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## ALL RISKS OF LOSS v. ALL LOSS: AN EXAMINATION OF BROAD FORM INSURANCE COVERAGES

*John P. Gorman\**

### *Introduction*

There is ample evidence in recent times to show that people who are interested in the protections offered by insurance are demanding broader forms of coverage upon fixed property, chiefly dwellings and the contents of dwellings. This is understandable enough, in view of the manifold perils to which all types of property are subjected in our times. With large urban concentrations growing larger, and with the increasing number of people and situations to which a person must expose himself just to live in a complex society, the need for extensive and comprehensive insurance coverage is evident. Preserving the usefulness of property by guarding against the unforeseen hazards to which it is exposed, and providing for adequate indemnity in the event of its destruction, is acknowledged by all to be desirable.

In response to this demand, the insurance industry has undertaken in recent years to furnish broad forms of coverage for property owners who wish to insulate themselves with the maximum amount of protection available for the premiums they are able to pay, and to do this by means of one policy. These coverages, reflected in the well-known *Home Owners C*<sup>†</sup> and *Home Owners B* policies, undertake to insure against "all risks of loss" of the property so insured. Because of this wording, considerable confusion has arisen as to the extent of the coverage provided by these policies. Do they purport to insure against "all loss" which may be suffered by the insured, or must the phrase "all risks of loss" be limited in some manner? It is this important question of construction that must be answered before any satisfactory and consistent scheme of insurance can be achieved under these new forms of coverage. A great number of claims are now arising under these Home Owners policies, with a resulting confusion as to their proper and fair disposition.

The insuring clauses in these new forms are brief and simply stated substantially as follows:

This policy insures against all risks of physical loss to the property insured except as otherwise excluded.

If one considers these few words in an offhand or casual manner, and as standing solely by themselves, one *might* in good faith conclude that here is something new in the field of property insurance. A person might think it was a blank check, as it were, intended to cover all losses of whatsoever

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† For the applicable provisions of the "all risk" policy discussed herein, see specimen policy abstract, Appendix A.

kind or description that might occur to the property described during the policy period unless specifically excluded. And if such a person were told that the policy did not purport to do this, he would likely react by saying: "So you're issuing a policy and accepting premiums upon a policy that does not mean what it says. This is trickery." And then, depending upon the identity of the individual making the statement, "I'll not place any more of my business in your company"; or, "I'll sue."

The fact is that the insuring clause of the policy does mean exactly what it says; but what it says is not dependent alone upon the words used, and a casual or offhand consideration of these words. The "all risks" contract, like any other insurance contract, is dependent for its meaning, intention and purposes upon the legal interpretation by our courts of the language adopted; the needs which have given rise to the form which, in turn, is historical; and the generally accepted meaning of the words as reflected in authoritative works in the language used, in this case the English language as generally accepted in the United States.

## I. DEFINITIONS

We will turn first to Webster's Dictionary. In doing so, we will not consider the modifying word "physical" as it appears in this clause because, while of great importance, it does not bear directly upon the dispute under discussion, "All Risks of Loss v. All Loss." Similarly, we will not consider the word "all" as it appears therein, because there can scarcely by any problem or disagreement concerned with that word. It is one that clearly and obviously means exactly what it says, literally and in no other way. It is possible to have less than all, but quite impossible to have more than all.

The key word in the insuring clause under consideration is the plural of "risk," i.e., "risks," or, as it appears therein, "all risks." Webster gives two principal definitions of the word "risk." In the general sense, it is defined as "hazard; peril; exposure to loss or injury"; and, in the insurance sense, the word is defined by this authority as, "The *chance* of loss or the perils to the subject matter of insurance covered by the contract." Note the word "chance" as it appears in that definition. It is important. It is a synonym for "fortuitous," which is another word of major importance in this study.

Next consider the word "loss" as it appears in the phrase "All risks of . . . loss." This word is defined as the "state or fact of being lost or destroyed; ruin, destruction." It is easily understood and not in itself troublesome, at least not in connection with the present problem.

Next we will consider the word already emphasized — "fortuitous." This is an adjective defined as meaning "happening by chance or accident; chance"; and, for a synonym to this word, Webster says, "See accidental." The noun "accident" is defined as "an event that takes place without one's foresight or expectation, especially one of an afflictive or unfortunate character."<sup>1</sup>

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<sup>1</sup> See generally, *Hauenstein v. Saint Paul-Mercury Indem. Ins. Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954).

