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The Fortuity Rule of Federal Maritime Law: The Scope of "All Risks" Coverage Under Policies of Marine Insurance and the New Decision of the Eleventh Circuit Court of Appeals

Michael I. Goldman, Esq.*

In the view of the author, there is now a new ruling which churns the already turbulent waters of the marine insurance industry. The ruling is the decision of the Eleventh Circuit Court of Appeals in the case of *Lamadrid v. Nat'l Union Fire Ins. Co.,*[1] and raises the potential for a drastic expansion in the scope of losses typically covered by the type of marine insurance policy known as an "all risks" policy. Additionally, this new decision appears to have created yet another circuit split with respect to federal admiralty law, with the Eleventh Circuit Court of Appeals adopting a rule of law contrary to the rule of law applied in the Eighth Circuit Court of Appeals. Further complicating matters, there is nothing in the Eleventh Circuit's new decision which gives any indication that the panel was even aware or might even concede that it was fashioning a new rule.

Prior to now, the admittedly broad type of coverage afforded under an "all risks" policy of marine insurance was always subject to two limits; first, the coverage afforded by an "all risks" policy has always been subject to the rule of federal admiralty law that only "fortuitous" losses are covered, since if not fortuitous, a loss is not covered by an "all risks" policy of marine insurance, even if not specifically excluded; second, even if a loss is deemed to have been fortuitous, the coverage afforded by an "all risks" policy is narrowed by the policy's exclusions, which expressly carve out from coverage

*Partner in the law firm of Goldman & Hellman and a member of the Massachusetts bar. Mr. Goldman's practice also is devoted exclusively to the representation of marine insurers and underwriters, with a specialization in appellate matters and practice. He holds degrees from the University of Massachusetts-Amherst and from Boston College School of Law. His first published article concerned the applicability of the 7th Amendment right to a jury in cases brought under the admiralty jurisdiction of the federal courts. This is his second published article. Goldman & Hellman was counsel to National Union in the Lamadrid case.

[1]567 Fed.Appx. 695 (11th Cir. 2014).

certain specified losses. However, the new thing which will be reviewed in this article arrives via the recent decision of the Eleventh Circuit Court of Appeals in the case of *Lamadrid v. Nat'l Union Fire Ins. Co.*, and the author maintains that the Eleventh Circuit's holding in that case has substantially narrowed, if it did not totally nullify, the first limit imposed on an "all risks" policy of marine insurance. What the author maintains is the novel holding of the *Lamadrid* case is this: that a loss caused by or resulting from the failure of a vessel's mechanical components which occurs before the end of that mechanical component's projected lifespan is a fortuitous event, and is therefore covered, unless specifically excluded. Furthermore, to justify this expansion, the Eleventh Circuit made the questionable assertion that an insurer must specifically exclude any loss it does not wish to cover.

The author respectfully submits that this holding is actually a departure from more than 125 years of combined Anglo-American maritime jurisprudence, as well as venerable marine insurance industry practice, and has now introduced into the body of marine insurance law and practice the novel concept that an unexplained, premature mechanical breakdown satisfies the familiar requirements of the "fortuity rule" and constitutes a covered loss. The likely result of this new rule will be that the costs of servicing and maintaining vessels will now be shifted from the insureds to the insurers, along with the inevitable increase in premium which must come from an increase in risk and an increase in claims.

Finally, the Eleventh Circuit's decision with respect to the unexplained, premature breakdown of a vessel's mechanical components appears to clash with the decision of the Eighth Circuit on the exact same subject and the authors believe that this marks an area in which the Eleventh Circuit may well have departed from established federal admiralty law and practice. Marine insurers must now be aware that, at least within the Eleventh Circuit, the standard "all risks" policy of marine insurance may be held to cover a much broader scope of risks, and that marine underwriters will be expected to specifically exclude from coverage any risks which they do not wish to cover. Until and unless the Supreme Court decides to hear another marine insurance case, which it has steadfastly refused to do since 1955,[2] the practice of marine insurance in the Eleventh Circuit on this critical issue will continue to diverge from the practice of marine insurance in the rest of the United States, and throughout the international marine insurance market.

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[2]Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955).

I
INTRODUCTION

The marine insurance industry exists because all vessels that ply the seas, great and small, pleasure boats and commercial vessels, are valuable objects which are routinely exposed to the hazards inherent to their nature and to the physical environment in which they are operated by their human agents. Shakespeare tells us, "[w]hat fates impose, that men must needs abide; It boots not to resist both wind and tide."[3] But, if wind and tide cannot be resisted, they can at least be insured against. Rational beings seek to minimize or to avoid exposure of their valuable property to foreseeable risks, to the thousand natural shocks that a vessel, like flesh, is heir to. In their modern form, policies of marine insurance, whether of the "named perils" or the "all risks" variety, afford protection against the myriad events that can damage or destroy a vessel, or harm or even kill a vessel's human operators and passengers. In the overwhelming majority of incidents in which something unfortunate occurs giving rise to a claim under a policy, that claim is quickly and expeditiously paid and both insurer and insured go about their respective business without further interruption.

For the professionals involved with reviewing or with adjusting marine claims, or with litigating the coverage issues which on occasion arise in connection with marine claims, there are certain issues which seem to recur more often than others. For example, when a vessel is reported to have been stolen, or perhaps to have run aground and then sunk, investigation will sometimes reveal that the coverage was obtained only because one or more material facts were concealed from the underwriter because these were omitted from the insured's application for insurance. Or the post-incident investigation might reveal that the insured was operating the vessel while legally intoxicated at the time that a collision with another vessel occurred. Frequently the essential facts of the incident will by themselves demonstrate that a potential coverage issue might exist, as where the insured vessel comes to grief while being operated by an individual other than the person identified in a named operator endorsement, or a sailing vessel suffers a dismasting well outside the geographic scope provided for under the policy's Navigational Limits Warranty. Issues of the insured vessel's seaworthiness quite often arise, focusing on the condition of the vessel prior to the date on which the policy incepted, or whether the circumstances of the loss were causally related to the insured failing to comply with the duty to maintain the vessel in seaworthy condition after the inception of coverage.

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[3]William Shakespeare HENRY VI, Part 3, act 4, scene 3, line 60, (1591).

Unfortunately, as is so often the case in human affairs, things are not always simple or easy, and the author of this article proposes to review and analyze a particular variety of claim and the particular area of the federal admiralty law which courts must utilize in order to resolve this particular variety of coverage dispute. This area of federal admiralty law is termed the "fortuity rule" and it has been the subject recently of a number of important rulings by federal courts.

This article will begin with a review of the caselaw concerning the requirements for demonstrating fortuity in different kinds of losses involving vessels. Next, this article will proceed to review the caselaw specifically dealing with unexplained, premature mechanical failure and explain why, in the opinion of the author, the *Lamadrid* decision represents such a startling departure from that caselaw. As detailed in more depth below, the Eleventh Circuit's recent foray into this area of the law produced a decision which seems to have overlooked much of the relevant caselaw, as well as modern marine insurance industry practice, and held that the totally unexplained, premature failure of an engine component (a relief valve) was a fortuitous loss which was covered by an "all risks" policy of marine insurance. As other courts have presciently warned, this ruling has the potential to convert "all risks" marine insurance policies from contracts of indemnity into mere maintenance contracts, in which marine insurers are now expected to bear all the costs of maintaining the mechanical integrity of the vessel.[4] Finally, although the Eleventh Circuit did not describe it as such, the author will also discuss how this new decision seems to have created a split between the Eighth and the Eleventh Circuits with respect to the fortuity of unexplained, premature mechanical failures.

II
THE FORTUITY RULE

"Marine insurance generally has three 'central conceptual elements:' (1) 'it is a contract of indemnity against loss;' (2) 'the indemnity . . . is only triggered by an accident or fortuity;' and (3) 'the 'adventure' or peril insured against must be specifically maritime in character.'"[5] "[T]he fortuity rule is

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[4]Port Auth. v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002), Great Lakes Reinsurance (UK) PLC v. Marius Fortelni, 33 F. Supp. 3d 204 (E.D.N.Y. 2014).

