

Policies, Perils and Proofs...

Marine and much other cover may need to respond to claims based on distant incidents which were neither witnessed nor recorded, and resulted in much of the evidence being destroyed or made inaccessible. What happened, and how and why, may never be known, and in such cases the parties will often use the policy wording to signpost who must show what and to which standard. This article discusses why a key distinction can become blurred, and offers a reminder that a valid claim always needs something out of the ordinary - a fortuity.

In a policy covering named perils the insured must credibly point to one or more. He must show that it is more likely than not that the loss was due to at least one of those listed.

In an "all risks" policy, or a named perils policy amended to become one, it is usually enough to show that the loss was due to some accident or other occurrence out of the ordinary. What exactly happened here, and (in both cases) the precise failure or damage mechanism need not be explained.

However, we have several times seen it argued that an "all risks" insured does not have to show that a fortuity occurred. This was probably due to imprecise language, or perhaps zeal in wanting to press underwriters to prove exception or breach, but it is incorrect, and now common enough to prompt this summary.

Just as with a warehouse and contents consumed by fire, a sinking makes it hard to examine the physical evidence, and a remote and deep location may make it impossible. The various insured cannot offer anything for inspection, and underwriters can neither probe seaworthiness nor check for warranty compliance or other exclusion. Diver and even ROV investigation may be unworkable, and crew accounts non-existent (in the case of a tow), inconclusive or sadly unavailable.

The insured will submit what reports, certificates, records and other material they can to show as far as possible that the vessel was seaworthy, the cargo and any packing was sound and that any warranties were met and any relevant exclusions are inapplicable. Underwriters will usually also examine the weather, sea state and routeing.

Every claim depends on its own facts and terms, but where there is little or no physical evidence the insured may have to rely on inference - conclusions drawn from known or assumed facts and knowledge of what usually happens. Perhaps the insured will succeed in convincing underwriters (or maybe ultimately a court) that one of the named perils must have operated, or that - in an "all risks" policy - something happened that would not be expected in the ordinary course of a voyage, towage or carriage. However, it may be more likely that the loss was due to uneventful wear and tear, or to the state of the vessel, or the cargo, and perhaps such also establishes a breach of warranty, or an exclusion.

So a "named perils" insured might be able to show that one or more of those listed applied, or an "all

risks" policyholder might establish that *something* (he need not establish exactly what) must have happened. But an insured's failure here would almost certainly mean that the vessel was unable to cope with what would normally happen on the voyage, or the cargo was for some reason certain to incur the damage claimed - in other words that some ordinary, expected and maybe even inevitable thing had occurred.

When grappling with circumstantial evidence, permissible inference and the nature of "all risks" cover, it may be easy to slip into urging that there is no need to show a fortuity, especially since the vital ingredient of unexpected, abnormal occurrence will often amount to one and the same thing.

In all cases, however, insurance covers risk. It responds, on terms, to what *might* happen. It is not engaged by what is sure to. There is no underwriting of a certainty. Where, regardless of policy restrictions, an insured claims for a loss which the facts reveal as either normally occurring or predestined, he cannot recover. Any type of insured must always show - by evidence, and sometimes inference - that the loss was not bound to occur but was the result of happenstance, that there was a *fortuity*, and consideration of any policy claim must begin with that.

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