So, I think it may be properly stated that we in the United States who use the English language as our native language agree that "risk" means a fortuitous hazard or peril; one that happens by chance; one that cannot be foreseen and is not certain to happen. All such chance or fortuitous happenings which result in loss are, unless excluded, covered by the "all risk" form of policy, but none other.<sup>2</sup>

## II. HISTORY

It will be helpful at this point to take a brief look into the history and development of the institution, or business, of property insurance as a guide to the coverage afforded by the "all risk" type of insurance policy. I believe it is well to bear in mind that the insurance industry as a whole, and the forms of coverage offered and made available by the industry in particular contexts, have come about and been developed in large measure in answer to a need and resultant demand of the public. Property loss incurred by disaster has been a problem of mankind from early times. As cities and towns developed and grew in size, with consequent concentration of values in relatively small areas, this problem increased. The problem was further increased by the development of commerce between these cities and towns and eventually between nations. The latter resulted in a very early development of ocean marine insurance, and it is said that the great fire in London in 1666 gave impetus to the development of fire insurance upon property on land.<sup>3</sup>

In the early days of insurance, the greatest single hazard to property on land was fire,<sup>4</sup> whereas the hazards to property being transported by sea were inexhaustibly many, *i.e.*, as it was stated then and is still stated, "all the perils of the sea." Insurance on property upon land was, for the most part, fixed as to locality and subject only to certain easily specified risks, the principal one then being fire. Consequently, this type of insurance developed along the lines of specified perils. On the other hand, property being transported by water, the then principal form of transportation, had no fixed place as to locality, and since it was subject to so many and unpredictable hazards, ocean marine insurance developed along the lines of "all risks" coverage.<sup>5</sup> The purpose sought to be accomplished in each case was, however, nonetheless identical; namely, spreading the risk of disaster which might be suffered by the few among the many. In neither case was it sought to spread the certain and expected loss or losses of the insured among all the insureds. They were designed to spread only the fortuitous or chance loss, or losses, of the few insureds who suffered them in a given period among all the insureds who faced them but did not experience them during the same period. The certain and expected losses could be and were provided for by other means, such as savings, depreciation accounts, obsolescence funds, etc.

<sup>2</sup> See generally, 2 RICHARDS, INSURANCE § 212 (5th ed. 1952).

<sup>3</sup> 1 *Id.* § 13.

<sup>4</sup> See VANCE, INSURANCE § 3 (3d ed. 1951).

<sup>5</sup> RODDA, INLAND MARINE AND TRANSPORTATION INSURANCE 9 (2d ed. 1958).

This is a fundamental principle of insurance, that only accidental losses, known as fortuitous losses, are insurable. Historically, this principle underlies the "all risk" form of coverage, early exemplified in ocean marine insurance, to an equal degree with the "specified peril" form, as exemplified in the fire insurance policy.

The early development of both these lines of insurance, "specified peril" and "all risks," occurred principally in England but their development in this country, while later in time, followed identical lines.<sup>6</sup>

Another equally important doctrine underlying each of these forms of coverage is that of indemnity; *i.e.*, that the purpose of insurance is to reimburse the insured financially for a fortuitous loss sustained.<sup>7</sup> It is not intended under either form that the insured shall profit from the loss. Any interpretation that would define "all risks of loss" as meaning "all loss" would seriously violate this doctrine.

It is well to recall briefly that with the development of railroads and the shipment of goods further inland and, for that matter, solely between points inland, there came a need for what came to be known as inland marine insurance. While not exclusively so, much of this was and is written upon the "all risks" form. It should not be assumed from this fact, however, that "all risks" is in anyway synonymous with marine or inland marine insurance and that therefore a revolution occurred when this form was used in covering fixed property which traditionally was covered under fire and extended coverage forms. Nothing of the sort has occurred but, rather, what has occurred is a natural development in meeting the insurance needs and resultant legitimate demands of the public.<sup>8</sup> The hazards encountered by property in transportation by rail and, more recently, by truck and by air, are like those at sea, many and varied, actually too numerous to be listed and specified. This explains the adoption of the "all risks" form from the marine coverage into the inland marine form.<sup>9</sup> As recently stated by the Supreme Judicial Court of Massachusetts in the case of *Insurance Company of North America v. Commissioner of Insurance*:<sup>10</sup>

Inland marine insurance is comparatively new. It is an outgrowth of the development of land transportation. The Federal operation of railroads in the overcrowded conditions of World War I, the inauguration of shipment by motor truck and by airplane, greater mobility of population, and increased traffic in personal property were some of the factors accelerating the need for a type of insurance policy which would cover portable personal property other than at fixed location. The name itself is a misnomer, and includes many forms of insurance wholly lacking in marine features. While the chief characteristic is a relation to transportation, there are recognized categories which have no such relation. . . .

As indicated here by the court, while this type of coverage was originally limited rather strictly to goods in transportation, changing conditions required

6 See generally VANCE, *op. cit. supra* note 4, at § 4.

7 MEHR & CAMMACK, *PRINCIPLES OF INSURANCE* 125 (rev. ed. 1957).

8 RODDA, *op. cit. supra* note 5, at 80.

9 *Id.* at 39.