[5]Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 654, 2008 AMC 305 (9th Cir. 2008), citing, Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW §17-1 (4th ed. 2004) (Hornbook Series); Continental Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 1999 AMC 2714 (7th Cir. 1999); Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040 (4th Cir. 1979); Great Lakes Reinsurance (UK) PLC v. Soveral, 2007 AMC 672 (S.D. Fla. 2007).

indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years."[6] "All risk" marine insurance policies provide "coverage against all risks,"[7] not all losses.[8] This is so because "[m]arine insurance was never intended to indemnify the assured against all loss or damage which might occur to his property or interest, but only those losses which are fortuitous and beyond the control of the assured."[9]

Not all losses that befall a vessel are fortuitous. "Notwithstanding the all-inclusive nature of the words 'all risks,' not all risks are covered, only those arising from a *fortuitous accident or casualty* resulting in damage or loss attributable to an external cause."[10] This necessarily means that any nautical calamity that is not fortuitous is not covered by an "all risks" policy of marine insurance, even if it is not specifically excluded from coverage. What is more, prior to the *Lamadrid* decision, the caselaw and the authorities were clear that the "absence of an exclusion cannot create coverage."[11] "A loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exceptions . . ."[12]

Because the insured is the party better placed to know the cause of the loss, federal admiralty law places the burden on the insured to show facts which demonstrate that the vessel suffered a fortuitous loss.[13] "Where, however, the fact finder can only speculate as to whether the loss was caused by an insured peril or some other cause not covered by the policy, or the evidence is in equipoise, the insured has failed to sustain his burden of proof and recovery on the policy must be denied."[14]

A review of the caselaw shows that in order to recover under an "all risks" policy of marine insurance, an insured must typically show something more than merely a sunken or broken vessel. But, the author submits that exactly

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[6]Youell v. Exxon Corp., 48 F.3d 105, 110, 1995 AMC 1147 (2d Cir. 1995).

[7]Int'l Ship v. Marine Servs., 944 F. Supp. 886, 892, 1997 AMC 1419 (M.D. Fla. 1996).

[8]Standard v. Bethlehem, 597 F. Supp. 164, 191 (D. Conn. 1984).

[9]Alex J. Parks, THE LAW AND PRACTICE OF MARINE INSURANCE AND GENERAL AVERAGE, p. 22 (Cornell Maritime Press, 1987).

[10]Id., at 63.

[11]Commercial Union Ins. Co. v. Flagship Marine Servs., 190 F.3d 26, 33-34, 2000 AMC 1 (2d Cir. 1999); Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 805 (6th Cir. 1996); Continental Cas. Co. v. Pittsburgh Corning Corp., 917 F.2d 297, 300 (7th Cir. 1990).

[12]10 COUCH ON INSURANCE 148:48 (3d ed. 1998).

[13]Banco Nacional de Nicaragua v. Argonaut Ins. Co., 681 F.2d 1337 (11th Cir. 1982); Northwestern Mut. Life Ins. Co. v. Linard, 498 F.2d 556, 561 (2d Cir. 1974); S. Felicione & Sons Fish Co. v. Citizens Cas. Co., 430 F.2d 136, 138 (5th Cir. 1970).

[14]Parks, at 1180, citing, Cox. v. Queen Ins. Co., 370 S.W.2d 206, 1963 AMC 2437 (applying Texas law of fortuity, which is identical to federal admiralty law).

what an insured is required to show differs depending on the type of loss. For instance, as explained in more depth below, the lowest standard applies in cases where a vessel sinks. In contrast, prior to the *Lamadrid* decision, the very highest standard applied in cases of unexplained, even premature, mechanical breakdown. It is the author's contention that, prior to the *Lamadrid* decision, whether a vessel merely suffered a mechanical breakdown or actually sank due to the mechanical breakdown, an insured making a claim under an "all risks" policy of marine insurance was required to show that some fortuitous event caused the breakdown. The breakdown itself, without more, was not evidence of a fortuitous, covered loss because a breakdown might have many causes, some fortuitous and others not. Furthermore, the caselaw implicitly rejected the contention that an insured could prove fortuity by showing that the mechanical breakdown occurred before the end of the mechanism's expected lifespan. But, departing from this caselaw, the Eleventh Circuit in the *Lamadrid* case held that a mechanical component which fails prematurely with no ascertainable cause is a fortuitous loss which is covered by an "all risks" policy of marine insurance.

III
A SINKING VESSEL

Where a vessel sinks, the caselaw shows that the insured can carry the fortuity burden in one of two ways. First, under both an "all risks" policy and a "named perils" policy, the insured can present the facts of the loss and show that some sort of accidental or chance event acted upon the vessel and caused the vessel to sink. The foremost example of a fortuitous cause of loss is heavy weather.[15] For instance, the case of *Federal Ins. Co. v. PGG Realty, LLC*[16] concerned a mega-yacht much like the vessel in the *Lamadrid* case. While the vessel was travelling in extremely bad weather in the Bahamas, seawater was discovered in the vessel's engine room. Several hours later, the vessel inexplicably lost electrical power. The vessel eventually capsized and sank. The captain of the vessel testified that the seas were "very strong and very rough" and the U.S. Coast Guard helicopter pilot who rescued the crew when they abandoned ship testified that the weather was "very unusual" for the Bahamas. The court found that the vessel sank due to the combination of two causes, (1) unusually severe weather and (2) the inexplicable loss of power.[17] Much like the failure of the relief valve in the *Lamadrid* case ana-

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[15]Continental Ins. Co. v. Hersent Offshore, Inc., 567 F.2d 533 (2d Cir. 1977); Aetna Ins. Co. v. Sacramento-Stockton S.S. Co., 273 F. 55 (9th Cir. 1921).

[16]538 F. Supp. 2d 680 (S.D.N.Y. 2008), aff'd, 2009 U.S.App.LEXIS 15173 (2d Cir. 2009).

[17]Id., at 700.

lyzed below, the cause of the loss of power remained unknown. However, the court did not require the insured to explain the loss of power. Instead, the court concluded that the extreme weather, weather not typical in the Bahamas, was at least a contributing factor in the loss. The court wrote:

> The most that this Court can conclude with any confidence is that the unexpectedly bad weather was a critical condition in the capsizing and that, more probably than not, the loss of power was a key ingredient in the boat's failure to ride out the storm. But the cause of the loss of power remains a riddle.[18]

Nevertheless, the court held that:

> Not every accident is explicable; yet accidents still occur. Which is why people have insurance. For all the foregoing reasons, the Court concludes that Federal is liable, up to the full limits of the all risks policy, for the loss of the Princess Gigi.[19]

Therefore, since weather which is unusually severe for the locale is fortuitous, a loss partly due to unusually heavy weather was held to be fortuitous and was therefore covered by an "all risks" policy of marine insurance, even if the cause of the loss of power could not be identified and no evidence could be presented showing that the loss of power was directly caused by the heavy weather.

Of course, heavy weather is hardly the only form of non-fortuitous loss. Just a quick review of the federal admiralty law jurisprudence from the last hundred years shows that there is a huge variety of fortuitous causes. For instance, the insured's own negligence,[20] the negligence of employees or crew,[21] allision with an underwater object,[22] collision with a floating object,[23] barratry,[24] sabotage,[25] theft,[26] and even white whales[27] are examples of fortuitous loss. Upon showing any one of these, or anything like these, the insured under an "all risks" policy of marine insurance has discharged the duty of showing that the loss was caused by a fortuitous event and the bur-

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[18]Id.

[19]Id.

[20]Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979).

[21]Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y. 1969).

[22]United States Nat'l Bank v. Maryland Nat'l Ins. Co., 218 F. Supp. 247 (S.D. Tex. 1963).

[23]Inland Rivers Service Corp. v. Hartford Fire Ins. Co., 418 N.E.2d 1381 (Ohio 1981).

[24]International Ultimate v. St. Paul Fire & Marine, 87 P.3d 774 (Wash. App. 2004).

[25]Miller Marine, infra.

[26]Great Lakes Reinsurance (UK) PLC v. Vasquez, 341 Fed.Appx. 515 (11th Cir. 2009); Aqua Craft I v. Boston Old Colony Ins. Co., 1987 AMC 1943 (N.Y.S. 1987).

[27]Moby Dick, by Herman Melville, Harper & Brothers, Publishers (1851).

den shifts to the insurer to show that coverage for the loss is specifically excluded.[28]

Alternatively, where a vessel sinks in calm seas and the insured is unable to present evidence showing that a fortuitous event caused the sinking, federal admiralty law allows an insured to satisfy the fortuity requirement by showing that the vessel was seaworthy at the time of the loss. If the insured under an "all risks" policy can show that the sunken vessel was seaworthy, then the insured is entitled to the rebuttable presumption that the loss was due to a fortuitous event.[29] This is only to be reasonably expected since, particularly in those cases where a vessel sinks far out at sea, there is often little physical evidence remaining from which the insured might be able to prove that the loss was caused by a fortuitous event. Furthermore, as a matter of principle, no admiralty court would likely tolerate an insurance company requiring that the owner of a $50,000.00 pleasure boat must go down with the ship trying to determine the cause of the loss, or that he must dive to the bottom of the ocean to examine the wreck of his vessel, like Jean-Louis Michel and Robert Ballard looking for the remains of the Titanic.

