Assurances

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Bumpershoot

Various contributors of The Merrit Company

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Article abstract

Ce texte, tiré du *Risk Management Manual*, fait le point sur l'un des types d'assurance les plus méconnus : l'assurance responsabilité excédentaire, risques maritimes et non maritimes confondus. L'approche dite *Bumpershoot* est une approche de l'assurance maritime qui incorpore les risques autres que maritimes. À l'inverse, l'approche *Umbrella*, liée aux risques terrestres, peut également servir d'assurance excédentaire à la garantie *Protection and Indemnity*.

Bumpershoot[1]

by

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The Merrit Company[2]

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In recent years there has been nothing more intricate in the field of excess liability than the meshing of marine and non-marine liability exposures in the Umbrella approach. There are large wastelands of uncertainty with respect to the status of employees, the determination of property of others in the custody of the insured, damage to other vessels or docks, the removing of wrecks, and unusual liabilities or expenses to comply with regulations.

In the London market there have been two approaches to the problem. One is a marine approach called the Bumpershoot which contains in its wording the language "All Protection and Indemnity risks of whatsoever nature including, but not limited to, those covered by the underlying Protection and Indemnity Insurances." Ordinarily the marine market has used this approach for a risk which was 80% or more marine in nature and picked up the non-marine liability exposures as incidentals. Underwriting problems

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[1]This text was taken from the ***Risk Management Manual***, and reprinted with permission of the publisher, The Merrit Company, 1661 Ninth Street, P.O. Box 955, Santa Monica, CA 90406 [Tel.: (213) 450-7234].

[2]The Merrit Company has published various manuals dedicated to insurance or risk management.

result when there is a very heavy non-marine casualty exposure in conjunction with marine exposures. The London market is ordinarily not geared to such a combination. There are very few American markets left in this difficult class.

The other approach, in the non-marine market, is to take the standard Umbrella wording and broaden it so that it is excess of the non-marine liabilities as covered under standard CGL, auto policies and the like, and also to be excess of the Protection and Indemnity Insurances on vessels owned or operated by the insured.

560 **Employees**

If an operation has employees who may at one time be construed as coming under State Workers Compensation Acts and at another time as coming under marine-type employment Acts (the Jones Act, the Longshoremen's and Harbor Workers' Act, or other maritime common or statutory requirements), that company should have a special note of gratitude when you provide the proper type of Umbrella. The counsel for such a client has undoubtedly been worrying for years with such things as "Third Party Over Liabilities," "Twilight Zones," and "Cases of Local Concern."

A case decided in the United States Court of Appeals for the Second District (*Peter Tedeschi vs. Luckenbach Steamship Company, Inc.*) is an example of the Third Party Over situation. Here the court opened up what should be a statutory cover to employer's liability and put the employee in the same position as an ordinary third party in collecting money from his or her own employer. This was a case where pallets, used to lower cargo, were ordinarily placed over a well: the worker caught a foot in the well, which was exposed, sustained injuries and sued the shipping line for breach of seaworthiness. Congress has eliminated the unseaworthiness remedy which had previously been available to Longshoremen, but this did not eliminate the right of Longshoremen and other harbor workers to bring a third party action based on negligence. The shipping line in turn sued the stevedoring firm and the courts said "an implied warranty to discharge the stevedoring duties in a workmanlike manner and to indemnify the ship owner from foreseeable loss resulting from negligent performance of its duty" was involved so that the

employer in effect had to pay the shipping line for the injury to the employer's own employee.

This is not at all a new doctrine, since *Ryan vs. Pan-Atlantic Steamship Corp.* in 1956 held the same thing when some rolls of pulp were improperly secured by the stevedoring company in South Carolina and another employee of the stevedoring company was hurt when unloading the cargo in New York. The steamship company filed a third party complaint against Ryan and it was held that the Longshoremen's and Harbor Workers' Act would not be an exclusive remedy — Ryan was just like a third party suing the employer via the steamship line.

The 1984 amendments to the Longshoremen's and Harbor Workers' Compensation Act granted shipyards the same immunity from suits by vessels which stevedores obtained under the 1972 amendments. These amendments, however, did nor bar suits by unrelated parties for negligence.

With regard to the Twilight Zone and Local Concern doctrines as to employees, there was another case: *Gillespie vs. United States Steel Corporation.* Here the man was a seaman, employed aboard a vessel of the United States Steel Corporation, who slipped on some wet ore and the wet surface of the dock. Three separate approaches were taken by the plaintiff: 1. The Jones Act; 2. The General Maritime Law; 3. The Ohio Wrongful Death Act. The United States Circuit Court of Appeals decided that Number 1 was the correct approach, and the Jones Act prevailed over the General Maritime Law and the Ohio State Law. One can never really tell until one gets to a higher court. Back in 1922, *Grant-Smith Porter Ship Co. vs. Rohde* held that the employee who was working on a ship which was only partially completed came under the local Workers Compensation Law instead of any admiralty laws.

