Insurance Law

Theft and Severe Weather: A Storm for **Marine Cargo Insurance**

BY JOSHUA GOLD AND CARRIE MAYLOR DiCANIO


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In recent years thieves have become uncannily adept at using technology as a means to steal—whether it's money, private information, or proprietary trade information. Computer thieves are also taking their act on the high seas, highways, and elsewhere to steal cargo.

Over the past couple of years, industry surveys have reported a number of alarming cargo heists accomplished by means of tracking devices, hacks, fraudulent electronic communications, and computer generated (fake) shipping documents.

Another recent contributor to shipping risk is increasingly volatile and unpredictable weather. While what qualifies as "severe weather" may be open to some interpretation for purposes of shipping law, weather conditions certainly may have a much greater bearing going forward on whether cargo makes it safely to its destination.

These fast-evolving perils may have serious implications for whether a policyholder and other stakeholders have cargo insurance protection. Some cargo insurance companies are adding cyber exclusions and/or weather exclusions (or warranties) to their policies.

Cargo Insurance Protection For Theft

Under New York law (and the law of most other jurisdictions), the peril of theft is covered under an all-risk insurance policy. As the case law makes clear, it does not matter what form the theft takes, e.g., fraud, trickery, deceit, or false pretenses. See, e.g., *Buckeye Cellulose v. Atlantic Mut. Ins.*, 643 F. Supp. 1030, 1036 (S.D.N.Y. 1986) (recognizing that a policy insuring "against all risks of physical loss or damage from external cause " would provide coverage against conversion); *Great N. Ins. Co. v. Dayco*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985) (holding an insured "who takes out an 'all risk' policy which does not exclude theft has a right to assume he has purchased coverage for loss by theft" including "theft by trick or false pretense").

Even where one is uncertain as to the actual cause of the loss to cargo, marine insurance coverage should provide insurance protection where thefts are so sophisticated that they leave no trace as to the disappearance of the goods. In *N. Am. Foreign Trading v. Mitsui Sumitomo Ins. USA*, 499 F. Supp. 2d 361, 374 (S.D.N.Y. 2007), modified in part on other grounds, 292 F. App'x 73 (2d Cir. 2008), the court held that the policyholder did not need to prove the cause of loss under an all risk cargo policy as urged by the insurance company. Instead, the court held that absent a mysterious disappearance exclusion, all risk marine insurance covers mysterious disappearance losses. Similarly, in *Farr Man Coffee v. Chester*, No. 88 Civ. 1692, 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y. June 28, 1993), the court held that an all risk policy covered larceny by trick where the cargo shipment of coffee was never delivered to the policyholder.

Fast-evolving perils may have serious implications for whether a policyholder and other stakeholders have cargo insurance protection.

Where theft is enabled by computers and associated technology, all-risk policies should cover such risks, absent a specific and unambiguous exclusion. In a recent case, *AGCS Marine Ins. Co. v. World Fuel Services*, No. 1:14 cv 05902 (S.D.N.Y May 17, 2016), the court presided over an insurance company's lawsuit seeking to evade insurance coverage for cargo (marine gasoil) stolen by an imposter that had emailed a solicitation to purchase from the policyholder. The emails were demonstrated to have been fraudulent solicitations to enable the cargo theft. The court found that the loss of the cargo was covered under the all risk cargo insurance policy.

Policyholders and insurance brokers need to be very careful going forward, given that cyber-related exclusions are already making their way into some cargo insurance policies. Generally speaking, there is a move well afoot in the insurance industry to move cyber-related claims to stand-alone cyber insurance policies. For cargo protection, this is especially problematic as a number of these cyber stand-alone insurance policies have exclusions for loss or damage to tangible property. Furthermore, most versions of cyber-related insurance exclusions (even those that promise not to gut protection for all cyber-related perils) have not been tested in court. This has left a great deal of uncertainty in the marketplace for almost all commercial policyholders.

Coverage Issues for Weather-Related Cargo Loss

It is particularly important to mind the weather forecast when negotiating coverage for marine cargo risks. One example of a case where representations concerning the weather nearly drastically impacted coverage is *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, No. 98 Civ. 7840 (HB), 2000 U.S. Dist. LEXIS 7803 (S.D.N.Y. June 7, 2000), rev'd in part, 266 F.3d 112.