For instance, the case of *Markel American Ins. Co. v. Pajam Fishing Corp.*[30] arose out of a policy of "all risks" marine insurance covering a fishing vessel. While the vessel was fishing off the coast of Massachusetts, the captain and the sole crewmember noticed that water was filling the lazaret. The vessel quickly sank off the shore of Gloucester in water too deep for the vessel to be raised or examined. Neither the captain nor the crewmember was able to ascertain the source of the ingress of water. Neither one testified that anything happened during the voyage that might have caused the ingress of water. The insured presented an expert affidavit which surmised that the weather may have caused the rudder to wrack from side to side and that this might have allowed water in, but this was pure speculation. However, the insured did present evidence that the vessel "was well-maintained, seaworthy, and had never been involved in an accident or other incident which would have presaged its sinking."[31] Under federal admiralty law, "[w]hen a vessel sinks in calm water, a presumption arises that the vessel was unseaworthy in some particular. This is a rebuttable presumption and the insured can prove that the vessel was seaworthy before the sinking. Once this particular presumption is rebutted, there arises a counter presumption that the

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[28]International Ship Repair and Marine Serv., Inc. v. St. Paul Fire and Mar. Ins. Co., 944 F. Supp. 886, 892, 1997 AMC 1419 (M.D. Fla. 1996).

[29]Markel American Ins. Co. v. Pajam Fishing Corp, 691 F. Supp. 2d 260, 2010 AMC 1919 (D. Mass. 2010); J&A Fleeting, Inc. v. Fireman's Fund McGee Mar. Underwriters, 2006 AMC 535 (E.D. Ky. 2006).

[30]Id.

[31]Id., at 263.

loss was caused by a 'fortuitous peril of the sea.'"[32] Therefore, the District of Massachusetts held:

> In the instant case, through the testimony of the vessel's owner and crew, [the insured] has established that the vessel was well maintained, and that there was no intentional misconduct which caused the vessel to sink. This is sufficient to prove a fortuitous loss of the covered property and the insured need not prove the cause of the loss.[33]

Since the insured in *Pajam* was able to present evidence that the vessel was well maintained, the presumption of unseaworthiness was rebutted and the insured was entitled to the counter presumption that the unexplained sinking was caused by a fortuitous event. With that counter presumption in place, the burden shifted to the insurer to show that coverage for the loss was specifically excluded.

Of course, when presented with a sunken vessel, it is vital for the diligent claims examiner to note that there is an essential practical difference between a vessel which sinks far out at sea and a vessel which sinks at its dock. When a vessel sinks at its dock, the insurer will likely be able to conduct a thorough post-loss investigation, examine the wreck, and make its own determination as to the condition of the vessel prior to the loss. This practical difference, between a vessel which sinks far out at sea (such as happened in *Pajam*) and a vessel which sinks at its dock, is well illustrated by the case of *J&A Fleeting v. Fireman's Fund*,[34] which demonstrates what happens when the insurer is able to make its own independent determination that the vessel was unseaworthy. The *J&A Fleeting* case concerned a vessel, the Ashley W, which sank at its dock. On summary judgment, it was undisputed that "a pump failure in the boat's shaft alley (a part of the boat's engine room) caused the 'Ashley W' to sink." Judge Wilhoit's opinion repeated the rule that a vessel which sinks at its dock in calm weather is presumed to be unseaworthy, and that the insured must overcome this rebuttable presumption.[35] Based on the facts of the case, Judge Wilhoit held that the insured had failed to present the evidence necessary to give rise to the counter-presumption that the loss was fortuitous. In particular, the court's opinion notes that the insurer presented undisputed evidence that the vessel was in disrepair, that the vessel had been leaking for some time, and that the vessel

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[32]Insurance Co. of North America v. Lanasa Shrimp Co., 726 F.2d 688, 1984 AMC 2915 (11th Cir. 1984); Reisman v. New Hampshire Fire Ins. Co., 312 F.2d 17, 20 (5th Cir. 1963); Boston Ins. Co. v. Dehydrating Process Co., 204 F.2d 441, 443 (1st Cir. 1953).

[33]Pajam, at 265-266 (internal quotations and citations omitted).

[34]J&A Fleeting v. Fireman's Fund, infra; see also, Underwriters at Lloyds v. Labarca, 260 F.3d 3; 2001 AMC 2409 (1st Cir. 2001).

[35]Id., at 10.

had only been kept afloat by the constant use of the bilge pumps.[36] Therefore, since the evidence showed that the vessel was unseaworthy, the loss was not covered by the "all risks" policy of marine insurance.[37]

Although showing seaworthiness creates a presumption that a vessel which sank in calm seas sank due to some fortuitous event, this is still only a presumption. Even if the vessel is seaworthy, that presumption of fortuity can be defeated if the insurer can present facts which show that the sinking of the vessel was due to a non-fortuitous cause. As noted above, the insurer is much more likely to be able to counter the presumption of fortuity in those cases where the vessel sinks at its dock. For instance, the case of *Great Lakes Reinsurance (UK) PLC v. Soveral*[38] arose out of an "all risks" policy of marine insurance covering a thirty-three foot pleasure yacht. The vessel was docked behind the insured's home in the Bahamas during the rainy season and was left unconnected to shoreside electricity. On summary judgment, it was undisputed that the insured exercised due diligence to maintain the seaworthiness of the vessel and it was undisputed that water did not enter the vessel through any leak or other infirmity in the hull. However, the insurer's investigation showed that when the rain inevitably fell, the vessel filled with water and the vessel's battery operated bilge pumps removed the water. Day after day and week after week, in the fullness of time, the batteries were inevitably depleted and the bilge pumps ceased to operate. Without power for the bilge pumps, the vessel filled with rain water until it eventually sank at its dock.

The insurer filed an action for declaratory judgment and Judge Ryskamp of the Southern District of Florida ruled that the loss was not covered. First, the court held that the perfectly foreseeable and inevitable depletion of batteries over time constituted perfectly normal wear and tear and was not fortuitous. Second, the court held that the accumulation of rain water in the vessel during the Bahamian rainy season was also not fortuitous. The court wrote:

> Thus, the question here is whether the bilge pumps' failure, due to dead batteries, constitutes an accidental loss. This Court holds that it is not an accidental loss. The evidence shows that the boat was left completely uncovered in the Bahamas, a tropical locale, during the rainy season. The reason the boat sank was because water entered the boat and the bilge pumps eventually

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[36]Id., at 3.

[37]It should also be mentioned that the insured's failure to properly maintain the vessel was a breach of the implied warranty of seaworthiness imposed by federal admiralty law. Where the insured, either from bad faith or mere neglect, knowingly permits the vessel to break ground in an unseaworthy condition, the policy of marine insurance affords no coverage for any loss or damage occasioned by such unseaworthiness. Parks, at 266.

[38]2007 AMC 672 (S.D. Fla. 2007).

> drained the battery. Once the battery died, the bilge pumps stopped removing the water and the boat sank. Batteries do not last forever. Although Defendant testified that he checked the batteries, the only test that he performed was starting the engines, seemingly for a short time. It is well known that while a battery may start an engine in the morning, it may not start that same engine later that day. Thus, while the batteries may have had enough power to start the engine, they obviously did not have enough power to operate the bilge pumps for at least two days. The deterioration of a battery constitutes normal wear and tear and is not fortuitous.[39]

Therefore, since neither the accumulation of rainwater nor the depletion of batteries was fortuitous, there could be no coverage for the loss, even under a policy which insured against "all risks."

Similarly, the case of *Sipowicz v. Wimble*[40] began, like so many other marine insurance cases involving pleasure vessels, with yet another vessel which sank at the dock. The Green Lio was a fifty-foot wooden auxiliary cutter which, at the time of the loss, was over twenty years old. Although built in 1943, the vessel was purchased by the insured in 1966 and had its hull refurbished in 1970.[41] In 1970, immediately after the vessel was placed in the water, a leak developed along the bottom seam of the hull. The vessel was hauled out of the water so that the hull could be cleaned and re-caulked. Nonetheless, when the vessel was returned to the water, it continued to leak, even after the insured attempted to plug the holes in the vessel's seams with cotton. Eventually, the vessel was found sunk at its dock. The insured offered the theory that the cause of the sinking was unknown and that the vessel's demise was the product of an unforeseen and unforeseeable accident to an otherwise seaworthy vessel. However, the insurer conducted an investigation into the loss and presented expert evidence that water entered the vessel due to the deterioration of metal fastenings which held the keel together.[42] Based on this evidence, the court concluded:

> [T]hat the sinking of the GREEN LION was not the result of a fortuitous entry of water into the hull; it was an event which had to happen because of the deteriorated condition of the metal fastenings which secured the vessel's keel and keelson to its hull.[43]

Therefore, the court held that there was no coverage for the loss, not because it was excluded, which it was not, but because it was not fortuitous. It is especially vital to note this holding because it points to what the author

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[39]Id., at 676.
[40]370 F. Supp. 442 (S.D.N.Y. 1974).
[41]Id., at 444.
[42]Id., at 445.
[43]Id., at 448.

maintains was one of the fundamental errors of the Eleventh Circuit in the *Lamadrid* decision which will be analyzed below. It made no difference at all that the loss was not specifically excluded, nor that the vessel had recently been overhauled. The loss was not fortuitous, therefore, it was not covered.

