Professional Liability Speed Round:

4 Topics you MUST address to make sure your clients are covered!

Texas Chapter
Dallas: September 18, 2019
Austin: September 19, 2019
4 topics you MUST address to make sure your clients are covered

1. Contingent bodily injury on E&O policies – what constitutes bodily injury and when is it triggered?

2. Business interruption – cyber vs. property

3. Workplace Violence & Active Assailant – Coverage Differentiators

4. #MeToo – coordinating coverage and avoiding pitfalls
Contingent Bodily Injury on E&O Policies
Contingent Bodily Injury - Overview

• What is Contingent BI and why is it needed?

• Intent, and Interaction with other policy wording

• Sample Wording & The Importance of “However/Unless”

• Coverage Treatments / Options

• Claims Examples
The term or phrase used to refer to Bodily Injury and/or Property Damage arising as a result of the provision of professional services
Contingent Bodily Injury – What is it/Why is it important?

• Professional Liability Policies
  – intended to cover claims brought by third parties arising out of a wrongful act that is generally an act, error, or omission in the rendering of or failure to render professional services.
  – Many PL forms however contain exclusionary wording for claims arising out of bodily injury and/or property damage.

• Commercial General Liability Policies
  – CGL policies contain a professional services exclusion that excludes claims arising out of the rendering or failure to render any professional service. Professional Services are defined by the policies as “any service requiring specialized skill or training.”
This inherent gap in coverage between the 2 above, i.e. claims for BI/PD arising out of the provision of professional services is in fact Contingent BI and represents the need for coverage and policy treatments.
To push liability/claims to the appropriate policies & coverage provisions, and ultimately to the proper insurance carriers
This policy does not apply to:

M. any claim based upon or arising out of, directly or indirectly, in whole or in part, **bodily injury, property damage, advertising injury**;
Exclusions M is deleted in its entirety and replaced with the following: Based upon or arising directly or consequentially from Bodily injury or Property damage; *However* this exclusion shall not apply to Claims for Bodily injury or Property Damage caused directly or consequentially, by an Insured solely while performing Professional Services.
Exclusions A. and B. are each deleted in their entirety and replaced with the following: based on or arising out of bodily injury or property damage **unless** such claim results from an act or omission in the rendering of professional services.
• Carry forward of the full on BI/PD exclusion
• Contingent BI/PD carvebacks
• BI/PD carvebacks with sublimits
• General Liability Warranties

***VERY IMPORTANT TO NOTE HOWEVER, THAT A CARVEBACK IS NOT A REPLACEMENT FOR A COMMERCIAL GENERAL LIABILITY POLICY (CGL)***
• Real Estate Agents

• Any Inspection Risk (pay attention to the base forms)
  – Bridges, Elevators, Homes, etc.

• Safety Consultants
Questions?
Business Interruption: Cyber vs. Property
Business Interruption Coverage

Where is it covered?
Cyber vs Property
What is Business Interruption?

For Cyber Policies, Business Income Loss and Extra Expenses incurred as a result of a total, partial, or intermittent interruption or degradation in service on an Insured’s computer system caused directly by a privacy breach, security breach, administrative error or power failure.

For Property Policies, Business Income Loss and Extra Expenses incurred during a period of restoration, as a result of Physical Damage to the covered property which prevents the insured from conducting business as usual.

The biggest question facing Risk Managers today is, Which policy truly covers my business?
• Traditional Property Policies provide coverage for the following related Business Interruptions
  • Fire
  • Natural Disasters
  • Physical Damage beyond normal wear and tear.

– What coverage is included?
  • Lost Revenue
  • Fixed Costs
  • Extra expenses
    – Additional equipment or locations needed to get back up and running
  • Civil Authority Ingress/Egress
Cyber Related Business Interruption Coverage

- Cyber Policies provide coverage for the following business related interruptions.
  - total, partial, or intermittent interruption or degradation in service on an Insured’s computer system caused directly by a privacy breach, security breach, administrative error or power failure.
  - What coverage is included?
    - Lost Revenue
    - Fixed Costs
    - Extra expenses
      - Additional equipment or software needed to get back up and running
Policy Structure differences

• Property Policies tend to have the following structure:
  • Longer waiting Period – 24 – 72 hours or longer
  • Values associated with each location set in the policy (you can blanket this value as well)
  • % deductible in lieu of a $ amount is more common
  • Catastrophe Related retentions can apply as well

• Cyber Policies tend to have the following structure:
  • Shorter waiting period
  • $ amount to pass to trigger payout after waiting period is exhausted
  • Coverage and value is not location based. Limit applies to the organization as a whole and can be triggered by an incident at any locations
What are the differences between the two?

- Property Policies typically have a more defined and measurable breakdown of where exact business interruption losses could come from and are laid out in their Policy. Typically via a Business interruption worksheet consisting of expected profit and fixed costs associated with exact locations. These are known prior to the inception of the policy most times.

- Cyber Policies typically have just one shared limit for all coverage components and relay on the overall sales of an organization to benchmark the probable maximum loss amount.
What are the differences between the two?

- Property Policies can typically determine a payout in a short period of time.

- Cyber Policies tend to have a longer tail when it comes to determining the payout on a claim due to the complex nature of determining the exact lost amount of revenue and expenses.
Cyber Coverage has a whole host of potential trigger points.

- Additional Areas of Coverage
  - Contingent Business Interruption
  - System Failure
  - Contingent Business Interruption
  - Contingent System Failure

- Some property policies are starting to remove their electronic attack exclusionary wording, but this can still lead to confusion around the physical and non physical areas of loss.
In Summary

• When it comes to claims time, whether it be on a property policy or a cyber policy, we all want the insured to be covered.