10 334 Mass. 108, 134 N.E.2d 423 (1956).

that it be extended into various forms of so-called floater policies.<sup>11</sup> Again, and for the same reasons, the "all risks" type of coverage was used, but not for an instant abandoning the traditional and fundamental principles of insurance of indemnity and that only accidental or fortuitous losses are covered.<sup>12</sup>

Finally, and this is very recent, to meet the complexities of present-day living in our country, a need and demand has arisen for broader coverage upon fixed property, principally dwellings and the contents of dwellings. It would seem natural that it should begin here since, for the average person, a substantial part of his worth is represented in his home and its contents. If he should lose his home by any of the many and varied fortuitous happenings that in this day may occur, he would be in real trouble. The present-day homeowner wants to spread these risks and he wants to spread all of them—that is to say, all of them that can be spread at premiums he can afford to pay. This accounts for the writing by the companies of *Home Owners C* and like forms of broad coverage insuring against "all risks" of physical loss to property, except as otherwise excluded.

One authority, pointing out the desirable features of all risks coverage, has summarized the advantages as follows:<sup>13</sup>

- (1) the concept of one policy covering all conceivable risks is imbued with simplicity of understanding so that the nature and scope of the Insured Event is readily appreciated by the insuring public;
- (2) the policy avoids costly overlapping of coverages and duplication of premiums in the interest of the insured;
- (3) the policy provides complete protection by filling in all possible gaps in coverage;
- (4) the concept greatly minimizes the adverse selection of the insurer; and
- (5) the concept is conducive to economies in the insurance business with respect to management, marketing, servicing, and collecting of premiums, in particular.

However, despite all these advantages, the point cannot be stressed too often that the present-day homeowner does not intend or wish, or at least he should not so intend or wish, to spread his certain and anticipated losses which arise and occur as night follows day from the mere ownership of the property. Thus, for example, there can be no protection under broad-form coverages against losses stemming from the fact that the roof must be replaced in fifteen or twenty years; that the foundation will settle; that plaster will crack; that doors will warp; that paint will fade, chip and peel; that certain metals will corrode and rust; that furniture will be scratched and marred; that draperies will fade and deteriorate; that clothing will wear out; that dogs and cats will be dogs and cats; that junior will be junior; that guests and members of the family will wear and tear the upholstered furniture and carpet-

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<sup>11</sup> See generally, RODDA, *op. cit. supra* note 5, ch. 12.

<sup>12</sup> VANCE, *op. cit. supra* note 4, at § 14; MEHR & CAMMACK, *op. cit. supra* note 7, at 17-21 33-34.

<sup>13</sup> 2 RICHARDS, *op. cit. supra* note 2, p. 722.

ing; that food at room temperature will decay; that, in short, everything he owns, including himself, wears out. If there be any in the insurance industry who would tell or seek to persuade an insured otherwise, they would be doing him a disservice.

### III. LEGAL INTERPRETATION

From what has thus far been said, it is clear that we are not here dealing with language that is new or unique. A new application, yes; but new in no other sense. Consequently, the language has been many times before the courts not only in England, where it originated, but in our own country. From these many cases it may be stated categorically not only that "all risks of loss" does not include "all losses," but that for a loss to come within "all risks" *each* of the following four factors must be present:

1. The loss or damage must be fortuitous (accidental). Stated in another way, the cause of the loss must be a *risk*, not a certainty.
2. The loss or damage must happen to the subject matter from without; *i.e.*, the cause must be an extraneous one as distinguished from the natural behavior of the subject matter.
3. The loss or damage must not be contributed to by the insured's willful or fraudulent act; it cannot be the result of the insured's deliberate or willful act.
4. The loss must result from a lawful risk.

Probably the leading case on this subject is *British & Foreign Marine Ins. Co. v. Gaunt*,<sup>14</sup> decided in the English House of Lords in 1921. In this case, plaintiff-insured sued upon an all risks policy covering cargo that was shipped from a port in Chile to England. The cargo arrived in a badly damaged condition, having been soaked through with water due to a delay in loading. The court allowed recovery for the insured, but in the course of the opinion set out the following test for construing an all risks policy:

In construing these policies it is important to bear in mind that they cover 'all risk.' These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of Walton J. in *Schloss Brothers v. Stevens*, on a policy in similar terms, states the law accurately enough. He said that the words 'all risks by land and water' as used in the policy then in question 'were intended to cover all losses by any accidental cause of any kind occurring during the transit. . . . There must be a 'casualty.' Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.<sup>15</sup>

Pointing out the limitations on all risks coverage, the court went on further to say:

There are, of course, limits to 'all risks.' They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a cer-

<sup>14</sup> [1921] 2 A.C. 41.

<sup>15</sup> *Id.* at 46-47.

tainty; it is something, which happens to the subject-matter from without, not the natural behavior of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description 'all risks' does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils.<sup>16</sup>

These canons of construction and limitation on all risks coverage were followed in this country a few years later in *Mellon v. Federal Ins. Co.*,<sup>17</sup> wherein the court declared that "the words 'other causes of whatsoever nature' cover, in my opinion, 'all risks'; but the perils insured against are risks."<sup>18</sup> (Emphasis by the court.)