In *Tradeline*, New York Marine & General Insurance Company denied coverage for the loss of over 49 metric tons of fertilizer that Tradeline (the policyholder) sold to Deepak, an Indian import business, and shipped from Mexico to India. The denial was based primarily on the ground that Tradeline had failed to inform the insurance company of the severe weather that was predicted at the time Tradeline purchased additional coverage for rainwater. The salient facts of the case are as follows.

When the shipment of fertilizer arrived at Kandla, its destination port, and Deepak began unloading the fertilizer onto barges to be transported to the wharf, Deepak's handling and forwarding agent informed Deepak that there was a risk of rain and that it was necessary to purchase insurance for such weather. Deepak, in turn, informed Tradeline, who purchased rainwater coverage to add to its existing coverage, but failed to inform its insurance broker of the impending storm. 266 F.3d at 118.

A few days later, while the fertilizer was still being offloaded, a cyclone stuck the port, "involving cyclonic wind and rain forces, tidal waves and rising waters." 266 F.3d at 119. Deepak's losses totaled over $1.5 million. Much of the fertilizer was lost or damaged at the port as a result of the storm. Other portions of the fertilizer had been damaged by rainwater after being diverted to a port of distress. Deepak also incurred costs for mitigating its damages due to salvage operations. Id. at 119.

New York Marine denied liability for Deepak's losses. Specifically, New York Marine argued that the policy was void ab initio because Tradeline and Deepak had failed to inform it of the severe weather that had been predicted when Tradeline purchased the rainwater coverage and this violated the principle of uberrimae fidei—the principal which "places the obligation of utmost good faith on the insured precisely because those who operate on the high seas are in the best position to determine the potential for

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Insurer's **Claim File** In the Crossfire Of Discovery

BY JONATHAN MEER

Insurer representatives are receiving more requests for discovery on their claim files, whether in a direct coverage action or via subpoena in connection with a claim against their insured. While CPLR §3101(a) provides for a full disclosure of all matters material and necessary in the prosecution or defense of an action, including from non-parties, unlimited disclosure is not permitted.

In fact, courts in New York have held that an insurer's claim file is conditionally immune from discovery, as the materials are protected by the privileges for (1) material prepared for litigation, (2) attorney work product and (3) attorney-client communications. There is constant tension with respect to materials in a claim file created by the insurer as part of its general responsibilities of investigating, evaluating and processing the claim compared with those documents that reflect analysis, work product and materials prepared with the assistance of counsel. While the party asserting the privilege, such as an insurer, has the burden under CPLR 3101(d) to demonstrate that the material it seeks to withhold is immune from discovery, an insurer's claim file is not always fair game in discovery.

Bases for Protecting Certain Materials From Discovery

In discovery in general, there are a variety of bases that a party can assert to protect certain documents from discovery. Three common ones are (1) attorney-client privilege, (2) attorney work product and (3) materials prepared in anticipation of litigation. Other protections that may prevent document production include trade secrets confidentiality, mediation privilege, clergy privilege, and husband and wife privilege, to name a few. Claim files, especially those involving matters that have proceeded to litigation, often include many documents from the appointed defense counsel. The appointment or consent by an insurer to such counsel gives rise to the "tripartite relationship" between the insured, insurer and defense counsel during the pendency of the litigation or the claim. Courts recognize the joint interest and the need for a free flow of communications between the three parties seeking a resolution to the claim or litigation without fear of such communications being subject to discovery by another party.

Attorney-Client Privilege. Communications between the retained attorney and the insurer should be considered privileged, under CPLR §4503 and in case law, to the extent such communications request or provide legal advice or analysis. So long as the communication is predominately addressing legal analysis or advice, the privileged nature of such communication is not lost simply because it also addresses non-legal matters. Further, an insurer's mental impressions flowing from an attorney's communications reflecting counsel's case theory also have been protected as privileged.

