Insurance 101: A Basic Level Introduction to Corporate Insurance

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Commercial Insurance a Key Corporate Asset

- Difference between potentially overwhelming liabilities and survival
- Important to corporate counsel to be able to navigate through minefields
Program Organization

1. Primary Forms of Liability Insurance
   - General Liability
   - Errors & Omissions Liability
   - Directors and Officers Liability
   - Employment Practices Liability
   - Fiduciary Liability

2. Primary Forms of First Party Insurance
   - Property Insurance
   - Business Interruption

3. Other Forms of Corporate Insurance and Purchasing and Negotiating Policies
Primary Forms of Liability Insurance
General Liability Insurance

- GL policy is the basic business liability insurance coverage
- Most insurers use standard forms for GL policies issued by Insurance Services Office (ISO)
- GL coverage typically protects against four types of corporate liability for:
  - Bodily injury
  - Property damage
  - Advertising injury
  - Personal injury
Types of Corporate Liability Covered

- **Bodily Injury** – bodily injury, sickness, disease or death
- **Property Damage**
  - Physical injury to another party’s tangible property, including loss of use of that property
  - Loss of use of another party’s tangible property not physically injured
- **Personal Injury and Advertising Injury**
  - False Arrest
  - Malicious Prosecution
  - Wrongful Eviction from, Entry into, or Invasion of Private Occupancy of Premises
  - Slander, Libel, Product Disparagement
  - Violation of Right of Privacy in a Publication
  - Copyright, Trade Dress, Slogan Infringement in Advertisement
GL Coverage and “Occurrence”

- GL coverage typically written on “occurrence” basis
  - Policy triggered by injury or damage during policy period
  - Regardless of when claim for injury or damage is asserted

- Number of specialty industry GL policies
  - Some written on basis other than “occurrence”
    - E.g., pharmaceutical industry GL coverage may be on “Occurrence Reported” basis, allowing policyholder to group claims together into single occurrence
Duty to Defend

- Most commercial GL policies include duty to defend
  - No requirement to defend unless and until a “suit” is filed
    - “Suit” defined as a civil proceeding seeking damages, including arbitrations and other ADR proceedings
  - Pre-suit fees and costs will not be covered
  - Unintended result: suits are encouraged
Typical Exclusions in Commercial GL Policies

- Expected or intended injury
- Contractual liability (but can get coverage through endorsement)
- Employer’s liability
- Pollution
- Owned property
- Product recall and damage to own product or work
- Professional services
Important Conditions in Commercial GL Policies

- **Notice**: Two notice requirements
  - “You must see to it that we are notified as soon as practicable of an occurrence or offense which may result in a claim.”
  - “If a claim or suit is brought against any insured, you must . . . [n]otify us as soon as practicable. You must see to it that we receive written notice of the claim or suit as soon as practicable.”

- **Prejudice rule**: New Jersey vs. New York law
Important Conditions in Commercial GL Policies

- **Cooperation and No Voluntary Payments**
  - Policyholder duty to cooperate with insurer “in the investigation or settlement of the claim or defense against the suit.”
  - Policyholder may not “voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.”
Additional Insured Coverage

- Parties often agree to transfer risk by contract
- Can accomplish this by one party naming a second party as an “additional insured” on the first party’s general liability insurance policy
  - Coverage subject to terms of additional insured endorsement
  - Scope of coverage varies widely – know what to give or get
- Second party receives coverage from first party’s insurer
Additional Insured Coverage

- Different additional insured endorsements provide different coverage
  - Specific endorsements
    - Examples include CG 20 10 11 85, CG 20 10 07 04, CG 20 15 07 04 and CG 20 33 07 04
  - Blanket endorsements
  - Ongoing/completed operations
  - Additional insured’s negligence
  - Vicarious liability
  - Mortgagee endorsement
Potential Pitfalls to Additional Insured Coverage

- Some endorsements purport to limit coverage to vicarious liability
- Newer versions typically exclude additional insured’s sole negligence
- Newer versions often limited to ongoing operations claims
  - Add endorsement for completed operations coverage if necessary
- Use proper names for all entities intended to be covered
Potential Pitfalls to Additional Insured Coverage

- Beware competing “other insurance” clauses
- Different versions could effectively vitiate additional insured coverage by making it respond after additional insured’s own coverage
- Require that additional insured coverage be primary and non-contributory to additional insured’s own coverage
- Deductibles and self-insured retentions do not constitute “other insurance” under New Jersey and New York law
Potential Pitfalls to Additional Insured Coverage