*Chute v. North River Ins. Co.*,<sup>19</sup> frequently cited as one of the leading cases in this country on the question, contains a lucid elaboration of the concepts of risk and fortuitous event. In this case, the insured sought to recover for the loss occasioned by the cracking of a precious jewel, valued at \$2,000. The policy covered "jewelry . . . against all risks of loss or damage during transportation (including all risks of loss or damage caused by breakage, fire and theft) or otherwise." Plaintiff admitted in the pleadings that the crack was not caused by any outside force, but was due solely to an intrinsic defect in the jewel. Defendant's demurrer to the complaint was affirmed, the court pointing out that an insurer is not liable for losses stemming from an inherent defect or infirmity in the subject matter insured.<sup>20</sup> The purpose of such a form of coverage is to secure indemnity against accidents or risks which *may* happen, not against events which *must* happen because of the very nature of the thing insured.<sup>21</sup> The court concluded by saying that:

Plaintiff purchased and defendant furnished indemnity against loss or damage from fortuitous and extraneous circumstances rather than warranty of the quality and durability of chattels. . . . Because the policy must be considered as one against damage from fortuitous and extraneous risks, it is not permissible to resort to an ultraliteral interpretation which will convert it into a contract of warranty against loss resulting wholly from inherent susceptibility to dissolution.<sup>22</sup>

<sup>16</sup> *Id.* at 57.

<sup>17</sup> 14 F.2d 997 (S.D.N.Y. 1926).

<sup>18</sup> 14 F.2d at 1002. See also *National Sur. Mut. Ins. Co. v. Failing*, 146 Tex. 607, 211 S.W.2d 567 (1948). *But cf.* *Republic Ins. Co. v. French*, 180 F.2d 796 (10th Cir. 1950), holding that an all risks binder issued to the insured bound the company to pay the total amount of a theft loss, even though the subsequently issued floater policy excepted this peril.

<sup>19</sup> 172 Minn. 13, 214 N.W.473 (1927). The term "inherent vice" is frequently used by courts in this context. This is a term inherited from the law of ocean marine insurance, and has been defined as "a quality within the object that results in the object's tending to destroy itself." *RODDA, op. cit. supra* note 5, at 85. See *Mayeri v. Glens Falls Ins. Co.*, 85 N.Y.S.2d 370 (S. Ct. 1948). For a definition of "inherent vice" in a non-insurance case, see *Texas & Pac. Ry. v. Prunty*, 233 S.W. 625 (Tex. Civ. App. 1921).

<sup>20</sup> See 2 ARNOULD, *MARINE INSURANCE* 700 (14th ed. 1954).

<sup>21</sup> *Gulf Transp. Co. v. Fireman's Ins. Co.*, 121 Miss. 655, 83 So. 730 (1920); *The Xantho*, 12 A.C. 503, 509 (1887).

<sup>22</sup> 214 N.W. at 474.

In *Gulf Transportation Co. v. Fireman's Fund Insurance Co.*,<sup>23</sup> a marine policy was involved providing "all risk" type of coverage upon a wooden barge. After being loaded with oil the barge sank some thirty minutes after starting its voyage and while being towed in smooth and placid water, the evidence being that "she broke under her own weight." In affirming the judgment of the trial court for the insurer, the Supreme Court of Mississippi said:

... Our duty in the case at bar is to determine whether the misfortune is an extraordinary or fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy. Mr. Arnould, in paragraph 812, quotes from Lord Herschell as follows:

'There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against the accidents which may happen, not against events which must happen.'<sup>24</sup>

It is interesting to note that the court also mentioned in this case that "... the contract must govern the rights and obligations of the parties, and, as stated by counsel for appellees, 'an insurance policy is not a promissory note.'<sup>25</sup>

It is clear from what has been said thus far that the standard all risks policy does not purport to protect the insured against all the disasters and mishaps to which his property may be subject. It was never intended that this should be the scope of the coverage, as an examination of the historical antecedents of this type of insurance clearly demonstrates. Unless the loss is fortuitous, proceeding from a combination of accidental and unexpected circumstances over which the insured has no control, and against which he could not have protected himself through other forms of compensation, there can be no recovery under the policy.<sup>26</sup>

It is also beyond dispute that there can be no recovery under an all risks policy for a loss occasioned by the wilful act of the insured. This is a well-settled principle of insurance law, having general application beyond just the immediate perimeters of the problem at hand.<sup>27</sup> This principle is reflected in an early Nebraska case,<sup>28</sup> involving a claim under an all risk form of policy for the loss of a mare which the insured had beaten to death. The court denied recovery to the insured, pointing to the fact that he had destroyed the animal by his own wilful act, and that under these facts he would not be permitted to take advantage of his own wrong. It does not seem that these cases will arise frequently in this area; and when they do, the legal principles

<sup>23</sup> 121 Miss. 655, 83 So. 730 (1920).

<sup>24</sup> 83 So. at 733. See also *Goldman v. Rhode Island Ins. Co.*, 100 F. Supp. 196 (E.D. Pa. 1951) (failure of proof by the insured as to the cause of damage to the insured property).

<sup>25</sup> 83 So. at 733.