Attorney Work Product. Certain documents in an insurer's claim file can be protected as attorney work product. This protection is embodied in both case law and CPLR §3101(c) and (d)(2). The work product doctrine is an extension of the attorney-client privilege, protecting confidential communication made in preparation for litigation. These attorney work product materials often reflect an attorney's legal research, analysis, strategy or theory of the case. Importantly, the work product protection is not limited to communications between attorneys and their clients. Documents in an insurer's claim file, such as draft pleadings, motions and reports from defense counsel, are common examples of documents that can be protected from production under the work product doctrine. Similarly, a coverage counsel memorandum or report to an insurer regarding issues of coverage and potential litigation regarding an insurer's claim practice also have been held to be protected under the attorney work product doctrine.

Materials Prepared in Anticipation of Litigation. A third basis commonly asserted to protect insurer claim file documents from discovery is that the documents were prepared in anticipation of litigation. Pursuant to CPLR §3101(d)(2), "material prepared in anticipation of litigation" is privileged and "may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." While the investigation and evaluation of claims is part of the insurer's regular practice, when an insurer determines that (1) the probability of litigation is substantial and (2) the commencement of litigation is imminent, an insurer's investigative file created in anticipation of litigation has been found to be privileged material prepared for litigation. Importantly, however, the anticipation of litigation privilege does not extend to documents that

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Coverage Counsel and **Personal Injury Lawyers:** Perhaps Not Such Strange Bedfellows

BY JEFF SCHULMAN AND MIKAELA WHITMAN

Comprehensive General Liability or Commercial General Liability (CGL) coverage provides broad insurance for claims against an insured alleging, among other things, bodily injury. A CGL insuring agreement will typically obligate the insurer to defend the insured in a lawsuit or to pay the costs of litigation, and to pay the judgement or settlement imposed on the policyholder.

Whether an alleged tortfeasor has this coverage often is one of the first and most fundamental inquiries made by plaintiff's counsel when assessing a new case. A severely injured prospective client and seemingly clear liability on the part of the prospective defendant may become far less appealing to plaintiff's counsel in the absence of this coverage. It may ultimately mean litigating a case for years through trial only to be left with an uncollectible judgment. This is one of the reasons why New York State's Preliminary Conference Order form requires defendants to disclose the existence and limits of potentially available insurance.

Even if an alleged tortfeasor has CGL coverage, injured plaintiffs generally do not have a direct cause of action against the tortfeasor's insurer. *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 357 (2004) (quoting *Jackson v. Citizens Cas. Co.*, 277 N.Y. 385 (1938)). This means that an injured plaintiff must rely on the alleged tortfeasor to comply with its policy obligations on which coverage is contingent and to reasonably dispute an insurer's denial of its defense and indemnity obligation. If it turns out that the tortfeasor does not do so, then a plaintiff can be left with an uncollectible judgment even when the tortfeasor had sufficient coverage limits to fund the settlement or judgment.

Almost one century ago, the New York legislature sought to remedy this perceived injustice with the enactment of N.Y. Insurance Law §3420. It provides that insurance policies issued in New York must include a provision "that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract." N.Y. Ins. Law §3420(a)(1). This statute grants an injured party a direct cause of action against the tortfeasor's insurer in a limited circumstance—"the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days." *Lang*, 3 N.Y.3d at 354. As described by Chief Judge Benjamin Cardozo:

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Inside

'Keyspan', 'Viking Pump' Throw **N.Y. Allocation Law** Into **State of Confusion**

BY PAUL E. BREENE AND ANN V. KRAMER

It has been an eventful year in New York for those who focus on issues concerning allocation for so-called "long-tail" insurance claims, that is, claims that trigger multiple consecutive insurance policies like asbestos bodily injury and environmental property damage claims.

After a groundbreaking pro-policyholder insurance allocation decision by the New York Court of Appeals in May, a September 1st decision by the First Department has caused another upheaval, not a good one for policyholders. *In the Matter of Viking Pump and Warren Pumps, Insurance Appeals* (N.Y. Court of Appeals No. 59 May 3, 2016) (*Viking Pump*); *Keyspan Gas East v. Munich Reinsurance America*, — N.Y.S.3d —, Supreme Court, Appellate Division, First Department, New York 2016 WL 4543479 (9/1/2016) (*Keyspan*).