The author submits that these cases demonstrate that when an insured submits a claim for a sunken vessel, an insurer must be careful to note the circumstances of the loss so as to know exactly what burden the law places on the insured and the insurer. In cases where a vessel sinks, a claims examiner must know that it is never enough for the insured to merely show that the loss occurred. No insured can simply present a sunken vessel and, with nothing more, demand coverage. Rather, federal admiralty law requires that the insured present some minimal quantum of evidence which might allow a court or jury to determine that the sinking was caused by a fortuitous event rather than a non-fortuitous event. This must be so because a sinking, without more, is as likely to be caused by a fortuitous event as by a non-fortuitous event. But, although there is no doubt that the insured must demonstrate a fortuity, a claims examiner reviewing such a claim must be aware that there are two ways that an insured can prove that a sinking was fortuitous. Where the vessel sinks, federal admiralty law allows the insured to carry the fortuity burden by showing either, (1) that some chance event caused the sinking, or (2) that the vessel was seaworthy at the time of the loss.

Furthermore, this highlights how vital it is that an insurer conducts a thorough post-loss investigation *before* making the decision to deny coverage and litigate. Where a vessel sinks in calm weather without any apparent cause, it is absolutely vital that the claims examiner know before denying the claim whether the insured can prove that the vessel was seaworthy before the loss. If the insured can prove that the vessel was seaworthy before the loss, then the insurer should not deny coverage for the loss unless there is some other evidence showing that the loss is not fortuitous or is specifically excluded from coverage. Without such evidence, the insured is likely to prevail because, if nothing else is known about the loss, demonstrating that a sunken vessel was seaworthy suffices to carry the burden of proving that the loss was fortuitous.

IV
MECHANICAL BREAKDOWN DUE TO A KNOWN CAUSE

Turning to mechanical breakdown, cases in which a mechanical component breaks entirely without cause or explanation are rare. More often than not, post-loss investigation reveals that the mechanical component failed due to a non-fortuitous cause which is also specifically excluded. However, even

if not specifically excluded, there is no coverage for the breakdown of a mechanical component if the cause of the breakdown is not fortuitous. The lion's share of such cases concern vessels which sink at the dock.[44] This is a fertile source of caselaw because, unlike a sinking far out at sea, a vessel which sinks at its dock can be raised and examined.[45]

For instance, the case of *Axis Reinsurance Co. v. Resmondo* involved a vessel covered by an "all risks" policy of marine insurance which sank at its dock.[46] At the time of the loss, the vessel was only a year old and had only been in operation for two hours. Almost immediately after purchasing the vessel, the insured heard a loud "popping" noise from the vessel's main engines, and engine alarms on the control panel sounded. The insured managed to get the vessel to an unmanned marina where he left the vessel tied up, but unconnected to shoreside electricity. Two days later, the vessel was discovered sunken at the dock. By anyone's standard, this was an unexpected and premature loss. Following the loss, the insurer had the vessel examined and the insurer's investigator concluded that the sinking was caused by the failure of the port main engine assembly's gimbal ring resulting from wear and tear, gradual deterioration, corrosion, and/or manufacturing defect. In opposition to the opinion of the insurer's expert, the insured presented the pure speculation of his own expert that the vessel may have suffered a grounding and that this grounding was the ultimate cause of the fracturing of the gimbal ring.

Since the opinion of the insured's expert was pure speculation, the district court held that the opinion of the insured's expert created no dispute of fact and the district court granted summary judgment to the insurer. The district court gave judgment to the insurer on two bases and provided an excellent demonstration of the interplay between the "all risks" coverage afforded by the policy, and the policy's enumerated exclusions. First, the district court held that losses due to wear and tear and gradual deterioration are not fortuitous and are therefore not covered, even by an "all risks" policy of marine insurance.[47] Second, the district court held that the policy afforded no coverage for the loss because the loss fell within the policy's specific exclusions for wear and tear and corrosion.[48]

It is vital to note that the district court gave judgment to the insurer on two separate bases because this demonstrates that an insurer does not need to exclude losses which are not fortuitous. The court in *Resmondo* correctly

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[44]See, e.g., Axis Reinsurance v. Resmondo, 2009 AMC 2597 (M.D. Fla. 2009).

[45]Northwestern, supra.

[46]Resmondo, supra.

[47]Id., at 2616.

[48]Id., at 2620.

held that it makes no difference whatsoever that a certain type of loss may not be specifically excluded. Before considering the applicability of the wear and tear exclusion, the court wrote:

> The Court agrees that the undisputed evidence in the [insurer's] expert report establishes that the efficient cause of the loss was the gradual corrosion of the gimbal ring, and thus the sinking of the vessel was a non-fortuitous loss that is not covered under the marine insurance policy.[49]

Even before considering a policy's exclusions, there can be no coverage for a non-fortuitous loss. A policy of marine insurance which contained no exclusions whatsoever would still afford no coverage for losses which are not fortuitous. As discussed further below, this familiar concept seems to have been misunderstood by the Eleventh Circuit in the *Lamadrid* decision. The Eleventh Circuit gave very little consideration to whether the unexplained, premature failure of the relief valve was fortuitous, and held that it was covered by the policy because it was not specifically excluded.

The interplay between fortuitous losses and excluded losses can also be seen in the recent case of *Class Action of S. Fla. v. Nat'l Union Fire Ins. Co*.[50] Like so many other cases in South Florida, the *Class Action* case also involved a vessel which sank at the dock. On summary judgment, it was undisputed that water entered the vessel through a broken air conditioning pump, that the air conditioning pump failed due to erosion and corrosion, that there had been an interruption of shoreside electricity to the vessel, that the operation of the bilge pumps led to the inevitable depletion of the batteries, and that the vessel sank when the bilge pumps ceased to remove the water which entered the vessel through the broken air conditioning pump. In particular, the insured presented no evidence showing what caused the air conditioning pump to break. First, the Southern District of Florida held that coverage for the erosion and corrosion of the air conditioning pump was barred by the exclusions for wear and tear and corrosion. Second, the court held that the insured had failed to show that a fortuitous event caused the air conditioning pump to fail. Citing to the District Court's decision in the *Lamadrid* case which will be analyzed more thoroughly below, the District Court in the *Ruiz* case wrote:

> Plaintiffs have not provided any case law supporting their theory that a mechanical failure of unknown cause could, on its own, satisfy Plaintiffs' burden of proving fortuity. In other words, Plaintiffs have not provided any case law for the proposition that an insured can satisfy its burden of proving fortuity by showing nothing to establish a fortuitous cause of some type of loss.

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[49]Id., at 2601.

[50]2013 U.S. Dist. LEXIS 130696 (S.D. Fla. 2013).

> And although an insured's burden of proving fortuity is a minor one, it is nevertheless a burden that the Court cannot simply cast aside.[51]

This establishes that, even if not specifically excluded, a loss due to erosion and corrosion is not accidental or fortuitous. Therefore, on both of these bases, the policy of marine insurance provided no coverage for the loss.[52]

These cases demonstrate that even the broad coverage afforded by an "all risks" policy of marine insurance does not encompass every type of nautical catastrophe. What is more, since the insured is the party which bears the burden of proving that the loss falls within the coverage of the policy, these cases demonstrate that the insured must do more than merely present a broken or sunken vessel. Claiming coverage under an "all risks" policy of marine insurance requires that the insured show something which gives some indication that the loss was caused by a fortuitous event. Of course, the caselaw cited above shows that there is an almost unlimited array of fortuitous losses which can befall a vessel, such as the insured's own negligence, the negligence of employees or crew, allision with an underwater object, collision with a floating object, barratry, sabotage, and theft.[53] Nor should this be considered an exhaustive list. But, absent evidence that something occurred which caused the loss or damage to the vessel, the loss or damage is not covered, even if not specifically excluded.

V
UNEXPLAINED MECHANICAL BREAKDOWN

As shown from the caselaw discussed above, it rarely happens that a mechanical breakdown is totally unexplained. More often than not, post-loss investigation reveals that the loss was caused by some event which is known to be both non-fortuitous and specifically excluded, such as corrosion. That is exactly what happened in the *Resmondo* case. However, it is the opinion of the author that, in those rare cases where a mechanical breakdown is entirely unexplained, the caselaw prior to *Lamadrid* was clear that merely

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[51]Id., at 17-18 (internal citations omitted).

