

Goods in Trust Brokers Beware

If damage occurs to customers goods in your client's possession, significant difficulties can arise in the context of interpretation of policy cover. Alan FitzGerald, FitzGerald Chartered Loss Adjusters, suggests that some clarity has been provided by a recent UK decision.

When representing Policyholders, on behalf of Brokers, I have come across an unusual number of cases involving customers goods where problems have arisen in the context of interpretation of policy cover. Your client may be processing or treating the goods or simply have them in his care. Obviously other issues arise in the context of "All Risks" cover and process exclusions etc., but for the purpose of this article, I want to deal with a situation where customers goods, either stock or machinery, is inadvertently damaged by an insured peril or contingency at the client's premises.

A typical policy wording in relation to stock reads as follows:-

"Stock and materials in trade therein and thereon, the property of the Insured or held by them in trust for which they are responsible".

Traditionally, Insurers have regarded this wording as meaning legal responsibility. In other words, if an Insured has customers goods in his care or control and those goods are damaged by an insured peril, it is necessary to demonstrate the Insured was negligent in some way before cover applies. This clearly creates its own difficulty, particularly in the context of an accidental fire or escape of water or indeed flood. It also raises the question as to who decides who is legally responsible, is it the Loss Adjuster for the insurance company, the Insured or indeed his customer?

My own interpretation of "for which they are responsible", has always been that the Insured does not have to be negligent, but that he is legally responsible for the goods, thus having sufficient financial relationship as to create an insurable interest. Unfortunately, any of the relevant text books have not developed greatly on this subject. They suggest that the wording dictates that the Insured has to be negligent but that in certain cases Insurers may be willing to make payments in relation to uninsured customers, but primarily personal lines rather than commercial individuals.

Some Policies have endorsements or extensions dealing with this aspect and indeed an example of this refers separately to "customers goods" and states that "in so far as such property is not otherwise

insured, the insurance by this Policy deems to cover the goods of the customer of the Insured which the Insured have made themselves responsible even though such goods have been bought and paid for". However, this wording again refers to responsibility and the issue is whether this dictates that the Insured has to be negligent i.e., in breach of his duty of care to the customer. A second condition is that the customer does not have insurance cover on the goods. In practical terms, this can create a difficult situation in that an Insured may have suffered a loss involving customers goods and the wording places the onus on the Insured to check with the customer whether insurance cover applies. If cover does apply, then presumably the customer will be asked to notify his own Insurer. This is clearly an unsatisfactory situation, particularly where a Bailor or Bailee relationship exists.

In one of the publications which deals with this issue (Property and Casualty Claims - F.W. Collins), the author states that under fire and theft policies, items of plant and stock commonly include the phrase "the property of the Insured or held by them in trust for which they are responsible". The author suggests that it is established that this enables the Insured to recover only to the extent of "his legal liability to the Bailor".

Cover under the customer's/bailors policy will no doubt be restrictive in that "temporarily removed" cover is limited and does not normally apply to stock and cover will usually apply only to the address noted in the schedule. There is therefore potential for a gap in cover and with it, significant problems both for the client and the Broker.

The position was dealt with recently in a UK case - Ramco (UK) Ltd., and ORS - v- International Insurance Company of Hannover Ltd., and another. This is a case which was heard by the English Court of Appeal and involved goods in a warehouse damaged by fire. The Policy was a combined "All Risks" covering Ramco and Resource Industries against loss, destruction or damage to property as a result of fire. A fire broke out at an industrial premises occupied by both Ramco and Resource Industries and

stock and other goods were destroyed but there was no question of fault on the part of either Ramco or their subsidiary.

There was no dispute in relation to liability for the property owned by Ramco and Resource but some of the goods damaged or destroyed were bailed to them by their customers and the issue was whether cover applied in relation to these. The material damage section of the Policy had the usual wording and property was defined to include stock and materials "the property of the Insured or held by the Insured in trust for which the Insured is responsible".

At first instance the Judge held that the phrase "for which the Insured is responsible", meant that the insurance responded only if Ramco was liable in respect of the goods but if there was no legal liability there would be no cover. Ramco appealed but it was held that where the cover is "goods in trust", this has been taken to mean the full value of the goods but if the Policy covers goods "in trust for which the Insured is responsible", the insurance covers only the Bailees (Ramco's) legal liability in respect of the goods and not the goods themselves. Whilst the Appeal Judges had difficulty with their decision, they unanimously concluded that this form of wording has been in use for many years and it would be wrong for the Court to interfere, unless there was a real reason for supposing the wording was unsatisfactory in practice. In conclusion, cover would have only applied in the event that Ramco was negligent and therefore there was no response in relation to the customers goods.

Every case must be taken on its merits but if any of your clients hold, or are responsible for customers goods then you should examine closely the issue of cover. If the words "for which they are responsible", are omitted, then I suggest cover applies as if the goods were the property of your Client. However, in accordance with the Ramco decision if, "for which they are responsible" remains then clearly the issue is one of legal liability which, as I stated at the outset, creates obvious difficulties.