In 2002, the New York Court of Appeals decided that pro rata allocation was an appropriate method for spreading long-tail losses among triggered policies. *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002) (*Con Ed*). *Con Ed* was a blow to policyholders. However, the court left open the possibility that other methods might be appropriate depending on specific policy wording. Fourteen years later, in *Viking Pump*, the high court held that "non-cumulation" and "prior insurance" clauses presented the type of specific policy language that would permit abandonment of pro rata allocation in favor of "all sums" allocation. "All sums" allocation permits the policyholder to choose a policy period and to exhaust all policies in that year (vertical exhaustion) and puts the burden on the chosen insurer to seek contribution from its brethren.

Viking Pump is a game-changer, finally allowing policyholders to avoid multiple deductibles, retentions, insolvent insurers and other coverage gaps. Unfortunately for Keyspan, according to the court, it did not have the clauses that *Viking Pump* had identified to escape pro rata allocation.

Keyspan involved liabilities arising from two manufactured gas plants (MGPs). Damage at the sites began in the early 1900s and continued into the early 2000s, although the plants had closed decades earlier. In 1995, New York environmental authorities began enforcement actions to hold Keyspan strictly liable for the damage caused by these MGPs and Keyspan sought insurance coverage for that liability. Keyspan had purchased liability insurance in all periods when it was available; however, because of New York regulatory rulings and insurance industry-wide limitations, coverage for gradual pollution essentially ended in New York in the early 1970s.[1] Similarly, asbestos coverage largely ended in 1985.

Like all pro rata rulings, *Keyspan* rests on a fundamental disregard of the coverage provided by standard comprehensive general liability policies.[2] *Keyspan* held that the policies only cover injury or damage during the policy period. However, standard form policies actually cover "*all sums that the insured becomes liable to pay because of*" property damage or bodily injury during the policy period. As any lawyer with a passing familiarity with tort or environmental laws knows, a policyholder's liability may have little or no connection with the damage or injury it actually caused.[3] This distinction is ignored in pro rata allocation rulings in favor of theories of perceived "fairness" and "equity." As the Court of Appeals admitted, "Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the 'during the policy period' limitation, despite the fact that the injuries may not actually be capable of being confined to specific time periods." *Viking Pump*, Slip op. at 18.

For the past two decades, New York courts, policyholders and, for the most part, insurance companies accepted that New York did not allow allocation to the policyholder for periods where a lack of coverage was not a conscious decision but solely because coverage was unavailable based on the Second Circuit's decision in *Stonewall Insurance v. Asbestos Claims Management*, 73 F.3d 1178, 1203-04 (2d Cir. 1995). The Second Circuit held that there should only be allocation to the policyholder when the lack of insurance reflected a conscious decision by the policyholder not to purchase insurance, that is, to "go bare." For periods when the insurance industry decided not to sell insurance to cover the risk, *Stonewall* held that there should be no allocation to the policyholder. Id.

Keyspan rejected *Stonewall*'s reasoning: "While none of the policies expressly address how to allocate liability in a situation where the underlying damage is long-term, continuous and indivisible, the fact that the policies require Century to indemnify Keyspan for occurrence, accidents, etc., 'during the policy period' is consistent with allocation for time on the risk. [The *Stonewall* exception for unavailability] is inconsistent with policy language restricting coverage to the policy period."

According to the Appellate Division, a contrary ruling would be a windfall for policyholders, "free insurance" as asserted by the insurer. Thus, the court held that Keyspan should bear the burden of liability for indivisible damage allocated to the period when Keyspan could not purchase insurance, even though the court agreed that the policy language itself does not address allocation and that there is no basis, other than the court's own perception of "fairness", for imposing a pro rata allocation and treating the policyholder as an insurance company. In fact, the decision provides a huge windfall to the insurance companies which sold policies to Keyspan while it operated the MGPs, the conduct for which it was held liable decades later.


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For latent and long-tail liabilities, where indivisible injury or damage leads to liability for a policyholder, the CGL policy's promise to pay "all sums" that the policyholder becomes legally obligated to pay, should be enforced as written as long as any of the injury giving rise to the policyholder's liability took place during the policy period. This is no "windfall" to the policyholder. It is what the policyholder bought and paid for and what the language of the policy requires. Instead of enforcing the language as written, *Keyspan* says that allocation is not dealt with in the policy language. Having found the policies to be silent, the *Keyspan* court then reverses long-standing contra proferentum[4] precedents; instead, enforcing ambiguous policy language against the policyholder and in favor of the insurance company that wrote it.