[52]Just for the sake of clarity, it should be pointed out that the court in Class Action applied the burden shifting analysis in the wrong order. The court first put the burden on the insurer to show the applicability of an exclusion, and then put the burden on the insured to show fortuity. This is backwards. First the insured must show fortuity. Northwestern Mut. Life Ins. Co. v. Linard, 498 F.2d 556, 561 (2d Cir.1974); S. Felicione & Sons Fish Co. v. Citizens Cas. Co., 430 F.2d 136, 138; Reliance Ins. Co. v. McGrath, 671 F. Supp. 669, 675, 1987 AMC 1916 (N.D. Cal. 1987). Then, only after the insured has carried that burden, does the burden shift to the insurer to prove the applicability of an exclusion. The mistake was harmless because the loss in Class Action was both non-fortuitous and specifically excluded.

[53]See cases cited supra.

showing an unexplained, premature mechanical breakdown was not adequate to show a fortuitous loss, even if the breakdown occurred before the end of the component's expected lifespan.

One of the earliest and most important cases to consider the fortuity issue was an English case, *Thames & Mersey Marine Ins. Co., Ltd. v. Hamilton, Fraser & Co*.[54] The *Thames & Mersey* case concerned a valve aboard a vessel named the "Inchmaree" which was covered by a "named perils"[55] policy.[56] As the "Inchmaree" was preparing for its voyage, it became necessary to pump up the main boilers. For that purpose, there was a pipe that led from a donkey pump to the boilers. At the junction of the pipe and the boilers, there was a valve which could be opened or closed. For some reason, the valve failed to open, with the result that water could not pass through the valve and the boiler burst. It was unknown whether the valve had been negligently left closed or if it had accidentally salted up. In either case, it was admitted that the valve did not fail due to ordinary wear and tear. On these facts, the court concluded that the loss was not covered because it was never the intention of the parties to cover perils solely arising from the machinery which gave motor power to the vessel and that the unexplained failure of the valve was not fortuitous. As a result of this case, the international marine insurance industry developed policy verbiage which came to be known as the "Inchmaree Clause." The purpose of the clause is "to extend the coverage to include losses caused by latent defects, meaning weaknesses in the vessel, which were not discovered even though the vessel was properly surveyed to determine its seaworthiness and was properly maintained in repair by the owner."[57]

A few years later, in the case of *Cleveland & B. Transit Co. v. Ins. Co. of N.A.*, the Southern District of New York had occasion to consider the coverage afforded by a "named perils" marine insurance policy which included an "Inchmaree Clause." The *Cleveland* case involved a brand new vessel.[58] A mere two weeks after it was launched, the vessel suffered a loss when it was discovered that there was a crack on the underside of the engine's bedplate. After some investigation, it was determined that the cracked bedplate was caused by a latent defect in the bedplate. The bedplate suffered a "cold shut," which occurs when two molten metals, which are at different temperatures,

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[54]12 App. Cas. 48 (1887); Cleveland & B. Transit Co. v. Ins. Co. of N.A., 115 F. 431 (S.D.N.Y. 1902); Rennselaer, 1925 AMC 1116 (N.Y. 1925).

[55]As noted above, cases involving "named perils" policies are relevant to the present discussion because those policies include the same fortuity requirement as "all risks" policies. If a loss is not fortuitous under a "named perils" policy, then it is also not fortuitous under an "all risks" policy.

[56]Cleveland, at 434.

[57]9A COUCH ON INSURANCE §137:44.

[58]Id., at 433.

meet and do not completely fuse as they should. This faulty fusing constituted a latent defect which was covered by the policy's "Inchmaree Clause."[59]

The relevance of this case lies here: the court did not find that the mechanical failures were fortuitous, even though they were indisputably premature, having occurred only two weeks after the vessel was launched. On the contrary, the court found that there was coverage for the mechanical failure under a separate provision of the policy which specifically extended coverage to a type of peril not ordinarily covered: unexplained, premature mechanical failures not occasioned by the insured's own lack of due diligence. Furthermore, as will be discussed further below with reference to the *Lamadrid* case, it made no difference in the *Cleveland* case that the vessel was brand new. Absent evidence that some chance event caused the bedplate to break, the insured had failed to show that the breakage was fortuitous.

One of the earliest American cases to consider the coverage afforded for unexplained, premature mechanical breakdowns under an "all risks" policy of marine insurance was the case of *Mellon v. Federal Ins. Co*.[60] The *Mellon* case concerned a claim for a burst port boiler and a leaking starboard boiler. In 1918, all three of the vessel's boilers were subjected to a mandatory hydrostatic test by federal authorities.[61] It is significant to note that, at the time of the test, all three boilers were eight years old and only half way through their expected useful lifespan of sixteen years.[62] During the test, which subjected all three boilers to a mere quarter of their rated maximum pressure, the port boiler burst. Seven months later, it was discovered that the starboard boiler had developed a leak, still seven-and-a-half years before the end of the starboard engine's expected useful lifespan. The insurer denied coverage for both claims. At trial, even though no evidence was presented conclusively proving that the hydrostatic test caused the bursting of the port boiler, the court nonetheless held that the bursting of the port boiler during such a test was "fortuitous and unusual."[63] The court wrote:

> I think a ground of recovery has been established in the case of the port boiler. The perils clause is an "all risk" clause, and the libelant has discharged his burden when he has proved that the loss was due to a casualty and was caused by some event, as here by the hydrostatic test, covered by the general expressions of the policy.[64]

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[59]Id., at 434.
[60]14 F.2d 997 (S.D.N.Y. 1926).
[61]Id., at 998.
[62]Id., at 1000.
[63]Id., at 1002.
[64]Id.

In contrast, since the court did not credit the evidence presented that the bursting of the port boiler caused the cracks in the starboard boiler, the court found that the insured had failed to carry the burden of proof of showing that the cracks in the starboard boiler were caused by a fortuitous event. Therefore, the cracks in the starboard boiler were premature and totally unexplained. In the absence of any evidence explaining the cracks in the starboard boiler, the court wrote:

> I am equally at a loss to say why the starboard boiler was apparently sound in August 1918, and displayed serious fractures in May of the following year. It might have been due to some latent defects, or it might have been due to wear and tear because of severe use, or to inevitable depreciation. One can only speculate about the real cause.[65]

Therefore, the court held:

> For some reason, whether from latent defects, wear and tear, or inevitable depreciation I cannot determine, the starboard boiler developed fractures. I cannot say that they were fortuitous, or, if they be regarded as due to latent defects, it has not been proved when such latent defects originated.[66]

Despite the fact that the starboard boiler was only eight-and-a-half years into its expected useful lifespan of sixteen years, the totally unexplained cracks in the starboard boiler were held to be non-fortuitous.

The missing element of fortuity can also be seen by examining the case of *Gibbar v. Calvert Fire Ins. Co.*,[67] a more recent case in which the Eighth Circuit Court of Appeals specifically found that there was no coverage for an unexplained, premature mechanical breakdown under the "all risks" language of the marine insurance policy, but that coverage was afforded by the separate "Inchmaree Clause." The *Gibbar* case dealt with an "all risks" policy of marine insurance covering a cargo vessel which suffered damage in a fire. But, in addition to the "all risks" coverage, the policy also contained an "Inchmaree Clause" which extended coverage for certain types of mechanical failures and latent defects so long as they were not caused by the insured's own lack of due diligence. Immediately before the fire, the vessel underwent extensive repairs and many of the vessel's engine components were replaced.[68] The vessel was tested and operated without mishap. However, a mere five days after the completion of the engine overhaul, the starboard engine suffered a catastrophic breakdown. The engine slowed

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[65]Id., at 1001.

[66]Id., at 1002.

[67]623 F.2d 41 (8th Cir. 1980).

[68]Id., at 43.

down and then sped up, eventually reaching runaway speed. Finally, the engine was wrecked when the counterweight, rods, and crankshaft were thrown outside the engine unit.[69]

Following the loss, an inspection of the engine revealed that the damage was caused by two fuel injectors which became stuck. The insured's primary witness testified that although he did not know what caused the fuel injectors to become stuck, he was able to list four possible causes: (1) varnish build up, (2) a foreign object in the fuel, (3) a foreign object in the injector, or (4) a burr in the gears or "mic rods" of the injector.[70] Furthermore, the insured presented evidence that the vessel had undergone extensive repairs just before the loss and that the vessel's engines had only been in use for 8,000 hours, less than half the number of hours before the engines would require an overhaul.[71] Based on this evidence, the Eighth Circuit held that the unexplained and premature sticking of the fuel injectors was not fortuitous. Even though the insured's expert was able to list possible causes, and even though the insured was able to show that the engine breakdown was premature, this did not suffice to show fortuity. Rather, the Eighth Circuit held that the unexplained and premature sticking of the fuel injectors was due to a latent defect. This holding was based on the insured having shown these facts: (1) that the machinery operated properly prior to the mishap, (2) that the engine had not yet reached the end of its expected useful life, (3) that the mechanical damage was likely not caused by a foreign particle, and (4) that metal breakage, among other causes, may have caused the mechanical failure.[72] Since the mechanical failure was not fortuitous, but was due to a latent defect, the loss was covered by the policy's "Inchmaree Clause."

