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WEATHERING THE STORM: INTERNATIONAL LOSS OF HIRE POLICIES AND THE PROBLEM OF UNCHARTERED VESSELS AND STACKED RIGS

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I. INTRODUCTION

To insure against lost profits and lost use of property, insureds have traditionally sought coverage under business interruption insurance (lost profits) and occupancy insurance (lost use of property).¹ With the advent of large oil tankers following World War II, a species of business interruption insur-

1. B. Glenn, Annotation, *Business Interruption or Use and Occupancy Insurance*, 83 A.L.R.2d 885, 890 (1962).

ance and use or occupancy insurance known as loss of hire (LOH) insurance appeared in the maritime insurance community. This insurance was designed to protect the future earnings of these large oil tankers.²

Initially, LOH insurance was offered almost exclusively on a charter contingent basis.³ This was because of the difficulty in proving an LOH if a casualty occurred when the vessel was tramping.⁴ As the market for hire began to change and deep sea drilling rigs became available on a charter basis, the role of LOH insurance began to expand. Beginning with the development of the Norwegian General Conditions for Loss of Charter Hire Form in 1972 (Norwegian General Conditions Form),⁵ LOH insurance became available to indemnify the future revenues of vessels, regardless of whether the vessel was chartered⁶ or unchartered at the time of the casualty.⁷

Despite its growing importance in the marine insurance community, there has been little litigation construing LOH coverage. Recently, however, an arbitration panel was called upon to determine whether the owner of a drilling rig, indemnified under an LOH form patterned after the Norwegian General Conditions Form, was entitled to coverage when the insured rig suffered a casualty during a hurricane while stacked⁸ in the

2. LESLIE J. BUGLASS, *MARINE INSURANCE & GENERAL AVERAGE IN THE UNITED STATES* 288 (1st ed. 1973). This insurance was referred to as Loss of Hire (LOH) insurance because the vessels insured were typically under charter or lease in exchange for rent or "hire." *Id.* In most cases, charter parties or charter contracts are time charters under which charter hire is paid for on a durational basis. 2 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 11-5 (2d ed. 1994). It is not uncommon, however, for charter payments to be made on a voyage or freight basis, in which case the charter party is referred to as a voyage charter. *Id.* § 11-4.

3. See BUGLASS, *supra* note 2, at 290; discussion *infra* part IV.B.

4. BUGLASS, *supra* note 2, at 290. An ocean tramp is a "free lance" that has "earned its name from its gypsy-like existence," and in addition to having no regular time of sailing has "no fixed route and is ever seeking those ports where profitable cargo is most likely to be found." *U.S. v. Stephen Bros. Line*, 384 F.2d 118, 124 (5th Cir. 1967).

5. See Form No. 1.23-3, General Conditions for Loss of Charter Hire Insurance (1972), *infra* Appendix A [hereinafter Norwegian General Conditions Form].

6. ERIC SULLIVAN, *THE MARINE ENCYCLOPAEDIC DICTIONARY* 88 (3d ed. 1992) (defining that "[a] chartered vessel is a hired vessel").

7. See discussion *infra* part V.B.

8. A "stacked" drilling rig is one that is idle. Diogenis C. Panagoitis, *Offshore Update—Five Years After Passage: Contractual Indemnity, Defense and*

Gulf of Mexico.⁹ The arbitration panel held that the assured was entitled to recovery, although the rig was not under charter at any time during the repair period. This holding was based on the fact that the insured had actively marketed the services of the rig in the period just preceding the casualty.¹⁰ Given the facts of that case and the language of the particular policy in question, it is clear that the panel's decision to allow recovery was proper. Unfortunately, the panel did not delve deeply into the background of LOH insurance. As such, the opinion provides only limited guidance for the resolution of coverage disputes in the future.

The purpose of this article is to shed light on these issues by exploring the development of LOH insurance from its origin as a species of business interruption insurance, by identifying the interests that the Norwegian General Conditions Form and its progeny were intended to insure, and by delineating the proof necessary to establish an LOH in the case of a vessel that is unchartered or stacked at the time of the casualty. The thesis of this article is that LOH policies patterned after the Norwegian General Conditions Form are intended to insure a vessel's inherent ability to generate income. Hence, a vessel that suffers a casualty while unchartered or stacked is entitled to recover under these policies provided there is proof that but for the accident, the vessel was capable of competing in the market for its services during the repair period.

To prove this thesis, Part II begins with a discussion of business interruption insurance and use and occupancy insur-

Insurance Under the Louisiana Oilfield Indemnity Act, 10 MAR. LAW. 203, 204 (1985). Stacked rigs are "becoming permanent along the Louisiana and Texas coasts." *Id.* "Stacking" a drilling rig means "to store a drilling rig that has been taken out of operation. Cold stacking is where a rig is mothballed for an indefinite time, whereas during warm stacking, the rig is maintained by a small crew." NORMAL J. HYNE, *DICTIONARY OF PETROLEUM EXPLORATION, DRILLING, & PRODUCTION* 486 (1991).

9. See *Reading & Bates Corp. v. All Am. Marine Slip, Soc'y Mar. Arb. No. 3087* (1993) (Hagans, Schumacher, and Tyler, Arbs.). The policy at issue in *Reading & Bates* was based on a form developed by Howard M. Marshall of the insurance brokerage firm of Adams & Porter (A&P Form). *Id.* para. 8. According to Mr. Marshall, Senior Vice President of Adams & Porter in Houston, Texas, this form was patterned after the Norwegian General Conditions Form. Deposition of Howard M. Marshall at 6, 17, *Reading & Bates* (No. 3087) (Oct. 8, 1993) [hereinafter Marshall Deposition].

10. *Reading & Bates, Soc'y Mar. Arb. No. 3087*, para. 12.

ance, examining the extent to which these different types of insurance diverge where a business is idle or certain property is not in use at the time of the casualty. Part III explores the elements of damage that may be recovered by an owner whose vessel has sustained a casualty as the result of a collision with another vessel, focusing on the proof necessary to sustain a claim for loss of use. Part IV sets forth some basic insurance principles, such as the difference between open and valued policies and charter contingent coverage. Familiarity with these principles is essential to an understanding of the coverages provided by different LOH forms. Part V compares a charter-contingent form,¹¹ such as the American Institute Form, with noncharter-contingent forms,¹² such as the Norwegian General Conditions Form, suggesting that the former is a form of business interruption insurance, while the latter is a form of use and occupancy insurance. Finally, Parts VI through VIII argue that the primary difference between lost earnings coverage under the American Institute Form and lost earning capacity under the Norwegian line of forms is the form of proof sufficient to invoke coverage. Under lost earnings coverage, the loss of a specific contract must be shown to invoke coverage. Under lost earning capacity coverage, an insured need only show that the vessel was capable of competing in the market for the vessel's services during the repair period.

II. BUSINESS INTERRUPTION AND USE AND OCCUPANCY INSURANCE

Although business interruption and "use and occupancy" insurance are related concepts, they are, in fact, separate interests that may be individually insured.¹³ Business inter-

11. See Form No. 1.23-1, Loss of Charter Hire Form (1961), *infra* Appendix B [hereinafter American Institute Form].

12. See Norwegian General Conditions Form, *infra* Appendix A; General Conditions for Loss of Hire Insurance for Drilling Barges or Similar Constructions, *infra* Appendix D [hereinafter A&P Form].

13. *Jacksonville Oil Mills v. Stuyvesant Ins. Co.*, 3 F.2d 1006, 1009 (W.D. Tenn. 1925) *rev'd* 10 F.2d 54 (6th Cir. 1926); *Tanenbaum v. Freundlich*, 81 N.Y.S. 292, 294 (N.Y. Sup. Ct. 1903); *Appeal of Piedmont-Mt. Airy Guano Co.*, 3 B.T.A. 1009, 1014 (1926). See also *Manchester Liners Ltd. v. British and Foreign Marine Ins. Co.*, [1901] 9 Asp. Mar. Law Cas. 266 (K.B.) (denying loss where a shipowner lost 15 days of income that was not due to inability to use equipment); *Wright v. Pole*, 110 Eng. Rep. 1344 (K.B. 1834) (differentiating

ruption insurance is based on a reduction in current earnings and is intended to return to the insured the amount of profit¹⁴ that the business would have earned but for the intervening event.¹⁵ Use and occupancy insurance, on the other hand, "relates to the business use which property is capable of in its existing condition."¹⁶ In many cases, these interests will converge because a convenient means of valuing the lost use of property is the profits generated from a business operating on that property.¹⁷

The coverages provided by these two forms of insurance are not synonymous.¹⁸ Business interruption insurance indemnifies

between policies insuring against loss of property use and those insuring against lost profits).

The distinction between these separate interests is often blurred, however, by opinions that construe "use and occupancy" policies to be business interruption insurance. *See, e.g.,* National Union Fire Ins. Co. v. Anderson-Pritchard Oil Corp., 141 F.2d 443, 444 (10th Cir. 1944); Miller v. Hocking Glass Co., 80 F.2d 436, 437 (6th Cir. 1935), *rev'g* 5 F. Supp. 355, 357-58 (S.D. Ohio 1933), *cert. denied* 298 U.S. 659 (1936).

14. *See* Dileo v. United States Fidelity & Guar. Co., 248 N.E.2d 669, 676 (Ill. App. 1969) (determining that business interruption losses equal gross earnings less charges and expenses that do not necessarily continue during the interruption of the business).

15. Berkley Inn, Inc. v. Centennial Ins. Co., 422 A.2d 1078, 1080 (Pa. Super. Ct. 1980); Eastern Associated Coal Corp. v. Aetna Casualty & Sur. Co., 475 F. Supp. 586, 590 (W.D. Pa. 1979), *aff'd in part & rev'd in part*, 632 F.2d 1068 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); National Union Fire Ins. Co. v. Anderson-Pritchard Oil Corp., 141 F.2d 443, 445 (10th Cir. 1944). *See also* Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co., 227 N.W.2d 789, 793 (Minn. 1975) (defining "interruption of business" insurance as the "breaking or suspension of production earnings of an operating business"); A & S Corp. v. Centennial Ins. Co., 242 F. Supp. 584, 589 (N.D. Ill. 1965) (observing that the general purpose of business interruption insurance is "to do for the business what the business would have done for itself had no loss occurred").

16. Wilson & Toomer Fertilizer Co. v. Automobile Ins. Co., 283 F. 501, 507 (S.D. Fla. 1922), *aff'd sub nom.* Hartford Fire Ins. Co. v. Wilson & Toomer Fertilizer Co., 4 F.2d 835 (5th Cir. 1925), *cert. denied*, 268 U.S. 704 (1925); Michael v. Prussian Nat'l Ins. Co., 63 N.E. 810, 813 (N.Y. 1902).