The incentive to the insurance company thus becomes plain: Delay payment of any long-tail claim as long as possible. The longer the delay, the lower the ultimate insurance payout. The *Keyspan* case itself illustrates the perverse economic incentives the decision has created. The case was originally brought in 1997, approximately 20 years ago. The insurance company asserts that property damage continued at the two sites at issue until 2002 and 2012 respectively; thus, under the Appellate Division's holding, the years of litigation have already been a huge success for Century Indemnity because the passage of time has reduced Century's potential payout by allocating any ultimate liability over several additional years at both sites to Keyspan—a nice win for the insurance company, even if it ultimately loses the case. If applied to asbestos claims, the pro-insurance company windfall would be even more dramatic since the allocation period to the policyholder would likely be longer.

Given the Court of Appeal's recognition in *Viking Pump* that pro rata allocation is a fiction created by the courts, it can only be hoped that the court will take up the appeal of *Keyspan* and reverse it. Otherwise it will unfairly and adversely affect not just those with environmental liabilities, but also companies with asbestos liabilities and those adversely affected by asbestos-related diseases.

1. Because of the insurance industry's introduction of the qualified pollution exclusion and New York regulatory and court rulings, coverage for gradual pollution essentially ended in New York in the early 1970s. The so-called "absolute pollution exclusion" was introduced by the insurance industry in 1985. The *Keyspan* ruling addresses the period after 1986, rather than after 1970.

2. The U.S. insurance industry has an antitrust exemption under the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, also known as Public Law 15, which allows industry participants to get together and collectively decide upon what insurance will be offered to the public.

3. Pro rata allocation theories conflate third-party liability insurance and first-party property insurance. Whereas the latter does indeed cover "property damage", the former covers liabilities arising from such property damage.

4. Ambiguous insurance policy language is interpreted against the insurance company drafter.

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The **Bermuda Form:** Declaring An **Integrated Occurrence** (or Not)

BY JARED ZOLA AND LISA M. CAMPISI

Many Fortune 500 companies' product liability insurance programs use the Bermuda Form to insure alleged bodily injury and property damage. The Bermuda Form has many characteristics distinct from standard commercial general liability (CGL) policies. Knowing its intricacies is essential for any coverage lawyer involved in large-scale coverage analysis and disputes.

When product and general liability insurance markets tightened in the mid-1980s, insurers designed the Bermuda Form to maintain the key features of traditional occurrence coverage and add features in an attempt to eliminate what insurers viewed as growing exposures and risks. Among these newly added features unique to the Bermuda Form are the so-called "integrated occurrence" provisions. Under traditional occurrence-based policies, where there is continuing injury or damage over many years, coverage is often owed on multiple policies spanning many policy years. By instead funneling similar third-party claims into a single policy year through an "integration" process, the Bermuda Form sought to provide a more insurer-friendly construct.

Most versions of the Bermuda Form require a policyholder to formally "declare" an "integrated occurrence" when providing notice to the insurer. Whether to do so, and how to do so in a way that will capture the appropriate claims and yet not inadvertently cast too wide a net, raises many thorny considerations. Additionally, while the Bermuda Form permits a retroactive declaration that an occurrence is integrated after it had previously been declared a single occurrence, doing so likewise raises several issues that require careful consideration.

Should an Insured Declare an Integrated Occurrence? Determining whether to declare integrated occurrence at the outset of a claim can have significant economic ramifications. When a claim is in its early stages, however, policyholders may not be able to determine the nature and extent of the occurrence or occurrences involved, thus potentially putting policyholders with Bermuda Form coverage at a disadvantage.

The Bermuda Form provides that a single "occurrence" exists if "actual or alleged personal injury to any individual person, or actual or alleged property damage to any specific property, arising from the insured's products takes place on or subsequent to the inception date, … and before the termination date of Coverage A."[1] The Bermuda Form further provides that a policyholder may be required to declare an integrated occurrence if that claim involves "an occurrence encompassing actual or alleged personal injury, [and/or] property damage … to two or more persons or properties which commences over a period longer than (30) consecutive days which is attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such."[2]

As reflected, this language applies only to claims involving multiple occurrences alleging damage to multiple persons or properties when they are attributable or allegedly attributable to the same actual or alleged condition, cause or defect. As a result of such policy language, if a claim involves a single occurrence the need to declare an integrated occurrence is negated.