- Expanded employee exclusions
  - Can bar coverage for all insureds for claims of injury to the employee of any insured
  - Would prevent insurance from responding to claim against additional insured brought by employee of named insured
- Self-insured retentions that only the named insured can pay
Potential Pitfalls to Additional Insured Coverage

- Do not rely on Certificates of Insurance to confirm coverage.
- Do not describe coverage fully.
- Usually informational only. Acord Form 25 Certificate of Liability Insurance states explicitly that policies must be endorsed to effectuate additional insured coverage.
- Courts in most jurisdictions, including New Jersey, concur.
- Better to review additional insured endorsement itself.
- Best to review entire policy for scope of coverage.
Errors & Omissions Liability Insurance

- Typically Provides Broad Coverage to Individual Insureds and Entities That Render Professional Services, including Physicians, Lawyers, Architects, Engineers, Directors and Officers, and Brokers
  - Protects against the consequences of deficiencies and errors in rendering professional services
  - Protects against claims of third parties
Errors & Omissions Liability Insurance

- Provides coverage for “purely economic” liability to which general liability policy language may not extend.

- Protects against liability due to the rendering or failure to render professional services that is typically explicitly excluded from general liability policies.
Errors & Omissions Liability Insurance

- Typically provide coverage for liability that arises out of:
  - “the practice of the insured’s profession.”
  - Nature of the act or omission vs. title of the person who performs or fails to perform the act
    - Nature of the act/omission is the deciding factor
Typical E&O Exclusions

- Generally related to nature of type of E&O policy (for example, medical malpractice policy exclusions will differ from legal malpractice policy exclusions) or particular services covered

- E&O policies almost always exclude the following:
  - Bodily Injury to any employee of insured during course of employment
  - Insureds’ Workers’ Compensation Obligations
  - Criminal Acts and Intentional Harm
  - Some policies include an express “negligence” requirement - modifies only word that directly follows (e.g. “act” and not “act, error or omission”)
Other E&O Policy Features

- Typically provide a duty to defend, in addition to a duty to indemnify, until the policy limit is exhausted.

- Coverage for “Wrongful Acts,” for professional liability of Individual Insureds as well as Partnerships, Associations and Corporations.
Similarities to Directors and Officers Liability Insurance

- E&O policies share many similarities with D&O policies:
  - Typically triggered by a “Claim”
  - Apply a “Retroactive Date”
  - Require notice of a Claim to the Insurer during the policy period (a “claims made” policy)
  - Provide exclusions for criminal or fraudulent acts
Directors and Officers Liability Insurance

- Typically Provides Broad Cover to Individual Insureds, Including Directors, Officers and Certain Corporate Employees for Liability, Not Indemnified by Entity, for “Wrongful Acts,” including:
  - “any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted” by the individual serving in his corporate capacity
Directors and Officers Liability Insurance

- Also Typically Provides Cover to the Entity in Two Circumstances:
  1. For amounts the entity indemnifies individual officers, directors, employees for “Wrongful Acts”
  2. For amounts the entity pays in connection with “Securities Claims” for publicly traded companies
     - “Securities Claims” are defined relatively narrowly
     - Entity coverage for private companies is not as restrictive
Directors and Officers Liability Insurance

- Unlike commercial GL policy, typical D&O policy is triggered by a “Claim” being made against the policyholder and reported to the insurer during the policy period
  - Definition of “Claim” and impact on other provisions
- And typical “Retroactive Date”: earliest date when covered Wrongful Act may occur
  - Date typically date when policy incepts or first policy purchased from insurer incepted
  - Encourages policy renewal
D&O Policy Duty to Defend or Pay Defense Costs

- Policy forms differ
- Most do not include duty to defend
- Most include duty to reimburse defense costs
  - Payment of which reduces policy limit
  - Sometimes required to use insurer panel counsel
  - Often need insurer’s consent on defense counsel and rates
Typical D&O Exclusions

- Prior/pending claim
- Insured vs. insured
- Criminal or fraudulent acts
- ERISA claims
- Bodily injury and property damage claims
Important Conditions in D&O Policies

Notice

- Notice of claim required to be given
  1. As soon as practicable and
  2. Before expiration of the policy or within agreed time (usually no longer than 30 or 60 days) after expiration of policy

- Unlike GL policies, failure to give notice of D&O claims before expiration of policy or short period after expiration (if agreed in policy) will result in loss of coverage for claim
Important Conditions in D&O Policies

Cooperation/Costs Must Be Consented To

- While policyholder must defend itself (subject to reimbursement), it must allow insurer the right to associate in defense of claims likely to involve the insurer

