

The valuation contained in the policy will be conclusive in a dispute between the insurer and the assured. In the case of an unvalued policy, the value of the insured property subject to the claim must be proved.

§ 10:5 The London insurance market and the Marine Insurance Act of 1906 --- General and Particular Average

Particular average loss and general average loss are defined in the Act at Section 64 and 66, respectively. A particularly average loss is a partial loss of the subject matter insured, caused by a peril insured against and which is not a general average loss. A general average loss is a loss caused by or directly consequently on the general average act. Obviously these definitions under the Act are somewhat less than satisfactory to gain a full understanding of the concept of average. Essentially, the average scheme is a mechanism by which to determine how to apportion losses incurred as the result of a maritime peril. The general average loss differs from a particular average loss in its nature and incidence. A general average loss is a loss voluntarily incurred for purposes of common safety or the protection of the greater sum of property. It is proportionally borne by all parties concerned in the maritime adventure. For example, assume that some portion of cargo has to be jettisoned from a vessel to prevent a total loss to the ship and remaining cargo. In such a circumstance, a general average act will have occurred which would likely allow some apportionment of loss among the various interested parties, i.e. cargo owners, ship owner, etc. A particular average loss occurs when a partial loss is fortuitously caused by a maritime peril. A particular average loss has to be borne by the party upon whom it falls and there is no sharing. Prime examples of particular average a loss is caused by heavy weather damage, stranding, collision and fire damage.

§ 10:6. The London insurance market and the Marine Insurance Act of 1906 --- Indemnity

Section 67 of the Act describes the measure of indemnity as follows:

Extent of liability of insurer for loss:

(1) The sum which the assured can recover in respect of a loss are the policy by which he is insured, in the case of an unvalued policy, to the full extent of the insurable value, or in the case of a valued policy, to the full extent of the value affixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy, in a case of a valued policy, or to the insurable value, in the case of an unvalued policy."

While insurance contracts are typically ones of indemnity, the amount of indemnity under a marine insurance policy is a matter of agreement between the parties. It is imperative to understand that the adjustment of a marine insurance loss proceeds on the hypothesis that the subject matter is fully covered by insurance. The measure of indemnity is therefore inextricably intertwined with value. In a declared value policies, which comprise the vast majority of all marine policies, any failure to reflect the actual value of an item insured will reduce the liability of the insurer in the event of loss. For example, assume that cargo valued at $10,000 is insured for only $1,000. Further assume that the cargo is damaged by sea perils causing $1,000 worth of damage. The assured would not be entitled to recover $1,000 for his loss. Rather, because the cargo was only insured for 10% of its actual value, the assured would be allowed to recover only $100. This concept is further embodied in Section 81 of the Act which provides as follows:

Effect of Underinsurance
Where the assured is insured for an amount less than the insurable value, or in the case of valued policy for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

§ 10:7 The London insurance market and the Marine Insurance Act of 1906 --- U.S. Regulatory and Legal Environment

The legal environment in the U.S. as noted by Justice Holmes has been greatly influenced by the common law and the Marine Insurance Act of 1906. There are, however, important differences. These differences were articulated most prominently in *Wilburn Boat Co. v. Fireman's Fund Ins. Co*.[1]. In *Wilburn Boat*, Justice Black, while finding the insurance policy sued on was a maritime contract and, therefore, that the admiralty clause of the Constitution brought it within federal jurisdiction, refused to find that every term and every maritime contract could only be controlled by a federally defined admiralty rule.[2] Accordingly, in the absence of a controlling federal admiralty rule, issues arising under a maritime insurance contract are to be governed by the appropriate state law. Accordingly, a marine insurance policy, whether issued by Lloyds of London, a domestic carrier in the United States or a carrier in some other part of the world, may well be governed by the common, statutory and regulatory law of any one of 50 states.

The most striking area of divergence between U.S. and U.K. law concern the areas of misrepresentation, nondisclosure and warranties. As noted above, the Marine Insurance Act of 1906 implies a duty of utmost good faith. English law has recognized this duty as continuing in various degrees up to and including the point of the claim.[3] Many states, however, do not allow an insurance carrier to void a policy absent a showing that the misrepresentation has led to a waiver or loss of a valid defense under the policy.[4] Further, compliance with the duty of good faith by an assured seems to be limited to those activities associated with the application or renewal for insurance. Additionally, statements in marine insurance policy are more likely to be construed as warranties in the U.K. than in the U.S. Many policies issued from abroad will have a jurisdiction clause reflecting the laws of the state which shall apply to the interpretation of the policy. Accordingly, while the principals originating from England may be very similar to those embodied in U.S. common law, the precepts of each state must be examined in analyzing any marine policy dispute.

[Section 10:7]

[1] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337, 1955 A.M.C. 467 (1955)

[2] 348 U.S. at 348

[3] The Star Sea, (1997) One Lloyds Ret. 360 (C.A.).

[4] See, e.g., Tex. Ins. Code Ann. § 705.003(b).

§ 10:8 The London insurance market and the Marine Insurance Act of 1906 --- Non U.K./U.S. Regularly and Legal Considerations.

Most commonwealth countries tend to follow the established principles of marine insurance law from the U.K. While there is a great deal of uniformity among the case law decisions of the commonwealth countries, there can be divergence. For example, Australian courts have expanded the definition of a general average loss beyond that which would be found in the U.K.

Marine policyholders and professionals must also be familiar with The York Antwerp Rules. These rules, when agreed to by the parties in interest in a marine adventure, govern the settlement of maritime losses among the interest of ship, cargo and freight owners. The York Antwerp Rules establish the rights and obligations of the parties when a general average event occurs. As mentioned previously, when a general average event occurs, all participants in the maritime adventure contribute to offset the losses incurred. The York Antwerp Rules were first promulgated in 1890 and have been amended several times, most recently in 1994. The rules may be incorporated by reference into a bill of lading, contract of freight or a marine policy itself.

§ 10:9 The placing and insuring various risks --- Ships and Vessels (hull and machinery).

Hull and machinery insurance is cover designed to protect the insured vessel or fleet against physical damage caused by perils of the sea or other named perils. Even though this type of cover is most commonly associated with vessels navigating the open sea, a hull and machinery policy may cover many types of vessels, such as tug boats, barges, and even offshore oil rigs. Provided that the hull and machinery policy has a running down clause, the policy may provide cover for damage resulting from a collision with another vessel as well as damage caused by ordinary sea perils, such as penetration of ocean water.