One potential benefit of declaring an integrated occurrence when confronted with multiple occurrences is that by "batching" such claims into a single occurrence, the insured is required to pay only a singled self-insured retention for that one batched claim. By contrast, without the ability to "batch," the insured potentially would have to pay a separate self-insured retention for each claim, such that actual insurance proceeds in excess of the retention are never reached.

To derive the benefit of an integrated occurrence, the policyholder must declare to its Bermuda Form insurers in writing that a matter is, and must be handled as, an integrated occurrence.[3] In making such a declaration, ample care must be given to identify what comprises the occurrence. The declaration must precisely and thoroughly describe the occurrence, but not describe it too broadly. For example, defining an integrated occurrence as "all claims relating to Product X" could unintentionally batch claims that are distinct from and do not allege the defects and/or injuries that gave rise to the claim for which the policyholder declares an integrated occurrence. A risk of such a broadly-worded declaration is that an unrelated claim several years later alleging entirely different defective qualities, and resulting damages, from the same product involved in the earlier declaration may be "batched" into the same policy year as the earlier declaration. Meanwhile, the earlier claim may have already impaired or exhausted the coverage, such that the insured will be left without coverage for the subsequent claim.

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Conversely, describing the integrated occurrence too narrowly can also be problematic. The declaration of an integrated occurrence is often made at the early stages of a claim, before theories of defect, damage, causation and liability have fully developed. In the face of an overly narrow integrated occurrence description, an insurer may contend that underlying claims premised on the later-developed theories are not batched into the integrated occurrence, and instead should be treated as separate occurrences. Among the downsides of such a result is that the later claim or claims may be subject to separate retentions, thus potentially in the insured being unable to reach the available insurance limits excess to the self-insured retention.

Retroactively Declaring an Integrated Occurrence Requires Careful Consideration. Recognizing that policyholders may not know whether to declare an integrated occurrence before theories of defect, damage, causation and liability have fully developed, the Bermuda Form permits a policyholder to retroactively declare an integrated occurrence after having provided notice of the same claim as a non-integrated single occurrence. Specifically, the Bermuda Form provides that even if in an earlier policy period an occurrence was not reported as an integrated occurrence, that previously reported occurrence may later be deemed to be "batched" with other similar occurrences as an integrated occurrence in a later policy year, as described below:

> Whether to "declare" an "integrated occurrence," and how to do so in a way that will capture the appropriate claims and yet not inadvertently cast too wide a net, raises many thorny considerations.

> If notice of an Occurrence … was given during a prior Annual Period, and if Personal Injury or Property Damage which is included in such Occurrence is included in an Integrated Occurrence of which Notice of Integrated Occurrence is first given during a subsequent Annual Period, all Ultimate Net Loss arising from such earlier notified Occurrence shall be included in the Ultimate Net Loss arising from such Integrated Occurrence. Any payments of Ultimate Net Loss on account of such earlier notified Occurrence shall be deemed to have been made under the Annual Period in which the Company received such Notice of Integrated Occurrence.[4]

On the surface, this provision appears advantageous to policyholders facing a claim that evolved over time. Nonetheless, what the quoted language in essence means is that the previously noticed claim will be handled in a later policy year ("a subsequent Annual Period"). This raises at least two potential issues.

First, there may be other as yet unknown claims in the same later policy year in which the integrated occurrence was retroactively declared. However, because the Bermuda Form is "a claims made and reported policy," the expired prior policy will not respond to those yet unknown claims. The net result is that the yet unknown claims arising under the subsequent policy year would then compete for available policy limits with the retroactively declared integrated occurrence. Moreover, because the integrated occurrence is by definition composed of multiple occurrences, and thus may involve significant defense and indemnity costs, there is a chance that less than adequate limits will remain to pay for those yet unknown claims.

