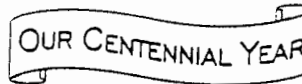


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RESPONSE BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES  
TO THE MARINE INSURANCE QUESTIONNAIRE  
OF THE COMITE MARITIME INTERNATIONAL

1. Does your country's national law contain rules on marine insurance? If so, are they contained in an act? Please supply a copy of the relevant act.

Response:

The national law of the United States does contain some rules on marine insurance. They are contained in court decisions, not an act of the legislature. The effect on the national law on marine insurance is subject to the rules announced in the United States Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). See Response to Question No. 2.

2. If your country's national law contains rules on marine insurance exclusively in the form of court decisions, what is the shortest summing up of the main rules? Please supply a copy of that document.

Response:

The national law of the United States with respect to marine insurance is exclusively in the form of court decisions. The shortest summing up of the main rules is Catell, Edward V. and others, *Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L.J. 1 (1995). A copy of that article and a selection of other articles of interest are annexed.

*Wilburn Boat, supra*, held that issues of marine insurance are governed by the national law of the United States when there is a well-established rule of federal or national admiralty law, or, if not, the court determines that it should fashion a federal or national rule. Otherwise,

marine insurance disputes are governed by the insurance law of one of the 50 states. As a result, to determine the law with respect to any particular issue of marine insurance, it is necessary to answer the following questions: (1) whether there is a well-established federal or national admiralty rule; (2) if not, determine whether there should be a federal or national admiralty rule; (3) if the answer to both (1) and (2) is no, decide which of the 50 states' law applies; and (4) decide what the law of that state is.

In responding to this questionnaire, we will state the principles of well-established federal maritime law, to the extent applicable. For issues with respect to which it is uncertain whether there is a well-established federal or national maritime law, we will state the principles that are generally applicable; however, it is beyond the scope of these responses to catalog the law which might be applicable with respect to a particular question in each of the 50 states.

For further discussion of *Wilburn Boat*, see the following, Joel K., *The Life and Times of Wilburn Boat "A Critical Guide (Part I)"*, 28 J. Mar. L. & Com., 395 (1997); Goldstein, Joel K., *The Life and Times of Wilburn Boat "A Critical Guide (Part II)"*, 28 J. Mar. L. & Com., 555 (1997); Sturley, Michael F., *Restating the Law of Maritime Insurance, A Workable Solution to the Wilburn Boat Problem*, 29 J. Mar. L. & Com., 41 (1998); Staring, Graydon S. and Waddell, George L., *Admiralty Law at the Millenium: Insurance*, \_\_\_ Tul. L. Rev. \_\_\_ (\_\_\_).

3. If your country's national law contains rules on maritime insurance in the form of an act, does that act apply to hull insurance only or to cargo insurance only or to both branches?

Response: This question is not applicable to the United States of America. See Response No. 1.

4. If your country's national law contains an act on maritime insurance, please indicate which rules are obligatory. May we assume that all rules which are not obligatory are directory?

Response: This question is not applicable to the United States of America. See Response No. 1. It should be noted that some of the states have obligatory provisions in their insurance codes, which, in certain circumstances, may apply to policies of marine insurance.

5. Has your country's marine insurance market adopted standard insurance conditions? If so, please supply a copy of such conditions.

Response: There are no standard insurance conditions in use in the United States of America, in the sense that a particular type of risk will always be written pursuant to the same form or set of forms. Many insurance companies, as well as brokerage houses, have developed their own forms. Nonetheless, there exist numerous coverage forms that are the product of research and development of the American Institute of Marine Underwriters ("AIMU"). Some of these forms, such as the "American Institute Cargo Clauses (April 1, 1966)," have common

usage. A selection of the more significant AIMU form clauses may be found in the Witherby Publishing Company's *Reference Book of Marine Clauses*. Insurers and insureds generally have freedom to negotiate the terms and conditions of marine insurance policies.

6. Does your country's national law or, in the absence of national law, do the Standard insurance Conditions used in your insurance market.

6.1 require that the insured has an insurable interest? If so, is it required when entering into the contract of insurance or at a later stage? Has this to be an economic and legal interest?

