

ACC NCR PUTTING YOUR BEST FOOT FORWARD – PRESENTING YOUR INSURANCE CLAIM TO MAXIMIZE THE UTILITY OF YOUR POLICY

Presented by:
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Businesses Face a Variety of Risks

Hazard Risk

Arises from property, liability, or personnel loss exposures

Property Risk
Legal Risk
Personnel Risk
Consequential Loss

Operational Risk

Arises from people, processes, systems or controls

People Risk
IT Risk
Management Oversight
Business Processes

↑ Pure Risk
↓ Speculative Risk

Financial Risk

Arises from the effect of market forces on financial assets or liabilities

Market Risk
Credit Risk
Price Risk
Liquidity Risk

Economic environment
Political environment
Demographics
Competition

Strategic Risk

Arises from trends in the economy or society

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What is Insurance?

- A contractual means of transferring risk from one party (the policyholder) to another party (the insurer) in exchange for payment of an insurance premium.
- The insurer agrees to take responsibility for the risks of the responsible party in the event of a covered loss.
- Think of insurance as an asset!



Types of Protection

First-Party Loss



Third Party Liability



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First Party Examples

- Property Loss or Damage
- Business Interruption
- Crime



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Identify Applicable First Party Policies

First party risks may be covered by, among other policies:

- Commercial Property
- Crime Policies
- Marine Cargo & Storage
- Builder's Risk/ Course of Construction
- Representations & Warranties Insurance
- Cyber Insurance

Third Party Examples

Source: Legal Resources: LETTER BEFORE ACTION, DEBT CLAIMS (2018)

Company Name Ltd
Kaiser Park
Business Suite
X80 7LM
5 February 2019

Miss Mortimer

88 Riverside Road
Willemore Moor
GL31 8BA

Dear Mrs Mortimer,

Letter before action

This is Company Name Ltd's letter before action pursuant to the Pre-Action Protocol for Debt Claims. We refer to our agreement:

It was agreed that Company Name Ltd would provide Second Company Name Ltd with IT services. A copy of the agreement has been enclosed with this letter.

We also refer to invoices dated 15.11.2018, 12.12.2018, letters of complaint dated 21.12.2018 and 01.01.2019 and a call charging record on 07.01.2019.

Pursuant to our agreement, the total amount due from Mrs Mortimer to Company Name Ltd:

Invoice Number	Due date	Amount Due
1	15 November 2018	£750
2	12 December 2018	£750

The debt detailed above remains outstanding as at the date of this letter and interest is accruing at a rate of 8.25% pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 (the Act). We also claim a fixed amount of compensation of £100, pursuant to section 5A of the Act. The total amount payable by you as at the date of this letter is £1600.

In light of the above, we request that you make payment of £1600 by return. Payment should be made by bank transfer to Company Name Ltd, account number 12345678. If you dispute that any or all of the debts owed, you should respond to this letter setting out the reasons why, together with an explanation as to which facts and/or part of the claim are disputed by you by 16 March 2019.

Enclosed with this letter are the following: a copy of the agreement.

Yours faithfully
Blank Rome LLP

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Third Party Policies may be tailored to business risks, including:

- Commercial General Liability
- Directors & Officers Liability
- Errors & Omissions – Professional Liability
- EPLI
- Media Liability
- Workers' Compensation
- Cyber Insurance

Provide Notice

First-Party

- Review the Policy's claim submission requirements, including when the duty to notify arises
- Submit prompt notice within the specified time period
- Align your presentation of the facts with the terms of the policy to maximize coverage

Third-Party Liability

- Occurrence v. Claims Made
- Some policies may include non-standard notice provisions
- May require notice in the event of *"knowledge of a claim"* vs *"knowledge of circumstances that could give rise to a claim"*

Immediate Considerations Once A Claim Begins

- Agents and brokers may be useful resources throughout the claims process.
- Distinction between agents v. brokers.
- They can advise you of potentially applicable policies, assist with providing notice, and help negotiate the claim.
- Public adjusters and consultant roles

Are communications with Agents & Brokers Privileged?