Second, the Bermuda Form frequently contains endorsements containing "Previously Notified Occurrence or Claim" exclusions. When retroactively declaring an integrated occurrence, these exclusions could create gaps in coverage. A typical "Previously Notified Occurrence or Claim" exclusion provides:

> This Policy does not apply to …
>
> Any Occurrence, including any "Batch Occurrence," "Integrated Occurrence" or similar term as defined under any other Policy, Personal Injury, Property Damage or Advertising Liability or any Claim or potential Claim arising therefrom, notice of which has been given or deemed to have been given under any other policy prior to the Continuity Date. …
>
> For purposes of this endorsement, the Continuity Date shall be defined as: [date].[5]

Under this language, if the policy defines the continuity date as Jan. 1, 2016, there can be no coverage for an occurrence previously noticed as a single occurrence on any date prior to Jan. 1, 2016. The ability to retroactively declare that previously notified occurrence as an integrated occurrence is thus effectively precluded.

Nonetheless, the continuity date will usually be the first date that an insurer participates uninterrupted in the policyholder's Bermuda Firm coverage program. Thus, in contrast to the foregoing illustration, if the Continuity Date is 1987 because Insurer XYZ had consistently participated in the policyholder's Bermuda Form coverage program since 1987, the ability to retroactively declare as an integrated occurrence an occurrence previously notified as a single occurrence should be unaffected. Instead, as described above, the greater risk is where the Continuity Date is more recent. If that Continuity Date is after the date on which the policyholder of an occurrence as a single occurrence, the policyholder will be precluded from then retroactively declaring an integrated occurrence under the policy containing that more recent Continuity Date.

In sum, the decision to declare an integrated occurrence is frequently not without risk. Policyholders must therefore be attentive to not only policy language and claims analysis, but also case specific risk-based subjective inquiry and business judgment.

1. Bermuda Form 0004, at §III(V)(1).
2. Id. at §III(R).
3. Id.
4. Id. at §II(B).
5. "Previously Notified Occurrence or Claim" exclusion.

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> The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Assured and claimant must abide by the conditions of the contract.

Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 275 (1928).

However, New York practitioners should be aware that there is an exception to the requirement that an injured party must first obtain a judgment against the tortfeasor before a direct action can be brought against the insurer. This exception provides that there is no "judgment requirement" when the insurer brings a declaratory judgment action against its insured seeking a declaration of no coverage and names the injured plaintiff as a defendant/necessary party in that action. See, e.g., *U.S. Underwriters Ins. Co. v. Zismopoulos*, No. 07-CV-4684 (CBA) (RLM), 2010 WL 1286221, at *2 (E.D.N.Y. March 31, 2010) ("However, the standing requirement is waived [when the injured parties are named] as defendants in the lawsuit; thus, 'as party defendants in the action, [the injured parties are] thereby allow[ed] … to contest the issue of coverage[.]'" (citing *Putnam Realty v. Ins. of N.Y.*, 828 N.Y.S.2d 394 (App. Div. 2007) (an injured party named in the declaratory judgment action has standing to contest coverage); *Maroney v. N.Y. Central Mut. Fire Ins. Co.*, 5 N.Y.3d 467 (2013) ("Because the insurer joined the insured in seeking a declaration of its rights … Insurance Law §3420 does not preclude consideration of the coverage issues in this case.")).

This exception was most recently reaffirmed by the Southern District of New York in *MIC General Insurance Co. v. Chambers*, Case No. 1:15-cv-03324 (S.D.N.Y. 2016). That declaratory judgment action stemmed from an underling lawsuit alleging personal injuries at a premises owned by the insured. MIC insured that premises, denied coverage, and then brought a declaratory judgment action against its insured and the underlying personal injury plaintiff seeking a declaration that it was not obligated to defend or indemnify the insured for the injuries sustained and allegedly caused by the insured's negligence.

Two of the three insureds did not appear in that action and the third appeared pro se. However, the injured plaintiffs retained coverage counsel to litigate the propriety of MIC's coverage denial as a result of being named defendants in MIC's case which, if successful, would benefit the injured plaintiff and the alleged tortfeasor. MIC and the injured plaintiff promptly moved for summary judgment respecting MIC's denial of any coverage obligation.