While all policies historically provided cover only for those perils associated with the sea, in the late 19th century, the perils covered under marine policies began to broaden. An "Inchmaree" clause began appearing in policies affording coverage for losses not specifically associated with sea perils. Today, almost every hull policy contains an Inchmaree clause.[1] A typical Inchmaree or additional perils clause will cover the following:[2]

1. Accidents in loading, discharging or handling cargo or in bunkering;
2. Accidents in going on or off or while dried docks, graving docks, weighs, or pontoons;
3. Explosions on ship board or elsewhere;
4. Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defects in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);
5. Breakdown of or accidents to nuclear installations or reactors not on board the insured vessel;
6. Negligence of charterers and/or repairers, provided such charterers and/or repairers are not an assured hereunder;
7. Negligence of masters, officers, cruise or pilots provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel or any of them.

[Section 10:9]

[1]See Employers Ins. of Wausau v. Occidental Petroleum Cort., 978 F.2d 1422, 1437, 1993 A.M.C. 1460 (5th Cir. 1992)

[2]*See Marine Insurance and General Average of the United States*, Leslie J. Buglass, 2nd Edition, Cornell Maritime Press 1981.

Loss occasioned by the lack of due diligence on the part of the assured will not be covered and this often provides a basis for dispute with underwriters. In Kearny Barge Co. v. Global Ins. Co., 943 F. Supp. 441 (D.N.J. 1996), the Barge company sought to recover insurance proceeds from various underwriters in connection with the capsize and salvage of one of its barges. While docking a barge for one of its clients, an employee of Kearny improperly opened some valves on the barge which caused its cargo to become unstable. The barge eventually listed 70 degrees and sank. The hull and machinery policy covering the loss contained an Inchmaree clause which provided cover for "loss or damage to the vessel directly caused by the . . . [n]egligence of the masters, officers' crew or pilots provided; provided such loss or damage has not resulted from the want of due diligence by the assured . . . .".[4] The Court found that the employee who improperly allowed the valves to be opened was indeed a crew member of the barge.[5] The Court also found that because the employee was adequately trained, Kearny had company procedures which addressed the appropriate manner and time for opening the valves, and the barge was in a seaworthy condition at the time it docked, the underwriter could not assert a defense under the policy for lack of due diligence by the assured. If the loss is caused by lack of due diligence by the assured, courts will not allow a recovery under the policy. One example of failure to exercise due diligence is where the assured fails to furnish sufficient information for the safe unloading of a vessel.[6]

Many hull and machinery policies also contain a "running down" clause. The running down clause is intended to cover liability for damage to other vessels or property caused by collision. Running down clauses had to be added to traditional marine policies as a collision was not considered a "peril of the sea"[7] A running down clause may not cover consequential damages resulting from a collision. For example, in *Benders Ship Building & Repair Co. v. Brasileiro*,[8] the Court found that a shipbuilder's liability for liquidated damages for the delay in delivery of a vessel was not recoverable even though the vessel was damaged in a collision on navigable waters. The Court noted that the running down clause was meant to protect against liability to owners of other vessels and property damaged by the collision. The Court declined to extend the cover under the running down clause to liability under a separate contract between the ship owner and a third party as there was not reasonable basis to extend the clause in such a manner.[9]

Every hull and machinery policy, either expressly or by implication, contains a warranty of sea worthiness.[10] Sea worthiness is determined by the use to which the vessel is to be placed and the place of its use.[11] If a vessel sinks in calm water without any explanation, a presumption arises that the loss was due to unseaworthiness of the vessel.[12] This is, however, a rebuttable presumption.[13] In the event of an unexplained sinking of a vessel, it is important for the assured to be able to demonstrate that the vessel was seaworthy before the voyage and was neither overloaded nor improperly loaded to rebut this presumption.

[Section 10:9]

[3]Kearny Barge Co., Inc. v. Global Ins. Co., 943 F. Supp. 441, 1997 A.M.C. 715 (D.N.J. 1996), judgment aff'd, 127 F.3d 1095 (3d Cir. 1997) and judgment aff'd, 127 F.3d 1095 (3d Cir. 1997).

[4]943 F. Supp. At 455.

[5]943 F. Supp. At 456

[6]See *Coast Ferries Limited v. Sentry Insurance Co. of Canada*, Two Lloyds Reporter 232 (1973)

[7]See DeVaux v. Salvador, 4 A.D. & E. 420, 111 E & G. Rep. 845 and General Mut. Ins. Co. v. Sherwood, 55 U.S. 351, 14 How. 351, 14 L. Ed. 452, 1852 WL 6758 (1973)

[8]Bender Shipbuilding & Repair Co., Inc. v. Brasileiro, 874 F.2d 1551, 1991 A.M.C. 220 (11th Cir. 1989).

[9]874 F.2d at 1557.

[10]Texaco, Inc. v. Universal Marine, Inc., 400 F. Supp. 311, 1976 A.M.C. 226 (E.D. La. 1975).

[11]Klein v. Globe & Rutgers Fire Ins Co of New York City, 2 F.2d 137,

§ 10:10 The placing and insuring various risks --- Charterer's Liability.

Charterer's liability insurance is designed to provide coverage for liabilities related to the care, custody and control assumed by a party chartering the vessel when the vessel's operation would be under the control of a party other than the charterer. Agreements between a charterer and a vessel owner may require the charterer to be responsible for some of the liabilities associated with the voyage. These can include damages which might occur while loading or unloading cargo or the loss of the use of the vessel if it is involved in the collision. Obviously, the contractual obligations of the charterer will have a direct bearing on the insurance cover required under the charterer's liability policy. The charterer's liability policy may be for a particular voyage or over a specified amount of time.

An unsophisticated charterer can run into problems if he is not familiar with the charter contract or the charterer's insurance cover. In *West Africa Trading and Shipping Company v. the London International Group*,[1] a relatively inexperienced charterer procured a marine policy through London International Group through its broker Mather & Co. As the plaintiff West Africa Trading and Shipping Company was a charterer, the policy included typical charterer's cover. The policy contained the following provision: "Warranted ship owner's bills of lading or if charterer's bills subject to inclusion or demise (identity of carrier) clause naming ship owners as carriers and subject to ship owner's approval." The clause had the effect of prohibiting charterer from issuing and/or signing bills of lading without the ship owner's approval. West Africa specifically chartered a vessel for the transport of a cargo of bagged salt. A loss at sea occurred and West Africa filed a claim with the underwriters for the value of the cargo, fuel, daily hire and employee expenses as well as the loss of income. The underwriters denied the claim based on West Africa's signing of the bills of lading. West Africa attempted to hold its broker responsible asserting that it was an unsophisticated assured who had no experience purchasing charterer's policies. The Court found that there was no evidence that the brokers had breached any duty to West Africa nor was there any evidence to show that the claim was denied as the result of any such breach. Rather, the basis for the denial of the claim was the post-placement conduct of West Africa in executing the bills of lading.