Response:

Long ago, the U.S. Supreme Court held that an insured may have an insurable interest in goods or property whether or not it has title to, a lien on or the right of possession of such goods or property. *Harrison v. Fortlage*, 161 U.S. 57, 64 (1896). As the Supreme Court stated:

It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself.

The insured need not have title or legally enforceable *in rem* rights in the property insured to have an insurable interest. If any economic advantage from the continued existence or pecuniary loss from destruction or damage of the insured property results, an insurable interest exists. *Groban v. S.S. Pegu*, 331 F.Supp. 883 (S.D.N.Y. 1971); 3 *Couch on Insurance* (2d ed. 1984) §24:13.

Otherwise put, the doctrine of insurable interest simply requires that an insured have some pecuniary interest in the property, not just a mere hope or expectation that would be tantamount to a "wager." *Scarola v. Insurance Co. of N. America*, 31 N.Y. 2d 411 (1972).

Accordingly, an insurable interest is required and U.S. law has liberally construed what that may constitute. As a further general proposition, the insurable interest need not be demonstrated at the time when the policy is entered into as long as it can be demonstrated to have existed at the time of the loss and during the policy period. 1 A. Parks, *The Law and Practice of Marine Insurance and Average*, 184 (1987).

6.2 result in termination of cover in the event of a breach of a warranty in the policy, regardless of whether the breach of warranty caused the loss which is the subject of the claim? If not, what is the effect of a breach of warranty?

Response:

There are American decisions that follow the British common law rule (as codified in Section 33(3) of the British Marine Insurance Act) that the breach of a warranty automatically eliminates insurance coverage, without regard to intent and regardless of whether a causal connection between the

breach and the subject loss can be established. *Drake Fishing v. Clarendon Am. Ins. Co.*, 136 F.3d 851 (1<sup>st</sup> Cir. 1998); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1366 (11<sup>th</sup> Cir. 1988); *Graham v. Milky Way Barge*, 824 F.2d 376, 383 (5<sup>th</sup> Cir. 1987).

Statutes of many of the States, however, relieve the effect of a breach of a promissory warranty, by keeping cover in force if there was "substantial compliance" and/or unless the breach was somehow related to the loss. These modifications to the traditional marine rules have been applied to marine policies, e.g. *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310 (1955). Notably, some states, such as New York, by statute have specifically *preserved* the marine rule for application to marine policies.

From time to time, there have been efforts by American law courts to move the federal common law in the same direction in marine insurance cases, usually by drawing distinctions between different types of warranties, or between a promissory "warranty" and some other kind of "condition," or between a "condition" and something else, like a "limitation," an "exclusion," or "discharging provision." *Union Ins. Co. v. Smith*, 124 U.S. 405, 426-27 (1888); *Kalmbach v. Insurance Co. of Pa.*, 529 F.2d 552, 555 (9<sup>th</sup> Cir. 1976); *Insurance Co. of N. Am. v. John J. Bordlee Contractors*, 507 F.Supp. 845, 847 (E.D. La 1981), *aff'd* 733 F.2d 1161, (5<sup>th</sup> Cir. 1984). But even in cases of clear breach of warranty, marine underwriters frequently ameliorate the consequences in the policy itself, by including a "held covered" clause. *Hilton Oil Transp. v. Jonas*, 75 F.3d 627, 620 (11<sup>th</sup> Cir. 1996); *Kalmbach v. Insurance Co. of Pa.*, *supra*, 529 F.2d at 555; S.B. Long, "Held Covered" Clauses in Marine Insurance Policies, *Ins. Counsel J.* 401 (1957).

6.3 impose upon the insured a duty of disclosure and, if so, only before the commencement of cover or during the currency of cover? If so, what is the nature and extent of the duty and what is the sanction for its violation?

Response:

It generally is considered that the national law in the United States imposes a duty of disclosure on the insured in policies of marine insurance. *M. Lanahan v. the Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 183, 1998 A.M.C. 285, 294 (1828); *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 1998 A.M.C. 1191, 1213 (1883); Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245 (1967); 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 216-222 (1987). The duty to disclose is an aspect of the duty of utmost good faith and may be limited in circumstances in which the duty of utmost good faith is limited. See Response to Question 6.6.