In 2014, the United States District Court for the Eastern District of New York considered a case almost identical to the *Lamadrid* case and reached the same conclusion as the district court did in *Lamadrid*, that unexplained, premature mechanical failure is not fortuitous. The case of *Great Lakes Reinsurance (UK) PLC v. Fortelni*[73] concerned a 1997 58 ft Sunseeker motor yacht insured for $425,000.00 under an "all risks" policy of marine insurance essentially identical to the policy in the *Lamadrid* case. Just like the vessel in the *Lamadrid* case which began billowing smoke without explanation, the vessel in the *Fortelni* case suffered a loss when, without any explanation, it was noticed that the vessel began taking on water in its engine compartment. The vessel was towed back to port and a boatyard later deter-

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[69]Id.

[70]Id.

[71]Id., at 44.

[72]Id., at 45.

[73]33 F. Supp. 3d 204.

mined that water entered the vessel through a hose that became disconnected from a water pump due to the failure of the hose clamp. No one was ever able to determine the cause of the hose clamp failure and there was no dispute that the vessel had been perfectly maintained throughout its life.[74] Eyewitnesses testified that the clamp had snapped clean through and that it was not corroded, eliminating one form of non-fortuitous loss. However, it was impossible for the insurer's investigator to examine the clamp later because it was lost before the vessel was taken to the boatyard. This last issue is key because, in the absence of the clamp, the insurer had no evidence with which to carry the burden of proving that the clamp failed due to an excluded cause, such as wear and tear, corrosion, gradual deterioration, or lack of maintenance. Therefore, absent any evidence showing that coverage of the loss was specifically excluded, the only issue on summary judgment was whether the insured had carried its fortuity burden by showing nothing more than a broken hose clamp. Furthermore, just like the *Lamadrid* case, the insurer did not dispute the vessel's seaworthiness or record of maintenance. Therefore, the evidence presented by the insured ruled out both corrosion and unseaworthiness due to lack of maintenance.[75] Most importantly, it was undisputed that no party could present any evidence showing what caused the hose clamp to fail.[76]

First, Judge Spatt cited the relevant precedents (which were also relied upon by the District Court in *Lamadrid*) holding that the fortuity doctrine is an entrenched principle of federal admiralty law which requires the insured to show that the loss was attributable to some fortuitous event.[77] Second, Judge Spatt made a particular point of noting the testimony of the underwriter, "that insureds do not look to their insurers to fix mechanical problems 'just like your auto policy; if your car breaks down, you don't phone your insurance company.'"[78] Judge Spatt's decision then stated:

> [T]he Defendant has not provided any persuasive case law supporting its theory that a mechanical failure of unknown cause could, on its own, satisfy the Defendant's burden of proving a fortuitous event. 'In other words, [the Defendant has] not provided any case law for the proposition that an insured can satisfy its burden of proving fortuity by showing *nothing* to establish a fortuitous cause of some type of loss.'[79]

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[74]Id., at 206.
[75]Id., at 207.
[76]Id., at 206.
[77]Id., citing Federal Ins. Co. v. PGG Realty, 538 F. Supp. 2d 680 (S.D.N.Y. 2008); Soveral, supra.
[78]Id., at 207.
[79]Id., at 209.

Judge Spatt further explained that "[t]o hold otherwise would transform the "all-risk" policy into a maintenance contract."[80] Therefore, since the insured could offer no explanation as to the cause of the hose clamp's failure, the insured had failed to carry its burden of showing a fortuitous loss rather than a non-fortuitous loss.

This same principle, that making a claim for coverage requires showing that some fortuitous event caused the mechanical failure, can also be seen by analyzing "named perils" policies and how those policies apply to vessels which sink. "Named perils" policies differ from "all risks" policies in that "named perils" policies only cover specifically identified fortuities, not all fortuities. For instance, an "all risks" policy will typically state that it covers "all risks of accidental physical loss or damage" or will include some other very broad language.[81] In contrast, a "named perils policy" will usually describe a much narrower scope of coverage:

> Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Waters named herein, Fire, Lightning, Earthquake, Assailing Thieves, Jettisons, Barratry of the Master and Mariners and all other like Perils that shall come to the Hurt, Detriment or Damage of the Vessel.[82]

However, since "named perils" policies include the same fortuity requirement and involve no presumptions, any case which involves a "named perils" policy and holds that a certain type of loss is not fortuitous, would also be applicable to cases dealing with "all risks" policies. If a loss is not fortuitous under a "named perils" policy, then it is not fortuitous under an "all risks" policy.

Miller Marine Servs. v. Travelers Prop. Cas. Ins. Co.[83] concerned a "named perils" policy covering a vessel in New Haven, CT which sank overnight at its dock. After an investigation by the United States Coast Guard, it was undisputed that water entered the vessel through open sea chest valves, but there was no evidence establishing what caused the sea chest valves to be open.[84] There was speculation that the valves may have been left open deliberately by disgruntled former employees, or that the valves may have been left open due to the negligent maintenance by a crewmember, both of which would have been fortuitous causes of loss. However, there was no evidence to actually support any of this speculation.

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[80]Id.

[81]Id., at 205-206.

[82]Miller Marine Servs. v. Travelers Prop. Cas. Ins. Co., 2005 AMC 2601, 2604 (E.D.N.Y. 2005).

[83]Id.

[84]Id., at 2603.

A situation existed in which it was known that water entered the vessel through open sea chest valves, but no cause for the open sea chest valves could be identified. Therefore, in response to interrogatories, the insured characterized the sinking as "an unexplained and, most probably, unexplainable fortuitous occurrence."[85]

Despite the insured's characterization of the sinking as fortuitous merely because it could not be explained, Judge Glasser of the Eastern District of New York disagreed. Judge Glasser held that since the only evidence as to the cause of the open sea chest valves was pure speculation, there was no evidence from which the court could conclude that a fortuitous, rather than non-fortuitous, event caused the sea chest valves to be open.[86] Judge Glasser wrote:

> The insured "is unable to establish that its loss was proximately caused by the peril insured against. While the plaintiff asserts in the Interrogatories that 'the direct cause of the sinking was the ship taking on water,' this is not the 'real efficient cause' of the loss but rather was the cause nearest in time to the loss. It is obvious that a vessel which sinks does so because she takes on water. However, the Hull policy entered into between the parties affords plaintiff a recovery for the sinking only if it can establish a causal connection between the peril it was insured against and the loss. The Interrogatories demonstrate that plaintiff is unable to satisfy this burden.[87]

Since there was no evidence which pointed to either a fortuitous or a non-fortuitous cause, the evidence was in perfect equipoise.[88] Where the evidence is in equipoise, the insured has failed to carry its burden of showing that the vessel suffered a fortuitous loss.[89] Therefore, Judge Glasser held that the insurer was entitled to summary judgment because the pure speculation offered by the insured was not enough to show that a fortuitous event was the cause of the sea chest valves being left open.

The author submits that the foregoing caselaw supports the proposition that even the very broad coverage afforded by an "all risks" policy was never meant to cover, and has never previously been held to cover, the unexplained, premature breakdown of a vessel's mechanical components. As explained by the underwriter in the *Fortelni* case, this is because "insureds do not look to their insurers to fix mechanical problems 'just like your auto policy; if your car breaks down, you don't phone your insurance company.'"[90] The caselaw

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[85]Id., at 2604.

[86]Id., at 2610-2611.

[87]Id.

[88]It is a mathematical proof that 0=0.

[89]Parks, at 1180.

[90]Fortelni, at 207.

holds that the purpose of marine insurance is to protect vessels from those external eventualities which may act against the vessel and cause a loss, not to reimburse the insured for the costs associated with ameliorating the vessel's own innate physical infirmities.

VI
LAMADRID v. NATIONAL UNION FIRE INSURANCE COMPANY

It is the author's contention that the case of *Lamadrid v. Nat'l Union Fire Ins. Co.* stands alone in holding that an unexplained, premature mechanical failure of unknown origin constitutes a fortuitous loss.[91] Not only is this a departure from the established case law, and in conflict with the Eighth Circuit's decision in the *Gibbar* case, but it is also a departure from the common practice of the marine insurance industry. As detailed above, the modern "Inchmaree Clause" is specifically designed to provide coverage for a host of unexplained, premature mechanical failures so long as those failures are not caused by the insured's own lack of due diligence. The "Inchmaree Clause" was developed specifically in response to the decision of the courts in the United Kingdom, subsequently followed by the American courts, that the unexplained, premature failure of a valve is not a fortuitous loss. Therefore, the *Lamadrid* decision threatens to render the "Inchmaree Clause" utterly superfluous, since under its holding, coverage for unexplained, premature mechanical failure can now be found under the "all risks" language of the standard marine insurance policy. Under such broadened coverage, marine underwriters subscribing to risks in the Eleventh Circuit will now be made to pay for the costs of servicing and maintaining a vessel's mechanical components before those mechanical components reach the end of their projected lifespan.