17. New England Gas & Elec. Ass'n v. Ocean Accident & Guarantee Corp., 116 N.E.2d 671, 684 (Mass. 1953). Some early cases attempted to distinguish use and occupancy insurance from business interruption insurance by not allowing evidence of lost profits to be admitted to prove the use value of the property insured. Tanenbaum v. Simon, 81 N.Y.S. 655, 658 (N.Y. Sup. Ct. 1903), *aff'd*, 82 N.Y.S. 1116 (N.Y. App. Div. 1903); Tanenbaum v. Freundlich, 81 N.Y.S. 292, 294 (N.Y. Sup. Ct. 1903). Later cases, however, have recognized that it is appropriate to value lost use in terms of the profits derived from the business that occupies the property. *Wilson & Toomer Fertilizer Co.*, 283 F. at 508.

18. *Michael*, 63 N.E. at 813. The court in *Michael* explained the difference

the insured against the loss of earnings from the interruption of its business.¹⁹ Use and occupancy insurance indemnifies the insured from the loss of the availability or earning capacity of its property.²⁰ Where the insured property is an active business facility, the recovery is likely to be the same. If the property is not actively engaged in business at the time of the casualty or is operating at a loss, these different forms of coverage may diverge.²¹

The seminal case illustrating the difference between the two types of coverage is *Michael v. Prussian National Insurance Co.*²² In *Michael*, the insured had a policy on the use and occupancy of its property and elevator building.²³ A per diem payment of \$4.77 would be triggered if there was fire damage that "prevent[ed] the elevating and other handling of grain."²⁴ The court recognized that "[t]he peculiar feature of the contract

as follows:

'Use and Occupancy,' as terms of insurance, may assume, within their general scope, the expectation of profits and earnings derivable from property; but the terms appear to have a broader significance as to the subject of insurance, and to apply to the status of the property, and to its continued availability to the owner for any purpose he may be able to devote it to.

Id.

19. *Gordon Chem. Co. v. Aetna Casualty & Sur. Co.*, 266 N.E.2d 653, 656 (Mass. 1970) (explaining that "[t]he purpose of [a business interruption policy] is to preserve the continuity of the insured's earnings"); *Miller v. Hocking Glass*, 80 F.2d 436, 437 (6th Cir. 1935) (explaining that "[t]he policies offered the usual business interruption insurance, which might be better termed earnings insurance").

20. *See supra* text accompanying note 16.

21. *Buffalo Elevating Co. v. Prussian Nat'l Ins. Co.*, 71 N.Y.S. 918, 920 (N.Y. App. Div. 1901), *aff'd sub nom. Michael v. Prussian Nat'l Ins. Co.*, 63 N.E. 810 (N.Y. 1902). In *Buffalo Elevating Co.*, the court rejected the contention that proof of lost profits was necessary to recover under a use and occupancy policy, noting that:

There is no suggestion in the policy that 'use and occupancy' is correlative with 'earnings,' or affects them in any way. The insurer agreed to pay absolutely and unconditionally the sum which it fixed in its contract for the loss to the plaintiff by reason of the suspension of its business by fire. That sum was in no way dependent upon the profits which were accruing to the plaintiff for the loss it may have been suffering at the time the fire took place. Whether the plant was in operation or idle, whether remunerative or not, was of no concern to the defendant.

Id.

22. 63 N.E. 810 (N.Y. 1902).

23. *Id.* at 811.

24. *Id.*

is that it contemplates, as its subject matter, not the mere material loss of the plant, or any part of it, but the loss to the owner of the ability to use it."²⁵ The insurer argued that the subject of "use and occupancy" insurance was the earnings or profits that would be lost in the event of a casualty.²⁶ The court rejected the insurer's argument, concluding that:

If the contract was intended as one of indemnity against the loss of earnings derivable from the operation of the elevator plant, the words chosen were unfortunate, and, in my opinion, too vague. "Use and occupancy," as terms of insurance, may assume, within their general scope, the expectation of profits and earnings derivable from property, but the terms appear to have a broader significance as to the subject of insurance, and to apply to the status of the property, and to its continued availability to the owner for any purpose he may be able to devote it to.²⁷

Because the owner of the property had an interest in the continued availability of the property, the per diem payment was required regardless of whether the insured derived a profit from the property.²⁸ Thus, *Michael* demonstrates that the loss of earnings or profits is not a prerequisite to recovery under use and occupancy insurance.

*Great Northern Oil v. St. Paul Fire & Marine Insurance Co.*²⁹ is also instructive in this area. In *Great Northern Oil*, the insured suffered damage to its refinery that was under construction at the time.³⁰ The insured filed suit claiming that it suffered a compensable loss under its business interruption policy.³¹ The Minnesota Supreme Court reversed a verdict for the insured, noting that it could not have suffered a loss of earnings as a matter of law because the construction of the facility was not scheduled to be completed until after the damage from the accident had been repaired.³² The court held

25. *Id.* at 812.

26. *Id.* at 813.

27. *Id.*

28. *Id.*

29. 227 N.W.2d 789 (Minn. 1975).

30. *Id.* at 790-91.

31. *Id.* at 791.

32. *Id.* at 793.

that a business interruption is a "breaking or suspension of production earnings of an operating business rather than an interruption of a construction schedule."³³ The plaintiff was not entitled to recover under the policy because it could not prove that it could have generated earnings during the repair period. The court did acknowledge, however, that the delay in construction may have resulted in a loss of future earnings.³⁴

Great Northern Oil demonstrates that a loss of earnings or profits during the repair period is a necessary prerequisite to recovery under business interruption insurance. Taken together, *Michael* and *Great Northern Oil* mark the fundamental difference between use and occupancy and business interruption insurance. Recovery under a business interruption policy is contingent on the loss of earnings or profits. Use and occupancy insurance, on the other hand, may cover the loss of profits, but is not so limited.

III. LOSS OF USE AND THE LAW OF ADMIRALTY

If a vessel is damaged in a collision, the recoverable damages are similar to those awarded for personal property damage in general. If the vessel is a total loss, or a constructive total loss,³⁵ the measure of damages is equal to the market value of the vessel plus interest, less salvage value.³⁶ Where a vessel is not a total loss or a constructive total loss, the measure of damages is usually equal to the reasonable cost of repairs and salvage necessary to restore the vessel to its pre-casualty condition.³⁷ If the repair cost is unduly expensive, the owner may only receive a sum equal to the vessel's diminution in value.³⁸ The vessel owner is also entitled to damages for loss of use.³⁹

33. *Id.*

34. *Id.* at 794.

35. A constructive total loss occurs where the cost of repairable damage exceeds a vessel's pre-collision value. *Self Towing, Inc. v. Brown Marine Servs., Inc.*, 837 F.2d 1501, 1506 (11th Cir. 1988); *Ryan Walsh Stevedoring Co. v. James Marine Servs., Inc.*, 792 F.2d 489, 491 (5th Cir. 1986).

36. 2 SCHOENBAUM, *supra* note 2, § 14-6, at 278. The market value of pending freight is also usually recoverable as a separate element of damages. *Id.*

37. *Marathon Pipeline Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229, 233 (5th Cir. 1985).

38. 2 SCHOENBAUM, *supra* note 2, § 14-6, at 280.

39. *Id.* § 14-6, at 282.

In the shipping industry, this figure is calculated in terms of profits lost during the repair period.⁴⁰

If the vessel is chartered, the use value of the vessel is typically calculated based on the amount due under the charter hire.⁴¹ If the vessel is unchartered, the measure of damages is typically based on the vessel's earnings both prior and subsequent to the period of loss.⁴² The recovery of these damages is subject to the established rule that damages from lost use must be proved with reasonable certainty.⁴³ Recovery has been denied where it has been affirmatively shown that the vessel would have been out of service during the repair period.⁴⁴

Recovery for lost use has also been denied where there is no proof that there was a demand for the vessel's services during the repair period.⁴⁵ This issue has also arisen where the damaged vessel is part of a fleet⁴⁶ under the common control of the owner or charterer.⁴⁷ In the absence of proof that the demand for the fleet's services exceeded the fleet's capacity during the repair period, damages for loss of use have been denied because they are merely speculative.⁴⁸ Hence, in *Dow Chemical Co. v. M/V Roberta Tabor*,⁴⁹ a charterer was denied recovery for loss of use of its chartered barges because the

40. *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1000 (5th Cir. 1984); *Standard Marine Towing Servs., Inc. v. M.T. Dua Mar*, 708 F. Supp. 562, 564 (S.D.N.Y. 1989). As with general property law, damages for lost use may not be recovered if the vessel is a total loss or total constructive loss. *Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988).

41. 2 SCHOENBAUM, *supra* note 2, § 14-6, at 282. Traditionally, damages are based on the three voyage rule, which uses an average of the vessel's daily charter hire rate during the collision voyage, the preceding voyage, and the first succeeding voyage. *Kim Crest, S.A. v. M.V. Svedlovsk*, 753 F. Supp. 642, 650 (S.D. Tex. 1990). Because charter hire rates were rapidly fluctuating, the traditional rule was inappropriate and damages were determined by the market value of additional charters at the beginning of each charter. *Id.*

42. 2 SCHOENBAUM, *supra* note 2, § 14-6, at 283.

43. *Johnson v. Otto Candies, Inc.*, 828 F.2d 1114, 1119 (5th Cir. 1987); *Delta S.S. Lines, Inc.*, 747 F.2d at 1001.

44. *Johnson*, 828 F.2d at 1119.

45. *Id.* (citing *Inland Oil and Transp. Co. v. Ark-White Towing Co.*, 696 F.2d 321, 326-27 (5th Cir. 1983)).

46. SULLIVAN, *supra* note 7, at 176 (defining a fleet as a "[g]roup or number of ships owned or managed by the same organization").

47. *See Dow Chem. Co. v. M/V Roberta Tabor*, 815 F.2d 1037, 1042 (5th Cir. 1987).

48. *See id.*

49. *Id.* at 1037.

charterer failed to prove that its transportation needs exceeded its fleet capacity.⁵⁰

On the other hand, reasonable certainty does not require that the vessel prove that it lost or turned down a specific contract.⁵¹ It is enough that the vessel was "engaged, or was capable of being engaged in a profitable commerce."⁵² In *Standard Marine Towing Services, Inc. v. M.T. Dua Mar*,⁵³ the recovery of lost profits was sustained based on evidence the vessel in question had been steadily employed during the period preceding the collision.⁵⁴

IV. CONCEPTS RELEVANT TO AN INTERPRETATION OF LOSS OF HIRE POLICIES

A. *Valued v. Open*

Maritime business interruption policies, like insurance policies, can be valued or open.⁵⁵ An open policy, sometimes called an unvalued policy, is a policy where the value is not fixed, but is left to be determined in case of a loss.⁵⁶ A valued policy is one where the recovery is fixed by agreement of the parties in advance of the loss.⁵⁷ Such valuation is in the nature of a contract for liquidated damages⁵⁸ and, in the absence of fraud, is normally conclusive as to the loss covered.⁵⁹ A valued policy may be void, however, as a "wagering contract" if the interest insured is grossly disproportionate to the stated value.⁶⁰

50. *Id.* at 1042.

51. *Standard Marine Towing Servs., Inc. v. M.T. Dua Mar*, 708 F. Supp. 562, 564 (S.D.N.Y. 1989); *Weeks Dredging & Contracting, Inc. v. B. Turecamo Towing Corp.*, 482 F. Supp. 1053, 1058 (E.D.N.Y. 1980) (stating that "[t]he test should be what profits more probable than not would have been earned").