§ 10:11 The placing and insuring various risks --- Stevedore's liability.

Any entity engaged in the loading and unloading of cargo should consider procuring stevedore liability coverage. Essentially, this type of coverage provides liability insurance for the care, custody and control of stevedoring operations related to exposures arising from the loading and unloading of vessels. Stevedoring organizations may be responsible for damage to vessels, the cargo being unloaded or loaded and damages to surrounding property such as other vessels, docks, and wharves. This coverage is typically found in a comprehensive marine liability policy.

Some insurers are hesitant to provide stevedore liability coverage where the entity which owns the cargo is also responsible for performing the stevedore operations.

[Section 10:9]

[12]Boston Ins. Co. v. Dehydrating Process Co., 204 F.2d 441, 1953 A.M.C. 1364 (1st Cir. 1953)

[13]*See Paddock-Holly Ironco v. Providence-Washington Ins. Co. of Providence,* 118 Mo. At 85, 93 SW 358 (1906); Land v. Franklin Nat. Ins. Co. of N.Y., 225 S.C. 33, 80 S.E.2d 420 (1954).

[Section 10:10]

[1]West Africa Trading & Shipping Co., Inc. v. London Intern. Group, Inc., 1996 A.M.C. 1905, 1996 WL 544234 (D.N.J. 1996).

An example of this situation arises in the case of *Hartford Fire Ins. Co. v. Block Marketing, Inc*.[1]. In that case, two entities, Wholesale Mulch Products, Inc. and Block Marketing, Inc., had common ownership. A broker for the entities sought to place a terminal liability policy which would cover stevedore operations. The cargo to be unloaded presented a danger of spontaneous combustion. Because Wholesale owned the cargo, Hartford was not willing to issue stevedore coverage as such would have basically indemnified Wholesale from themselves.[2] While the above case was decided on a separate issue, it does raise an important consideration for brokers. When the broker was advised that the owner of the cargo could not be issued stevedore coverage, he purportedly requested that the cargo owner be removed as a named insured under the policy. If a loss had been occasioned by a danger associated with the cargo, it is foreseeable that the underwriter might have sought to deny coverage based on a failure to disclose the common ownership.

§ 10:12 The placing and insuring various risks --- Port Authorities and Terminal Operators

Port authorities and terminal operators may engage in a multitude of operations. First, they are likely to be directly responsible for the management of the port or terminal. They may also be involved in operations more directly involving stevedoring, ship repairing, engineering, vessel removal and other activities. Many liabilities can arise related to the efficiency and safety of the port or terminal. There may be liability exposure related to public safety or accidents on the premises. Third party claims can arise as the result of death, bodily injury or property occasioned through the operator's activities. The exact nature of exposure may depend upon the type of traffic or vessels using the facilities. Because of the diverse nature of operations, policies issued to terminal operators and port authorities contain a mixture of typical marine and nonmarine provisions.

An interesting case which has implications for brokers is that of *St. Paul Fire & Marine Ins. Co. v. Board of Commissions of the Port of New Orleans*,[1]. In that case, the personal injury occurred at the port of New Orleans. The port submitted a claim on its bumbershoot, a marine insurance policy covering multiple liabilities. St. Paul claimed that it did not receive timely notice of the claim. The policy contained a choice of law clause designating New York law as controlling. The port, who filed a third party claim against its broker, argued that Louisiana law should apply based on a conflict of law analysis of the forum state, i.e., Louisiana. The carriers, on the other hand, asserted that the bumbershoot policy was a marine contract of insurance and therefore subject to a conflict of law analysis under Federal Admiralty rules. The Fifth Circuit decided that the bumbershoot policy, even though it covered nonmarine types of exposures, was still primarily a marine policy. Consequently New York law applied which allowed for the defense of late notice to bar coverage under the policy. As the St. Paul case demonstrates, a broker may not be able to always rely on the law of the State where he is located. The application of Louisiana law could have led to a different outcome. Accordingly, in policies which cover a wide range of exposures, such as those procured for port authorities and terminal operators, it is important for brokers to be aware of choice of law provisions in the insurance contract, especially where such provisions apply the law of a foreign state.

[Section 10:11]

[1]Hartford Ins. Co. v. A. Block Marketing, Inc., 2005 A.M.C. 2055, 2005 WL 1838447 (ND. Ill. 2005)

[2]2005 WL 1838447 at *3.

[Section 10:12]

[1]St. Paul Fire & Marine Ins. Co. v. Board of Com'rs of Port of New Orleans, 418 Fed. Appx 305 (5th Cir. 2011)

§ 10:13 The placing and insuring various risks --- Political Violence, Piracy and Terrorism.

Anyone engaged in maritime activities in the corridor approaching the Gulf of Aden must be aware of the potential exposure of losses due to piracy. Other areas of the world have also experienced an increase of piracy related attacks, including Brazil, the Philippines, along with both coasts of Africa. Many times, piracy coverage is included with war risk insurance. Many vessel owners will also want kidnap and ransom coverage for their activities in high risk areas. These policies will typically cover costs associated in dealing with the kidnappers and benefits may include kidnap negotiators to assist with negotiation and delivery of ransom. Terrorism and political violence coverage may also be required for certain maritime activities. Anyone engaged in marine commerce through the Suez Canal is aware of the threat of violence from domestic turmoil as well as political and religious extremists. Among the losses that businesses may face are property damage, business interruption, injury to employees and third parties, and cargo damage.

The events of September 11, 2001 have created a heightened awareness of the need for terrorism insurance internationally and domestically. Certainly, any assured that owns or manages high profile marine property would find such coverage advisable. Most of the cases in the U.S. dealing with terrorism insurance examine the issue of whether its procurement it is a reasonable requirement of a loan.[1]

Relatively few cases have been decided in the United States related to the issue of piracy coverage. However, a review of the relevant case law does reveal the piracy at common law, at least from a historical standpoint, has been defined to be the commission of “those acts of robbery and depredation upon the high seas, which have if committed on shore would amount to a felony.”[2] Accordingly, not every criminal act committed on the high seas will be subject to cover under a piracy clause. While naval patrols in the Gulf of Aden have decreased the number of piracy attacks from Somalia in the last year or so, reports do indicate that ransom demands from pirates have increased since 2011.[3] While the incidents of such attacks are going down, the dollar value exposure of such losses is going up.