The *Lamadrid* case involved an 85-foot motor yacht insured by National Union Fire Insurance Company.[92] The "all risks" policy of marine insurance provided $1,050,000.00 in first-party property damage coverage "for accidental, direct physical loss" to the vessel and included specific exclusions for loss or damage caused by wear and tear, gradual deterioration, and corrosion.[93] While returning from a pleasure trip in the Bahamas, smoke began billowing from the vessel's engines.[94] Rather than immediately reporting the loss, the vessel owner took the vessel to his own commercial boat yard

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[91]Contrast, Gibbar, Resmondo, Mellon, Cleveland, Thames & Mersey, supra.

[92]Lamadrid, 567 Fed Appx. at 696.

[93]Miami Yacht Charters, LLC v. Nat'l Union Fire Ins. Co., Docket Entry #134, 11 cv-21163 (S.D. Fla. 2012).

[94]Id., at 8.

where he proceeded to undertake his own independent investigation into the cause of the loss. Eventually, six weeks after the loss, after the vessel owner had satisfied himself that he could not determine the cause of the engine failure, he finally reported the loss to the insurer, which denied the claim.

Although it was not relevant before the district court, there was one other piece of evidence that proved to be critical before the Eleventh Circuit. During the investigation into the loss, the vessel owner claimed that he had undertaken a complete overhaul of the vessel's engines in 2007, that the vessel's engines should have lasted between 2,500 and 3,500 hours since the overhaul, and that the engines had only 750 hours of use at the time of the relief valve failure in 2010.[95]

After receiving the insured's report of the loss, the insurer denied coverage. Following the initiation of litigation, the insured had his vessel examined again by his own expert who determined that the engine failure was caused by a relief valve which became stuck. However, the vessel owner's expert was adamant that he could identify no cause for the valve being stuck.[96]

On summary judgment, the insured asserted that an "all risks" policy of marine insurance covers all losses which are not specifically excluded.[97] However, the district court rightly rejected this unsupportable contention because, even under an "all risks" policy of marine insurance, "[a] loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exclusions."[98] The district court noted that this erroneous assertion of law seemed to have its source in a very narrow line of cases dealing with the "mysterious disappearance" of cargo.[99] In that narrow category of cases, all an insured needs to show in order to recover under an "all risks" policy of marine insurance is that the "mysterious disappearance" occurred.[100] Therefore, Magistrate Judge Goodman correctly held that the insured could not prove fortuity by merely showing a broken engine.

However, the district court then denied summary judgment to both parties on the fortuity issue based on an error of law. The district court found that there was a dispute fact between the two experts over whether the failure of the relief valve was due to wear and tear.[101] Judge Goodman held that if the

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[95]Lamadrid, at 701-702.

[96]Miami Yacht, Docket Entry #134, at 12-13.

[97]Id., at 30.

[98]10 COUCH ON INSURANCE §148:48 (3d ed. 2012).

[99]Miami Yacht, Docket Entry #134, at 31.

[100]Id., citing Transamerica Leasing, Inc. v. Institute of London Underwriters, 7 F. Supp. 2d 1340, 1347 (S.D. Fla. 1998); 10 COUCH ON INSURANCE, §137:15 (3d ed. 2012).

[101]Id., at 32.

vessel owner's expert could convince the jury that the failure of the relief valve was not due to wear and tear, then the insured could carry its burden of showing that the loss was fortuitous. Based on the caselaw, the district court made no mention whatsoever of the age of the relief valve and rightly treated the matter as totally irrelevant.

The insurer filed an immediate motion for reconsideration pointing out that the district court had made a critical error because wear and tear is only one form of non-fortuitous loss. Therefore, even assuming that the vessel owner's expert could rule out wear and tear, such testimony would still fail to establish fortuity for two reasons; first, merely ruling out one form of non-fortuitous loss does nothing to identify the fortuitous cause, which is the insured's burden; second, even assuming that an insured could show fortuity by ruling out non-fortuitous losses, such a strategy could only work if the insured was able to rule out *all* forms of non-fortuitous loss. Since there are many other forms of non-fortuitous loss (gradual deterioration, corrosion, lack of maintenance, and intentional scuttling, to name just a few), simply ruling out one did not show that the relief valve failed due to a fortuitous cause. The district court agreed and granted summary judgment to National Union.[102] In keeping with the caselaw cited above, the district court held that the insured had failed to carry its fortuity burden because merely showing a "stuck" relief valve did nothing to indicate whether the cause of the sticking was fortuitous or non-fortuitous. Just as in its first summary judgment decision, the district court made no mention whatsoever of the irrelevant fact of the relief valve's age.

The insured then filed its own motion for reconsideration. After additional briefs were filed and the district court held further oral argument, the district court affirmed the grant of summary judgment to the insurer.[103] Once again, the district court held that the vessel owner had failed to show that he suffered a fortuitous loss because he had failed to show what caused the relief valve to fail. Just as in the two prior summary judgment orders, the district court completely ignored the irrelevant fact that the relief valve failed prematurely.

On appeal, the Eleventh Circuit overturned the district court's decision.[104] First, the Eleventh Circuit held that the insured met its burden of demonstrating a fortuitous loss by showing the failure of the relief valve and "by establishing that the unexplained loss occurred well before the end of the engine's expected lifespan."[105] The Eleventh Circuit pointed to no other facts

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[102]Miami Yacht, Docket Entry #151, at 3.

[103]Miami Yacht, Docket Entry #175.

[104]Lamadrid, supra.

[105]Id., at 701-702.

which showed what caused the relief valve to fail or which indicated that the failure was fortuitous. In a departure from existing caselaw, the Eleventh Circuit held that an unexplained, premature mechanical failure, standing alone, was sufficient to demonstrate fortuity. As detailed below, the Eleventh Circuit's decision left unmentioned all the caselaw specifically dealing with unexplained, premature mechanical failure and focused instead on decisions involving every other type of loss.

For instance, The Eleventh Circuit cited cases concerning cargo seized from a warehouse by Russian authorities, a Styrofoam dome which collapsed, a plane which crashed in the ocean, stolen jewels, a homeowner's policy on a house which was swallowed by a sinkhole, a liability policy covering a police officer who committed assault, and a "mysterious disappearance" of cargo.[106] None of these cases involved factual situations even remotely similar to the unexplained, premature failure of the insured's relief valve. In fact, the *Atlantic Lines* case specifically stated that its holding was dependent upon the rule of law only applicable to cases of "mysteriously disappearing" cargo.[107] It is baffling that the Eleventh Circuit would rely on unrelated cases when there is a wealth of caselaw dealing specifically with unexplained, premature mechanical failure.

Turning to the few cases which did involve vessels, the Eleventh Circuit seemed to go out of its way to avoid considering any cases with remotely similar fact patterns or legal issues. For instance, the Eleventh Circuit cited to cases involving a vessel scuttled by an insane captain, a vessel damaged when the captain and sole crewmember died, and a vessel dropped from a boatlift.[108]

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[106]Int'l Multifoods Corporation v. Indemnity Ins. Co. of North America, 309 F.3d 76, 84, 2002 AMC 2939 (2d Cir. 2002); National Union Fire Ins. Co. v. Carib Aviation, Inc., 759 F.2d 873 (11th Cir. 1985); Dow Chemical Co. v. Royal Indem. Co., 635 F.2d 379 (5th Cir. 1981); Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11 (2d Cir.1976); Jewelers Mut. Ins. Co. v. Balogh, 272 F.2d 889 (5th Cir. 1959); Doe v. North River Ins. Co., 719 F. Supp. 2d 1352 (M.D. Fla. 2010); Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So. 2d 565 (Fla. App. 1984); Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. App. 1970).

[107]Id. Although never stated explicitly, there is likely a practical, common sense reason for why the standard for showing fortuity is so low in cases where cargo "mysteriously disappears." Anyone who has seen GOODFELLAS or *The Sopranos* knows that inert cargo does not simply disappear. It does not grow legs and walk off. Any time that cargo is placed in a warehouse on Friday night, and is gone on Monday morning, it does not take Sherlock Holmes to guess that the cargo has likely been converted by "wise guys." In Re: Balfour MacLaine International, Ltd., 85 F.3d 68, 1996 AMC 2266 (2d Cir. 1996). See also, GOODFELLAS (Martin Scorsese, 1990) (This is exactly what happened in the Air France heist of 1967, http://en.wikipedia.org/wiki/Air_France_Robbery).

[108]S. Felicione & Sons Fish Co. v. Citizens Casualty Co., 430 F.2d 136, 138 (5th Cir. 1970); B&S Associates, Inc. v. Indemnity Cas. and Prop., Ltd., 641 So. 2d 436, 1994 AMC 2960 (Fla. App. 1994); Aetna Ins. Co. v. Webb, 251 So. 2d 321 (Fla. App. 1971).