52. *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001 (5th Cir. 1984) (quoting *The CONQUEROR*, 166 U.S. 110, 133 (1897)).

53. 708 F. Supp. 562 (S.D.N.Y. 1989).

54. *Id.* at 564.

55. PROPERTY AND LIABILITY INSURANCE HANDBOOK 265-66 (John D. Long & Davis W. Gregg eds., 1965).

56. GEORGE J. COUCH ET AL., COUCH ON INSURANCE § 1:86 (2d rev. ed. 1983).

57. *See id.* § 54:104.

58. J. APPLEMAN, INSURANCE LAW AND PRACTICE § 3827 (1972).

59. *See* COUCH ET AL., *supra* note 56, § 54:104.

60. *Casablanca Concerts, Inc. v. American Nat'l Gen. Agencies, Inc.*, 407 N.W.2d 440, 443 (Minn. Ct. App. 1987).

Since the amounts recoverable under a valued policy are fixed by the policy, a valued policy removes the burden from the insured of proving the actual value of the loss sustained.⁶¹ The economic value of the loss is irrelevant, so long as the stated value was a reasonable estimate of the anticipated loss.⁶² The fact that the loss is valued, however, does not remove from the insured the burden of proving that it did, in fact, sustain a loss to the interest insured.⁶³

B. Charter Contingent

The term "charter contingent" is not a term of art. It is simply a useful means of describing a feature of such forms as the American Institute Form,⁶⁴ which serves to distinguish it from later forms, such as the Norwegian General Conditions Form.⁶⁵ As has been stated earlier, prior to the development of the Norwegian General Conditions Form, LOH insurance was generally available only to vessels that sustained a casualty during or prior to the performance of a specific charter. The American Institute Form is typical and provides in relevant part that:

No Claim Shall be Paid Under This Policy for Loss of Hire due to the occurrence of a physical loss or damage, unless by reason of the accident on which the claim is based the Vessel;

(a) actually goes off hire under the current charter thereon or the charter, under the terms of said charter, successfully claims a diminution of hire; or

(b) is unable to be tendered under the binding charter thereon and the charter by reason thereof elects to cancel said charter, or the charterer agrees to a deferred delivery date, in consequence of which cancellation or deferred delivery date the

61. See COUCH ET AL., *supra* note 56, § 54:106.

62. *Zuraff v. Empire Fire & Marine Ins. Co.*, 252 N.W.2d 302, 309 (N.D. 1977).

63. See *Casablanca Concerts, Inc.*, 407 N.W.2d at 443 (holding that increased expenses and damaged goodwill as a result of rainfall constituted a loss for the purposes of the interest insured).

64. See American Institute Form, *infra* Appendix B.

65. See Norwegian General Conditions Form, *infra* Appendix A.

owner has actually sustained a loss of hire.⁶⁶

Thus, under subsection (a), an LOH claim is only stated if a charter currently in progress cannot be completed or is otherwise canceled due to the casualty, or if earnings under the same are reduced because of the casualty. Likewise, subsection (b) only provides coverage if a charter, which has been engaged but has yet to be performed, is canceled or delayed due to the casualty. Hence, under either subsection the insureds can claim LOH only if they were performing or were engaged to perform a specific charter party. In other words, under the American Institute Form, it is necessary to prove the loss of a specific charter to sustain a claim.

Another feature of charter contingent policies is the "Automatic Termination" clause, which provides in relevant part that:

In the event that at any time during the term of this Policy the current charter on the Vessel expires or is canceled or terminated for any reason whatsoever and the Vessel does not immediately go on charter . . . this Policy shall automatically terminate, no notice to the Assured being necessary or required.⁶⁷

Thus, not only does this coverage not respond to potential lost profits in the absence of a specific charter, but the policy terminates if the vessel is unchartered for any appreciable period of time.

These policies stand in stark contrast to the Norwegian line of forms, which provide for LOH recovery whether the vessel is chartered or unchartered at the time of the loss.⁶⁸ This distinction is important because it casts doubt on the argument that proof of the loss of a specific contract is necessary to sustain recovery under the Norwegian line of forms.⁶⁹ If such proof were necessary to recover under a policy that purported to pro-

66. See American Institute Form, *infra* Appendix B, Conditions Precedent to Claim, para. A.(1).

67. *Id.* para. H.(1); see also Form No. 1.23-2, Loss of Charter Hire Insurance — Including War, *infra* Appendix C, para. 10 [hereinafter London ABS Form].

68. See *infra* part V.B. See also A&P Form, *infra* Appendix D, para. 1 (stating that "[t]he insurance covers loss due to the Drilling Barge being wholly or partly deprived of her earning capacity, chartered or not chartered").

69. Marshall Deposition, *supra* note 9, at 71-73 (observing that a "very great distinction" between the London ABS Form and the Norwegian General Conditions Form is that the former is based on actual contract revenue).

vide coverage for unchartered vessels, the expansion of coverage to include periods when the vessel was unchartered would be meaningless.

V. LOSS OF HIRE OR LOSS OF EARNING CAPACITY:
THE PROBLEM OF UNCHARTERED VESSELS AND STACKED RIGS

The market for LOH insurance began after World War II.⁷⁰ “[T]he advent of larger oil tankers . . . and the practice of chartering these vessels for long periods of time, often before the vessels were even constructed, [created] a demand . . . for insurance to protect vessels’ future earnings.”⁷¹ One of the first manifestations of this demand was insurance to protect vessels from the loss of earnings under charter.⁷²

A. *The American Institute Loss of Hire Form*

The Loss of Charter Hire Form developed by the American Institute in 1961 is typical of insurance designed to protect loss of earnings.⁷³ In this form, the American Institute provided coverage for each day that the vessel was prevented from “earning hire (in whole or in part)”⁷⁴ as a direct result of physical loss or damage to the vessel occurring during the term of the policy.⁷⁵ Hence, the policy was valued because the damages were fixed at a specific sum on a per diem basis.⁷⁶ The policy was also, as discussed earlier, charter contingent.⁷⁷ Coverage on the vessel automatically expired if the current charter was canceled or terminated and the vessel was not immediately chartered.⁷⁸

In terms of coverage response, this variation of LOH insurance offers a high degree of certainty to the insurer and the insured. Because the coverage is charter contingent, the insured only needs to prove the event occurred prior to or during the

70. BUGLASS, *supra* note 2, at 288.

71. *Id.*

72. *See id.*

73. *See* American Institute Form, *infra* Appendix B. A.B. Stewart of London developed a similar form in 1983. *See* London ABS Form, *infra* Appendix C.

74. American Institute Form, *infra* Appendix B, Interest Insured and Perils.

75. *Id.*

76. *Id.*

77. *See supra* part IV.B.

78. *See supra* part IV.B.

performance of an existing charter and that the charter was not terminated prior to the insured event.⁷⁹ Moreover, because the policy is valued on a per diem basis, the insured need only establish the number of days the insured was deprived of its earnings under the charter.⁸⁰

The problem with this variation of insurance is that it offers the insured little flexibility or continuity. The focus on a specific charter makes it impractical for the short-term charter,⁸¹ and offers no relief to a vessel owner who suffers an insured event before a charter commitment can be secured.

B. *The Norwegian General Conditions Form*

The Norwegian market was the first to respond to these concerns.⁸² In 1972, a group of Norwegian insurance companies developed the Norwegian General Conditions for Loss of Charter Hire Insurance to provide coverage for drilling rigs in the North Sea.⁸³ This form provided for coverage that was extensively broader than the loss of charter earnings provided by the American Institute Form and its progeny.⁸⁴ The critical language of the Norwegian General Conditions provides in relevant part that:

The insurance covers loss due to the vessel being wholly or partly deprived of her earning capacity as a consequence of damage sustained. The compensation shall be calculated on the basis of the time the vessel has been deprived of her earning capacity (the loss of time)

79. See American Institute Form, *infra* Appendix B, Conditions Precedent to Claim, para. I(3).

80. See American Institute Form, *infra* Appendix B, Interest Insured and Perils.

81. BUGLASS, *supra* note 2, at 290 (stating that “[t]he American [Institute] form . . . is designed for long term chartered vessels only (either time or contract)”). See also Affidavit of Nicolas Wilmot para. 6, Reading & Bates Corp. v. All Am. Marine Slip (No. 3087) (Nov. 8, 1993) (noting that the addition of the “chartered or not chartered” language to LOH policies was necessary to extend coverage to vessels operating in the spot market) [hereinafter Wilmot Affidavit]. Mr. Wilmot is the Legal and Claims Director for the Marine and Offshore Division of Vesta Insurance Co., Bergen, Norway. *Id.* para. 1.

82. See Wilmot Affidavit, *supra* note 81, para. 4.

83. *Id.*; see also Marshall Deposition, *supra* note 9, at 10, 12.

84. See *supra* part IV.B.

and the loss of earning per day (the daily amount).⁸⁵

The daily amount, however, is not a stipulated value but is calculated according to the following formula:

The assured's loss of earnings for each day during which the vessel is deprived of her earning capacity (the daily amount) shall be the amount of freight per day according to the contract of affreightment in force, with deduction of such expenses as the assured has saved or ought to have saved through the vessel being out of regular employment. If the vessel is not under any freight engagement, the daily amount is to be calculated on the basis of the average freight rates for vessels of the type concerned during the period the vessel is deprived of her earning capacity.⁸⁶

This language differs from the American Institute Form in three significant ways. First, the Norwegian General Conditions Form is an open rather than a valued policy. Instead of providing coverage on an affixed per diem basis, the Norwegian General Conditions Form provides coverage based on a specified formula. Second, and more significantly, the language indicates that coverage is available whether or not the vessel is chartered.⁸⁷ If the vessel is chartered, the per diem rate is based

85. Norwegian General Conditions Form, *infra* Appendix A, § 2.

86. *Id.* § 9.1.

87. It has been argued that the above language was not intended to provide coverage for unchartered vessels or stacked rigs. See Wilmot Affidavit, *supra* note 81, paras. 6-8. In Mr. Wilmot's opinion, the provision for recovery if the vessel is not under any freight engagement was intended only to cover losses arising from casualties suffered during ballast voyages between freight engagements or losses due to charter parties canceled after repairs have been completed. *Id.* paras. 9-10.

If, however, hire is lost as a result of a casualty suffered during a ballast voyage, the loss is necessarily attributable to the delay or cancellation of the pending charter. It would be anomalous, to say the least, that the insured would be entitled to two different rates of recovery for the same loss, depending on whether the casualty occurred the day before or after the charter commenced, or on whether the charterer cancels the charter party before or after repairs are completed. However, the Commentary to the Norwegian General Conditions indicates that such a result was not intended. See COMMENTARY TO GENERAL CONDITIONS FOR LOSS OF CHARTER HIRE INSURANCE (1972) 63 (Trans. from the original Norwegian version into English, 1991) [hereinafter COMMENTARY] ("In cases where a freight agreement is canceled because of a casualty covered by the insurance, the vessel cannot be regarded as unchartered . . . One has not

on the "contract of affreightment,"⁸⁸ less expenses saved.⁸⁹ If the vessel is unchartered, the per diem rate is based on the market rate for freight for vessels of comparable type.⁹⁰ Finally, and perhaps most significantly, the Norwegian General Conditions Form shifts the focus of the interest insured from "lost earnings" to "lost earning capacity."