- Courts have gone both ways:
 - *See, e.g., Roc Nation LLC v. HCC Int'l Ins. Co., PLC*, No. 19 CIV. 554 (PAE), 2020 WL 3170886, at *2 (S.D.N.Y. June 15, 2020) → holding that certain communications between an insured's counsel and the insured's broker "made for the purpose of informing [counsel's] legal advice to [the insured] are properly privileged."
 - *But see SR Int'l Bus. Ins. Co. v. World Trade Ctr. Properties LLC*, No. 01 CIV. 9291 (JSM), 2002 WL 1334821, at *1-6 (S.D.N.Y. June 19, 2002) → rejecting arguments that communications between the insured's counsel and its broker were protected by the attorney-client privilege, common interest privilege, or work product doctrine.
- Some courts identify the line as whether the Broker is acting as an agent of the attorney, or find that privilege only to communications seeking legal (vs business) advice.
- When in doubt, assume no privilege applies.

Assess Coverage: First Party Loss

- Explore your specific policy language
- First Party Recovery may be available under one of three buckets:
 - Repair/replacement
 - Business Income
 - Other
- Work from the proposition that there should be coverage unless it can be unequivocally shown that there is no basis for coverage
 - *See, e.g., “[i]n an action based upon an ‘all risks’ insurance policy, the burden is upon the insured to show that a loss has occurred; thereafter, the burden is on the insurer to defend by showing that the loss falls within a specific policy exclusion.” Betz v. Erie Ins. Exch., 2008 PA Super 221, ¶ 17 (2008) (citing Miller v. Bos. Ins. Co., 420 Pa. 566, 572 (1966) (internal marks omitted)*
- Analysis will be driven by state law

- Policy may cover a defense costs
- ***The policyholder is entitled to a defense if there is any “potentiality” that the claim will come within coverage – based on the allegations but without applying magic pleading requirements.***
 - *See, e.g., Brohawn v. Transamerica Ins. Co., 276 Md. 396, 408, 347 A.2d 842 (1975).*
- “*Duty to defend*” vs promise to “*pay defense costs*”
- Who has the right to select defense counsel?
 - Insurer
 - Policyholder
 - Both?

Identify Potentially Responsive Insurance Assets



- Excess vs. Primary Coverage
- Additional Insured status -- indemnifications
- For longtail liability, brokers and agents can be key in helping to identify lost policies
 - E.g., Asbestos claims, environmental, sex abuse claims

- Document everything - early and often!
 - Loss
 - Damages
 - Contact/Communications with Insurers
 - Inspections
- Address waivers of spoliation and insurer's opportunities to participate in the post-loss response

Analyze and Be Aware of Conditions

COMMON POLICY CONDITIONS

- a. Notify Police
 - b. Notify Us
 - c. Protect Property
 - f. Proof of Loss
 - g. Cooperate
- 2. Examination Under Oath
 - 11. Legal Action Against Us
 - 21. Transfer of Rights of Recovery Against Others To Us (Subrogation)

Identify Suit Limitations

- Claims trajectories are unpredictable, and may require litigation
- Identify applicable limits that bear on the policyholder's ability enforce coverage rights
 - Statue of Limitations
 - Arbitration Provisions
 - Mediation Provisions
- Take steps to preserve the policyholder's ability to file suit on its own terms

E. LOSS PAYMENT AND VALUATION CONDITIONS

1. Replacement Cost

2. Actual Cash Value

3. Specific Property Valuations

Inflation Guard (%)	Replace- ment Cost (x)	Replace- ment Cost Ind. Stock (x)	Agreed Value (x)	Monthly Limit (fraction)	Maximum Period (X)	Extended Period (Days)
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BUSINESS INCOME

Definitions

1. Business Income means:

Period of Restoration means the period of time that:

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- Confirmation of coverage v. reservation of rights – what happens in each scenario
- Privilege
- Limits of insurance v. amount of alleged liability
- Cooperation is a two-way street
- Insurance considerations concerning settlements
 - *See, e.g., Wood v. New Jersey Mfrs. Ins. Co.*, 206 N.J. 562, 564, 21 A.3d 1131, 1132 (2011) (“where there is a settlement demand within the policy limits, the insurer in bad faith refuses to settle the claim, and the verdict above the policy limits is returned, . . . the carrier's bad faith failure to settle the claim within the policy limits may render the carrier liable for the entire judgment, including the excess above the policy limits[.]”).