<sup>26</sup> In the field of fire insurance, an analogous distinction has grown up between "friendly" and "hostile" fires. A friendly fire is one initiated by the insured for some purpose (heating, lighting etc.) and which continues to burn within a confined area. A hostile fire is one which is uncontrollable or breaks out from where it was intended to be. There can be recovery for damage done only by this latter type of fire. *Mode, Ltd. v. Fireman's Fund Ins. Co.*, 62 Idaho 270, 110 P.2d 840 (1941); *Youse v. Employers Fire Ins. Co.*, 172 Kan. 111, 238 P.2d 472 (1951); 5 COUCH, INSURANCE § 1201 (1931).

<sup>27</sup> 2 RICHARDS *op. cit. supra* note 2, at 721.

<sup>28</sup> *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N.W. 581 (1887).

involved are well-settled, and do not create a difficult problem of interpretation.

Furthermore, a standard all risks policy does not cover losses which are caused by the "neglect of the insured to use all reasonable means to save and preserve the property at and after a loss. . . ." However, it has been held that this does not require any extraordinary promptness on the part of the insured to forestall or minimize a loss, particularly when the preventive measures that would have been necessary under the circumstances were beyond the ordinary knowledge of a layman.<sup>29</sup>

Another type of case posing little problem in this area involves a claim for loss resulting from an illegal risk, such as confiscation of contraband jewelry, liquors, furs, and similar items, or the breaking up of roulette and dice tables and the like by state and local police. Clearly, there can be no recovery for a loss arising in such circumstances, as a contract to insure such goods is void.<sup>30</sup>

A somewhat troublesome question may arise with respect to the usual exclusion in an all risks policy relating to "damage to property (watches, jewelery and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process." The only case found construing this clause held that such language does not enable the insurer to escape liability for damage done to carpeting by a third person hired to prevent the *possibility* of moth infestation.<sup>31</sup> The court reasoned that since the actual presence of moths in insured's carpeting had not been shown, there was no "renovating" or "repairing" to be done; rather, this was merely a "preventive measure . . . to insure the continuation of a normal, sound state."<sup>32</sup> However, wording under a different form of policy excluding liability "for loss or damage occasioned by processing or any work upon the property" was held broad enough to exclude damage done to fur garments while in the custody of a storage company.<sup>33</sup>

The usual form of all risks policy now being written contains a \$50.00 deductible clause. This provision, familiar to many forms of insurance, generally states that "This Company shall be liable only when loss hereunder exceeds \$50.00 in any one occurrence and then only for its proportion of the excess." The wisdom of placing deductible clauses in these policies cannot be doubted. There is a tendency on the part of insureds to grow careless toward their property if they think that any accidental loss will be covered by their insurance. Therefore, it is felt that the use of deductible clauses lessens the hazard of carelessness, and effectively eliminates claims for inexpensive items of personal property that are damaged or lost. Moreover, the deductible clause does away with the numerous small claims that would be relatively costly to adjust and would push the rates for all risks coverage much higher than necessary.<sup>34</sup>

<sup>29</sup> Finkelstein v. Central Mutual Ins. Co., 8 Misc. 2d 261, 166 N.Y.S.2d 989, 995 (1957).

<sup>30</sup> See generally VANCE, *op. cit. supra* note 4, at 291-95.

<sup>31</sup> Harvey v. Switzerland Gen. Ins. Co., 260 S.W.2d 342 (Mo. App. 1953).

<sup>32</sup> 260 S.W.2d at 344.

<sup>33</sup> Wibbelman v. Home Ins. Co., 194 F.2d 262 (6th Cir. 1952).

<sup>34</sup> RODDA, *op. cit. supra* note 5, at 86-87.

## IV. BURDEN OF PROOF

Finally, there remains the question of upon whom rests the burden of proof in a claim presented under the "all risk" form of policy: the insured, or the insurer. It is universally recognized that under the specified peril form, such as the standard fire and extended coverage policy, the burden of proving that the loss complained of resulted from a risk or hazard covered by the policy rests upon the insured.<sup>35</sup> On the other hand, it is sometimes urged that in the case of a claim presented under an all risk policy, the insured need merely show that he has sustained a loss and that it then becomes the burden of the insurer to prove that such loss is not covered by the policy.<sup>36</sup> It is perhaps only being realistic to state that the insured's position upon a close or difficult question of coverage under an all risks form is easier than it would be under a specified peril form, but it is wholly incorrect to say that the burden of proving that the insured has sustained a loss as the result of a risk insured against under the policy shifts from the insured to the insurer under the all risk form. This is simply not the case. As a matter of fact, the burden of proving all conditions precedent to the right to recover remain with the insured under the all risk form in the same manner as they are upon the insured under the specified peril form.<sup>37</sup> These may be enumerated as follows:

1. The existence of the policy.
2. The validity of the policy.
3. Insurable interest.
4. Identity of the named insured.
5. That the loss occurred during the policy period.
6. The value of the property alleged to have been destroyed, damaged, lost or stolen.
7. The amount of the loss.
8. That the property damaged or lost was the property covered by the policy.
9. That the loss was caused by an insured peril.
10. That the loss occurred at the insured location.
11. That the insured has complied with all conditions and warranties of the policy.