C. The A&P Form

The policy at issue in the *Reading & Bates* case was based on the A&P Form that was developed in the late 1970s.⁹¹ Like the Norwegian General Conditions Form after which it was modelled,⁹² the A&P Form is specifically designed to respond to the insurance needs of offshore drilling rigs.⁹³

The A&P Form begins with "Principal Rules Concerning Underwriters' Liability," which identifies the basic interests the policy covered.⁹⁴ The language from the introductory paragraph was taken almost verbatim from the Norwegian General Conditions Form.⁹⁵ Most notably, it mirrors the broad "earning capacity" language introduced by the Norwegian General Conditions Form.⁹⁶ This language was chosen to extend coverage for rigs that were stacked or unchartered at the time of the casualty.⁹⁷

seen a need to state this explicitly.").

Brutto freight per day does not constitute a problem for time charters. Voyage charters will mean that the calculated voyage freight shall be distributed on the number of days the voyage normally takes, plus necessary ballast voyage before or after. In both cases the freight according to [the] running freight agreement will be decisive.

See id. at 59.

88. A contract of affreightment is "[w]hen parties enter into an agreement for transportation of goods aboard a ship." 2 SCHOENBAUM, *supra* note 3, § 10-5.

89. *See supra* note 86 and accompanying text.

90. *See supra* note 86 and accompanying text.

91. *Reading & Bates Corp. v. All Am. Marine Slip, Soc'y Mar. Arb. No. 3087*, para. 8 (1993) (Hagans, Schumacher, and Tyler, Arbs.); Marshall Deposition, *supra* note 9, at 8-11. *See also supra* note 9 and accompanying text.

92. *See* Marshall Deposition, *supra* note 9, at 17.

93. *Id.* at 9.

94. *See* A&P Form, *infra* Appendix D, para. 1.

95. *See* Marshall Deposition, *supra* note 9, at 96. Compare Norwegian General Conditions Form, *infra* Appendix A, § 2 with A&P Form, *infra* Appendix D, para. 1.

96. A&P Form, *infra* Appendix D, para. 1.

97. *See* Marshall Deposition, *supra* note 9, at 18-22.

To emphasize the breadth of this coverage, the phrase "chartered or not chartered" was added to the principal rules⁹⁸ to make explicit what was already implicit in the Norwegian General Conditions Form.⁹⁹ Coverage was not contingent on the vessel being chartered at the time of the casualty.¹⁰⁰ This additional language was necessary, in part, because the A&P Form had abandoned the Norwegian General Conditions Form's method of calculating a loss¹⁰¹ in favor of a fixed and agreed per diem indemnity.¹⁰² Thus, the A&P Form is both a valued and non-charter contingent policy.

As a result, the A&P Form offers the insured the broadest form of LOH coverage available in the maritime insurance industry. Not only does the A&P Form follow the Norwegian General Conditions Form in providing coverage to vessels damages while stacked or unchartered, it also relieves the insured of the burden of proving the actual amount of loss.¹⁰³

D. Lost Earnings, Lost Earning Capacity, and Their Relationship to Business Interruption and Use and Occupancy Insurance

The expansion in coverage from the American Institute line of forms to the Norwegian line of forms is accompanied by a subtle change in terminology that marks the difference between business interruption insurance and use and occupancy insurance.¹⁰⁴ Under the American Institute Form, the losses to be indemnified were the vessel's "earnings."¹⁰⁵ The Norwegian General Conditions Form was the first to describe the losses

98. A&P Form, *infra* Appendix D, para. 1.

99. See *supra* part V.B. See also Marshall Deposition, *supra* note 9, at 95 (stating that the "chartered or not chartered" language was added to the Norwegian General Conditions Form to provide additional security for an international risk, as the underwriting practices or statutory laws of each country are unknown).

100. See Marshall Deposition, *supra* note 9, at 20-22.

101. See *supra* text accompanying note 86.

102. See A&P Form, *infra* Appendix D, para. 1 (stating that "[t]he compensation per day shall be as stipulated in the Policy, less hire received by the Assured").

103. See *supra* text accompanying note 59.

104. See COMMENTARY, *supra* note 87, at 5-6 (drawing a distinction between losses recoverable under the Norwegian General Conditions Form and lost earnings under the Vesta Conditions Form).

105. See American Institute Form, *infra* Appendix B.

indemnified in terms of "earning capacity."¹⁰⁶ Business interruption insurance, as discussed previously, was said to cover the loss of one's profits, or a reduction in net earnings.¹⁰⁷ Use and occupancy insurance, on the other hand, covers the value that one's property is capable of rendering.¹⁰⁸ One way to think about the difference between the American Institute Form and its progeny and the Norwegian General Conditions Form and its progeny is that the former is business interruption insurance, while the latter is use and occupancy insurance.¹⁰⁹ Use and occupancy insurance can provide more coverage than business interruption insurance.¹¹⁰

VI. LOSS OF HIRE COVERAGE AND THE NORWEGIAN LINE OF FORMS: THREE PERSPECTIVES

In the context of LOH insurance, analysts disagree about how broadly to interpret the expansion in coverage. There are three distinct possibilities. First and most favorable to the insured, LOH insurance was intended to compensate the insured for the "inherent" earning capacity of the vessel.¹¹¹ Un-

106. *Reading & Bates Corp. v. All Am. Marine Slip, Soc'y Mar. Arb. No. 3087*, para. 6 n.1 (1993) (Hagans, Schumacher, and Tyler, Arbs.). The Commentary suggests that this change in terminology was deliberately intended to expand the scope of coverage. See COMMENTARY, *supra* note 87, at 5-6 (contrasting the losses recoverable under the Norwegian General Conditions Form and the Vesta's Conditions Form, which allowed recovery only to the extent that the vessel was prevented from earning hire). According to Black's Law Dictionary, earning capacity "does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning." BLACK'S LAW DICTIONARY 508 (6th ed. 1990).

107. *Miller v. Hocking Glass*, 80 F.2d 436, 437 (6th Cir. 1935).

108. *Michael v. Prussian Nat'l Ins. Co.*, 63 N.E. 810, 813 (N.Y. 1902).

109. See *supra* text accompanying notes 22-28. This paradigm is foreshadowed in *Michael*, 63 N.E. at 810 (noting that coverage under "use and occupancy" may be broader than insurance for loss of profits). In *Michael*, the insured argued that use and occupancy insurance was similar to insurance on the freight that a ship earns. *Id.* at 813. The court rejected the insured's argument, drawing a distinction between lost earnings and the "business use which the property is capable of in its existing condition." *Id.* (emphasis added).

110. *Id.*

111. Mr. Marshall, author of the A&P Form, espouses this view. Marshall Deposition, *supra* note 9, at 18-19. See also *id.* at 56 (observing that the policy should respond in the event of a covered peril even in the absence of a corresponding "economic loss").

der such a view, claims should be based on lost time during the repair period without consideration of whether the insured intended to charter the vessel during that period.¹¹² The second view, the view adopted by the *Reading & Bates* panel, is that earning capacity requires proof of a lost potential.¹¹³ The insured is entitled to recover, provided it can show the vessel was capable of competing in the market for its service during the repair period. The final and most restrictive view is that earning capacity only extends coverage where the loss of a specific contract can be shown.¹¹⁴

Under a fair reading of the Norwegian line of forms, the most restrictive view is not defensible. Such an interpretation is contrary to the elimination of chartered status as a prerequisite to recovery.¹¹⁵ The Commentary to the General Conditions Form implicitly rejects proof of lost income in relation to a specific contract.¹¹⁶ Proof of the loss of a specific contract as a prerequisite to recovery is also inconsistent with the general rule that "earning capacity" or use and occupancy insurance is not contingent on proof of lost earnings or profits.¹¹⁷ Apart from the insurance context, such an interpretation is inconsistent with the proof that has been required to sustain a claim of lost earning capacity or loss of use in the collision context.¹¹⁸

Requiring the insured to show a loss of potential, on the other hand, is not only consistent with the proof of loss necessary to sustain loss of use damages in the vessel collision

112. Marshall Deposition, *supra* note 9, at 51-52. According to Mr. Marshall, all that needs to be shown is that there was a covered peril and that the rig was down for repairs for some period, even if the rig was cold-stacked. *Id.* But see *infra* note 118 and accompanying text (discussing the establishment of claims utilizing the Norwegian line of forms).

113. *Reading & Bates Corp. v. All Am. Marine Slip, Soc'y Mar. Arb. No. 3087*, para. 9 (1993) (Hagans, Schumacher, and Tyler, Arbs.) (expressing the view of counsel for the insurers).

114. *Id.* para. 6.

115. Norwegian General Conditions Form, *infra* Appendix A, § 9(1).

116. COMMENTARY, *supra* note 87, at 14. "That the insured according to agreement . . . gets complete or partial compensation for the not carried out part of the transport, shall not reduce his right to compensation." *Id.* "[T]he underwriter is not liable for the increase in loss of hire which is due to the vessel being chartered on conditions that are unusual in the actual sailings." *Id.* at 18. See Marshall Deposition, *supra* note 9, at 19 (noting that earning capacity is not intended to be based on specific contract revenue).

117. See *supra* notes 22-28 and accompanying text.

118. See *supra* text accompanying note 51.

context, it is also consistent with the "unchartered" recovery allowed by the Norwegian line of forms and the proof found necessary to sustain a claim for use and occupancy insurance in general.¹¹⁹ This may best be demonstrated by discussing individually the elements necessary to sustain recovery for the loss of a potential claim.

VII. PROOF OF LOST EARNING CAPACITY IN CASES INVOLVING VESSELS AND STACKED RIGS

The unchartered vessel, or stacked rig, presents special problems of proof. When a vessel is chartered at the time of the casualty, the insured only needs to point to the charter agreement to establish the lost earnings as a result of accident or damage. In contrast, lost earnings from an unchartered vessel are less certain.¹²⁰ This uncertainty led many insurers to make LOH insurance contingent on the existence of a charter agreement at the time of the loss.¹²¹

The Norwegian line of forms accounted for this uncertainty by transforming LOH insurance from a form of business interruption insurance to use and occupancy insurance.¹²² Instead of requiring the insured to prove lost earnings or the profits that he would have earned but for the casualty, the insured is only required to prove lost earning capacity or the business use the vessel was capable of in its existing condition. To establish a claim under the Norwegian line of forms, the insured must show that the property had a business use and that the property was capable of that use in its existing condition.¹²³ In addition to the two requirements, the insured's intent may also affect a claim.¹²⁴

119. See *supra* notes 22-28, 51, 87 and accompanying text.

120. See BUGLASS, *supra* note 2, at 290.

121. *Id.*

122. See generally Glenn, *supra* note 1 (discussing cases dealing with "business interruption" and "use and occupancy" insurance).

123. See Marshall Deposition, *supra* note 9, at 71-73.

124. *Id.* at 68-73.