A Denial is Not the End of the Road!



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Maintain Your Coverage Positions

- Don't blindly accept conventional wisdom about what is and is not covered
- Reject assertions that insurance is just “not intended” to pay your type of claim.
- The Insurers' interpretation of the policy language does not control the outcome of the case:

A policyholder does not have to show that its construction is the only permissible one, or the best one - only that it's a reasonable one.

See, e.g., Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 153 (Minn. Ct. App. 2001).

Rules of Insurance Policy Construction Every Policyholder Should Know:

- Insurers bear the burden to prove the applicability of exclusions.
 - *White Pine Ins. Co. v. Taylor*, 233 Md. App. 479, 165 A.3d 624 (2017) (insurer had burden to prove assault and battery exclusion applied).
- Words in a policy are construed by their “ordinary and popular,” or “plain meaning,” not their technical meaning.
 - *See, e.g., Buckeye State Mut. Ins. Co. v. Carfield*, 914 N.E.2d 315, 318 (Ind. Ct. App. 2009); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990).
- When policy language is reasonably susceptible to more than one interpretation, the policyholder’s interpretation controls.
 - *See, e.g., Mega Life & Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1406 (11th Cir. 2009); *Int’l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 424 (2d Cir. 2002).
- Insurance should be interpreted to give the policy and risk transfer real meaning.
 - *See, e.g., USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357 (Del. 2020).

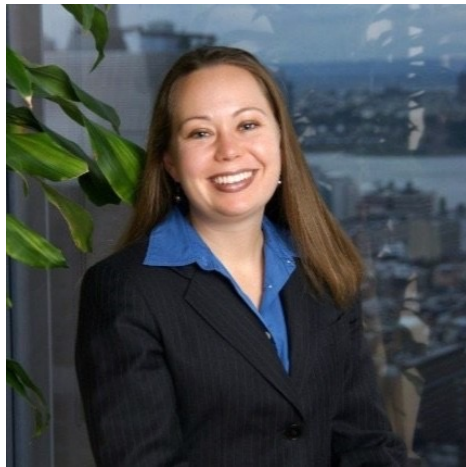
QUESTIONS?

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PANELISTS

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Kristin Meister is Senior Counsel at IDEMIA where she handles all litigations and investigations, trade compliance, data privacy, and IP. Prior to IDEMIA, Kristin was in house counsel at Credit Agricole Corporate and Investment Bank in New York City, also covering litigation and investigations. Kristin was also previously a plaintiff-side securities class action attorney at Bernstein Litowitz, prosecuting stock price drop cases, and an associate at Alston & Bird and Dewey Ballantine in New York City.

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John's national practice focuses on advising corporate policyholders about their insurance policy rights and recovery insurance assets, either through negotiation or trial. He maintains a particularly active trial practice that includes serving as trial counsel for a *Fortune* 100 pharmaceutical company in a four-month trial, a *Fortune* 500 regulated utility in two separate multiweek jury trials, and a large multinational engineering services corporation in a three-judge panel arbitration. John is ranked in *Chambers USA* and *Legal 500* recommended John for his "subject-matter expertise and business-focused approach." *Benchmark Litigation* also recognized John as a local (Washington, DC) "Plaintiff Litigation Star" and ranked him in the National Tier 1 level (one of only 11 for insurance nationally). He is also recognized in *Best Lawyers in America*.

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Dominique Meyer is an associate in Blank Rome's policyholder-only insurance recovery practice. She focuses her practice on insurance recovery matters and complex commercial litigation, with experience in federal and state court insurance coverage disputes, contract actions, and business tort matters.

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