Of these several factors, the only one that appears to present difficulty is No. 9. It is true that the "all risk" forms do not specify the perils covered, but rather cover all perils, or, as phrased in the form, "all risks." As previously stated, this means exactly what it says; that the loss for which claim is made must result from a risk, *i.e.*, from a fortuitous or a chance occurrence. The burden of proving that the loss was so caused is upon the insured. He need not prove the exact nature of the fortuitous occurrence in all detail, but

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<sup>35</sup> 8 COUCH, INSURANCE § 2246 (1931).

<sup>36</sup> This position seems to have been adopted by way of dictum by the court in *Balough v. Jewelers Mut. Ins. Co.*, 167 F. Supp. 763, 769 (S.D. Fla. 1958), though it is not wholly clear from the language of the opinion. The case involved a claim under an all risks jewelry policy, with the defendant-insurer raising without success the defense of mysterious disappearance, one of the exclusions in the policy.

<sup>37</sup> See *Goldman v. Rhode Island Ins. Co.*, 100 F. Supp. 196 (E.D. Pa. 1951).

he must prove that it was, in fact, fortuitous. This is well illustrated in the decision of the House of Lords in the *Gaunt* case previously cited, wherein Lord Birkenhead said:

We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. In this case the respondent established that the loss must have been due to some casualty, and consequently the judgment of the Court of Appeal upon this point is right.<sup>38</sup>

And wherein Lord Sumner said:

I think, however, that the quasi-universality of the description does affect the onus of proof in one way. The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he avers loss by some risk coming within 'all risks,' as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused.<sup>39</sup>

There will be present in many of the claims reported under the "all risks" form of policy very serious and extremely difficult questions relating to whether an occurrence is fortuitous or natural, what is inherent or extraneous, what is wilful or accidental, and perhaps even what is lawful and unlawful, but these must be decided upon an individual claim basis, using the basic principles herein discussed as a guide.

There will also occur cases in which it will appear that the loss for which claim is made was caused, in part, by an insured peril, and, in part, by an uninsured peril; that is to say, a part by a risk as herein defined and described, and a part by natural deterioration and the like. In such cases the burden is upon the insured to show how much of the loss resulted from risk; and, in the event the insured is unable to meet this burden, he will not be entitled to recover under the policy.<sup>40</sup> It has been said that when an insured peril combines with an uninsured peril to produce a loss, the insured is entitled to recover under the policy.<sup>41</sup> But it has also been held that when the predominate or proximate cause of the loss is a risk that was not assumed by the insurer, the covered peril being only a concurrent or contributing factor, then there can be no recovery under the policy.<sup>42</sup> It is difficult to elaborate a general rule in this area, in as much as the ultimate determination must turn on the facts of each case, with special emphasis placed on the proportionate degrees of causation of the several factors.

<sup>38</sup> [1921] 2 A.C. 41, at 47.

<sup>39</sup> *Id.* at 57-58.

<sup>40</sup> *Georgia Mut. Ins. Co. v. Ford*, 95 Ga. App. 710, 98 S.E.2d 577 (1957); *Paddock v. Commercial Ins. Co. of Nantucket*, 104 Mass. 521 (1870).

<sup>41</sup> *Fireman's Fund Ins. Co. v. Hanley*, 252 F.2d 780 (6th Cir. 1958) (the court here was also influenced by the ambiguity in the policy regarding exclusions).

<sup>42</sup> *James v. Federal Ins. Co.*, 5 N.J. 21, 73 A.2d 720 (1950).

### Conclusion

In conclusion, it must be borne in mind that there have been few cases thus far construing the type of insurance policy under consideration here. This form of coverage being relatively new, time will be required before a comprehensive and intelligible body of case law can be developed. To be sure, there are many claims being filed under these policies, but their disposition thus far has been largely by way of settlement, or through litigation that has not passed beyond the trial court level. However, be there adequate case law or not, the bases of interpretation will remain the same. That is to say, the principle of indemnity only for actual loss sustained, and the principle of fortuitous event or risk, must be used as guideposts of interpretation. With these principles kept in mind, there can be no doubt but that all risks coverage will, in years to come, prove to be a satisfactory and successful venture for both the insurance industry and the public.

## APPENDIX A

### SPECIMEN POLICY ABSTRACT

#### *Homeowners C*

Section	Coverages		Limit of Liability
1	All risks of physical loss to the property insured except as excluded. Note particularly the deductible clauses on page 3.	A. Dwelling	\$
		B. Appurtenant Private Structures	\$
		C. Personal Property	\$
		D. Additional Living Expense	\$
11	E. Comprehensive Personal Liability—Bodily Injury and Property Damage,		Each Occurrence
	F. Medical Payments,		Each Person

#### PROVISIONS APPLICABLE ONLY TO SECTION 1

##### DESCRIPTION OF PROPERTY INSURED AND COVERAGES AFFORDED

**Coverage A—Dwelling:** Coverage A applies to the dwelling building described in the declarations, including its additions and extensions, building equipment, fixtures and outdoor equipment pertaining to the service of the premises (if the property of the owner of the dwelling), while located on the described premises or temporarily elsewhere, and all lumber and materials on the premises or adjacent thereto incident to the construction, alteration or repair of such dwelling.