VIII. ELEMENTS NECESSARY TO SUSTAIN RECOVERY FOR THE
LOSS OF A POTENTIAL CLAIM

A. *A Market for the Vessel's Services: Establishing a Business*

In the context of commercial chartering, the easiest way to establish a business use for a vessel is to show there is a market for the vessel's services at the time of the casualty. Establishing the existence of a market is relevant because the chartering of the vessel appears to be the business use which LOH insurance is intended to insure.¹²⁵ Proof of a business use is necessary to establish that the insured suffered a loss as a result of the casualty.

It could be argued, however, that under an earning capacity policy with a fixed daily indemnity, proof of the existence of a market for the vessel's services is unnecessary since the loss is valued.¹²⁶ Notwithstanding a fixed daily indemnity clause, the insured must still show that it suffered an actual loss.¹²⁷

A cross-reference to claims under general occupancy insurance may be instructive. In *New England Gas & Electric Ass'n v. Ocean Accident & Guarantee Corp.*,¹²⁸ the plaintiff was indemnified from the lost use of its power generating and distributing plants.¹²⁹ After suffering damage requiring the replacement of one of its turbines, the insured pursued a claim under the policy.¹³⁰ The court noted the distinction between "lost profits" or business interruption insurance and use and occupancy insurance.¹³¹ Despite having identified loss of capacity as

125. See BUGLASS, *supra* note 2, at 228.

126. Marshall Deposition, *supra* note 9, at 63-64.

127. See *supra* note 63 and accompanying text.

128. 116 N.E.2d 671 (Mass. 1953).

129. *Id.* at 683-84.

130. *Id.*

131. *Id.* at 684. In drawing the distinction, the court observed in relevant part that:

Many use and occupancy policies base the amount to be paid, in case of loss, upon the net profits that the business would have earned if it had not been interrupted by damage to the plant, together with the fixed charges necessarily incurred during the suspension of the business. The indorsement in the case at bar provides for the selection of a standard of the capacity of the plant before it was damaged and provides for the payment of indemnity for reduction in that capacity due to the damage. It is not directly concerned with profits and fixed charges but is concerned with production before and after the damage.

the subject of the insurance, the court denied coverage¹³² even though it was undisputed that the insured had suffered a decrease in its maximum kilowatt hour potential during the period in which the turbine was disabled.¹³³ Recovery was denied because the evidence established the company had sufficient production capacity, notwithstanding the loss, to meet customer demands.¹³⁴ In other words, coverage was denied because the insured could not prove there was a market for its excess capacity. From the court's perspective, there was no loss of business use because there was no market for the property's use during the repair period.¹³⁵ The court stated that "[t]he sole reason for lack of production by [the plant owner] was the want of demand. This was not an event which was insured against in favor of the [plaintiffs]."¹³⁶

New England Gas & Electric Ass'n illustrates two basic principles. First, mere damage to property alone is not sufficient to sustain a claim of loss under use and occupancy insurance. Second, where the interest insured is the ability of the insured to respond to the demand for its product, it must show there was a market for its product during the period of loss. Collision cases reflect these same basic principles. As discussed earlier, a vessel owner that suffers a casualty is required to prove that there was a market or demand for the vessel during the repair period in order to recover for the lost use of his vessel.¹³⁷

This does not mean, as the most restrictive view suggests, that the insured must prove the actual loss of a specific contract. Use and occupancy insurance does not require proof of lost earnings or profits,¹³⁸ only lost earning capacity.¹³⁹ Moreover, such an interpretation is inconsistent with the movement of the Norwegian line of forms away from charter contingent

Id.

132. *Id.* at 685.

133. *See id.* at 684 n.1.

134. *Id.* at 685.

135. *Id.*

136. *Id.*

137. *See supra* notes 45-50 and accompanying text.

138. *See supra* notes 22-28 and accompanying text.

139. *New Eng. Gas & Elec. Ass'n*, 116 N.E.2d at 685. The loss of a specific contract was not at issue in *New Eng. Gas & Elec. Ass'n. Id.* Although business had been diverted to other companies, the facts established that the plant's generating capacity after the casualty was adequate to serve even those customers it diverted. *Id.*

policies. Finally, it is worth noting that this standard of proof has been specifically rejected in collision cases.¹⁴⁰ Thus, it is not surprising that the arbitration panel in *Reading & Bates* specifically rejected the argument that the insured should be required to establish the loss of a specific contract.¹⁴¹

B. Capable of Business in Its Existing Condition: Ability to Compete in the Market

The second element is whether the vessel is capable of a business use in its existing condition.¹⁴² In other words, if there is a market for the insured's vessel, is the vessel able to compete in that market? Identifying physical capacity as an additional element is useful to emphasize that establishing a market for the vessel alone is not enough if the vessel for some other reason would not have been able to compete in that market.

C. Intention

A final item worthy of mention is the intention of the insured. In allowing the claim, the *Reading & Bates* arbitration panel emphasized that the insured had consistently made efforts to market the stacked rig prior to the casualty.¹⁴³ Such efforts presumably evidenced an intent to use the property during the repair period.¹⁴⁴ An opportunity does have some value, even if the opportunity is not ultimately seized.¹⁴⁵ However, the value of an opportunity declines the moment one decides not to pursue it. Thus, the fact that there is a market for the vessel and that the vessel is capable of competing in that market should itself be sufficient to carry the insured's burden of proof, shifting the burden to the insurer to show that the insured did not intend to use its property.¹⁴⁶

140. See *supra* notes 51–54 and accompanying text.

141. *Reading & Bates Corp. v. All Am. Marine Slip, Soc'y Mar. Arb. No. 3087*, para. 12 (1993) (Hagans, Schumacher, and Tyler, Arbs.).

142. See BUGLASS, *supra* note 2, at 290.

143. *Reading & Bates, Soc'y Mar. Arb. No. 3087*, para. 12.

144. *Id.* para. 11.

145. Marshall Deposition, *supra* note 9, at 59–61. With the more restrictive view, intent is implicit in the requirement that the loss be based on prior earnings or a specific future contract.

146. Cf. *Reading & Bates, Soc'y Mar. Arb. No. 3087*, paras. 11–12 (stating

IX. CONCLUSION

In holding that the insured proved a covered claim under its LOH policy, the arbitration panel in *Reading & Bates* properly construed "earning capacity" as the ability to compete in the open market during the repair periods. Requiring less would have relieved the insured of the burden of establishing an actual loss. Conversely, requiring proof of a specific contract would have undermined the significant change from lost "earnings" under the American Institute line of forms to lost "earning capacity" under the Norwegian line of forms. The *Reading & Bates* panel properly rejected such a position.

The panel was unclear as to whether the insured bears the burden to show an intention to compete in the market. The insured should not be required to prove intent. Rather, the relevant inquiry should be *lack of intent* to compete in the market, an issue that is best treated as an exception to coverage. The insurer bears the burden of proving exceptions to coverage.¹⁴⁷

that since *Reading & Bates* actively marketed the rig and the rig was capable of being used before the hurricane sufficiently proved an intent to market the rig; therefore, under this particular policy, *Reading & Bates* does not need to establish "a specific pecuniary loss in order to establish a valid claim").

147. *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1199 (5th Cir. 1993) (stating that the insurer has the burden of proving the applicability of policy exclusions under federal maritime law). See also TEX. INS. CODE ANN. art. 21.58(b) (Vernon Supp. 1995). This article states that

[i]n any suit to recover under a contract of insurance, the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure. Any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense.

Id.

APPENDIX A

NORWEGIAN GENERAL CONDITIONS FORM

FORM No. 1.23-3
 GENERAL CONDITIONS FOR LOSS OF
 CHARTER HIRE INSURANCE (1972)¹⁴⁸

§ 1. Reference to the Plan

Unless otherwise stated in the policy wording or in these conditions, The Norwegian Marine Insurance Plan of 1964 ("The Plan") shall apply with the exception of Chapter 20.

§ 2. Principal rule concerning the insurer's liability

The insurance covers loss due to the vessel being wholly or partly deprived of her earning capacity as a consequence of damage sustained.

The compensation shall be calculated on the basis of the time the vessel has been deprived of her earning capacity (the loss of time) and the loss of earnings per day (the daily amount).

§ 3. Limitation of the insurer's liability

1. The insurer is only liable for the time lost provided that the damage which has caused the loss, is recoverable according to the Plan and ordinary Norwegian hull conditions for ocean going vessels, or would have been recoverable if a deductible had not been agreed upon, see § 189 of the Plan or similar stipulations in the hull policy.

2. The insurer is not liable for the loss of time in consequence of casualty which gives the assured right to compensation for total loss according to the regulations in Chapter 11 of the Plan, or which is settled by way of compromise, the insurer paying at least 75% of the assessed hull value without the right to take over the vessel and without imposing on the insured the duty to repair her.

148. 7 BENEDICT ON ADMIRALTY § 1.23-3 (Thomas Fennel ed., 6th ed. 1994). This edition of the Conditions is a translation of the original Norwegian text. In case of conflict, the latter shall prevail.

3. The insurer is not liable for the assured's loss in consequence of a contract of affreightment being abrogated or canceled, wholly or partly, by reason of damage sustained by the vessel. The fact that the insured receives compensation, wholly or partly, for the nonperformed part of the transportation due to a freight prepaid and nonreturnable clause or an insurance covered according to Chapter 19 or 23 of the Plan, shall not reduce his right to compensation under this insurance.

4. The insurer is not liable for extension of time lost due to the vessel being chartered on conditions which are not customary in the trade concerned. §§ 78 and 92-94 of the Plan, shall apply correspondingly where the settlement between the assured and the charterer is of relevance for the insurer's liability.

§ 4. *Calculation of the loss of time*

1. The loss of time is stipulated in days, hours, and minutes.

2. A period in which the vessel only has been partly deprived of her earning capacity, shall be converted into a corresponding period of total loss of earning capacity.

3. Each casualty shall be subject to a deductible period, which shall be reckoned from the beginning of the casualty and shall last until the loss of time in consequence of the casualty converted according to the rules in No. 2, has reached the number of days deductible stated in the policy wording. Loss of time in the deductible period shall not be compensated by the insurer.

4. The insurer's liability for loss of time in consequence of any one casualty and for the total loss of time in consequence of all casualties occurring during the insurance period, is limited to the sum insured per day multiplied by the number of days of indemnity any one casualty and in all stated in the policy wording.

5. Heavy weather damage which has arisen during the period between departure from one port and arrival at the next port shall be deemed to be one casualty. Should the insurance attach or expire in this period, the insurer shall compensate the proportion of the loss of time caused by all heavy weather damage in the period that the number of heavy weather days within the insurance period bears to the number of heavy weather days in the whole period.

6. The rules in No. 5 shall apply correspondingly to damage as a consequence of the vessel having passed through ice and to damage caused by grounding or touching of the ground when sailing in shallow waters.

§ 5. *Survey of damage*

§ 181 of the Plan shall apply correspondingly to this insurance.

§ 6. *Choice of repair yard*

The insurer may require tenders for the repairs to be taken from yards of his own choice. Where the insured does not invite such tenders, the insurer may do so.

Where the assured, because of special circumstances, has justifiable reason for objecting to the repairs being carried out at one of the yards that have tendered, he may demand that this yard's tender be disregarded.

