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Towboat Companies: Uninsured Exposures for Standard Properties

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It's a foggy Thursday evening, a barge owned by Le Barge is in tow of the "Tiger" headed to Nanaimo, B.C. The "Tiger" is owned and operated by Timmy Towboat. Unfortunately the "Tiger" is too small for the tow and ends up running the barge aground. With surmountable damage to the barge, Le Barge turned to the company it anticipated was doing to tow, Ocean Tug.

Le Barge had an agreement with Ocean Tug to perform certain transportation services including transporting of its barges to Nanaimo, B.C (the "Transportation Agreement"). The Transportation Agreement included the following terms:

- ™ Ocean Tug was required to obtain consent from Le Barge before it subcontracted a tow; and
- ™ Ensure it had insurance to cover any loss or damage arising out of the Transportation Agreement.

Ocean Tug would occasionally subcontract with other tow companies as it only had four tugs and those tugs were often in use performing other contracts. Ocean Tug had subcontracted with Timmy Towboat to take the above barge to Nanaimo and had not discussed this with Le Barge. Now faced with a lawsuit, Ocean Tug turns to its Insurers to defend it.

The Insurers, in turn contact a lawyer with two very important questions. Can a tow company subcontracting out to another tow company be held liable? If they are held liable, is this covered under their policy of insurance?

(i.) Liability for Subcontracting Tow Operations

The above situation is no stranger to the tugboat industry. A typical scenario is where one tow company will subcontract to another tow company a specific task as happened in the above scenario. In that type of situation, the tow company that has subcontracted is acting like an agent only freight forwarder as opposed to a carrier.

Although the tow company such as Ocean Tug is not actually involved in the carriage, they can still be held liable for damage to cargo. The analysis can be compared with the liability exposure of freight forwarders. Accordingly, many of the key issues in towboat subcontracting claims will include:

- ™ failing to issue proper instructions, such as failing to advise the other tow company that the load was to be towed in a certain manner, along a certain route, at a certain time, during certain weather conditions, or that special steps were required to secure or otherwise tow same;
- ™ retaining a tow company with a vessel that is not the proper size or does not have sufficient power to undertake the tow; and

- ™ direct contract exposures such as claims for breach of contract based on an agreement not to subcontract, to get consent prior to subcontracting, or where to ensure that all towing vessels have sufficient insurance coverage.

(ii.) Uninsured Exposures

In our scenario, the claims that will likely be advanced by Le Barge against Ocean Tug are as follows:

- ™ failure to obtain permission to sub-contract;
- ™ failure to obtain sufficient insurance;
- ™ subcontracting to a tug that is undersized and underpowered; and
- ™ vicariously liability for the actions of subcontracting vessel.

Once the above claims are advanced, the tow company will likely turn to its Protection and Indemnity (“P&I”) insurers. The typical insuring provision under the P&I policy will be as follows:

“The Assurers(s) hereby undertakes to make good to the Assured or the Assured’s executors, administrators and/or successors all such Liabilities and/or Expenses as the Assured or the Assured’s executors, administrators and/or successors shall have become liable to pay and shall have in fact paid on account of the liabilities, risks, events and/or happenings arising out of the ownership, use or operation of the vessel(s) hereby insured. [Emphasis added]

The key to coverage under this covering provision is “arising out of the ownership, use or operation of the vessel(s) hereby insured”. In any subcontracting situation, the tug is typically owned and operated by the subcontractor and thus subcontracting losses will not fall within this covering clause. If we go back to our earlier scenario, the “Tiger” is owned and operated by Timmy Towboat and not by Ocean Tug. As Ocean Tug does not own or operate the “Tiger”, Ocean Tug’s P&I policy would not cover the loss arising from a tow performed by the “Tiger” and, as such, would not owe a duty to defend Ocean Tug.

The P&I policy will also likely only respond to claims in negligence. In other words, it will respond to negligence or other tort claims arising out of the use and operation of an insured vessel. The claim that would be advanced against Ocean Tug would be a purely contractual claim (i.e. breach of the Transportation Agreement or being vicariously liable for the actions of Timmy Towboat) and would not be covered under the P&I policy.

Further, while a Commercial General Liability policy (“CGL”) may provide coverage, exclusions within such policies may apply to exclude similar subcontracting based claims. There is typically a “watercraft exclusion” in a CGL which purports to exclude damage caused by any watercraft over a certain gross tonnage or length.

These gaps in coverage become particularly problematic when the tow company is unable to go after the actual carrier. Examples of this are when the sub-contractor has no insurance,

insufficient insurance or has gone bankrupt, or where the subcontractor can limit liability. Limits will only apply to the actual carrier since the claims against the initial tow company likely arise to subcontracting failures only, and do not arise from the use and operation of a vessel.

(iii.) Coverage for Mixed Duties

In our original scenario, let's assume that Ocean Tug provided an assist tug, "Jaguar", and Timmy Towboat provided the lead tug "Tiger". The barge is still run aground. In this scenario, Ocean Tug has acted like an agent only freight forwarder but has also supplied its own tug and thus is wearing two different hats.

If the claim is advanced by Le Barge or a claim over made by Timmy Towboat for the negligent operation of the "Jaguar", this will likely be sufficient to trigger the P&I policy as it would fall within the parameters of "liabilities...arising out of ownership, use or operation of the vessel hereby insured". This would also trigger the insurers duty to defend.

What would not be covered are any claims against Ocean Tug in relation to the "Tiger" (i.e. the same subcontracting claims as discussed in the prior section above).

(iv.) Protection Against Uninsured Exposures

All tow companies and their Brokers should consider the following:

- ™ add sub-contracting tugs to their own policy;
- ™ ensure that the subcontracting company has insurance that will cover the tow company, with sufficient policy limits;
- ™ ensure that the tow company has E&O Insurance (i.e. Freight Forwarders E&O) that will cover subcontracting exposures; and
- ™ notify customer of subcontracting carrier, and confirm their consent.

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