

“Sue and Labour”

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Sue?

Sue?



Sue?



Labour?

Labour?



Labour?



Sue and Labour?

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Sue and Labour?



When looking at a sue and labour problem: keep in mind a commercial ship undertaking a “marine adventure”.

3 x legal concepts associated with saving property in the context of a commercial marine adventure

- Salvage
- General Average
- Sue & Labour

3 x legal concepts associated with saving property in the context of a commercial marine adventure

- **Salvage**

A contract with a third party engaging them to perform services to save from imminent danger the property which comprises the marine adventure (usually ship and cargo) and re-deliver it to a place of safety.

- **General Average**

A sacrifice incurred by one party to the marine adventure for the benefit of all interests jointly.

- **Sue & Labour**

An expense incurred by one insured party with a view to saving his insured property from damage by an insured peril.

Q: What is Sue & Labour?

A1: In marine cases the insured is under a **duty** to take reasonable measures to avert or minimise a loss - see s78(4) MIA 1906

A2: A sue and labour clause is a clause in the policy that **allows the insured to recover** those expenses **from the insurer** in certain circumstances.

Marine Insurance Act 1906

Suing and Labouring clause

- 78 (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.
- (2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.
- (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.
- (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

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WELCAR 2001 - Section 1 Conditions

9. Sue and Labour Clause

It is further agreed that in the case of any **imminent** physical loss or physical damage to the property insured hereunder which is the **direct result of a peril insured** against, the Assureds, their servants and their agents may **sue, labour and travel for**, in and about the defence, safeguard and recovery of the subject matters insured without prejudice to this insurance and may incur reasonable expenses in efforts to avert or minimise a loss which may fall under Section I.

The expense so incurred shall be borne by the Assureds and Underwriters proportionately to the extent of their respective interests. No acts of Underwriters or the Assureds in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Underwriters limit of liability under this clause shall be 25% of the scheduled value contained in the latest agreed Schedule B at time of loss of the item or items that are the subject of such sue and labour.

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WELCAR 2001 - compare the due diligence obligation in the general conditions

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10. Due Diligence

It is a condition of the Policy that the Assureds **shall exercise due care and diligence** in the conduct of all operations covered under the Policy, utilising all safety practices and equipment generally considered prudent for such operations. In the event any hazardous condition develops, including with respect to any well from which consequential damages covered by the Policy may arise, the **Assureds shall at their expense** make all reasonable efforts to prevent the occurrence of a loss insured against under the Policy.

3 x threshold tests for expenses to qualify as “sue & labour”:

1. Imminent risk of physical loss or physical damage which is or will be the direct result of a peril insured against.
2. Any costs must have been incurred for the purpose of saving insured property (or the subject matter of the insurance).
3. Any costs must be extra or exceptional costs.

1. Imminent risk

- (a) Imminent risk - often referred to as “in the grip” of an insured peril.

Some sue & labour clauses are even stricter than “imminent”, requiring the peril to have caused some actual damage.

- (b) Fear of a peril is not enough.
- (b) Once the threat of the peril has receded, sue and labour no longer applies,
- (b) Ongoing expenses incurred over a period of months in continuous peril situations can be allowable.

AUTHORITY:

- (a) 9. Sue and Labour Clause
It is further agreed that in the case of any **imminent** physical loss or physical damage to the property insured hereunder...
See also the line of case law discussed in Royal Boskalis Westminster vs Trevor Rex Mountain (1997)
- (b) See numerous outbreak of war cases, prior to actual hostilities, such as Cacionoff v China Traders (1914). See also the Y2k cases where there turned out to be no actual danger.
- (c) See “Nukila” (1996) where tow to repairs, the repairs themselves and the tow back were all claimed as sue & labour.
- (b) See detention cases such as “B Atlantic” No2 (2015) where legal expenses plus crew expenses were allowed for over 2 years.

2. To save insured property

AUTHORITY:

- (a) Were the expenses incurred to save insured property? Evidence: what was the purpose for which the money was spent?
- (b) NB the question is NOT: did the sue & labour expense actually save the insured property because you can have a total loss AND still recover a sue and labour claim - see s78 (1). It follows that the issue of recoverability must be viewed prospectively.
- (c) Difficult area: where non-severable sue & labour expenses are incurred for a dual purpose. For example partly to protect insured property, partly to protect uninsured interests, such as delay.

- (a) **Section 78 (3) of MIA 1906**

Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

- (b) **Section 78 (1) of MIA 1906**

...notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

- (c) **9. Sue and Labour Clause**

...the expense so incurred shall be borne by the Assureds and Underwriters proportionately to the extent of their respective interests...