The sole case cited by the Eleventh Circuit which involved mechanical breakdown was the case of *Egan v. Washington General Ins. Co*.[109] *Egan* involved a vessel which was purchased used, but was well maintained and was in good condition at the time of the loss. Only a year after the vessel was purchased, the insured discovered water flowing into the vessel through a corroded bolt in the vessel's sea strainer.[110] The insured repaired the sea strainer. However, ten months later, the vessel was found sunk at its dock. The insured made a claim for coverage, not contending that the loss was fortuitous and within the "all risks" language of the policy, but contending that a loss due to the premature failure of the sea strainer fell within the policy's separate coverage for losses due to latent defects.[111] It was on this basis alone, the separate coverage for latent defects, that the trial court allowed recovery. On appeal, the Court of Appeals of Florida reversed the trial court and held that the evidence did not support the finding that the sea strainer was latently defective.[112] However, the Court of Appeals noted that there might be a basis for recovery which was not considered by the trial court. The Court of Appeals held that the failure of the sea strainer might fall within the "all risks" coverage of the policy because there was evidence that the sea strainer failed due to negligent maintenance. Importantly, the Court of Appeals did not hold that the broken sea strainer, by itself, showed a fortuitous loss. Rather, since negligent maintenance is a fortuitous cause of loss, the breakdown of the sea strainer caused thereby would be covered by the "all risks" policy of marine insurance.[113]

Nowhere in any of the cases cited by the Eleventh Circuit is there any support for the proposition that an insured can prove a fortuitous loss by showing nothing more than the unexplained, premature breakdown of a mechanical component. In the only case which even comes close to being applicable, the *Egan* case, the court only found fortuity because the insured might have been able to show that the mechanical breakdown was caused by negligent maintenance. It is a mystery how the Eleventh Circuit concluded, based on these inapplicable cases, that the unexplained, premature failure of a relief valve could be fortuitous.

While the Eleventh Circuit's first holding is merely mysterious, its second holding is positively frightening. After a superficial review of irrelevant cases, the Eleventh Circuit finally announced: "[W]e find it persuasive that National Union did not specifically exclude mechanical failures such as this

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[109]240 So. 2d 875 (Fla. App. 1970).
[110]Id., at 876.
[111]Id., at 877.
[112]Id., at 878.
[113]Id., at 879.

from the coverage of the Policy."[114] Then, without explanation, the Eleventh Circuit quoted the familiar rule that where the language of an insurance policy is susceptible to different interpretations, any ambiguity must be interpreted in favor of the insured.[115] Without explicitly saying, the Eleventh Circuit appeared to hold that National Union's policy was ambiguous merely because it did not specifically exclude coverage for unexplained, premature mechanical breakdown.

This holding ignores what the authorities agree is one of the bedrock principles of "all risks" coverage, i.e. that a loss which is not fortuitous cannot be covered, even if not specifically excluded. "Notwithstanding the all-inclusive nature of the words 'all risks,' not all risks are covered, only those arising from *fortuitous accident or casualty* resulting in damage or loss attributable to an external cause."[116] "A loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exceptions . . ."[117] "The absence of an exclusion cannot create coverage."[118] As demonstrated in the cases analyzed above (*Gibbar*, *Fortelni*, *Miller*, *Sipowicz*, *Mellon*, *Cleveland*, and *Thames & Mersey Marine*),[119] there is no need for an insurer to specifically exclude a loss which is not fortuitous. Even if an "all risks" policy contained no exclusions whatsoever, the entire universe of non-fortuitous losses would still never be covered. However, despite this clear principle, the Eleventh Circuit held that a policy which only covered fortuitous losses nevertheless covered the unexplained, premature failure of a relief valve because such coverage was not specifically excluded. This new holding, which diverges from the holding of the Eighth Circuit in the *Gibbar* case, must mean that a whole host of losses not previously covered will now be covered in the Eleventh Circuit.

VII
CONCLUSION

Of course, the Eleventh Circuit did not call its decision a new rule of law. However, it is a near certainty that many marine insurance disputes which

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[114]Lamadrid, at 702.

[115]Id.

[116]Parks, at 63.

[117]10 COUCH ON INSURANCE §148:48.

[118]Commercial Union Ins. Co. v. Flagship Marine Servs., 190 F.3d 26, 33-34, 2000 AMC 1 (2d Cir. 1999); Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 805 (6th Cir. 1996); Continental Cas. Co. v. Pittsburgh Corning Corp., 917 F.2d 297, 300 (7th Cir. 1990).

[119]Supra.

arise in the Eleventh Circuit will be impacted by the *Lamadrid* case, because insureds can now argue that there is coverage under an "all risks" policy because their vessel broke down prematurely, before the end of the vessel's expected lifespan.

One can only speculate what would cause the Eleventh Circuit to fasten onto this irrelevant issue (the age of the relief valve), especially when there is so much contrary authority holding that non-fortuitous losses are not covered, even without a specific exclusion. In light of the Eleventh Circuit's other decisions enforcing the Florida anti-technical statute[120] and the Florida attorney's fees statute,[121] the first of which nullifies the traditional rule in admiralty that attorney's fees may only be awarded where there is bad faith,[122] and the second of which renders void warranties which would otherwise be enforceable under federal admiralty law,[123] *Lamadrid* might be symptomatic of nothing more than the general disfavor shown by the Eleventh Circuit towards existing federal admiralty law and practice.

If all the *Lamadrid* decision did was to create a novel rule of federal admiralty law, that would merely be interesting. However, the *Lamadrid* decision is more than merely interesting—it could be costly because there now appears to be a split between the Eleventh Circuit and the Eighth Circuit with respect to the fortuity doctrine. As described above, in *Gibbar*, the Eighth Circuit held that the totally unexplained and premature failure of the vessel's fuel injectors, which occurred a mere five days after the vessel's engines were overhauled, was not a fortuitous loss. Rather, the loss was covered solely because of the supplemental coverage afforded by the marine insurance policy's "Inchmaree Clause." Should any case like the *Lamadrid* case arise in the Eighth Circuit, which seems likely because the Eighth Circuit includes most of the western shore of the Mississippi River, that Father of Waters, such a case would have to be resolved exactly in the same manner as *Gibbar*. Unless the insured could show that the loss was covered by the policy's separate "Inchmaree Clause," the loss would not be covered under an "all risks" policy of marine insurance.

On the other hand, should any case similar to *Gibbar* come before the Eleventh Circuit, of the *Lamadrid* decision would require a different outcome. The holding in *Lamadrid* would seem to require that coverage for the unexplained, premature failure of the vessel's fuel injectors would be covered under the "all risks" language of the policy. Due to this clear split,

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[120]Windward Traders, Ltd. v. Fred S. James & Co., 855 F.2d 814 (11th Cir. 1988).

[121]Blasser Bros., Inc. v. Northern Pan-American Line, 628 F.2d 376 (5th Cir. 1980).

[122]New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 2011 AMC 90 (2d Cir 2010).

[123]Canton Ins. Office, Ltd. v. Independent Transp. Co., 217 F. 213 (9th Cir. 1914).

marine claims examiners dealing with claims in the Eleventh Circuit will be paying claims they would not have to pay in the Eighth Circuit. This split between the Circuits must result in an increase in uncertainty for marine underwriters, and will inevitably cause an increase in premiums paid by vessel owners.

Finally, one other important issue bears emphasis. As noted above, the modern "Inchmaree Clause" was inserted into policies of marine insurance throughout the international marine insurance market in direct response to the decision by the courts in the United Kingdom that the unexplained, premature failure of a valve was not a fortuitous loss covered by a policy of marine insurance. In response to that holding, the international marine insurance industry developed the "Inchmaree Clause" to meet the market's demand for a type of coverage not previously afforded by policies of marine insurance. Now, in light of the holding of the *Lamadrid* case, it appears that the purpose of the "Inchmaree Clause" may have been completely negated. If the unexplained, premature failure of a valve is now a fortuitous loss, then the "Inchmaree Clause" becomes entirely superfluous. A vessel owner reading the *Lamadrid* decision may likely conclude that there is little point in purchasing the additional coverage afforded by the "Inchmaree Clause" because the "all risks" verbiage of the policy has now been stretched to include such coverage.

Unfortunately, the Supreme Court's utter lack of interest in the field of marine insurance since the *Wilburn Boat*[124] decision means that there is likely no prospect of the Supreme Court correcting the Eleventh Circuit. Until such a correction takes place, the scope of coverage afforded by the "all risks" policy of marine insurance has been drastically broadened within the Eleventh Circuit. In light of this decision, the international marine insurance industry must anticipate that vessel owners within the Eleventh Circuit will now turn to their underwriters to seek reimbursement for the costs of repairing their vessels any time a mechanical breakdown occurs.

[124]Wilburn Boat Company v. Fireman's Fund Insurance Company, 348 U.S. 310 (1955).