The duty applies upon application, up until the policy is issued, on renewal, and on amendment or endorsement of the policy. Staring, Graydon S. and Waddell, George L., *Admiralty Law at the Millennium: Insurance*, \_\_\_ Tul. L. Rev. \_\_\_\_ (\_\_\_\_); 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 230-231 (1987). Generally, there is no duty of disclosure during the pendency of the policy. See discussion of increase of the risk under Question 6.8.

Generally, the insured must disclose all material facts. Material facts are those found likely to

influence the underwriter in accepting the risk or setting the premium or terms of coverage. *Sun Mutual, supra*. Further, it generally is believed that materiality is determined on the basis of whether the information would have influenced the decision of a "prudent underwriter" to enter the contract. *M. Lanahan*, 26 U.S. (1 Pet.) at 185, 188, 1998 A.M.C. at 2095, 2099; *Sun Mutual*, 107 U.S. at 509-510, 1998 A.M.C. at 1212; *Healy, The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-250 (1967); 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 219-220, 222-224 (1987).

The exceptions to the requirement of disclosure generally are matters within the underwriter's knowledge or duty to know, waiver, risks or matters covered by warranty, and matters which would diminish the risk. See 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 224-230 (1987).

The sanction for failure to disclose is that the underwriter may, on tendering return of the premium, void the policy *ab initio*. *Healy, The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967). It is unnecessary that the matter which the assured failed to disclose be related to the loss. *Cattell, Edward V. and others, Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar.L. J. 1, 20-22 (1995).

6.4 provide a rule on misconduct of the insured during the period of cover; if so, please outline what is considered misconduct and what is the sanction.

Response:

The national law of the United States has no general rule on misconduct of the insured during the term of the policy. It does deal with two situations involving misconduct of the insured: the warranty of seaworthiness provides for the conduct of the insured each time the vessel goes to sea, and there is a rule with respect to intentional loss.

The national law applies a warranty of seaworthiness in time hull policies. While the warranty applies at the time of attachment, it also requires that the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition, and the consequence of violation of this negative burden is loss of coverage for damage caused proximately by such unseaworthiness. *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385, 388, 1957 A.M.C. 655, 661 (5th Cir. 1957); 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 266-271 (1987).

United States national law also addresses misconduct of the insured when it intentionally causes the loss. Although sometimes addressed as a matter of state law, it generally is considered that the national law of marine insurance denies coverage with respect to losses which are not fortuitous, and this includes losses intentionally caused by the insured. *Youell v. Exxon Corp.*, 48 F.3d 105, 109 (2d Cir. 1995).

6.5 provide that the insured has to take responsibility for the conduct of others including an

insurance broker. If so, for whom?

Response:

Under the United States national law of marine insurance, the broker is considered to be the legal representative of the insured, and the insured is bound by his acts, for example, misrepresentation with respect to the risk. On the other hand, other intermediaries may as a matter of fact be agents of the underwriters, and the insured is not bound by their acts. *Certain Underwriters at Lloyd's London v. Giroire*, 1998 A.M.C. 2153 (S.D. Fla. 1998); Cattell, Edward V. and others, *Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L. J. 1, 22-24 (1995); 1 A. Parks, *Law and Practice of Marine Insurance and Average*, 222 (1987).

6.6 provide that either the insured or the insurer or both of them have a duty of good faith? If so, please outline the extent of that duty.

Response

The view of the majority of courts is that the United States national law considers policies of marine insurance to be contracts of utmost good faith. See Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-246 (1967); Goldstein, Joel K., *The Life and Times of Wilburn Boat "A Critical Guide (Part II)"*, 28 J. Mar. L. & Com., 555, 576-577 (1997). A significant exception is *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 822, 1991 A.M.C. 2511 (5th Cir. 1991), in which the United States Fifth Circuit Court of Appeals distinguished statements from earlier cases as *dicta*, and held that utmost good faith would not apply in all cases. Accordingly, the application of good faith will vary depending on the court of appeals district in which the case arises.

The most significant effect of the duty of utmost good faith is with respect to the insured's duty of disclosure. See Response to Question 6.3.

While the duty imposed by the national law applies to both the insured and the insurer, (See, Staring, *Marine Insurance – Is the Doctrine of "Utmost Good Faith" "Out of Date?"* 2 CMI Yearbook 1994, 288.), there is a trend toward applying state law of bad faith and punitive damages against insurers of marine policies. Clann, Brown, and Sydow, *Judicial Interpretation of Insurance Contracts in Maritime Law: the Duty of Good Faith in Handling Claims*, 66 Tul. L. Rev. 479 (1991); Staring and Waddell, *supra*, \_\_\_ Tul. L. Rev. at \_\_\_\_.

6.7 provide rules on the insured value? If so please state at which time the subject of insurance is to be valued and how?

## Response

Again, no statutory law addresses insured value. As a practical matter, however, the rules pertaining to insurable value as laid out in the Marine Insurance Act of 1906 are utilized as a guide. These are:

Subject to any express provision or valuation in the policy, the insurable value of the subject matter insured must be ascertained as follows:

(1) In insurance on ship, the insurance value is the value, at the commencement of the risk of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole;

The insurable value, in the case of a steamship, includes also the machinery, boilers and coals and engine stores if owned by the assured, and, in the case of a ship engaged in special trade, the ordinary fittings requisite for that trade;

(2) The insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance;

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole;

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance (Sect 16).

In valued policies, the stipulated value obviously governs. *N.Y. & Cuba Mail S.S. Co. v. Royal Exchange Assn.*, 154 Fed. Rep. 315 (2d Cir. 1907). Generally speaking, the insured value in hull policies is the value of the vessel at the commencement of the risk including fuel, provision and stores. In the case of a vessel engaged in a special trade, the value of any equipment required for that trade should be included. By way of example, the valuation clause in the American Institute Hull Clauses reads:

The Subject Matter of this insurance is the Vessel called the .....or by whatsoever name or names the said Vessel is or shall be called, which for purposes of this insurance shall consist of and be limited to her hull, launches, lifeboats, rafts, furniture, bunkers, stores, supplies, tackle, fittings, equipment, apparatus, machinery, boilers, refrigerating machinery, insulation, motor generators and other electrical machinery.

In the event any equipment or apparatus not owned by the Assured is installed for use on board the vessel and the Assured has assumed responsibility therefor, it shall also be considered part of the Subject Matter and the aggregate value thereof shall be included in the Agreed Value.

Notwithstanding the foregoing, cargo containers, barges and lighters shall not be considered a part of the Subject Matter of this insurance.

In cargo insurance the most frequently used valuation clause stipulates that insured value be comprised of the invoice value and charges/freight plus 10%. Typically, cargo policies will include a Limits of Insurance Clause which effectively limits the amount covered to any one vessel or any one place. Moreover, when the value of the goods shipped exceeds the amount stipulated in the policy, the principles of co-insurance will apply. These policies usually also contain accumulation of interest clauses (i.e. usually twice the policy limit), provided the accumulation was beyond the insured's control, and address cargo to be insured which has a highly fluctuating value. Buglass, *Marine Insurance and General Average in the United States* (3d Ed.) p. 25-26.

6.8 allow the insured to increase the risk during the currency of cover with or without informing the insurer and with or without obligation to pay an additional premium?

#### Response

The courts have stated that alterations of the risk which would result in a loss of coverage should be treated in the terms of the policy, its conditions and warranties. Accordingly, it is doubtful whether, under the national law, an increase in the risk which is not specifically proscribed by the policy would result in a loss in coverage. *Navegacion Goya, S.A. v. Mutual Boiler & Machinery Insurance Co.*, 411 F.Supp. 929 (S.D. N.Y. 1975).

Various terms commonly in use do provide for increase of the risk on notice to the insurer and, when provided, payment of additional premium. For example, proceeding beyond the navigational limits of the policy may be held covered with notice to underwriters and additional premium agreed. *Windward Traders v. Fred S. James & Co. of N.Y.*, 855 F.2d 814, 817 (11th Cir. 1988); *New York Mar. & Gen. Ins. Co. v. Gulf Marine Towing, Inc.*, 1994 A.M.C. 976 (E.D. La. 1993).

6.9 provide for exclusions from cover, in particular

6.9.1 for political risks like war, mines, strikes

6.9.2 for nuclear risks

6.9.3 for arrest and detachment by a court or government body

6.9.4 for ordinary wear and tear (or, in cargo insurance, inherent vice)

6.9.5 for inadequate maintenance, fault in design, construction or material

6.9.6 in hull insurance for unseaworthiness, loss of class or in hull or cargo insurance breach of safety

regulations:

6.9.7 in hull insurance for change of flag, ownership or management

6.9.8 for management issues (like non-compliance with the ISM Code)

Response:

In general, the above exclusions from cover are provided for, either in the policy itself or by operation of law. However, in some instances, United States marine insurers are willing to reinstate coverage, for an additional premium, usually on limited terms and conditions. The classic example is "additional" coverage for loss to cargo due to "strikes, riots, and civil commotions." It should be noted that exclusionary language tends to be strictly construed by the courts in the United States. Ordinarily, the burden of proof relating to the applicability of the exclusion lies with the insurers.

Some of the above exclusions from cover bear special attention:

6.9.4 for ordinary wear and tear (or, in cargo insurance, inherent vice): traditional cargo insurance forms in use in the United States do not specifically exclude inherent vice, as do the London Institute Cargo Clauses. Rather, the concept of inherent vice is considered a function of whether the loss was "fortuitous." *Ingersoll Mill. Mach. Co. v. M/V BODENA*, 829 F.2d 293, 307 (2d Cir. 1987). Nonetheless, even though the issue of inherent vice is not the subject of an exclusion, the courts treat it as such, casting the burden of proof upon the insurers. *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424 (5<sup>th</sup> Cir. 1980).

6.9.5 for inadequate maintenance: Questions of inadequate maintenance, or for fault in design, construction or material raise the question of seaworthiness which may give rise to a breach of an express warranty of seaworthiness, or may constitute a violation of either of the two implied warranties of seaworthiness known as the "American Rule (*see* 6.9.6 below).

For claims arising out of problems with maintenance, or fault in design, construction or materials, the central question is whether the loss was due to an insured peril under the policy. The American Institute Hull Clauses (June 2, 1977) ("AIHC") contains for example, "Perils" and "Additional Perils ("Inchmaree")" Clauses. Coverage for claims of the type described in this question may exist under the Inchmaree Clause if due to a latent defect in the vessel, or the negligence of the master and crew. Coverage under hull policies may be supplemented by the Liner Negligence Clause, which extends cover to, *inter alia*, the negligence, errors of judgment or incompetence of any person. As noted by Alex Parks, "...this would include, for example, negligence of a builder, and is not limited to masters, a few, engineers, pilots and repairers or charterers—as in the ordinary Inchmaree form." 1 A. Parks, *The Law of Marine Insurance and General Average*, 406 (1987).

Under both the Inchmaree and Liner Negligence clauses, such losses must not have resulted from a want of due diligence on the part of the Assured, Owners, Managers, or any one of them, of the insured vessel.

6.9.6 for hull insurance, unseaworthiness: As noted in 6.9.5 above, hull policies issued by the United States insurers may include an express warranty of seaworthiness is addressed above.

A controversial aspect of marine insurance law in the United States relates to the so-called "American Rule," which some courts have applied, while other courts and commentators have criticized. For an excellent analysis of the "American Rule," see G. Staring & G. Wadell, "Marine Insurance", Tulane Admiralty Law Institute ) (March 17-19, 1999) (paper); see also, N. Healy, "The Hull Policy: Warranties, Representations, Disclosures and Conditions, 41 Tul. L. Reve. 245, 258 (1967).