- Insurer’s consent required before insured:
  1. Admits or assumes liability
  2. Enters into settlement or stipulation to judgment
  3. Incurs any defense costs
Employment Practices Liability Insurance

- Typically provides broad cover to the entity and to individual insureds, including directors, officers and certain corporate employees for liability for any actual or alleged “Employment Practices Violation,” including employment-related:
  - Wrongful discharge
  - Harassment
  - Discrimination
  - Retaliation
  - Misrepresentations
  - Wrongful failure to employ or promote
  - Wrongful demotion
  - Wrongful discipline
  - Violation of civil rights
Employment Practices Liability Insurance

- Trigger same as D&O – claim made and reported to insurer during the policy period
- Retroactive date provision similar to D&O policy
- Defense/notice/conditions generally similar to those found in D&O policies
- Similar exclusions
- Important additional exclusion – wage and hour matters
Fiduciary Liability Insurance

- Typically provides broad cover to the entity and to individual insureds, including directors, officers, certain corporate employees and trustees of sponsored plan for:
  - Breach of responsibilities, obligations or duties imposed on fiduciaries of sponsored plan by ERISA, rules and regulations under ERISA, or similar laws
  - Negligent acts, errors or omissions in administration of plan
  - Other matters claimed against Insured from service as fiduciary of sponsored plan
Fiduciary Liability Insurance

- Trigger same as D&O – claim made and reported to insurer during the policy period
- Retroactive date provision similar to D&O policy
- Defense/notice/conditions generally similar to those found in D&O policies
- Similar exclusions plus:
  - Benefits Due Exclusion
Primary Forms of First Party Insurance
General Aspects of Property Policies

- **First-party**: Insures the policyholder’s losses rather than the losses of others (but some do contain duty to defend)
- **Insures property**
  - Examples: buildings, fixtures, equipment, inventory
  - Whether “land” is insured property is a litigated issue
- **Insures against perils causing loss of or damage to property**
Types of Property Policies

- **All Risks or Difference-in-Condition**
  - Covers all of the policyholder’s property, unless specifically excluded (may be called “blanket” coverage)
  - Covers all risks of loss (perils) unless specifically excluded

- **Named Perils**
  - Fire insurance policy
  - Theft/fidelity
  - Schedule of insured property or locations
  - Other specialty policies

- **Specialty Policies for Life Sciences**
Property – Insured Property

- “Real and personal property” owned, used or intended for the policyholder’s use
  - Improvements and betterments to buildings
  - Equipment and machinery
  - Contents/Inventory/stock
- Interest of the policyholder in the property of others in the policyholder’s care, custody and control (leasehold)
- Personal property of employees on premises
- Property in transit that policyholder insures
Extent of Coverage

- The extent of coverage is determined by policy language as interpreted by applicable case law.

- Policy language
  - Coverage Grant
  - Exclusions
  - Conditions

- Applicable case law – under common choice-of-law principles, law of the location of the damaged or destroyed property or the location of policyholder’s insurance department/headquarters may govern.
Coverage Grants

- The scope of insurer’s coverage grant and obligation is usually found in the insuring agreement
- Coverage grants can be broad (e.g., all risks/blanket) or narrow (e.g., named perils/scheduled)
- Need to review entire policy to have a full picture of coverage grant
Broad Coverage Grants

- All Risk Property Example
  - “This policy covers all risks of physical loss of or damage to property described herein including general average, salvage and all other charges on shipments covered hereunder, except as hereinafter excluded.”
Narrower Coverage Grants

- **Named perils/scheduled locations**: “The insurer will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.”
  - Covered property is defined to include only certain categories of property
  - Premises – List of locations
  - Covered Cause of Loss is defined to include only certain perils.
Exclusions - Property

Commonly excluded property in current policies:

- Money
- Land
- Property insured under other policies (e.g., aircraft, watercraft, automobile, and marine insurance)
- Animals
- BI without direct physical damage to property
- Contraband
- Infrastructure: Retaining walls, roads and bridges, pipes
Exclusions - Perils

- Carve-outs from coverage grant
- Commonly excluded perils (cause of loss) in general policies:
  - Ordinary wear and tear
  - Perils covered by other policies
  - Vacant Buildings – may not cover against certain perils (e.g., theft, vandalism, sprinkler damage) and may reduce amount of payment from other causes of loss
  - Contamination (currently)
  - Asbestos
  - Correction of faulty workmanship, construction, design
  - Nuclear materials
  - War-like actions
- Fortuity issue
Claim Submission Conditions