**Coverage B—Private Structures:** Coverage B applies to private structures other than the described dwelling (excluding structures used for mercantile, manufacturing or farming purposes) located on and appertaining to premises of the described dwelling but wholly detached from such dwelling, including all lumber and materials on the described premises or adjacent thereto incident to the construction, alteration or repair of such structures.

**Coverage C—Personal Property:** Coverage C applies to all personal property owned, worn or used by the named Insured and members of the named Insured's family of the same household, while in all situations anywhere in the world. This coverage excludes animals and birds; vehicles licensed for road use; aircraft; property pertaining to business or occupation of the persons whose property is insured hereunder, other than professional books, instruments and other professional equipment while actually within residences of the Insured. This insurance shall in no wise insure directly or indirectly to the benefit of any carrier or other bailee.

**Coverage D—Additional Living Expense:** If loss under Coverages A, B or C renders the described dwelling or appurtenant private structures untenable, this Company agrees to pay the necessary and reasonable increase in expense in conducting the Insured's household caused by such

untenantability. If a portion of the dwelling or appurtenant private structures is rented to others or held for rental, this Company will reimburse the Insured for the loss of fair rental value of such portion during the period of untenability. This Company shall also be liable hereunder during the period of time, not exceeding two weeks, while access to the described premises is prohibited by

order of civil authority, but only when such order is given as a direct result of damage to neighboring premises by a peril insured under this policy. Loss under Coverage D shall be computed commencing with the date of loss and extending for not exceeding the time required with due diligence and dispatch to repair or replace the property damaged or destroyed.

#### PERILS INSURED AGAINST

Section 1 of this policy insures against all risks of physical loss to the property insured except as otherwise excluded. In the application of the preceding provisions of this policy, wherever the word

"fire" appears, there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

#### EXTENSIONS OF COVERAGE

1. **Trees, Shrubs, Plants and Lawns:** The named Insured may apply up to 5% of the limit of liability under Coverage A to cover trees, shrubs and plants (except those grown for commercial purposes) against loss by fire, lightning, smoke (except smoke from agricultural smudging or industrial operations), explosion, riot, riot attending a strike, civil commotion, aircraft, vehicle (except vehicles operated by an occupant of the described premises), collapse of a building, vandalism and malicious mischief, and damage caused by theft or attempted theft (except with respect to property taken from the premises), but this Company shall not be liable for more than its proportion of \$250 on any one tree, shrub or plant. Coverage A shall also apply to lawns but only against loss by perils named in this paragraph.

2. **Optional Interests—Coverage C:** Coverage C includes at the option of the named Insured personal property of others while on the described premises and the property of guests while in a secondary residence of, and occupied by the Insured, or residence employees while in a secondary residence of the Insured or in their custody while on the Insured's business.

3. **Removal of Debris:** This insurance covers expenses incurred in the removal of all debris of the property insured hereunder which may be occasioned by loss caused by any of the perils insured against.

#### 4. Replacement Cost Coverage — As respects building structures:

- a. In the event of loss to a building structure covered under this policy, when the full cost of repair or replacement is both (1) less than \$1,000, and (2) less than 5% of the whole amount of insurance applicable to such building structure for the peril causing the loss, the coverage of this policy is extended to include the full cost of such repair or replacement without deduction for depreciation.
- b. If at the time of loss the limit of liability for the dwelling in Coverage A of this policy is 80% or more of the full replacement cost of the dwelling insured, Coverages A and B only of this policy are extended to include the full cost of repair or replacement without deduction for depreciation.
- c. If at the time of loss the limit of liability for the dwelling in Coverage A of this policy is less than 80% of the full replacement cost of

the dwelling insured, this Company's liability for loss under this policy shall not exceed the larger of the following amounts:

- (1) the actual cash value of that part of the building structure damaged or destroyed;
  - (2) that proportion of the full cost of repair or replacement (without deduction for depreciation) of that part of the building structure damaged or destroyed, which the limit of liability for Coverage A of this policy bears to 80% of the full replacement cost of the dwelling insured in Coverage A.
- d. In determining such full replacement cost, the value of excavations, underground flues and pipes, underground wiring and drains, and brick, stone or concrete foundations, piers and other supports which are below the surface of the ground may be disregarded.
- e. This Company's liability for loss under Coverages A and B of this policy including this Extension of Coverage shall not exceed the smallest of the following amounts: (1), (2), or (3)—
- (1) the limit of liability for Coverage A or B, whichever applies;
  - (2) the replacement cost of the building structure or any part thereof identical with such building structure on the same premises and intended for the same occupancy and use;
  - (3) the amount actually and necessarily expended in repairing or replacing said building(s) or any part thereof intended for the same occupancy and use.
- f. This Company shall not be liable under paragraph b. or c.(2) of this replacement cost coverage extension for any loss unless and until actual repair or replacement is completed.
- g. The Insured may elect to disregard this Extension of Coverage in making claim hereunder, but such election shall not prejudice the Insured's right to make further claim within 120 days after loss for any additional liability brought about by this Extension of Coverage.
5. The foregoing extensions of coverages shall not increase the total limit of liability opposite each named coverage in the policy declarations.