• The best bet is to have the broadest coverage possible on both policies and allow each policy to provide coverage where it is intended to be covered.

• Just ask some larger companies if they wish they had a full blown Cyber policy when they started getting declines from their property carriers.
Questions?
Workplace Violence & Active Assailant
• Workplace Violence vs. Active Assailant
• Definition of Weapon
• Domestic vs. Foreign Influenced
• Preparation
• Response Consultants
Key Coverages

- Medical Expenses
- PTSD and Counseling Expenses
- Crisis Communications Expenses
- Legal Liability
- Demolition / Clearance
- Business Interruption
Incident Response

- Victims and their families
- Affected employees and guests
- Social and Mainstream media
- Return to normal operations
- Legal Strategy
Market Considerations

- Workers Compensation
- Property
- General Liability
- Monoline Workplace Violence
- Monoline Active Assailant
- Kidnap & Ransom
Questions?
#MeToo
#MeToo

Coverage Challenges and Solutions
#MeToo Claim Statistics

- Nearly 14% increase in sexual harassment claims filed with the U.S. Equal Employment Opportunity Commission in fiscal year 2018 — despite an overall decrease in complaints filed — after several years of declining rates.
- EEOC recovered $56.6 million in monetary benefits for sexual harassment victims in FY 2018, up from $47.5 million in fiscal year 2017.
- In one Betterley Report poll, 10 carriers said they were not underwriting the legal industry. Financial firms, including brokers, investment banks, and venture capital operations landed on the prohibited lists of eight insurers. Seven insurers said they’d blacklisted companies in the entertainment industry.
Isn’t it just sexual harassment?
What’s the coverage problem with EPL?
Employment Harassment means:

(A) sexual harassment, including unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature that is made a condition of employment with, used as a basis for employment decisions by, interferes with performance or creates an intimidating, hostile or offensive working environment within an Organization; …
EPL Exclusions

Exclusions that could preclude coverage

1. Bodily Injury/ Property Damage for bodily injury, mental anguish, humiliation, emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including the loss of use thereof whether or not it is damaged or destroyed, provided that this Exclusion (D) shall not apply to Loss for any mental anguish, humiliation or emotional distress when alleged as part of an otherwise covered Claim;

2. Sexual Molestation Exclusions
What happens if it affects the bottom line?
Wrongful Act means any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by:

(A) for purposes of coverage under Insuring Clauses (A), Individual Non-Indemnified Liability Coverage, and (B), Individual Indemnified Liability Coverage, any Insured Person while acting in his or her capacity as such or any matter claimed against any Insured Person solely by reason of his or her status as such; or

(B) for purposes of coverage under Insuring Clause (C), Entity Liability Coverage, any Organization.
Exclusions that could preclude coverage

Employment Practices & Third-Party Violations
alleging, arising out of, based upon, or attributable to the

(a) employment of any individual or any employment practice, including, but not limited to, wrongful dismissal, discharge or termination, discrimination, harassment, retaliation or other employment-related claim; or

(b) the harassment or unlawful discrimination, or the violation of the civil rights of a person relating to such harassment or discrimination; in all cases, whether alleged to be committed against an Insured Person or anyone other than an Insured Person or applicant for employment with an Organization or an Outside Entity, including any students, patients, members, customers, vendors and suppliers;
Exclusions that could preclude coverage

**Personal Injury**
for emotional distress or mental anguish of any person, or for injury from libel, slander, defamation or disparagement, or a violation of a person’s right of privacy; provided, however, this exclusion shall not apply to any Securities Claim;

**Bodily Injury & Property Damage**
for bodily injury (other than emotional distress or mental anguish), sickness, disease, or death of any person, or damage to or destruction of any tangible property, including the loss of use thereof; provided, however, this exclusion shall not apply to UK Corporate Manslaughter Act Defense Costs or a Securities Claim;

**Sexual Molestation Exclusions**
THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY.

SEXUAL ABUSE EXCLUSION

This endorsement modifies and is subject to the insurance provided under the following:

PRIVATE COMPANY PROTECTION PLUS

This Policy is amended as follows:

With respect to coverage under Parts 1 & 2, the Underwriter shall not be liable to make any payment for Loss in connection with any Claim made against the Insured based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any act of sexual misconduct, sexual molestation or physical or mental abuse of anyone who is not an Insured under this policy.

All other terms and conditions of this Policy remain unchanged.
• Application Issues – How do you answer this question when you have a known offender in your company?

As of the date the Applicant first purchased the Liability Coverage(s), is the Applicant or any person proposed for this insurance aware of any fact, circumstance, situation, event or act that reasonably could give rise to a claim being made against them under the Liability Coverage(s) for which the Applicant is applying? Yes No If Yes, please attach an explanation.

• Settlement Confidentiality Challenges

• Standalone Policies for Molestation & Abuse
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Professional liability exposures continue to evolve. As newer exposures work their way through the legal system, insurance carriers often respond by restricting coverage. Specialty policies can address the coverage gaps, but how do you know what your client really needs?

This course addresses four (4) key areas where emerging exposures can leave clients with unexpected gaps in coverage. Join us for a crash course in learning how to protect your clients. CE/CLE Pending: TX, OK, AR, LA.

Speakers

Kara Altenbaumer-Price, Esq., Senior Vice President, Corporate Risk & Governance, Executive & Professional Risk Solutions Practice Leader, USI Southwest
Greg Ferrell, Vice President, Underwriting, Professional Liability, Admiral Insurance Group
Ed Rivas, AVP, Senior Underwriter, AXA XL, a division of AXA
Greg Wagner, Vice President, Cyber Underwriting, Corvus Insurance

Moderator

Katie Guiou, Territory Manager, Beazley