- **Notice**
  - Look to Notice Provision for recipient (e.g., insurer, broker, law firm)
  - If notice provided orally, follow-up in writing
  - Timely notice – standards vary based on policy language, facts and law
  - Policy may require certain information – read the notice provisions
Claim Submission Conditions

- **Sworn Proof of Loss**
  - Place, time and cause of loss
  - Property lost or damaged
  - Value of property
  - Amount of loss
  - Usually a time limit
  - If not submitted, insurer may have to show prejudice to deny coverage
  - Coverage litigation may supersede
Claim Submission Conditions

- Examination Under Oath
  - Usually after proof of loss filed
  - Deposition of policyholder
  - Produce documents
  - Exhibit damaged property to insurer
  - Coverage litigation may supersede
Claim Submission Conditions

- **Suit Limitation Provision**
  - May limit the time in which an action can be brought to a time period (usually one or two years) after the happening of the loss or discovery of the occurrence giving rise to the claim.
  - In context of progressive losses (e.g., asbestos-related property damage), may be disputes as to when a loss happened or occurred.
  - Some versions of provision provide “unless a longer period is provided by applicable statute.”
  - Should not rely on insurer’s ongoing investigation of claim to toll running of suit limitation period (varies by state).
Claim Submission Conditions

- Consider tolling agreement if claim resolution may be ongoing for considerable time
- Small minority of jurisdictions require insurer to show prejudice from policyholder’s failure to comply with provision

**Assistance and Cooperation**
- Provides policyholder shall cooperate with insurer in its investigation of claims
- Should respond to requests for information
- Reasonableness is a factor
General Property Policy Coverages

- **Examples of Specific Additional/Supplemental Coverages:**
  - May be separate provisions from insuring agreement providing for payment of policyholder’s costs associated with a loss
  - Sue and Labor – Under certain conditions, insurer will contribute to cost of safeguarding property from loss or mitigating loss
  - Rental equipment (e.g., vehicles) for temporary replacement of damaged or destroyed property
  - Property Damage/Physical Loss or Damage
    - Debris removal of insured property
  - Business Interruption
Business Interruption Insurance

- BI coverage is typically included as part of first-party commercial property insurance covering assets of the insured entity.

- Limits of commercial property insurance – provides coverage for loss or damage to real and personal property of business, or “hard” costs associated with repairing or replacing property.

- Catastrophic events, however, often result in consequential economic losses that extend far beyond the “hard” costs.
Scope of Coverage - Overview

- Basic form of coverage
- Additional coverage provisions
  - Extended
  - Contingent
  - Civil/Military Authority
  - Ingress/Egress
  - Extra Expenses
  - Claims Preparation Costs
  - Delay in opening/soft costs
The Relationship between BI Coverage and Property Damage

- BI insurance covers necessary business interruptions caused by damage to covered property.

- After establishing that a covered peril has caused property damage, an insured may need to establish that the property damage caused the interruption.

- Some policies may expressly exclude coverage for losses attributed to worsened business or market conditions.
The Causal Connection

Covered Peril → Property Damage

AND

Property Damage → Interruption

NOT

Covered Peril → Property Damage and Interruption
“Interruption” or “Suspension” of “Operations”

- Complete Cessation vs. Partial Shutdown
- “Partial Loss” of business income
  - Slowdown does not count unless specified
- “Suspension” means:
  - the slowdown or cessation of your business activities, or
  - that a part of all of the described premises is rendered untenantable, if coverage for Business Income including “Rental Value” applies
“Necessary” Interruption

- Most policies today require that the suspension of operations be deemed “necessary”
- “Necessary” is generally not defined in most policies
- General standard: unreasonable for insured to continue business operations
- Insured need not take extraordinary efforts to avoid Necessary Interruption
- Discretionary Business Decisions may not qualify as Necessary
“Period of Restoration”

- A defined term in policies
- Sometimes understood to be the theoretical (or hypothetical) reasonable amount of time that it should take the insured to repair the damage or otherwise resume operations

- Permanent Replacement Issue/Failure to Rebuild
  - If failure to rebuild then theoretical debate ensures
  - Carriers will downplay severity and estimate time of repair under ideal circumstances
  - Policyholders will argue for estimates based on conditions as they exist and account for events such as insurance companies’ refusal to advance funds in a timely manner
Duty to Mitigate

- Most policies require an insured, where possible, to reduce the loss by complete or partial resumption of the business or by making use of the merchandise or other property at the location.
- An insured must take steps to shorten indemnity period where possible, but it’s not necessary to take any and all measures.
- Reasonable actions with intention to reduce the recovery.
Typical Exclusions