## LIMITATIONS OF COVERAGE

**1. LOSS DEDUCTIBLE CLAUSE No. 1, COVERAGES A AND B** (applies only if so stated in the Declarations): This Company shall be liable for loss by any one windstorm or hailstorm only in excess of \$50 in any one occurrence and then only for its proportion of the excess. This clause shall not apply when the loss, including the amount of this deductible, exceeds \$500.

**2. LOSS DEDUCTIBLE CLAUSE No. 2, COVERAGES A, B AND C:** This Company shall be liable only when loss hereunder exceeds \$50 in any one occurrence and then only for its proportion of the excess. This deductible shall not apply:

- (a) to loss by fire, lightning, smoke, explosion, riot, riot attending a strike, civil commotion, aircraft, falling objects, vehicles, vandalism and malicious mischief, burglary or holdup, landslide, collapse of buildings, or sudden or accidental tearing asunder, cracking, burning or bulging of steam or hot water heating systems except appliances for heating water for domestic consumption;
- (b) under Coverage C, to loss by windstorm or hail; and
- (c) when the loss, including the amount of the deductible, exceeds \$500.

**3. As respects any one loss under Coverage C, this Company shall not be liable for more than:**

(a) 10% of the amount of Coverage C as respects property ordinarily situated throughout the year at residences of the Insured other than the described dwelling;

(b) \$100 on money, including numismatic property, and \$500 on notes, securities, stamps, including philatelic property, accounts, bills, deeds, evidences of debt, letters of credit, passports, documents, and railroad and other tickets;

(c) \$500 on gems, watches, jewelry and furs, or any combination thereof, except to loss by fire, lightning, windstorm, hail, smoke, explosion, riot and civil commotion, aircraft, vehicle, falling objects, vandalism and malicious mischief, landslide, collapse of building, burglary and holdup;

(d) \$500 on boats, including their trailers, furnishings, equipment and outboard motors, and such coverage applies only against loss by fire, lightning, windstorm and hail (while inside of fully enclosed buildings, except rowboats and canoes on the premises of the described principal dwelling), smoke, explosion, riot and civil commotion, aircraft, vehicle, falling objects, vandalism and malicious mischief, landslide, collapse of buildings and theft.

## EXCLUSIONS

This policy does not insure against:

Under Coverages A, B and D—

(a) loss to plumbing or heating systems or their appliances, or by leakage or overflow from such systems or appliances, caused by freezing while the described building(s) is vacant or unoccupied, unless the named Insured shall have exercised due diligence with respect to maintaining heat in the building(s) or unless such systems and appliances had been drained and the water supply shut off during such vacancy or unoccupancy;

(b) loss by earthquake; surface waters, flood waters, waves, tide, tidal wave, high water, overflow of streams or bodies of water, or spray therefrom, all whether driven by wind or not, or whether caused by or attributable to earthquake; unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss;

(c) loss occasioned by enforcement of any local or state ordinance or law regulating the construction, repair, or demolition of building(s) or structure(s);

(d) loss to retaining walls not constituting part of a building when such loss is caused by landslide, water pressure, or earth movement;

Under Coverage C—

(e) loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; moth, vermin and inherent vice; damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process; the exclusions set forth in this paragraph shall not apply to loss caused by fire, lightning, smoke (except from agricultural smudging or industrial operations), windstorm, hail, explosion, aircraft, riot, civil commotion, collapse of buildings, earthquake, flood, theft, attempted theft, vandalism, malicious mischief, falling objects; landslide, cracking, burning or bulging of hot water heating sys-

tems except appliances for heating water for domestic consumption;

(f) seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade;

Under Coverages A, B, C and D—

(g) loss by termites or other insects; wear and tear; deterioration; smog; smoke from agricultural smudging or industrial operations; rust; wet or dry rot; mould; mechanical breakdown; settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings; unless loss by fire, smoke (other than smoke from agricultural smudging or industrial operations), explosion, landslide, collapse of buildings, water damage, or glass breakage ensues, and this Company shall then be liable only for such ensuing loss;

(h) loss by theft in or to a dwelling in the course of construction or of lumber and materials therefor;

(i) loss by contamination including such loss by any radioactive or fissionable materials;

(j) with the exception of fire and lightning (which are otherwise provided for on page 2 of this policy) all loss caused, directly or indirectly, by: (1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing atomic fission or radioactive force shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces; (2) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence.