

RISK MANAGEMENT

Exploring all available sources of insurance coverage

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Given the current economic market, more than ever it is critical for companies to offset business losses by seeking payment from all available insurance sources. Although companies are typically well aware of coverage under their own insurance policies for traditional losses, there may be other potentially significant insurance recovery sources that are less obvious. These sources include insurance issued for a different line of coverage; insurance purchased by business partners and entities such as suppliers, distributors, contractors or retailers; and/or insurance issued to predecessor or affiliated companies.

First and foremost, companies should look to their own policies for insurance coverage. Most companies have insurance coverage for a wide range of risks and liabilities. Examples of different types of coverage include general liability insurance, property insurance, workers' compensation insurance, professional liability insurance, directors and officers insurance and umbrella coverage. Often a loss may appear to fit into one line of coverage, but further investigation reveals that the loss actually falls within another line of coverage as well. For instance, property insurance policies typically apply when there is a loss to a policyholder's own property. Yet many property insurance policies also provide coverage for business interruption or business income losses, meaning that a policyholder may be able to recover insurance proceeds for lost earnings when property damage suffered by business partners

forces the business to incur business losses. Therefore, as an initial matter, companies should thoroughly analyse all lines of insurance coverage in connection with any business loss.

Insurance policies issued to other parties are an additional source of potential insurance recovery. It is common for contracts among business entities to contain insurance provisions. In fact, business contracts often include provisions requiring an entity to maintain certain types of insurance coverage or maintain minimum limits of liability. These contracts may also require that one company be named as an 'additional insured' under another company's insurance policy. 'Additional insureds' are parties to whom the policyholder has chosen to extend coverage, but that are not named specifically as an 'insured' under the policy. When seeking insurance coverage, companies should be mindful to consider whether they fall within the 'additional insured' provision of another entity's insurance policy. Even in the absence of an express policy provision, coverage may be available, particularly if the contract between the entities required that one company be named as an additional insured under the other entity's policy.

Moreover, insurance coverage may be available through insurance issued to predecessor or affiliated companies. Indeed, insurance rights may unknowingly be available as a result of corporate changes such as mergers, acquisitions, spinoffs or other forms of reorganisation. Although the insurance agreement is a contract between a business and the insurer, insur- ►►

ers of predecessor corporations may have coverage responsibilities to successor corporations. While the issue of coverage is ultimately a fact-driven analysis, a few examples are worth discussion.

ASSET PURCHASE AGREEMENTS. In these cases, the successor corporation generally does not explicitly obtain the insurance rights of the selling company. However, there are often exceptions. For instance, several courts have found that insurance rights may be transferred from a predecessor to a successor company by contract or as a matter of law when there was an intention to transfer the insurance rights and the insurance policy at issue did not preclude assignment.

MERGERS. Typically, insurance rights after a merger are available to the surviving corporation because the acquiring corporation inherits the rights and obligations of the merged company. Thus, the merged company's insurance policies remain effective to cover losses from the company's premerger operations. Accordingly, if a successor company is sued for liabilities arising out of premerger operations, insurance coverage may be available.

STOCK SALES. If a company was purchased by way of a stock sale, generally the insurance policies issued prior to the sale are available to the surviving entity, since there is no change to the corporate entity and no change to the named insured under the policy.

With each of the examples above, issues related to anti-as-

ignment clauses may arise. Insurance policies typically contain such clauses, providing that the rights under the policies cannot be transferred unless the insurer consents to the transfer. In many cases, the claim is made long after the corporate transaction, and even long after the loss took place – such as an environmental claim arising out of a subsidiary's actions before the subsidiary was acquired by the company. Courts in different jurisdictions have developed various rules to determine if and how the anti-assignment clauses may apply to coverage for such losses. These legal authorities will necessarily be a part of the analysis when pursuing coverage for insurance rights that may be transferred as a result of a corporate transaction.

In short, companies should pursue all available insurance, including insurance for different lines of coverage and insurance purchased by other companies. As shown above, there are a variety of ways these alternate sources of recovery may come into play to offset business losses. Particularly given the current market conditions, it is important that all such avenues be pursued to maximise recovery efforts. ■

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