Citing *Lang v. Hanover Insurance Co.,* 3 N.Y.3d 350 (2011), MIC argued that the injured plaintiff lacked standing to bring a counterclaim because "under Section 3420 of New York Insurance Law, an injured person may not bring a declaratory judgment action against an insurer until he first obtains judgment against the tortfeasor." The court disagreed, holding that although an underlying injured party "ordinarily" lacks standing to bring a declaratory judgment against an insurer until there is a judgment against the tortfeasor, "[the] requirement is 'waived' when the injured party is named "as [a] defendant[] in the lawsuit.'" Id. (citations omitted). It ultimately denied MICs motion for summary judgment and granted the injured plaintiff's motion for summary judgment, declaring that MIC had both the duty to defend and indemnify its insured as a matter of law.

This often overlooked exception provides an injured party with an avenue to coverage or, at the very least, an avenue to contest the denial of coverage. Personal injury lawyers should be working closely with coverage counsel anytime their client is put in a defensive posture by a tortfeasor's insurer in a declaratory judgment action.

Cargo

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risk to their vessels and cargo … ." 2000 U.S. Dist. LEXIS 7803 at *25.

Although the district court rejected New York Marine's argument that the *entire* policy was void, it found that Deepak and Tradeline were not entitled to rainwater coverage

> because they violated the duty of utmost good faith by not disclosing the weather conditions to New York Marine … . Therefore, the district court awarded to Deepak that part of the claim covered by the Policy and the original SMPs (367 and 368) [the Special Marine Policy certificates evidencing coverage for the fertilizer shipments], which, the district court concluded, amount[ed] to $410,879.70."

Id. at 120. This amount represented the fertilizer "lost due to the sinking of the lightering barge in the port of Kandla" and the fertilizer "lost during discharge … at the port of distress." Id. at 126.

On appeal, the Second Circuit agreed "that the prediction of severe rainy weather in the Kandla area [was] a material fact that would have affected New York Marine's decision whether to issue the extended coverage at all or to do so at a higher premium. Deepak, therefore, had a duty to disclose this information when seeking rainwater coverage." Id. at 123 (internal citation omitted). However, the Second Circuit found that Deepak had sufficiently informed New York Marine of the impending weather because it had communicated information concerning the storm risk to Tradeline, who, the court found, was New York Marine's agent. Id. at 123. Therefore, the fertilizer was covered by the terms of the "ICC(C) provisions, with the addition of rainwater damage as a covered risk." Id. at 125.

But the Second Circuit's decision concerning rainwater coverage did not secure coverage for all of Deepak's losses. The court determined that coverage terminated at the time Deepak offloaded the fertilizer to its handling and forwarding agent so any damage to the fertilizer after that point was not covered. Id. at 127-28. In addition, the court found that Deepak's expenses incurred in diverting the fertilizer shipment to the port of distress were not covered because they were not incurred "as a result of" a covered loss as "neither port closure nor cyclones" were covered under the policy. Id. at 129.

Tradeline highlights the limitations of marine cargo insurance in the context of weather-related loss. It also shows the importance of disclosing information concerning the weather forecast to your marine cargo insurance company at the time coverage is purchased. Even in the face of commercial pressure to transport cargo on time, given the prevalence of severe weather these days, it would be a shame to lose insurance coverage due to a weather issue based upon a "disclosure" argument, an exclusion, or a warranty that certain measures of weather severity not be exceeded.

Claim File

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are "multi-motivated," such as acknowledgment letters, which are part of an insurer's general investigation of a claim.

Conclusion

When an insurer is pressed to protect documents in its claim file, there are options that can be considered, depending on the insurer's role in the case. Pursuant to CPLR §2304, an insurer can move to quash a subpoena for its claim file. While application to quash subpoenas on the grounds that they are overbroad or irrelevant are generally disfavored, courts do routinely protect those documents that qualify as confidential or privileged. Also, pursuant to CPLR §3103(a), an insurer may seek a protective order. This protection can be accomplished on motion practice alone. More often than not, the insurer will be required to produce a privilege log and/or submit such for in camera review by the court, advising which documents are protected by the privilege.

Battles over discovery in litigation are quite common and insurers are often part of these combative disputes. There remains the overarching tension regarding a New York litigant's right to the free flow of information in the discovery process with the notion that an insurer's claim file is conditionally immune from discovery. There is a strong public policy benefit to allowing a party access to material necessary for the defense or prosecution of an action. This is compared to the other public policy protecting the free flow of communications from attorneys and insurers. Finding a happy medium is not easy, but when two essential public policies seemingly butt heads, court intervention is a reasonable solution.