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Understanding Risk Management in a High-Risk Environment

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Webinar

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A member of the firm's Litigation department and the Insurance Recovery and Counseling practice group, Joshua Rosenberg represents policyholders by helping them maximize their insurance assets through informal negotiations with and litigation against insurance companies.

Joshua has assisted private, public and governmental entities in insurance recovery matters involving general liability, directors and officers liability, errors and omissions liability, healthcare professional liability, employment practices liability, cyber liability, and punitive damages liability insurance. Moreover, Joshua has handled a wide variety of litigated and non-litigated matters for clients in the healthcare, technology, banking, real estate, and construction industries.



Risk Management in a High-Risk Environment

- When risk managed poorly, business suffers and people lose jobs
- When it's managed effectively, saving capital and earnings, people get promoted
- Corporate counsel can quarterback the risk management



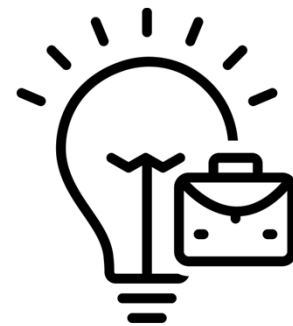
Policies are Corporate Assets

- **You needn't be an expert on insurance** – just need to know:
 - ✓ What – generally – policies **cover** (so you ask for payment **only where payment is due**)
 - ✓ What they don't cover (to maintain **reasonable client expectations**)
 - ✓ What to do to **protect them** (like any other asset)



Key Concepts

- **First-party** vs. **third-party** insurance
- Duty to **defend** vs. duty to **indemnify**
- What **triggers coverage**
- When must you **notify the insurers**
- **What you need to do** to get a claim paid





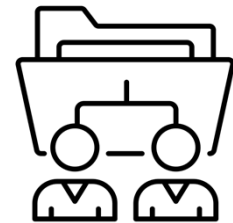
Key Concepts: 1st vs. 3rd Party Insurance

- **First-party**: Carrier writes the check to the Company
- **Third-party**: Carrier writes the check to the claimant
- **First/third-party**: Some policies are both (Cyber)
- **Deductible/SIR**: Company's layer of financial responsibility before coverage kicks in



Key Concepts: 1st Party Insurance

- **Property**: Fire, wind, etc. / supply chain issues
- **Crime**: Employee dishonesty, extortion, etc.
- **Cyber**:
 - **Incident Response**: Forensics, attorneys, public relations
 - **Business interruption**: Lost revenue from a data breach
 - **Data recovery**: Retrieving lost data, fixing damage to systems
 - **Network extortion**: Ransomware





Key Concepts: 3rd Party Insurance

CGL: Bodily injury/property damage

E&O: Corporate mistakes, professional liability

D&O: Securities law violations, management liability

Cyber: Data breaches, privacy violations

EPL: Employee claims (discrimination, harassment)

Fiduciary: Administering employee benefits plan



Key Concepts: Duties Owed

- **Duty to defend**: Potential coverage (same as duty to reimburse?)
- **Duty to indemnify**: Coverage more likely than not
- **Duty to settle**: Not in the policy, implied by law
 - ✓ **Insurer must settle** if liability is reasonably likely
 - ✓ **Excess Judgment Rule** applies if liability is likely to exceed policy limits and Insurer refuses to settle – limits waived



Potential Coverage Traps

- **Notice** of claims
- Control of **defense** counsel
- Effective **cooperation** with insurers
- **Planning** ahead of mediation



Trap No. 1: Notice (General)

Claim: Written demand for compensation (tolling?)

Circumstance: Likely to result in a Claim (optional?)

What to include: All you know (burden?)

Who gets it: Primary insurer, plus excess carriers (even small claims?)



Trap No. 1: Notice (Timing)

When to give notice:

- Occurrence (“as soon as practicable”)
- Claims-made-and-reported (within policy period)
- Claim-made (same insurer?)



Trap No. 1: Notice (Prejudice)

Notice-Prejudice Rule: Often applies when notice within policy period is not a condition to coverage

- Occurrence-based policies
- Long-tail environmental contamination liabilities
- Claims-made

Not Universal: Some states haven’t adopted, TN has

Proving Prejudice: Typically carrier’s burden



Trap No. 2: Defense (Duty to Defend)

Duty to defend:

- Insurer controls defense and settlement (consent?)
- Costs of defense don't reduce limits
- Keep an eye on panel defense counsel (independent counsel?)



Trap No. 2: Defense (Insured's Choice)

Duty to reimburse:

- Insured selects and controls defense counsel
- Costs of defense within limits
- Ask for evaluation of liability and damages



Trap No. 3: Cooperation (General)

When carrier is defending:

- Assist with discovery, docs and depositions
- Duty to cooperate, not duty to conform

When insured controls defense counsel:

- “All information” ≠ All information
- Defense invoices (privilege?)
- Prejudice?



Trap No. 4: Planning Ahead (General)

Defense counsel's evaluation: Carriers will want to know before committing funds

- Can you just give the carrier a copy?
- Has defense counsel provided a trial budget?





Trap No. 4: Planning Ahead (Dialogue)

Dialogue with carrier: Start months before mediation, carriers are slow moving

- Have you elevated the claim to the carrier's management?
- Have you leveraged broker relationships?
- Have you given the adjuster a way to save face?



Trap No. 4: Planning Ahead (Value)

Valuing the claim: Weigh potential for coverage against cost to recover

- Has coverage counsel provided a coverage opinion? Litigation budget?
- Are all stakeholders on board?



Case Study: Bet-the-company lawsuit

- Your company makes software for large healthcare systems
- Largest client files action alleging defective software design
- Demand is \$1B and getting lots of press
- Carrier defends, but during discovery small related claim in Kentucky, never noticed to the insurance company, settled for \$25k
- Carrier denies coverage based on late notice, using policy language to lump the Kentucky claim and bet-the-company lawsuit together
- What do you do?



You Don't Have to be an Expert!

...just remember to ask:

- What kind of policy applies to the claim?
- What do we have to do right now to preserve coverage?
- How do we plan ahead to get the coverage we paid for?



Q&A



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