The legal situation is confusing:

1. There can be an action under the old Admiralty Law of unseaworthiness of a vessel which can be a suit *in rem or in personam.*

2. A suit can be under the Jones Act which gives the right to the seaman to sue for negligence.

3. The Longshoremen's and Harbor Workers' Act may apply for people other than the master and crew where the injury is on navigable waters, including any drydock.[3]

4. The suit might end up as a Local Concern matter and come under a State Workers Compensation Act for a state near the navigable waters.

5. When a worker happens to move a railroad car at the loading dock, it may turn out that he or she is a railroad employee under the Federal Employers Liability Act. Other acts might apply, such as the Outer-Continental Shelflands Act.

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The answer would seem to be, with respect to employees, that Workers Compensation should be written to cover all states, including off-shore locations adjacent to states in which work may be performed, then add the United States Longshoremen's and Harbor Workers' cover and Maritime Coverage 1 which extends Coverage B in the Compensation policy to the master and crew members, and Maritime Coverage 2 for voluntary compensation, extend territorial limits, have a provision that claims *in rem* shall be treated as claims against the employer and, if possible, pick up maintenance and care of seamen.

Schedule, in an Umbrella, the primary coverage provided for employees with all endorsements. Also, schedule the Protection and Indemnity insurance which covers members of the crew under the Jones Act. If there is still a gap, such as the Third Party Over situation or a Twilight Zone, the Umbrella will pick up excess of Section B or excess of a self-insured retention. At the water's edge, people walk in and out of maritime activities and, although Congress has done so much, there are still uncertainties that may only be decided in the courts.

The Bumpershoot or Umbrella approach to provide a substantial amount excess of the P & I coverage in the primary marine insurance is extremely important. Too often an inadequate

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[3]The 1972 amendments gave very generous benefits to amphibious workers and their land-based fellow workers, as well as those on navigable waters. The 1984 amendments exempted specifically office workers, data processing, recreational, retail operations, and small boat work done on land, as long as they were covered by state workers compensation laws for jurisdictional purposes.

amount is carried while the liabilities may be tremendous.[4] The P & I, at the bottom, may be written so that it picks up:

1. Liability to all sorts of persons — passengers, visitors, crews, stevedores, and those not covered under Federal and State Compensation laws.
2. The P & I covers damage to cargo, harbors, wharves, docks, and other vessels. A vessel may become an obstruction to navigation and have to be removed by government direction.
3. There may be all sorts of unusual expenses for fees, penalties, or local laws or ordinances.

If you do not have P & I insurance on the bottom, and you remove just the watercraft exclusion from the CGL policy, you would not be picking up a great number of the things which are included in the P & I coverage on a maritime basis. There is the expense of raising a wreck when legally required. There is the whole business of *in rem* proceedings when the insured may not be in control or have anything to do with the vessel at the time of the loss. The vessel may have been taken over under compulsion. There is the unusual expense involved in enforcement of quarantine regulations.

There is never any certainty that the liabilities arising from the exposures included in P & I will be restricted to the value of the hull. In addition, one can never guess whether an action is going to be brought under Admiralty or on the basis of the law of the particular state or country where the insured is engaged in both marine and non-marine activities.

Combination Policies

In the non-marine Umbrella it is sometimes advantageous to weld together a contract with separate insuring clauses, one which will provide all-risk of physical loss or damage on real and personal properties and business income, and another insuring clause which will provide umbrella liability over the primaries. In the same way,

[4]Remember that international conventions on Limitations of Liability for Marine Claims [the latest 12/1/86] do not apply where the courts find that an act or omission was committed with the intent to cause loss or committed recklessly and with knowledge that such loss would probably result.

especially where reasonable deductibles will be taken, the entire hull and other property may be written under direct damage wordings with a bumpershoot clause provided for the excess liabilities over both marine and non-marine coverages.

A very interesting approach may be taken on a contractor who is engaged heavily in construction which involves navigable waters, bridges, docks, and tunnels, and also employs barges, tugs and other maritime equipment. The direct damage wording may cover all-risk builders risk any one location in the world, the watercraft involved, all other equipment usual to a contractor, incidental
564 buildings and places of repair, and a bumpershoot liability insuring clause to pick up the excess liabilities over Workers Compensation and that which is not included in the primary liabilities. With regard to a contractor, the covering of care, custody and control is extremely important and this can best be accomplished where both the builders risk and the umbrella are in the same underwriting hands.