Some support also in the cases for an apportionment to apply - see *Royal Boskalis vs Trevor Rex Mountain* (1997) and *Cunard v Marten* (1902) but see *The "B Atlantic" No2* (2015)

3. Extraordinary Expenses

Expenses need to be beyond normal outgoings and/or the normal measures that an insured should be taking to protect his property anyway.

As regards the operation of commercial ships and cargo, it is easy to ascertain what are “normal” expenses.

This can be much more difficult to do this as regards offshore oil and gas construction works or installations.

AUTHORITY:

Pre-Marine Insurance Act 1906 cases, such as *Lohre v Aitchison* (1879) [HL]

Interface between due diligence clause and sue and labour clause

Do sue and labour concepts apply to non-marine insurance?



Do sue and labour concepts apply to non-marine insurance?

1. In non-marine cases the Marine Insurance Act 1906 does not apply, therefore there is no statutory duty on the insured to avert or minimise a loss.
2. Will the court imply terms into a non-marine policy: (a) that the insured has a duty to minimise loss and (b) that if he incurs expenses in doing so, can he compel his underwriters to reimburse him?
3. Regarding (a) there is a general implied duty to act as a prudent uninsured which applies to marine and non-marine insurance. Query how far does that go; is it the same as the duty to sue & labour? Any failure by the insured to minimise loss is usually decided in terms of causation rather than s78(4). See for example *Clothing Management vs Beazley* (2012) which is a non-marine claim on a marine wording where underwriters pleaded breach of the s 78(4) duty but failed on the evidence. See also “The Nore Challenger” (2005) with same outcome in a marine case.
4. Regarding (b) reimbursement by underwriters, there is authority in liability cases that there will be no implied term requiring underwriters to reimburse, even if the insured is under a duty to mitigate. See *Yorkshire Water Services v Sun Alliance* (1997)
5. There is also authority in an English marine policy with no sue & labour clause that there was no right of recovery. See *Integrated Container Service v British Traders* (1981)
6. There will be uncertainty unless the position is dealt with by sufficiently clear contractual provisions.

Do sue and labour concepts apply to non-marine insurance?

Clause from an onshore operational policy covering an onshore chemical plant:

28. SAFEGUARD, RECOVERY AND LEGAL EXPENSES

In case of loss, if it shall be **lawful and necessary** for the NAMED INSURED, **to sue, labour, and travel for, in and about the defence, safeguard and recovery of the property insured hereunder**, or any part thereof, without prejudice to this insurance, nor shall the acts of the NAMED INSURED in recovering, saving and preserving and the property insured in case of loss be considered a waiver or an acceptance of abandonment. **The expenses so incurred shall be borne by the NAMED INSURED with its subscribing COMPANY involved in the applicable coverage, proportionately to the extent of their respective interest.** The NAMED INSURED and the subscribing COMPANY shall be limited to the extent that such expenses reduce the loss which would otherwise be payable under this policy. This provision does not increase any amounts or limits of insurance provided by this policy and deductible provisions shall apply to any expenses so incurred.

Sue & Labour - Summary

What is it?

(a) A duty and (b) a clause that introduces supplementary insurance cover.

Three threshold issues to qualify as sue & labour.

1. Imminent risk of physical loss or physical damage which is the direct result of a peril insured against.
2. Costs must have been incurred for the purpose of saving insured property.
3. Must be extra or exceptional costs.

Other issues

1. Usually (but not always) sue & labour is considered where the main cover is not available or is burnt.
2. Quantum claimed must be reasonable. See s78 and WELCAR Sue & Labour clause; both refer to “reasonable” measures/expenses. Reasonableness is viewed prospectively at the time the money is spent.
3. Sue & Labour cover is supplementary to the contract of insurance and therefore lies outside normal policy limits - See s78(1). The notional maximum exposure in a hull case is twice the hull value but the exposure is actually unlimited. Under WELCAR sue & labour cover is limited as a matter of contract to 25% of Schedule B values.
4. Burden of proof is on the insured to establish that a valid claim arises under the sue & labour clause.
5. Expenses need not be direct payments; any detriment to the insured in money or money’s worth can be sufficient. (see *Boskalis vs Mountain 1997*).
6. English courts have confirmed ransom payments can be recovered as sue & labour. (see “*Bunga Melati Dua*” 2011). Query does this mean Insureds are under a duty to pay ransoms in marine cases?
7. Very difficult issue concerning costs incurred for a dual purpose. If you don’t have WELCAR wording, there is doubt about whether such costs are to be shared or not.

Sue and Labour



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