The "American Rule" actually consists of two different warranties of seaworthiness, that are implied by operation of law. First, there is a warranty of seaworthiness upon attachment of coverage. *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 1422 (5<sup>th</sup> Cir. 1992), cert. denied, 510 U.S. 813 (1993). It is generally agreed that the warranty arises only if the vessel is in port at the time the insurance attaches; however, the law is unclear in this respect.

Second, once the initial warranty is satisfied, the "American Rule" implies an additional warranty which has been described as a "sort of negative modified warranty...that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *The Spot Pack*, 242 F.2d at 388. Unlike the first implied warranty, however, the consequence of a violation of this negative burden is "merely a denial of liability for loss or damage caused proximately by such unseaworthiness." *The Spot Pack*, supra at 388.

Knowledge of an unseaworthy condition sufficient to deny coverage is not limited to the Owner, but can also be imputed from those working for the Owner. See *Spot Pack*, supra at 389, in which Judge Brown referred to an earlier Supreme Court decision in stating that bad faith or want of ordinary prudence on the part of the Owner "refers to those acts in which the owner, if an individual, personally participates, or if a corporation or multiple ownership, in which there is personal participation by those having shore side managerial responsibilities." While the answer to this question is thus clearly "yes,," it is not clear from the case law from how far down the management chain such knowledge will be imputed up to the Owner.

6.10 provide cover for total or partial loss or damage to the subject matter insured, contribution in general average and expense for ascertaining or averting or reducing loss or damage.

Response:

Traditionally, United States marine insurers do provide the above coverages. Premium reduction may be achieved by mean of purchasing "total loss only" coverage on hulls and "F.P.A." coverage ("free of particular average") on cargo, both of which are generally available in the United States marine insurance market. It should be noted that the definition of a "constructive" total loss is usually provided for in the policy. "Compromised" or "arranged" total losses have been known to be settled by United States marine insurers.

Losses for general average and expenses is usually the subject of a specific clause in a hull or

cargo policy and are recoverable in excess of a total loss payment. Most policy provisions require that if there is a difference between the contributing value of the hull or cargo, and the insured value, the owner becomes a co-insurer for the difference. In hull insurance (but not cargo) the absence of such a provision may make the insurer liable for the entire contributory value, notwithstanding the insured value. 1 A. Parks, *The Law and Practice of Marine Insurance*, 625-627 (1987).

United States marine insurers also customarily cover "sue and labor" expenses, by means of a specific clause in the policy. These generally involve the cost incurred in the "defense, safeguard and recovery" of the insured property. It is understood that the expenses are recoverable despite the eventual total loss of the insured property. To be recoverable, however, the expenses must have arisen out of a peril, or impending peril, insured against by the policy, to avert or minimize a loss that would otherwise be payable under the policy. The cost of ascertaining the extent of loss is generally reimbursed upon establishment of a covered claim. All the foregoing are subject to the "prudent uninsured" principle, in that the insured will be compensated for expenditures it would have reasonably incurred for its own account, as if no insurance were available.

6.11 provide that the insurer is automatically subrogated to any claim against a third party the insured may have because of loss or damage covered or has the insured to assign such claim to the insurer?

#### Response

Subrogation rights arise as a matter of equity, as well as by contract. Thus, it can be considered to be "automatic" under the law of all of the States of the United States. The rights that do arise out of equity may be modified by contract; however, the law of many of the States will not permit the insurer to recover before an insured is fully compensated for any uninsured loss, even if the policy provides otherwise. Of course, under no circumstances will the insurer be permitted to recover more than it has paid to indemnify the insured.

7. What is the period of limitation for a claim under a policy.

#### Response

There is no uniformly applicable time limit to bring suit, mostly because the maritime doctrine of "laches" itself is a flexible concept. As a result, the law of the State with the greatest interest in the outcome will be applied, either because the court has found that there is no entrenched maritime rule on the issue, or because a reasonable measure of the limitations period for the purpose of determining laches is the local state law on the issue. The law of some States permits the parties to modify by contract of the period of limitations, to require suit in a shorter time than provided for by state law; the law of other States prohibits the enforcement of such a clause in the contract.

May 1, 1999