The assured decides which yard is to be used, but the liability of the insurer shall be limited to

- a) the loss of time under the tender which would have caused the shortest loss of time, plus
- b) one half of additional loss of time which arises.

§ 7. *Costs incurred in expediting the repairs*

The insurer is liable for extra costs of temporary repairs and other extraordinary measures in expediting the repairs, so far as they, according to §§ 178 and 179 of the Plan, are not recoverable from the hull insurer. The insurer is not, however, liable beyond the amount that he would have paid if the measures had not been taken.

§ 8. *Simultaneous repairs*

1. If repairs covered under the insurance are carried out simultaneously with work not covered under any loss of hire insurance, but which

- a) are carried out to fulfill classification requirements, in connection with or irrespective of periodic inspection, and notwithstanding due or not due at the time of repairs, or

- b) are necessary for the seaworthiness of the vessel, or
- c) otherwise refer to reconstruction, strengthening, repairs, or maintenance, with the exception of works which by their nature would not have necessitated a separate stay at a repair yard.

The insurer shall compensate half of the time common to both classes of work in excess of the deductible period.

If repairs resulting from two casualties both covered under this insurance are carried out simultaneously, the rules above shall apply correspondingly for the time which is within the deductible period of the one casualty but not within the deductible period of the other casualty.

2. If repairs covered under this insurance and work covered under other loss of hire insurance are carried out simultaneously, the insurer shall compensate half of the time common to both classes of work in excess of the deductible period. This also refers to occasions where repairs under the other policy are carried out in the deductible period under this policy. If also work not covered under any loss of hire insurance, but of the nature as mentioned under 1 a-c is carried out simultaneously, the insurer shall compensate only one fourth of the common time of repairs in excess of the deductible period.

3. When using the rules in Nos. 1 and 2 each class of work shall be deemed to have lasted the number of days which would have been necessary if they had been carried out separately, counted from the point of time when the work started. Unless the circumstances clearly indicate another point of time, all classes of work shall be deemed to have started when the vessel arrived at the yard. The delay which might occur due to the fact that two or more classes of work are carried out simultaneously, shall be referred to all classes of work in proportion of the number of days as mentioned in the first sentence of No. 3.

4. Loss of time due to removing the vessel to repair yard etc. which cannot be referred to one single class of work, shall be divided between work covered under this insurance, work covered under other loss of hire insurance, and work not covered under any loss of hire insurance, in proportion to the time

each class of work would have necessitated if they had been carried out separately.

§ 9. *The daily amount*

1. The assured's loss of earnings for each day during which the vessel is deprived of her earning capacity (the daily amount) shall be the amount of freight per day according to the contract of affreightment in force, with deduction of such expenses as the assured has saved or ought to have saved through the vessel being out of regular employment. If the vessel is not under any freight engagement, the daily amount is to be calculated on the basis of the average freight rates for vessels of the type concerned during the period the vessel is deprived of her earning capacity.

2. Where the policy working states that the loss of time shall be compensated by a fixed amount per day this is to be considered as an assessed insurable daily amount unless the circumstances clearly indicate otherwise. For vessels on time-charter an assessed daily amount is considered to include the assured's expenses for bunkers during the off hire period.

3. If the contract or contracts of affreightment being the basis of the insurance are terminated during the period of insurance, the loss of time accruing thereafter shall be compensated in accordance with the rules in No. 1, even if the daily amount is assessed, provided this results in a lower compensation per day. This, however, does not apply if the contract of affreightment terminates in consequence of a casualty covered by the insurance.

§ 10. *Loss of time after completion of repairs*

Loss of time in consequence of the vessel not being under any contract of affreightment when the repairs are completed shall only be compensated if the vessel's type or normal trade necessitates proceeding in ballast from the yard to the first port of loading.

§ 11. *Repairs after expiry of the period of insurance*

1. The insurer is not liable for loss of time resulting from a stay at a repair yard which commences more than one year after the expiry of the period of insurance.

2. Loss of time resulting from a stay at a repair yard which commences after the expiry of the period of insurance is com-

pensated according to the rule of § 9 No. 1 even if the daily amount has been assessed, provided this results in a lower compensation per day.

§ 12. The liability of the insurer if the vessel is transferred to a new owner

If the vessel is transferred to a new owner after repairs have been effected or with unrepaired damages, the insurer shall compensate the loss the assured can prove he has suffered because the vessel has been taken out of commission or will have to be taken out of commission by the buyer during repair of the damage, but not more than compensation based on the daily amount and the time which has been used or is estimated will have to be used for repairs. The rule in § 10 does not apply in these cases.

§ 13. Reimbursement from third party

The rules of subrogation in § 96 of the Plan shall apply correspondingly to

- a. the assured's claim for compensation of loss of time according to § 182 of the Plan.
- b. the assured's claim for compensation of the running expenses during removal to repair yard according to § 184 of the Plan.
- c. other claims the assured may have for compensation of the loss from another insurer.

§ 14. Interest

The assured can claim interest on the amount of compensation in accordance with the rules of § 86 of the Plan. For compensation of the assured's disbursements the interest accrues as from the day when these were paid, otherwise as from one month after completion of the repairs.

§ 15. Trading limits

The rules concerning trading limits in the ordinary Norwegian hull conditions for ocean going vessels shall also apply to this insurance. When trading in waters during periods where the hull conditions provide for an additional premium, an additional premium as agreed is to be paid for this insurance.

§ 16. *Return of premium*

1. Re §§ 122–125 of the Plan: If the vessel has been laid up in a safe port for a period of at least 30 consecutive days, 50%, respectively 75% of the premium for the laid up period in excess of 30 days shall be returned, depending on whether or not repairs or rebuilding of the vessel has been carried out.

2. The insurer's charge according to § 126 of the Plan shall always be 10% of the return.

APPENDIX B

AMERICAN INSTITUTE FORM

FORM No. 1.23-1

LOSS OF CHARTER HIRE FORM¹⁴⁹

*American Institute*¹⁵⁰

August, 1961

To be attached to and form a part of Policy No of the

Insuring

For Account of Themselves. Loss, if any, payable to . . . or order. From noon . . . 19 . . . to noon . . . 19 . . . Standard Time at place of issuance.

Interest Insured and Perils. On account of loss of charter hire to pay \$. . . (part of \$. . . insured this interest) for each day of 24 consecutive hours in excess of . . . days (of 24 consecutive hours each) up to a maximum of . . . days of 24 consecutive hours each that the . . . (hereinafter referred to as the "Vessel") is prevented from earning hire (in whole or in part) as a direct result of physical loss or damage to the Vessel occurring during the term of this Policy, or a sequence of such losses or damages arising from the same accident during said term, provided that such loss or damage is directly caused by a peril insured against under the American Institute Time (Hulls) December 1, 1959 form of policy, subject to the F. C. & S. Clause therein.

149. 7 BENEDICT ON ADMIRALTY § 1.23-1 (Thomas Fennel ed., 6th ed. 1994).

150. Joseph Lazard, New York. Form No. SP-40B.

The phrase "same accident" shall be deemed to include all heavy weather damages occurring on one passage as defined in the said form of policy.

Limit of Liability. There shall be no further liability under this insurance after the per diem sum herein agreed upon has been paid by these Underwriters for a total of . . . days of 24 consecutive hours each, amounting in all to a maximum liability of . . . dollars \$. . . (Part of . . . dollars \$. . . insured this interest). Rate . . . Premium \$

Reinstatement. All claim for which Underwriters are liable hereunder shall, to the extent thereof, reduce the limit of liability under this Policy from the date of the physical loss or damage to the Vessel. However, this Policy may be reinstated to its original limit of liability under such terms and conditions as are named by Underwriters in writing.

Held Covered. Should the Vessel at the expiration of this Policy be at sea or in distress, or at a port of refuge or of call, this insurance shall, provided previous notice be given to the Underwriters, be continued at a pro rata daily premium to her port of destination.

Warranty of Class. Warranted that the Vessel's class will be maintained during the currency of this Policy.

Trading Warranties. Subject to American Institute Trading Warranties but held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing provided notice be given by the Assured immediately after such breach or proposed breach is known to the Assured and any additional premium required be then agreed upon.

Conditions Precedent to Claim. Notwithstanding the foregoing, the liability of Underwriters hereunder is subject to the following terms and conditions:

A.(1) No Claim Shall be Paid Under This Policy for Loss of Hire due to the occurrence of a physical loss or damage, unless by reason of the accident on which the claim is based the Vessel:

(a) actually goes off hire under the current charter thereon or the charter, under the terms of said charter, successfully claims a diminution of hire; or

(b) is unable to be tendered under the binding charter thereon and the charter by reason thereof elects to cancel said charter, or the charterer agrees to a de-

ferred delivery date, in consequence of which cancellation or deferred delivery date the owner has actually sustained a loss of hire; and

(2) No Claim Shall Be Paid Under This Policy for Loss of hire in consequence of a deferred lay-up for repairs (during or after the Policy term) necessitated by a physical loss or damage occurring during the term of this Policy unless the Vessel is precluded from:

(a) continuing to perform under a then current charter thereon in consequence of which the owner has actually sustained a loss of hire under the terms and conditions of the said charter; or

(b) being tendered to a charterer under a then binding charter thereon and by reason thereof the said charter is canceled under the terms thereof, or the charter agrees to a deferred delivery date and the Assured has actually sustained a loss of hire in consequence of said cancellation or deferred delivery date; Provided that if the deferred repairs are carried out promptly after the termination of any charter on the Vessel and the Vessel is fixed and sails for a loading part within thirty days after completion of repairs, the claim shall be adjusted by these Underwriters without regard to the conditions of this Subsection A(2).

B.(1) Underwriters in no event shall pay hereunder for loss of hire for a number of days in excess of the remaining term of the current charter on the Vessel and the term(s) of any charter or sequence of charters immediately following and canceled or deferred as in (A) above.

(2) If this insurance attaches or expires during a passage as defined in the American Institute Time (Hulls) December 1, 1959, from a policy, heavy weather damage occurring on the same passage but outside the period covered by this insurance may be added for the purpose of calculating the loss provided the damage sustained during the period covered hereunder has not been repaired during the passage, but only the proportion of the loss arising from damage occurring during the currency of this insurance shall be payable hereunder.

(3) If at the time a claim is presented to Underwriters and is otherwise collectible hereunder but the Assured cannot prove

an actual loss of hire by reason of the fact that the charter on the Vessel is for a stipulated number of consecutive voyages over a stated period of time or requires the owner to lift a stipulated amount of cargo over a stated period, Underwriters will adjust and pay such claims on the basis of an estimation of the number of days of hire which the Assured can reasonably be expected to lose by the expiration of the consecutive voyage charter or contract of affreightment by reason of the physical loss or damage to the Vessel giving rise to the claim hereunder.

(4) If the loss of hire arises out of a claim by the charterer for diminution of hire as provided for in A(1)(a) above, notwithstanding the terms and conditions of this Policy, these Underwriters shall not be liable hereunder for a sum per diem in excess of the difference between the charter hire and the hire diminished as provided in A(1)(a) above, but in no event exceeding the per diem liability of these Underwriters set forth first above in the Policy.

