Insurance Company Attempts to Deny Cargo Liability Asserting "Failure to Cooperate"

By Ronald H. Usem, Esq. Huffman, Usem, Saboe, Crawford & Greenberg, PA

A common clause contained in the "conditions" of many insurance policies states that, in so many words, that the insurance company does not have to pay claims in the event the insured "fails to cooperate with the insurance company". Typically, there is no definition of that phrase in the policy, thus allowing the insurance company plenty of "wiggle" room. The question that naturally follows is: how much "cooperation" is enough to avoid the impact of the phrase? In the following case, that is exactly the defense raised, however the insurance company lost. Ocean Garden Products, Inc. v. Northfield Insurance Company, 210 U.S. Dist. Lexis 39851 (U.S. Dist. Ct. So. Dist. TX, April 2010).

Background: Ocean Garden Products, the Plaintiff, owned 600 cartons of black frozen shrimp. Ocean hired Distributors Transport, who operated both as a broker and a carrier to transport the shipment. As a broker, it arranged for the shipment to be transported with the carrier, Loga Transport who was to transport the shipment from Arizona to New Jersey. When the truck was loaded, Loga signed a "clean" bill of lading. En route, the tractor trailer was parked on a Friday however, when a different driver arrived the following Monday, the entire tractor trailer was missing. Shortly thereafter, the tractor trailer was recovered, but the shrimp had disappeared. Northfield Insurance Company insured Loga for the cargo loss with limits of $100,000, and a $2,000 deductible. The fair market value of the cargo at the time of the loss was $120,000. There was no question but that the carrier, Loga, was liable for the loss under Carmack, 49 USC 14706.

Shortly after the loss occurred, Loga reported it to its insurance company, Northfield. Northfield's representative investigated the loss and interviewed Loga personnel. Loga informed Northfield that Ocean had demanded payment at least two times, and Northfield's claims manager spoke to Ocean about the claim. In the meantime, Ocean's cargo insurer (Ace USA) paid Ocean for the loss, and then representing Ocean's subrogated claim, contacted Northfield demanding reimbursement but no payment was made. Ocean sued Loga and the broker, Distributor's Transport, for the loss. Loga defaulted and "disappeared." Ocean had notified Northfield of the lawsuit against Loga and the broker, Distributors Transport, and sent notices of the lawsuit and copies of the pleadings to Northfield warning that it (Ocean) would be taking action for default judgment against Loga. Ocean filed suit and the Court issued default judgment against Loga for $126,000, the market value of the shrimp. Ocean then added Northfield as a Defendant. *Northfield claimed that it was not liable because Loga failed to notify it of the lawsuit and refused to cooperate in the investigation, including failure to appear for depositions.* Under Texas law, an insurer, in order to avoid liability, must show that it has been prejudice by the insured's breach of the policy.

> One of the important lessons of this case is the value of maintaining open communications with the carrier's insurance company about the details and status of the claim. These communications could come from the shipper, or from the broker.

According to the facts in this case, the Court concluded that Northfield was not prejudiced by Loga's failure to directly report Ocean's lawsuit because Northfield was immediately aware of the loss, as well as the progression of the lawsuit, and could provide no facts which would excuse it from paying. According to the Court, Loga's actions did not avoid coverage by refusing to participate in the lawsuit because it simply "disappeared." According to the Court, because Northfield did not show that it was harmed

by Loga's disappearance, its "lack of cooperation" did not preclude Northfield's liability.

Since there were no other exclusions which Northfield could assert, the insurance company was held liable.

In dealing with Distributors (the broker) the Court found that it had in fact *arranged* for the transportation of the shipment but had neither accepted the cargo nor contracted as a carrier, and thus was not liable.

One of the important lessons of this case is the value of maintaining open communications with the carrier's insurance company about the details and status of the claim. These communications could come from the shipper, or from the broker (as a service to its shipper customer). So long as the carrier's insurance company is not "blind sided" or prejudiced, this case allows the communication to come from other parties, not necessarily from the insured, thus avoiding the insurance company's "failure to cooperate" defense.

Ronald H. Usem, Esq. Huffman, Usem, Saboe, Crawford & Greenberg, PA may be contacted at (763) 545-2720 or by e-mail at ron@usems.com