[Section 10:13]

[1] See *e.g.*, Philadelphia Plaza-Phase II v. Bank of America Nat. Trust & Save. Assn., 2002 WL 1472337 (Pa. Com. Po. 2002); Omni Berkshire Corp. v. Wells Fargo Bank, NAB., 2003 WL 1900822 (S. D. N. Y. 2003). Four Times Square Associates v. Cigna Investments, Inc., 764 NY’S ad 1 (2003).

[2] 48 *Corporate Juris Secondum* 1206.

[3] See “Insurers Face Tougher Times as Somali Piracy Drops”, Reuters, September 21, 2012.

§ 10:14 The placing and insuring various risks --- Freight and Cargo

Anyone who has an ownership interest in goods, commodities or merchandise which needs to be transported by land, sea or air has a need for cargo coverage. The institute cargo clauses have been the most common method of insuring cargo in the marine market. Cargo clause A provides the most comprehensive all risks cover, with the B and C clauses providing less cover at a typically lower premium. It is common for exporters who sell on cost insurance and freight ("CIF") basis or similar terms to be responsible for arranging cargo insurance. Alternatively, exporters can allow their customers to arrange the insurance and sell Exworks, free onboard ("FOB") or cost and freight ("CFR") terms. An Exwork sale represents the minimum obligation for the seller who is merely to make the goods available at his premises for collection by the buyer's designated carriers.

For ocean and sea voyages, one of the oldest principals of cargo insurance comes into play. Specifically, the concept of general average. As referenced above, if a general average loss is declared, all the parties involved must contribute to covering the loss. It is typical for both importers and exporters to arrange "open cover" where cover is provided for a given period of time. It is also common for voyage policies to be issued which expire on the safe arrival at port of the cargo or at the place of storage.

The broad coverage allowed by cargo clauses A is set forth in *The House of Lords Judgment in British and Foreign Marine Insurance Co. Ltd. v. Gaunt*,[1] In that case, bales of cotton were insured against all risks in transit from Patagonia to Puntarenas. Some bales were damaged by water prior to be loaded onto the vessel. Even though there was little evidence to establish how the damage occurred, the assured was successful in demonstrating that the loss was caused by a casualty. The House of Lords opinion reads as follows:

> The damage proved was such as did not occur and could not be expected to occur in the course of a normal transit. The inference remains, that it was due to some abnormal circumstance, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case that he must show that the loss comes within the terms of his policy; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss.

A truly remarkable domestic case detailing the perils of improperly procuring cargo cover is illustrated in the case of *Craddock International, Inc. v. WKP Wilson & Son, Inc.*,[2] 116 F.3d 1095 (5th Cir. 1998). In *Craddock*, a vessel owner agreed to transport a deconstructed fish meal processing plant out of Venezuela. In connection with this endeavor, WKP Wilson, a broker in Alabama, was engaged to procure marine insurance cover. Wilson was able to effect placement of a hull and machinery policy as well as a protection and indemnity policy for the vessel owner. The cargo owner was added as an additional assured under both policies for reasons that are not entirely clear but were evidently hotly disputed at trial. The cargo owner attempted to obtain first party cargo insurance through a Peruvian insurance broker. After several unsuccessful efforts, the Peruvian broker contacted Wilson for assistance.

[Section 10:14]

[1]The House of Lords Judgment in British and Foreign Marine Insurance Co. Ltd. V. Gaunt (1912) 2 AC 41.

[2]Craddock Intern. Inc. v. W.K. P. Wilson & Son, Inc., 116 F.3d 1095, 1998 A.M.C. 1107 (5th Cir. 1997)

A Wilson broker responded shortly after receiving the request to advise that the underwriters were working on a quote for the cargo policy, but at that time, he was unable to confirm coverage. The vessel departed Venezuela prior to the time a quote was issued from London. Unfortunately, when the quote did arrive, the vessel had already sunk and was a total loss.

Not surprisingly, extremely contentious litigation broke out between the cargo owner, vessel owner and the insurance broker. The broker was subject to much criticism for its conduct, including but not limited to the fact that it recommended canceling retroactively the protection and indemnity cover as a cost saving measure to obtain a return of premium. The Fifth Circuit found that had the protection and indemnity cover been left in place, cover would have been provided for the cargo even though first party cargo coverage had not been independently procured. It is also worth noting that the fish meal processing plant was valued at $1.7 million. The most striking aspect of the case of the case, however, revolved around the ultimate recovery awarded to the Plaintiffs. A clause in the protection and indemnity policy had the effect of limiting coverage on cargo to $250 per package or customary freight unit. The record from the trial court revealed that the fish meal processing plant was not shipped in "packages" but rather singularly in one "package". Accordingly, the Court of Appeals had to determine what constituted the customary freight unit for this shipment. After a lengthy analysis, the Court of Appeals found that the customary freight unit was the singular shipment of the entire meal processing plant. Accordingly, based on this customary freight unit designation reference in the protection and indemnity policy, the total recovery of the plaintiffs was limited to $250.

§ 10:15 The placing and insuring various risks --- Inland and Coastal Marinas

Marinas present a variety of exposures which must be considered in evaluating their insurance needs. First, and perhaps most obviously, marinas will have a number of property exposures. Common among these are boating slips, docks, bulk heads, administrative facilities, bars, restaurants, fuel stations and convenience stores. There will likely be a mixture of both wet assets (those in or over water) and dry assets. Additionally, the marina will certainly have general liabilities insurance need for exposures to third parties. A marina may also require a separate policy covering high water or flood events. Finally, in the event of a significant flood or storm, a marina would foreseeably need business interruption coverage.

While many marine policies are written to cover inland and coastal marinas, it is important to bear in mind that the marina exposure is essentially limited to stationary property. As noted above, a marine policy will introduce certain concepts in the adjustment process that might not otherwise come into play for a standard property policy. Most importantly, this raises the issue of valuation. It is imperative that before placing a marine policy to cover an inland or coastal marina the insured understand that the policy will most likely contain an underinsurance penalty. In other words, if the marine property values are not properly and accurately declared, the marina will be considered its own insurer to the extent of the underevaluation. This writer has personally seen more than one marina owner surprised to learn that the underwriters did not consider the coverage limits to be dispositive of the value of the property insured.