- Excluded Perils
- Idle Periods
- Interference
- Loss of Contracts
- Consequential Losses

- Utility Service Interruption
- Finished Stock
- Wear and Tear Exclusion
- Loss Due to Unfavorable Business Conditions
Proving Loss Income

- Burden of Proof on Plaintiff
  - Must show, but for the suspension of operation, the business would have earned income
  - Insured must prove how much would have earned
  - TIP: Insured should retain assistance of forensic accountant/expert
  - Policies will typically provide standard for Loss Determination for Business Income [and Extra Expenses]
  - Insured may have option to negotiate in advance with insurer on a Business Income Agreed Value
Conclusion

- Property policies can cover losses to policyholder’s property arising from a wide variety of perils – obtain all potentially applicable policies
- If involved in a claim, be aware of policy conditions
- Applicable state’s law may make a difference to interpretation of policy in a coverage dispute
- Valuation is often the key issue to address
Other Forms of Corporate Insurance and Purchasing and Negotiating Policies
Other Forms of Corporate Insurance

- “Cyber-Attack” Insurance Policies
  - Provides coverage for various first-party liability that results from “cyber-attacks” and is typically not covered by general liability policies, including:
    - Losses due to data breach, including third-party lawsuits against the company
    - Notification requirements and public relations efforts
    - Misappropriation of intellectual property or confidential business information
“Cyber-Attack” Insurance Coverage

- Provides coverage for various first-party liability that results from “cyber-attacks” (continued):
  - The cost to recover data that is damaged or malicious code
  - Business interruption resulting from operations being disabled by a cyber attack
  - Extortion from cyber attackers who have stolen data
“Cyber-Attack” Insurance Coverage

- Expected increase in Cyber-Attack Insurance policy sales due to new Securities and Exchange Commission regulations:
  - Requires companies disclose “material” cyber-attacks and their cost to the shareholders
  - Little uniformity in cyber-attack insurance policies because emerging niche in insurance coverage industry
    - Most companies self-insured for such risks in the past
    - Increase in policy issuance expected due to recent increase in large-scale attacks, e.g., Sony, Epsilon, Google, RSA
“Cyber-Attack” Insurance Policies

- Type of coverage dependent on specific loss scenarios and potential exposure to companies

- Example of specimen policy exclusion:
  - Excludes any claim arising out of “(1) any shortcoming in security that [the insured] knew about prior to the inception of this policy” or “(2) [the insured’s] failure to take reasonable steps, to use, design, maintain and upgrade [the insured’s] security…”

- Exclusions must be reviewed carefully and, in context of specialized policies, insureds may be able to negotiate more favorable terms and conditions
Other Forms of Corporate Insurance

- **Special Crime (Kidnap & Ransom)**
  - Generally reimburses for payments made as a result of a kidnapping, bodily injury, extortion, property damage extortion, accidental death & dismemberment, including, but not limited to, security consultant’s fees, salary, travel, and repatriation.
Other Forms of Corporate Insurance

- Crime
  - Generally covers loss of money, securities or other property due to employee dishonesty as well as forgery, theft, computer fraud/funds transfer or acceptance of phony money orders or counterfeit paper currency by non-employees.
Other Forms of Corporate Insurance

- **Cargo**
  - Generally covers all risks of physical loss or damage from external cause to shipments of goods and/or merchandise and/or property made by vessel, barge, truck, railcar and/or land and/or air conveyance. Such coverage generally excludes domestic inland transit.
Other Forms of Corporate Insurance

- **Umbrella**
  - Generally provides additional liability coverage above primary limits
    - One policy covers multiple coverage lines
      - E.g., auto, CGL, employers liability
  - Often covers claims not covered under primary liability policies
  - Increases both amount and scope of coverage
    - Contrast with excess policies, which only increase the amount of coverage
Process of Purchasing Insurance

1. Partner with your Risk Manager – Start Early
2. Pre-Renewal Strategy Meeting with your Broker
3. Gathering/Submitting Accurate Underwriting Information
4. Assess your Risk/Exposures
5. Work with your Broker/Role of the Broker
6. The Application/Severability
7. Marketing Process/Audience with Carriers/Underwriters
Process of Purchasing Insurance

8. Negotiation Process – Review the Carrier’s Form Early
   - Definitions, Named Insured, procedures for reporting claims, manuscript policy, endorsements, occurrence vs. claims made policies

9. Receipt of Binder

10. Receipt of Policy/Centralized Repository