C. Total Loss and Time to Repair. No claim shall be paid under this Policy if:

(1) The Vessel becomes an absolute, constructive, compromised, or arranged total loss under the Marine Hull and Machinery policies thereon. If the Vessel be uninsured for such interest, then for purposes of determining whether such a loss occurred it shall be assumed that the Vessel was insured under the American Institute Time (Hulls) December 1, 1959 form of policy for the fair market value thereof at the time of the loss.

(2) Repairs with respect to which a claim arises under this Policy are not completed within 24 months from the expiry of the term of this Policy.

D. Simultaneous Repairs (1) If the Vessel is laid up:

(a) for damage repairs caused by a peril insured against hereunder and Assured's repairs (necessary for seaworthiness or classification repairs due under periodic inspection requirements) are carried out simultaneously therewith; or

(b) for Assured's repairs (necessary for seaworthiness or classification repairs due under periodic inspection requirements) and damage repairs caused by a peril insured against hereunder are carried out simultaneously therewith;

As much time as is common to both classes of work in excess of the deductible period shall be divided equally between Underwriters and Assured.

Provided that, if the time necessary to effect damage repairs is extended in any way by reason of concurrent repairs, such additional time to be entirely for Assured's account.

For the purposes of this clause, classification repairs shall be deemed due at the time such repairs are recommended by the Vessel's Classification Society or at any time thereafter.

(2) Temporary Repairs. In the event that temporary repairs to the Vessel are made (at a time and place when permanent repairs could have been effected) and by reason thereof a claim is paid hereunder, these Underwriters shall not be liable under this Policy for a further claim in consequence of making said temporary repairs permanent (so-called permanent repairs) unless the Assured can demonstrate that by so doing Underwriters have not incurred a greater loss than would have been the case if the permanent repairs were made at the time the temporary repairs were effected as aforesaid.

(3) Due Diligence of Assured. The Assured shall effect, or cause to be effected, all repairs (temporary or permanent) with due diligence and dispatch. Underwriters to have the right to require the Assured to incur any expense which would reduce Underwriters' liability under this Policy provided such expense is for Underwriters' account.

E. Interruption of Repairs. There shall be deducted from any claim, otherwise payable hereunder, the period of time, if any, that the Vessel is precluded from earning hire by reason of:

(1) Delay in the commencement or completion of repairs caused by or arising out of the capture, seizure, arrest, restraint or detainment, or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time or peace or war and whether lawful or otherwise, insurrection, rebellion, revolution, civil war, any weapon of war or device employing atomic fission, fusion or radioactive force whether in

time of peace or war, hostile or warlike action by any government or sovereign power or any authority maintaining or using military, naval or air forces or by any agent of any such government power or authority; or

(2) Immobilization of the Vessel by ice or by the blocking or closing of natural or artificial arteries of navigation, which preclude the commencement or completion of such repairs or the resumption of the normal operations of the Vessel.

F. Other Insurance. The liability under this Policy shall not exceed the sum insured hereunder, nor shall these Underwriters be liable for a greater proportion of any loss than the insurance hereunder shall bear to all insurance, whether valid or not, and whether collectible or not, covering any manner the loss insured against by this Policy.

G. Subrogation. (1) In the event of any accident the Assured agrees to subrogate to these Underwriters all rights for recovery of loss or use or earnings of the Vessel for any period for which Underwriters have made payments under this Policy which the Assured may have against any other person or entity including charterers which respect to said accident. Said subrogation to be limited to the amount paid by Underwriters hereunder and to be distributed pro rata with the Assured's claim for demurrage (if any) during said period.

(2) In case of any agreement or act, past or future, by the Assured, except as in customary and necessary in the case of so-called pilotage agreements, whereby any right of recovery of the Assured against any person or entity is released or lost to which these Underwriters on payment of loss would be entitled to subrogation but for such agreement or act, this insurance shall be vitiated to the extent that the right of subrogation of these Underwriters has been impaired thereby; and in such event the right of these Underwriters to retain or collect any premium paid or due hereunder shall not be affected.

H. Automatic Termination. (1) In the event that at any time during the term of this Policy the current charter on the Vessel expires or is canceled or termi-

nated for any reason whatsoever and the Vessel does not immediately go on charter, unless otherwise agreed to in writing by these Underwriters, this Policy shall automatically terminate, no notice to the Assured being necessary or required. The Assured will be entitled to pro rata return of premium in the event of such cancellation provided that no claim has been paid or is payable under this Policy. Underwriters to retain a minimum premium of thirty days.

(2) Cancellation for Nonpayment of Premium.

In the event of nonpayment of premium within thirty days after attachment, this Policy may be canceled by Underwriters by giving a five-day written notice of such cancellation. Written notice mailed to the Assured at the last known address of the Assured shall constitute a complete notice of cancellation and this Policy shall be null and void at noon on the fifth day after such notice shall have been mailed. A written or telegraphic notice sent through the brokers who negotiated the insurance or by them, at the request of the Underwriters, shall operate to effect cancellation in the same manner as if sent directly by Underwriters. Such proportion of the premium on a daily pro rata basis as shall have been earned up to the time of such cancellation shall be due and payable immediately but in the event that a claim has been paid or is payable under this Policy full premium shall be deemed earned.

(3) Mutual Cancellation and Lay-Up Return. In the event of mutual cancellation, Underwriters to return pro rata daily net premium provided no claim has been paid or is payable under this Policy. Underwriters, however, to retain a minimum premium of thirty days. If the Vessel is laid up for more than thirty consecutive days at the request of a charterer, and not for any repairs which could give rise to a claim under this Policy, Underwriters to return one-third of daily pro rata net premium for the lay-up period provided that no claim has been paid or is payable under this Policy, and arrival.

(4) Change of Ownership. In the event of any change, voluntary or otherwise, in the ownership of the Vessel, or if the Vessel be placed under new manage-

ment or be chartered on a bareboard basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become canceled from time of such change in ownership or management, charter or requisition. A pro rata net daily return premium shall be made, provided that no claim has been paid or is payable under this Policy. Underwriters to retain a minimum premium of thirty days.

I. Notice of Accident. The Assured shall:

(1) As soon as practicable, report of these Underwriters every occurrence which may result in a claim under this Policy and, if the Vessel is covered by hull and machinery insurance, the Assured, again if practicable, shall file with Underwriters a copy of any notice of such occurrence given by it under the marine hull and machinery policies on the Vessel; and

(2) **Notice of Survey.** Give reasonable notice to these Underwriters of the time and place of any survey required by reason of an accident which could give rise to a claim under this Policy; and

(3) **Proof of Loss.** If required and if necessary for adjustment of a claim hereunder produce for examination of all books of account, bills, invoices, ship's logs and accounts, charters or contracts of affreightment, or certified copies thereof if the originals are lost, at such reasonable time and place as may be designated by these Underwriters of their representatives, and shall permit extracts and copies thereof to be made.

J. Arbitration. Any dispute arising hereunder shall be submitted to arbitration at New York. All questions (whether as to liability or amount thereof) shall be left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator or failing such agreement, to the decision of arbitrators, one to be appointed by the Assured and one to be appointed by these Underwriters — the two arbitrators chosen to choose a third arbitrator before entering upon the reference and the decision of such single, or of any two of such arbitrators, appointed as above, to be final and binding and may be made a rule of the Court.

Marginal captions are inserted for purposes of convenient reference only and are not to be deemed a part of this Policy.

The terms and conditions of this form are to be regarded as substituted for those, if any, of the policy form to which it is attached, the latter being hereby waived, except provisions required by law inserted in the Policy.

APPENDIX C

LONDON ABS FORM

FORM No. 1.23-2

LOSS OF CHARTER HIRE INSURANCE — INCLUDING WAR¹⁵¹

(ABS 1/10/83 Wording)

This insurance is subject to English law and practice

1. If in consequence of any of the following events:

(a) loss, damage or occurrence covered by Institute Time Clauses-Hulls (1/10/83) or Norwegian Hull Form or American Institute Hull Clauses (2nd June 1977) and also loss damage or occurrence covered by Institute War and Strikes Clauses-Hulls (1/10/83) or American Institute Hull War and Strikes Clauses (1/12/77) plus Addenda 1 and 2,

(Option of clause to be exercised at inception)

(b) breakdown of machinery, including electrical machinery or boilers, provided that such breakdown has not resulted from wear and tear or want of due diligence by the Assured, occurring during the period of this insurance, the Vessel is prevented from earning hire for a period in excess of . . . days in respect of any accident, then this insurance shall pay . . . of the sum hereby insured for each 24 hours after the expiration of the said days during which the Vessel is so prevent-

151. 7 BENEDICT ON ADMIRALTY § 1.23-2 (Thomas Fennel ed., 6th ed. 1994).

ed from earning hire for not exceeding a further . . . days in respect of any one accident or occurrence (and not exceeding . . . days in all during the currency of this Insurance (irrespective of the expiry date of this insurance)), provided that the repairs in respect of which a claim is made hereunder are completed within 12 months of the expiry of the period covered by this policy.

2. No claim to attach to this insurance if the occurrence in respect of which such claim arises is the cause of the Vessel becoming a Total Loss (Actual or Constructive).

3. In all cases where a recovery is obtained from third parties in respect of loss of earnings or demurrage such recovery shall be apportioned between the Assured and the Underwriters as their respective interests may appear.

4. Subject to current Institute Trading Warranties and, in respect of War risks, subject to current London Market War Risk Trading Warranties.

5. Held covered in case of any breach of warranty as to cargo, trade, locality, towage, salvage services or date of sailing, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.

6. The expression "one accident" shall be deemed to include all heavy weather damage occurring during a single sea passage between two successive ports as defined in Clause 12.2 of Institute Time Clauses — Hulls (1/10/83).

7. If this insurance attaches or expires during a passage as defined above heavy weather damage occurring on the same passage but outside the period covered by this insurance may be added for the purpose of calculating the loss provided the damage sustained during the period covered hereunder has not been repaired during the passage, but only the proportion of the loss arising from damage occurring during the currency of this insurance shall be payable hereunder.

8. It is understood and agreed that if the Vessel is prevented from earning hire on separate occasions, which shall not in any event exceed three, in respect of any one accident or occurrence falling within this insurance, for the purpose of ascertaining the amount claimable hereunder the total time that the Vessel is off hire shall be taken into account, provided that the

repairs are completed within twelve months of the expiry of this insurance.

9. Should the Vessel at the expiration of this insurance be at sea or in distress, or at port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata daily premium to her port of destination, but in no event shall such extension affect or postpone the operation of the Institute Notice of Cancellation and Automatic Termination of Cover Clause for War.

10. In the event of the Vessel named herein being sold or unchartered, other than by reason of Total or Constructive Total Loss of Vessel, this insurance is automatically canceled. In such event Underwriters agree to return pro rata net monthly premium, provided there are no claims on the Vessel during the currency of the insurance prior to cancellation. In no other event shall there be any return of premium (except as provided under Clause 14.3 below).

This clause shall prevail notwithstanding any provisions whether written, typed or printed in the insurance inconsistent therewith unless especially agreed by Underwriters.

11. Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of change of the Classification Society of the Vessel, or change, suspension, discontinuance, withdrawal or expiry of her Class therein, provided that if the Vessel is at sea such automatic termination shall be deferred until arrival at her next port. However where such change, suspension, discontinuance or withdrawal of her Class has resulted from loss or damage covered by Clause 1 of this insurance such automatic termination shall only operate should the Vessel sail from her next port without the prior approval of the Classification Society.

12. The Assured shall effect, or cause to be effected, all repairs (temporary or permanent) with due diligence and dispatch. Underwriters to have the right to require the Assured to incur any expense which would reduce Underwriters' liability under this insurance provided such expense is for Underwriters' account.

13. This insurance excludes:

13.1 loss damage liability or expense arising from:

13.1.1 any detonation of any weapon of war employing atomic or nuclear fission and/or fusion

or other like reaction or radioactive force or matter, hereinafter called a nuclear weapon of war;

13.1.2 the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Union of Soviet Socialist Republics, the People's Republic of China;

13.1.3 requisition or pre-emption;

13.1.4 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the Government or any public or local authority of the country in which the Vessel is owned or registered;

13.1.5 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations; or

13.1.6 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause

13.2 any claim for any sum recoverable under any other insurance on the Vessel or which would be recoverable under such insurance but for the existence of this insurance.

13.3 any claim for expenses arising from delay except such expenses as would be recoverable in principle in English law and practice under the York-Antwerp Rules 1974.

14. 14.1 Cover hereunder in respect of the risks of war, etc., may be canceled by either the Underwriters or the Assured giving 7 days notice (such cancellation becoming effective on the expiry of 7 days from midnight of the day on which notice of cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate cover subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and/or conditions and/or warranties.

14.2 Whether not such notice of cancellation has been given cover hereunder in respect of the risks of war, etc., shall TERMINATE AUTOMATICALLY

14.2.1 upon the occurrence of any hostile detonation of any nuclear weapon of war as defined in Clause

13.1.1 wheresoever or whensoever such detonation may occur and whether or not the Vessel may be involved;

14.2.2 upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Union of Soviet Socialist Republics, the People's Republic of China; or

14.2.3 in the event of the Vessel being requisitioned, either for title or use.

14.3 In the event either of cancellation by notice or of automatic termination of this insurance by reason of the operation of this Clause 14, pro rata net return of premium shall be payable to the Assured.

15. Cover in respect of the risk of war, etc., shall not be effective if, subsequent to acceptance by the Underwriters and prior to the intended time of attachment of risk, there has occurred any event which would have automatically terminated cover under the provisions of this clause.

APPENDIX D

A&P FORM

GENERAL CONDITIONS FOR LOSS OF HIRE INSURANCE FOR DRILLING BARGES OR SIMILAR CONSTRUCTIONS¹⁵²

1. PRINCIPAL RULES CONCERNING THE UNDERWRITERS' LIABILITY

The insurance covers loss due to the Drilling Barge being wholly or partly deprived of her earning capacity, chartered or not chartered, as a consequence of damage sustained which occurs within the effective dates as stipulated in the Policy (or in the event of cancellation of the Policy, prior to the effective date of cancellation).

152. This is the policy at issue in *Reading & Bates Corp. v. American Marine Slip, Soc'y Mar. Arb. No. 3087 (1993)* (Hagans, Schumacher, and Tyler, Arbs.).

The compensation per day shall be as stipulated in the Policy, less hire received by the Assured according to the "Coordination With Compensation Under Drilling Contracts" clause contained in this Section II.

2. LIMITATION OF THE UNDERWRITERS' LIABILITY

- a. The Underwriters are only liable for the time lost provided that the damage which caused the loss is recoverable according to the London Drilling Barge Form, Norwegian Conditions for Drilling Vessels, or the Special Manuscript Conditions hereon as applicable, or other Drilling Barge conditions as approved by the Leading Underwriter, or would have been recoverable if a deductible had not been agreed upon.

The Underwriters are also liable for time lost caused by breakdown of machinery, including but not limited to electrical machinery or boilers, regardless of whether or not such breakdown causes other damage; provided, however, that if such breakdown is caused solely by normal wear and tear or by want of due diligence by the Assured, the Underwriters are only liable for time lost in repairing other damage caused by such breakdown.

- b. The Underwriters are not liable for the loss of time in consequence of a casualty which gives the Assured right to compensation for Actual and/or Constructive Total Loss according to the Hull Conditions (Section I-A(iii), or which is settled by way of a compromise, the insurer paying at least 75% of the assessed hull value without the right to take over the vessel and without imposing on the Assured the duty to repair her; this clause 2b being subject always to the provisions in the clause in this subsection entitled "Special Agreement Pertaining to Loss Hereunder."

3. CALCULATION OF LOSS OF TIME

- a. The loss of time is stipulated in days, hours, and minutes.

- b. Each casualty shall be subject to a deductible period, which shall be calculated from the beginning of the casualty and shall last until the loss of time in consequence of the casualty, has reached the number of days deductible stated in the Policy wording. If loss or damage occurs to a stacked unit, then the deductible period shall be calculated from the moment the damaged unit is mobilized for the purpose of effecting repairs.
- c. Damage due to heavy weather which has arisen during one stay in port or during one operating period counts as one casualty. An operating period is the period between the insured barge's departure from port and its departure from the first location where she has been operating ("operating location"), the period between its departure from one operating location and its departure from the next operating location, the period between departure from its last operating location and the arrival at port, or in cases where no operating has been performed enroute, the period between departure from one port and arrival at the next port.

4. COSTS INCURRED IN EXPEDITING THE REPAIRS

The Underwriters are liable for extra costs of temporary repairs and other extraordinary measures in expediting the repairs. The Underwriters are not, however, liable beyond the amount that they would have paid if the measures had not been taken.

5. SIMULTANEOUS REPAIRS

- a. If repairs covered under this insurance and other work covered under other loss of hire insurance effected for the Assured are carried out simultaneously, the Underwriters shall compensate half of the time common to both classes of work in excess of the deductible period.
- b. Each class of work shall be deemed to have lasted the number of days which would have been necessary if they had been carried out separately, counted from the point of time when the work started. Unless the cir-

cumstances clearly indicate another point of time, all classes of work shall be deemed to have started when the vessel arrived at the yard. The delay which might occur as a consequence of owners repairs, not covered by loss of hire insurance, being carried out simultaneously, shall be solely for the Assured's account.

6. REPAIRS AFTER EXPIRY OF THE PERIOD OF INSURANCE

The Underwriters are not liable for loss of time resulting from a stay at a repair yard which commences more than twenty-four months after the expiry of the period of insurance.

7. THE LIABILITY OF THE UNDERWRITERS IF THE DRILLING BARGE IS TRANSFERRED TO A NEW OWNER

If the Drilling Barge is transferred to a new owner after repairs have been effected or with unrepaired damages, the Underwriters shall compensate the loss the Assured can prove he has suffered because the Drilling Barge has been taken out of commission or will have to be taken out of commission by the buyer during repair of the damage, but not more than compensation based on the daily amount and the time which has been used or is estimated will have to be used for repairs, less any hire which the Assured could have claimed according to Drilling Contract.

8. REIMBURSEMENT FROM THIRD PARTY

Where the Assured has a claim for damages against a third party on account of the loss, the Underwriters, on payment of the compensation, are subrogated to the rights of the Assured against the third party.

9. PREMIUM ADJUSTMENT

Premium agreed at inception shall be adjusted at expiry (on a pro rata daily basis), subject always to the adjustment provision of Item 8 of the Declarations herein.

10. WAIVER OF SUBROGATION

All rights of subrogation against any party are expressly waived by Underwriters hereon, to the extent required by contract. Further, underwriters hereon waive all rights of subrogation against the Assured, any of the Assured's subsidiary, affiliated, or interrelated companies, any of the Assured's officers or employees, and any of the Assured's vessels or other Underwriters.

Notwithstanding the above, Underwriters hereon shall have the opportunity to consult with the Assured concerning the interpretation of the compensation available under Drilling Contract. In the event that the Underwriters hereon do not agree with the applicable compensation offered by the other party(ies) to the Drilling Contract or the termination date thereof, the Underwriters may require the Assured to litigate against the other party(ies) to the Drilling Contract, provided that Underwriters hereon shall pay all expenses of such litigation and shall commence payments hereunder at the applicable per diem rate, beginning on the termination date offered by the other party(ies) to the Drilling Contract (but such payments shall in no event begin until the minimum excess has expired). If the Assured does not wish to enter into such litigation for commercial or other reasons, payment hereunder shall be reduced by the difference between the amount offered by the party(ies) to the Drilling Contract and the amount that Underwriters hereon contend should have been offered.

11. ARBITRATION

It is hereby mutually agreed between the parties hereto that if and whenever any dispute, difference or question arises between the Assured and the Underwriters hereon with reference to the construction, validity or performance of the Policy or any other matter arising out of or in any way connected with this Policy, whether arising before or after termination of this Policy, it shall be as a condition precedent to any right of action hereunder that such dispute be referred to two arbitrators (one arbitrator to be appointed by each party) and an umpire, who shall be ap-

pointed by the Arbitrators before they enter upon the reference.

The award of the Arbitrators or in the event of their disagreement the award of the umpire shall be final and binding upon all parties without appeal, and the award may be entered in any Court of competent jurisdiction for the enforcement thereof.

The costs and expenses incidental to the reference and award shall be in the discretion of the Arbitrators or umpire, as the case may be, and they shall determine the amount and direct to and by whom and in what manner the costs or any part thereof shall be paid, and they shall have power to tax the costs in such manner as they think fit and to award costs to be paid as between solicitor and client.

In the event of either party refusing or neglecting to appoint an Arbitrator within one month after the other party requests it to do so or if the Arbitrator fail to appoint an umpire within one month after they have accepted their appointments, such Arbitrator or umpire, as the case may be, shall upon the application of either party be appointed by the Commissioner of Insurance of the State of New York, and the Arbitrators and the umpire shall thereupon proceed to the reference as above stipulated.

The Policy shall be interpreted rather as an honorable engagement than as a legal obligation and the award shall be made with a view to effecting the general purpose of this Policy rather than in accordance with the literal interpretation of its wording. The Arbitrators and the umpire may abstain from judicial formality and from following strictly the rules of the law.

Service of process or notices in Court proceedings taken to effectuate such Arbitration or award shall be binding upon either party if delivered by the other party to the attorneys stipulated in the declarations for service of process.

Unless otherwise mutually agreed between the Assured and the Underwriters hereon, any Arbitration shall take place in New York, New York.

12. CLAIMS SETTLEMENT

The Assured shall provide the Leading Underwriter with such particulars and documents as are available to him, and which the Leading Underwriter requires for the purpose of settlement of claims. The Leading Underwriter shall issue claims settlements as promptly as possible. Where the Assured, before the claims settlement can be issued, shows that he has had or in the near future will suffer substantial loss coming within this insurance, he may demand a reasonable payment on account in respect of his claim. The compensation falls due for payment one month from due date on which claims settlement has been issued.