§ 10:16 Inland Marine Insurance

In the early part of the 20th century as technological advancements enabled goods to be transported in greater quantities away from ports of call and into interior geographic locations, insurance carriers began providing coverage for the trip "inland". Hence, the term "inland marine" originated as a means of differentiating it from traditional "ocean marine" coverage. Traditional ocean marine coverage was the first type of insurance to address the needs of those who had an interest in transported goods under the control of third parties. Historically, however, the coverage would typically terminate once the goods reached their destination. Initially, most inland marine coverage was provided by ocean marine underwriters. This was due to the fact that the same underwriters were already involved in covering the property transported over water, the pre-existing experience in rating property risks of these same underwriters, and the ability of the underwriters to cover multiple perils in one policy.

Because the term "inland marine" is extremely broad, it would be difficult, if not impossible, to address comprehensively all the concepts which could be encompassed under its terms. As a basic premise, it is fair to assume that the term addresses the coverage of property subject to being transported over dry land. However, even this premise has its exceptions as some policies which have nothing to do with property transportation have been held to be inland marine in nature. An example of one such holding is the case of *Village of Kiryas Joel Local Development Corp. v Ins. Co. of Northa America*,[1] In *Kiryas Joel*, a dispute arose as to whether the policy at issue had been properly cancelled. Policy language appeared to offer primarily builder's risk coverage. The carrier argued that the policy was and inland marine policy and thus was exempted under New York law from certain statutory regulations concerning cancellation. The insured contended that a builder's risk policy could not be an inland marine policy because inland marine coverage could only be written for movable things, such as railway cars and cargos and not for construction projects. The court noted that inland marine insurance had evolved to cover virtually everything that moves and transport. The court also reflected that certain commentators believe that builder's risk insurance is, in fact, a form of inland marine insurance. Taking into account the holding in Kiryas Joel, it appears virtually any type of property policy could be construed as inland marine. For the purposes of this chapter, we will assume that inland marine is coverage for property in or subject to transport.

Obviously, depending upon the route and means of transportation, a policy may be necessary covering both ocean and inland marine risks. Sometimes multiple policies are necessary. This can lead to interesting legal dilemmas for the policy holder and insurers. For example, if both ocean and marine risks are contained in a single policy, would a policy holder's misrepresentation regarding the risk allow the underwriter to void the policy? Remember, an ocean marine policy carries with it the requirement of utmost good faith. An inland marine policy is accompanied by no such requirement. The Second Circuit Court of Appeals applying New York law attempted to answer this question, noting that certain warehouse coverage was to be distinguished from the "ocean" marine coverage within the policy at issue. *In re: Balfour Maclaine Intern, Limited.*[2] Even though there was a breach of the utmost good faith doctrine as to the marine cover by the assured, the doctrine would not preclude recovery as to the inland marine claim.

Most often, inland marine will usually involve the coverage of goods in domestic transit, property held by bailees or warehousemen, and equipment and property subject to being moved from one location to another. Contract carriers will often require inland marine coverage for the carriage of goods of third parties. Many times such coverage will be limited to a specific geographic area. Motor carriers are generally required by contract or statutory regulation to procure insurance for the carriage of goods. There may be a number of different types of risks of loss towards the properties exposed. Obviously, damage to goods as a result of a collision would be perhaps the most expected form of casualty involving a motor carrier.

[Section 10:16]

[1] Village of Kiryas Joel Local Development Corp. v. Insurance Co. of North America, 996 F.2d 1390 (2nd. Cir.1993)

[2] In re: Balfour Maclaine Intern. Ltd., 85 F.3d 68, 1996 A.M.C. 2266, 44 Fed. R. Evid. Serv. 1088 (2d Cir. 1996).

Warehousemen would also be another category of business which would have a need for inland marine cover. As warehousemen deal with the receipt and storage of the goods of others, they would need policies providing for risks such as fire and water penetration. Finally, a bailee such as a drycleaner or auto repair shop may take out an inland marine policy covering its customer's property. Where a bailee promises to return the bailor's property undamaged, the bailee is liable for any damage to the property while it is in his possession regardless of fault. An examination in more detail of these various categories follows below.

§ 10:17 Inland Marine Insurance --- Carrier's Insurance

A carrier, that is, an entity who agrees with a shipper to transport goods, will often be required to procure coverage protecting those goods in the event of damage or theft. However, for a loss to be covered, several facts have to be analyzed. First, is the entity to which the goods were delivered actually a carrier? For example, a transfer company may not necessarily be a carrier. Additionally, it must be determined whether or not the goods were actually in the care, custody and control of the carrier at the time of loss or theft. It is important to him examine any agreements between the shipper and carrier to note whether they address this issue. Industry customs and usage may also bear upon what constitutes custody and control. Many carrier's policies will also contain geographic limitations and restrictions. Accordingly, when producing a policy for a carrier, it is imperative that items such as contractual relations with the shipper, the type of goods to be covered, the value of the goods to be covered and the geographic area in which they will be transported the well understood.

§ 10:18 Inland Marine Insurance --- Motor Carrier Cargo Insurance

Motor cargo carriers, for their own protection or for compliance with state regulations, will often require coverage to protect the goods in transit. Such policies are sometimes referred to as "motor transportation floater" policies. Such policies may provide coverage for a single trip or makeover the property of specific shippers. As with general carrier insurance, and examination of all agreements between the shipper and motor carrier must be made. These policies are generally given the same construction as similar provisions in automobile policies.[1] Public policy requires that any interpretation of a cargo insurance policy must be made with the interest of the shipping public given the upmost consideration.[2] In many jurisdictions, the terms and conditions of motor carrier cargo insurance is statutorily provided.

Many motor carrier cargo policies have restrictions on the persons who have coverage under them. For example, independent contractors or third parties may not be entitled to coverage. Other policies only cover specific types of property. However, it must be borne in mind that the general rule of construction that a policy is to be interpreted in the light most favorable to the insured applies to motor carrier policies as well. In this regard, a house being transported from one street to another was held to be covered under a policy insuring "goods or merchandise consisting principally of general merchandise and machinery".[3]

[Section 10:18]

[1]See Couch on Insurance 3rd §§ 156:40 et seq.

[2]Turner Cartage & Storage Co. v. Jefferson Ins. Co., 546,159 N.W. 2d 863 (10 Mich. App. 1968).

[3] See, Utica Carting, Storage & Contracting Co. v. World Fire & Maine Ins. Co., 277 A.D. 483, 100 N.Y. S.2d 941 (4th Dep't 1950).

One of the most common ways in which goods can be damaged while in the care of a motor carrier is through a collision. While coverage for damage to goods which results from a collision is common, it is surprising how much litigation has arisen over what constitutes a covered collision. In one case, a trucking company's liability insurer was not liable to the owner of a drill being transported on a truck for damages to the drill occurring when the drill, but not the truck, struck a railroad underpass.[4] It is important to bear in mind that not all instances of cargo colliding with another object will be covered under the collision provision of a motor carrier policy.

§ 10:19 Inland Marine Insurance --- Warehouseman's Insurance

Warehousing is the receipt and storage of goods of others as a business for compensation or profit. A warehouse is generally defined as a storehouse – a building or structure in which any goods, but particularly wares or merchandise, are stored or kept.[1] Various statutes, including the uniform commercial code, may impose duties on a warehouseman. As with carriers, it is important to examine all agreements between a warehouse man and his customers. Generally, a warehouseman is required to have a bond. It is imperative for the insurance professional to learn the types of goods being stored by the warehouse man when seeking insurance coverage.

Generally, a warehouseman's insurance policy covers property so warehoused until its delivery by the warehouseman pursuant to the terms of his contract. As with other types of inland marine policies, location and duration of warehousing must be noted. As a general rule, the warehouseman moves the goods out of the warehouse at his own peril. Additionally, a warehouseman's policy may require that he take reasonable steps to protect property after a loss has occurred.

§ 10:20 Inland Marine Insurance --- Bailee's Customers Insurance

A bailee's customers insurance policy is one which merely describes the class or nature of the property insured, but which does not identify the property of any particular customer of the bailee. The most common example of a bailee is the operator of a dry cleaning business. These policies are typically interpreted under principles of liberal construction. Many policies require the bailee to issue a receipt to this customer property. Some policies require the value of the property payable to be disclosed in the receipt, as well. Location and duration of the bailment may also be specified in the policy. As with all types of coverage, it is important to be familiar with the bailee's business, the types of items being bailed and the values of the property typically being bailed. Using bailed property for purposes outside the normal bailment arrangement may result in a failure of coverage. In addition to try cleaning businesses, other businesses such as jewelers, repair shops and automobile service operators may be appropriate holders of these policies.

[Section 10:18]

[4]St. Paul Fire & Marine Ins. Co. v Mose Gordon Const. Co., 172 S.E. 2d.459 (1970).

[Section 10:19]

[1]See, 78 Am Jur 2d, Warehouses § 2.

§ 10:21 Inland Marine Insurance --- Transportation Insurance

Transportation insurance is similar to the above referenced policies in that it is a form of inland marine insurance. It is distinguished by the characteristic that it is most often purchased by property owners rather than carriers. A wide variety of property may be covered under a transportation policy. It is, however important to note that policies may limit liability based on the characteristics of the property or the value stated under the policy. Additionally, there is generally a requirement in most transportation policies that the property be delivered to the custody and control of the carrier. It is also generally required that the property be "in transit" for coverage to effective in the event of loss. The transit stage of transportation ceases when the goods arrive at their final destination.[1] A great deal of litigation has arisen regarding what constitutes "in transit". Depending on the policy, procedures such as removal of property from storage, transferring property from one vehicle to another, or preparing property for delivery to a carrier may or may not be considered "in transit". It is important for insurance producers to be familiar with the value and types of property the insured seeks to deliver when placing transportation policies. Additionally, knowing the means and mode of transportation is essential to procuring the appropriate policy.

§ 10:22 Inland Marine Insurance --- Personal Property and Floater Policies

"Floater" policies are policies which provide coverage that floats, or moves along with, the covered property as it changes location. This type of coverage can be tailored and ordered to insure a specific type of property. An appropriate policy limit should be selected by the insured. Unless the property is specifically scheduled, the insured's recovery may be subject to a stated maximum dollar limitation. The cover is typically written on all risks basis except for specially excluded losses. Often, the floaters will cover property on a worldwide basis. There is an exception, however, for property considered to be fine art which is usually only covered in the United States.

Typical examples of property declared on floating policies include jewelry, furs, musical instruments, stamps and coins. Many times, floaters will cover property belonging to members of the insured's household. This leads to a rather interesting result in that the insured is not required to have an insurable ownership interest in all the covered property for coverage to be effective. The fact that other members of the insured's family may have property covered under the policy does not give them the status as insureds under the policy. A policy covering personal property against all risks of loss or damage is an agreement of indemnity and is designed to compensate for any actual loss sustained.[1] Perhaps the most important consideration for the insurance producer of wind procuring personal property coverage is to understand the value of the property being covered.

A special type of floater policy originating out of the Lloyd's of London market is that of a jeweler's block policy. These policies arose in response to complaints from jewelers who had historically been required to obtain separate policies from multiple insurers in order to achieve complete protection against loss to their fixed property locations. These policies also provide cover for jewelry while it is in transit from one location to another. In most policies, the coverage would be dependent on the insured or its representatives having custody or possession of the jewelry. Jewelers' block policies have been

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[Section 10:21]

[1] Whitehall Co. v. New Hampshire Ins. Co., 361 Mass. 865, 281 N.E.2d 234 (1972).

[Section 10:22]

[1] Naiman v. Niagra Fire Ins. Co., 285 A.D. 706, 140 N.Y.S.2d 494 (1st Dep't 1955).

interpreted to provide broad and comprehensive coverage, covering any loss other than a willful or fraudulent act of the insured.[2] However, many jewelers' block policies do contain an exclusion for unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Of course, a "mysterious disappearance" can be the result of a fraud perpetrated by the insured. Accordingly, while the courts are somewhat skeptical of such losses, the courts are split in interpreting the exclusion. One court has held that the exclusion applied only to unexplained losses or mysterious disappearances discovered upon taking inventory.[3] Other courts have found it applicable to all unexplained losses or mysterious disappearances.[4] Additionally, jewelers' block policies often exclude from coverage loss or damage to property while the property is in a vehicle unless the assured or one of its employees is within the vehicle. This exclusion has been upheld even where the car was parked within the view of the insured.[5]

Boats and personal watercraft are items for which a separate marine policy may be required to meet the specific needs of an insured. It is important for the producer to understand the particular activities the insured will engage in on the water. For example, if the insured is an avid water skier, personal watercraft liability insurance may be advisable. If the insured is a fishing enthusiast, fishing equipment coverage may be necessary. The insured may also want coverage for medical payments and emergency towing. As always, knowing the value and typical location where the voter watercraft will be used is of paramount importance.

§ 10:23 Important considerations for policyholders --- Uberrimae Fidei (Utmost Good Faith)

Because a traditional marine policy carries with it the obligation of utmost good faith, it is imperative that applicants for such policies understand the nature of this obligation. Especially when going into the London market, this writer's experience has been the obligation is taken far more seriously and applied more broadly than in the U.S. Applicants must be aware of their obligation not to conceal or misrepresent information the underwriters would consider relevant to the risk. Obviously, information traditionally provided in an ACORD application must be accurate. Further, it is not unusual to receive questions from underwriters relayed through placing brokers in the U.K. asking for further information about risk. As with any risk, make sure all communications are promptly transmitted to the assured so that there is ample time to respond.

Should a claim arise, a magnifying glass will be applied to all communications. This includes not only communications during the placing of the policy but post-loss communications as well. While U.S. and U.K. law may differ on the duration and extent of the utmost good faith requirement (U.K. law holds that it extends through the claim process), bear in mind that claims adjusted on policies placed in the London market will be reviewed by persons influenced by U.K. law. Attempts to persuade adjusters and claims personnel substance of policy duties under U.S. law can result in delays in the claims process. While policy holders will always want to regarding the nature and maximize the dollars submitted under a claim, caution is urged with respect to attempts to "push the envelope" to enhance claim recovery.

[Section 10:22]

[2]See Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275 (1966).

[3]Balogh v. Jewelers Mut. Ins. Co., 167 F.Supp. 763 (S.D. Fla. 1958), judgment aff'd, 272 F.2d 889 (5th Cir. 1959)

[4]See Marine Goldman & Sons, Inc. v. Hanover Ins. Co., 80 N.Y..2d 986, 592 N.Y.S.2d 645, 607 N.E.2d 792 (1992). Star Diamond, Inc. v. Underwriters at Lloyd's, 965 F. Supp. 763 (ED Va. 1997).

[5]Jerome I. Silverman, Inc. v. Lloyd's Underwriters, 422 F. Supp. 89 (S.D. NY 1976).

One example that this writer personally observed involved an assured who experienced a multifaceted loss which included property damage and expenses associated with attempts to repair the property. The policy issued out of the London market appeared to exclude one category of expenses related to repairs. During litigation, documents and testimony came to light which appeared to show that the assured had attempted to reclassify some of the repair expenses as property damage, thereby increasing the likelihood that the dollar values associated with the claim would be recoverable. The underwriters took a very dim view of this strategy and it unquestionably prolonged the litigation. It should also be noted that the retail broker played no ostensible role in assisting the assured during the claims process. While the insurance code of the forum state appeared to preclude the underwriter from voiding the policy based on the facts, the aggressive claim submission strategy not only protracted the litigation but undermined the credibility of the assured as well. Accordingly, there are practical as well as legal considerations which must be taken into account when complying with the obligation of uberrimae fidei.

§ 10:24 Important considerations for policyholders --- Agreed and Scheduled Values/Coinsurance Penalties

In a marine policy, a stated value is conclusive in a dispute between the assured and the insurer. For example, take the situation of an inland marina. It will likely have multiple items of property covered under a policy. The underwriters in insuring the marina would likely require a schedule of values for each piece of property. This may be detailed to the extent that every dock and pier must be listed with a value attached. As the underwriter will want a statement of value for each piece of property, it will be incumbent upon the assured to provide this information. Let’s assume Dock A at the marina is scheduled with a value of $10,000. Further assume that Dock A sustains $5,000 worth of damage by a covered peril. Many policy holders would assume that because the loss is less than the declared value, the full $5,000 claim would be recoverable. However, this is true only if Dock A is insured for its full value. If the actual value of Dock A is $20,000, (insured for 50% of its actual value), the assured would only be entitled to a recovery of half of its actual loss, or $2,500 in the example given. This is due to the inclusion in most marine policies of an underinsurance or coinsurance provision. The coinsurance provision essentially means that the assured will be his own insurer on a proportional basis for any value he understates.

An assured who has not been adequately apprised of the effect of coinsurance will almost certainly seek to hold the retail broker responsible for an uncovered loss. Notwithstanding the general rule that a broker is under no obligation to specifically assess an assured’s insurance needs unless specifically asked to do so, it seems advisable for the broker to make the assured aware of the impact of failing to accurately reflect property values in the application process. Obviously, declaring higher values under the policy will result in an increase in premiums. Many assureds will be willing to take the risk of being their own insurer in exchange for reduced premiums. However, the broker is well served to make sure he has pointed out, preferably in writing, the effect of underinsuring property.

The best example this writer has seen of making the assured aware of the implications for underinsurance occurred in litigation involving an inland marina (hence the example cited above). The marina happened to be purchased out of bankruptcy at an extreme discount. The marina sought insurance through a retail broker who ended up procuring a marine policy out of the London market. The retailer asked the assured for a breakdown of property values for the purposes of obtaining a quote. The assured submitted the values and the retailer transmitted this information to the London underwriters via a Lloyd’s broker. A quote slip was returned to the retailer from London and passed along to the assured. Because the slip contained a coinsurance provision, the retailer included a separate letter he personally drafted detailing the effects of coinsurance. He provided mathematical illustrations of what would happen in the event of a loss if the property values were understated. He also advised the assured that he could arrange for an appraisal to be done on the property if necessary. The assured disregarded this advice and requested the cover to be bound based on the original quote. A tropical storm hit the marina causing a significant loss after the cover was bound. Not surprisingly, the assured appeared incredulous when the underwriters offered only a fraction of the total loss and settlement. The marina filed suit and the retail broker's letter describing the impact of coinsurance was produced to the assured's counsel. To say that the assured's counsel was surprised to see the detailed letter from the retail broker would be an understatement. Needless to say, the claim was settled on very favorable terms early in the litigation. Especially in circumstances where an assured is procuring a marine policy without prior experience, no matter how otherwise sophisticated the assured may be, it is always a good idea to point out, in writing, the effect of a failure to state the actual value of property being insured. This is especially true in circumstances where the assured has recently acquired property at a discount through a bankruptcy or receivership proceeding.

§ 10:25 Important considerations for policyholders --- Standard and Non-Standard Wordings

For marine policies placed in the London market, there are clauses which have been used so frequently they are considered standard. For example, for cargo coverage, the Institute of Cargo Clauses A, B and C have been so frequently they are considered standard wordings. Accordingly, an offer to extend cover might simply state "Institute of Cargo Clause A" rather than repeating the entire clause verbatim. Other standard wording clauses may simply be abbreviated as LSW ("London Standard Working") followed by a particular number associated with that clause. London market brokers are authorized to abbreviate such references to specific clauses pursuant to written guidance from Lloyd's of London. To the extent that an offer of cover deviates from a standard wording, the offer of cover must state verbatim the language of the proposed insuring clause. For example, if an assured has specific needs or desires a custom made policy, any offer of insurance would have to be stated verbatim.

These considerations must be taken into account when receiving a proposal of insurance from the London market. It is perfectly permissible in the London market for a broker to transmit a quote for insurance on a slip that incorporates by reference the specific insuring clauses, provided they are standard wordings. For example, the quote while detailing the name of the assured, the property to be covered, the loss payee and premium to be charged may abbreviate many of the insuring clauses for entries such as "LSW 1524", "LSW 1560", "LSW 1514". Also, bear in the mind that the London brokers may be used to dealing with very sophisticated wholesalers who are familiar with such abbreviations and have the complete forms readily available. Many retailers in the U.S., however, are not used to dealing with such abbreviations. If a retailer receives a quote for a marine policy with abbreviations for standard wordings and does not have copies of the complete clauses, the retailer must procure copies of the clauses as soon as possible. Obviously, the best source of information would be either the wholesale broker or the London broker. Many forms can also be downloaded on the internet and many electronically transmitted documents have hyperlinks. It is important to make sure that the assured is aware of the language of the standard wording clauses. Obviously, gathering the forms after a loss has occurred will put the retailer and the assured in a difficult position.

§ 10:26 Important considerations for policyholders --- Communications in the Broking Chain

The placement of a marine policy will often proceed along the following lines. The assured contacts his retail broker seeking cover, for example, on a vessel. A retail broker approaches a wholesaler for the purposes of obtaining a policy. A wholesaler goes to his various markets both admitted and nonadmitted. If the wholesaler goes to the London market, he would likely seek a quote through a Lloyd's broker. The Lloyd's broker may seek an open market quote from various syndicates which are known to him to write that particular category of business. Alternatively, the broker may have a line slip, that is, a prepared set of clauses and wordings which have been pre-approved by various underwriters or syndicates. After receiving sufficient information from other members of the broking chain, a quote will be offered in the form of a slip transmitted by the Lloyd's broker to his client. The slip will contain the various insuring clauses either verbatim or through the incorporation by reference of standard wordings. The quote slip essentially represents a proposal on which the underwriters are willing to insure a particular risk. Once an agreement has been reached, the underwriters will place their initials on the slip or "scratch" the slip representing their agreement to bind cover. Once the proposal has been accepted and the slip scratched by the underwriters, a binding contract of insurance exists. Obviously, this process and documentation is peculiar to the London market.

While the Lloyd's broker is an agent of his client, it is also important to bear in mind that he is a member of the Lloyd's community as well. The Lloyd's broker will typically perform various roles for the underwriters. These include policy preparation, surveys, claim services, appointments of surveys, solicitors, claims adjusters and the collection and remittance of premium. When acting on behalf of his client, the London market imposes a duty on the Lloyd's broker to arrange as wide a cover as is required at the most economical rate to his client, bearing in mind the financial security and service provided by the underwriter.[1]

There seems to be much confusion on the function and role of the Lloyd's broker in the U.S. market. This may stem in large part from the fact that the broker is responsible for preparing various insuring documents on the part of the underwriter. Many brokers have by agreement assumed the responsibility of preparing a broker's insuring document to evidence cover for transmittal to their clients. Oftentimes, this document is a cover note. The cover note essentially replicates the formal language of an insurance policy. Nowadays it is somewhat unusual for a formal insurance policy bearing the stamp of Lloyd's of London to be issued. Instead, evidence of cover such as cover note will most likely be provided to the assured. In most cases, the cover note will bear the name of a Lloyd's broker. Hence, it is not surprising that many assureds of marine policies are left with the mistaken impression that the Lloyd's broker has agreed to insure some risk exposed under the policy. Despite the appearances of the cover note, this is not the case.

This general overview of communication and document creation in the broking chain merely serves to give an overview of the process. To the extent that the retailer has any questions regarding what terms mean or why certain documents have been created, they would be well advised to contact their wholesale clients or request an opportunity to speak with the London based broker. If a claim arises, the Lloyds broker will likely facilitate the flow of information from the underwriters back to the assured. Lloyd's brokers play no role in making claims payment decisions. They do not guide the work of claims adjusters but merely pass along instructions to them from the underwriters. The Lloyd's broker will also be responsible for providing adjuster's reports to the underwriters and furnishing at the request of the underwriter through reports back through the broking chain. The Lloyd's broker will also often hold claims payments from the underwriters in escrow pending release to the assured. Again, there is really nothing comparable to these claim related functions in the U.S. market. Accordingly, to the extent that a retailer has questions with respect to a Lloyd's broker's role in the claim process, they are urged to contact their wholesale broking client.

[Section 10:26]

[1] Chartered Insurance Institute Journal No. 10 /1 of December 1985

§ 10:27 Conclusion

Marine insurance has remarkable historical roots. The largest market for marine insurance in the world is London. The influence London market practice, custom and usage has had on the rest of the world cannot be overstated. Many principals of marine insurance can trace their origins back to creation of Lloyd's Coffee House in the late 17th century in London. Codification of many of these principals later appeared in the Marine Insurance Act of 1906 passed by parliament. Though the Act is over 100 years, it remains profoundly influential in the U.S., with the Supreme Court recognizing that U.S. and U.K. marine insurance law should agree where possible. While the regulatory environment for marine insurance has become more diffused over the last 70 years, with many questions now being left to the laws of various states, it is hoped that the reader will have a better understanding of today's issues in marine insurance by examining its historic development. For as long as there are exporters and importers, carriers and shippers, and consumers who want products they can't acquire locally, there will be a need to transport those goods. Concomitantly, there will be a demand to insure those goods, the machinery which transports them and the profit derived therefrom.