Insurance Lines for Businesses

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Maintained

This practice note sets out the common types of ***insurance*** coverage including commercial lines of ***insurance*** that provide protection for businesses. ***Insurance*** for businesses is generally referred to as property and casualty ***insurance***. In essence, it includes all types of ***insurance*** other than life and health. The practice note then discusses umbrella policies, which provide coverage above or in excess of multiple policies, and excess policies, which provide coverage above or in excess of specific underlying ***insurance*** policies. The practice note also looks at how an effective ***insurance*** program is essential to the management of risks of a business and the role of the in-house counsel in the organization's ***insurance*** program.

For information on interruption policies for businesses, see the practice note Business Interruption Policies. For a discussion of ***insurance*** contracts generally, see the practice note ***Insurance*** Contracts and Risk Transfer. For more information on the key elements of an ***insurance*** contract, see the practice note ***Insurance*** Policy Coverage, Exclusions and Reporting. See also ***Insurance*** Coverage Options Checklist.

Common Types of ***Insurance***

As part of its harmonization efforts, the Canadian Council of ***Insurance*** Regulators ("CCIR") developed nationally accepted set of standard ***insurance*** classes. However, the statutory definitions of the classes used for each class differ by province.

The following is a summary of common coverage types:

1 **Accident and Sickness.** Provides coverage for sickness, disability or bodily injury. It may or may not require that the sickness, disability or bodily injury is caused by an accident. It will typically provide money for health care services, including dental care and preventative care, of a person.

2 **Aircraft.** Provides coverage against liability from bodily injury or loss or damage to property caused by an aircraft or its use, as well as the loss of use of or damage to an aircraft.

3 **Automobile *insurance*.** Provides three types of coverage: (i) liability coverage for losses incurred in the use or operation of a motor vehicle to third parties, (ii) accident benefits or first party benefits for the insured, and (ii) optional direct damage to the insured vehicle.

Each province and territory establishes minimum compulsory coverages and policy conditions, and in most provinces and territories, drivers purchase the minimum compulsory and optional coverages from private sector ***insurance*** companies. All provinces require minimum liability limits of $200,000, with the exception of Nova Scotia, which requires $500,000, and Quebec, which requires $50,000 for losses in Quebec and $500,000 for vehicles excluded from the government plan or losses outside Quebec.

Drivers are not required by law to purchase physical damage coverage, although leasing and other financing arrangements often dictate minimum coverages. However, there are mandatory Direct Compensation Property Damage ("DCPD") in most provinces that require damages from a two or more vehicle collision to be first reported to the insured's own insurer. Many large organizations opt to either self-insure or carry large deductibles for physical damage coverages, buying minimum liability coverage and purchasing "umbrella ***insurance***", a coverage that sits over multiple policies and responds when the underlying policy limits have been exhausted. Umbrella policies are discussed further below, under Umbrella and Excess Policies.

4 **Boiler and machinery *insurance*.** This is a form of property ***insurance*** that covers direct damage to covered specialized property caused by a sudden and accidental breakdown, explosion or malfunction of boilers, pressure vessels and other machinery, including the equipment and the liability arising out of the breakdown. It will provide liability coverage for property damage or bodily injury arising from any such machinery's explosion, rupture, accident or breakdown.

This coverage is necessary for specialized equipment because general commercial property ***insurance*** policies exclude the explosion of steam boilers and breakdown of machinery. The standard boiler and machinery policy contains extensions such as defence costs and supplemental payments arising from claims for damage to property of others.

5 **Business interruption *insurance*.** This is a form of property ***insurance*** that provides coverage for the loss of profit and continuing expenses resulting from a disruption in operations by an insured peril. The forms and terms applicable to this coverage are complex and are dealt with in greater detail in the practice note Business Interruption Policies. A form of business interruption ***insurance*** is Extra expense ***insurance***. Provides coverage for additional costs necessarily incurred resulting from a disruption by an insured peril.

6 **Credit *insurance*.** Provides ***insurance*** against loss to a person or organization that has granted credit if the loss is the result of the insolvency or default of the person or organization to whom credit was granted. Specifically, it overs insureds for accounts receivable losses relating to buyer insolvency and slow payment (protracted default). For export receivables, it can also cover political risks including the inability to obtain hard currency, changes in import/export regulations or embargoes, contract frustration due to an act of war and foreign government non-payment, although the exact wording of the policy should be consulted. It normally excludes trade disputes (faulty goods, missed deadlines or returns).

7 **Credit protection *insurance*.** Provides ***insurance*** coverage where an insurer agrees to pay off credit balances or debts of an individual, in whole or in part, in the event of an impairment or potential impairment in the individual's income or ability to earn an income.

8 **Crime and fidelity *insurance*.** Covers the insured for loss of money and securities arising from dishonesty, embezzlement, theft, burglary, mysterious disappearance and computer fraud. The exact language of the policy will dictate what coverages are provided, but fidelity policies will typically also insure the abuse of trust or unfaithful performance of duties of an employee or person in a position of trust within an organization.

9 **Cyber risk *insurance*.** This coverage is relatively new and is evolving. Insurers are very reluctant to provide this coverage as part of a commercial general liability ("CGL"), and will normally otherwise exclude it. As a result, many insurers are now offering stand-alone policies that cover notification, recovery and legal costs on either a primary or excess basis. Some policies are "first party" only, covering the direct loss of the insured. Other policies also cover "third party" claims of, for example, customers. In general, cyber liability ***insurance*** will cover the risks around liability to third parties from the use of e-commerce, including privacy liability, identity theft response, network computer security, internet media liability, and cyber extortion.

10 **Directors and officers ("D&O") *insurance*.** Provides coverage for liability as acting in the course of such a position in a corporation, including actual or alleged wrongful acts or omissions by an organization and its directors and officers. This policy can also cover statutory liabilities conferred on directors and officers in the performance of their duties. D&O ***insurance*** is similar to general liability in that it covers the costs that the directors and officers are legally obligated to pay as a result of damages to another party, but may have exclusions for criminal conduct or bad faith performance of duties. For more information, see practice notes in the subtopic "D&O ***Insurance***".

11 **Fiduciary liability *insurance*.** Provides coverage for director liability, often in an unfunded pension liabilities context, for coverage not otherwise available by a general D&O liability ***insurance*** policy. Specific fiduciary liability ***insurance*** coverage is generally used to cover a board or committee representing an employer policyholder who is a parent or affiliate.

12 **General liability *insurance*.** Sometimes referred to as commercial general liability ("CGL"), provides coverage for damages that the insured becomes legally obligated to pay to third parties due to bodily

injury, property damage or personal injury on the insured premises or arising from operations of the insured. Punitive damages are excluded. The insurer usually maintains the right to defend any suit against the insured and to settle as it deems expedient.

13 **Hail.** Provides ***insurance*** coverage against the loss of, or damage to, crops in the field caused by hail.

14 **Kidnap and ransom *insurance*.** Provides financial indemnification for losses arising out of a kidnap and ransom situation. This coverage is becoming more important with multinational corporations operating globally. Although it is an indemnity policy, many insurers are affiliated with security firms and hostage negotiators, and the value of this ***insurance*** is as much in the expert network it employs as the indemnification it may provide.

15 **Legal Expense *Insurance*.** Provides ***insurance*** coverage for the costs incurred by a person or organization for legal services specified in the policy, including any retainer and fees incurred for the services, and other costs incurred in respect of the provision of the services.

16 **Life *Insurance*.** Provides ***insurance*** coverage that pays out a sum of money either on the death of the insured person or after a set period.

17 **Marine *insurance*.** Covers the loss or damage of ships and goods at sea, as well as bodily injury or property damage to third parties, and the loss of or damage to, property, occurred during a voyage or marine adventure at sea or on an inland waterway, or during a delay or a transit other than by water that is incidental to a voyage or marine adventure at sea or on an inland waterway. Inland marine ***insurance*** provides coverage for goods in transit and shipments not involving ocean voyages. Cargo ***insurance*** protects merchandise in transit by water, land or air from the warehouse to point of destination.

18 **Mortgage *Insurance*.** Provides coverage against loss caused by default on the part of a borrower under a loan secured by a mortgage or charge on, or other security interest in, real property.

19 **Political risk *insurance*.** Provides coverage for assets from losses due to expropriation, nationalization and confiscation resulting from political events.

20 ***Pollution* *insurance*.** Provides coverage for ***pollution*** or environmental liability losses arising out of the sudden and accidental release of contaminants from an insured's operations. Coverage generally includes the costs of damages, injuries and cleanup. It is often written as a separate policy.

21 **Privacy liability *insurance*.** Provides coverage against financial loss arising out of unauthorized access to, collection of and use or disclosure of personal information that results in harm to employees or third parties. These are usually part of a broader cyber ***insurance*** package. Coverage generally includes the costs of defence expenses as a result of investigations; crisis management and notification expenses; and/or network security liability.

22 **Products liability *insurance*.** Provides coverage against financial loss arising out of the legal liability incurred by manufacturers, merchants or distributors due to injury or damage resulting from the use, handling or consumption of a covered product. On a first party basis, there is also specialized product recall ***insurance*** that can cover the costs of a product recall, the financial loss occasioned by that recall and possibly crisis management expenses as well, depending on the policy wording.

23 **Professional liability *insurance*.** Provides coverage for those "professionals" who have a liability exposure arising from a specialized service provided (*e.g.*, giving advice, providing counselling or administering a service).and covers claims arising from acts, errors or omissions in rendering services of a professional nature. The definition of "professional" has expanded over the years to include quasi-professionals, or occupations in which special knowledge, skills and close client relationships are paramount. This includes errors and omissions and malpractice coverages, but excludes Directors and Officers coverage.

24 **Property *insurance*.** These policies are either personal ***insurance*** or commercial ***insurance***. On a personal ***insurance*** property policy, this is ***insurance*** against the loss of, or damage to, property owned or occupied by a person, and includes habitational property and mutli-peril policies, including residential contents of buildings such as apartments, rooming houses, motels, manufacturing and mercantile buildings

and the liability exposure of personal package policies issued with indivisible premiums. This line would include fire policies, householder contents and homeowner personal risks, residential burglary and theft and special residential glass coverage. Casualty coverage such as personal liability for bodily injury would not be included in this category. Commercial property ***insurance*** covers loss of, or damage to, property, and includes ***insurance*** against loss caused by forgery and all commercial property and multi-peril policies. In general, property ***insurance*** provides coverage for damage to real and personal property for losses arising from "all risks" or "named perils", such as fire, theft, flood, windstorm, hail and vandalism.

25 **Terrorism *insurance*.** Protects insureds for losses and liabilities resulting from terrorist activities, a peril excluded from most property and liability policies.

26 **Title *insurance*.** Provides coverage against loss or damage caused by the existence of a mortgage, charge, lien, encumbrance, servitude or any other restriction on real property, or any a defect in the title to property.

27 **Surety.** While not properly speaking ***insurance***, surety bonds are written by insurers and provide a guarantee the due performance of a contract or undertaking or the payment of a penalty or indemnity for any default. They are used in large construction projects.

28 **Workers' compensation *insurance*.** Benefits required by law for injuries and illness sustained by employees arising out of and in the course of their employment. Workplace ***Insurance*** is provided by a statutory government program in all Canadian provinces.

Specialized Coverage

Negotiating to Cover Unusual Risks

Specialized ***insurance*** products are available on a negotiated basis to deal with unusual risks. Since these risks involve specialized forms of underwriting, experts are normally retained to assist the insurer with understanding the risks involved.

The forms of policies normally involve considerably more negotiations than is the case for the typical commercial lines. If you are able to identify a risk and that risk can be quantified, there may be an insurer who is willing to underwrite it. Placing that risk may be difficult, and a wholesale brokerage, or Managing General Agent ("MGA") may be required.

Some examples of risks that can be incorporated into specialized ***insurance*** policies include:

1 **Intellectual property *insurance*.** Provides coverage for matters such as patents. One line of policies protects the company against allegations that it is infringing the patents of another person. Another line of policies provides coverage for the insured's patents, including enforcement actions.

2 **Product recall *insurance*.** Protects the insured against the risk of product recalls that, contrary to products liability, may not have resulted in injury to consumers or a third party; for example, recalls initiated by the insured resulting from test results or from a public health hazard alert warning consumers that certain products may be unsafe or contaminated.

3 **Representation and warranty *insurance*.** Protects either the person giving the representation and warranty or the person that is the recipient.

4 **Tax *insurance*.** Protects the insured against the risk of adverse tax assessments, for example, in a transaction that involves the purchase of tax losses.

Umbrella and Excess Policies

Umbrella Policies

Umbrella policies provide coverage above or in excess of multiple policies, to protect an insured from catastrophic loss and provide additional limits when the aggregate limits from a scheduled underlying policy have been exhausted. Where the underlying policy limits are exhausted, or where the umbrella coverage is broader than the underlying coverage, the umbrella policy "drops down" to provide primary coverage, which is where it gets the name. The precise wording of the policy should be consulted.

Excess Policies

Excess policies provide coverage above or in excess of specific underlying ***insurance*** policies and apply when limits under the scheduled primary policies or self-***insurance*** are exhausted. There may be a tower of excess ***insurance*** policies for very large risks where there is no individual insurer willing to assume the risk.

Terms

Excess policies can be "follow form", incorporating or following the terms of the underlying policy, or they can have their own terms in whole or in part.

Analyzing Excess Policies

The analysis applicable to the primary policy applies equally to the excess policies: the policy wording should be reviewed to ensure that the excess policy provides adequate coverage of your organization's operations.

Additionally, an insured organization should ensure that there are no gaps in coverage or gaps in contractual terms between or among the various policies providing an insured organization's ***insurance*** coverage. The gaps could be coverage- or term-related, temporal and geographic. Analyze what happens if one or more of the underlying layers are exhausted or cease to apply. A broker should be able to identify all of these gaps, and suggest strategies on how best to deal with them.

Insurance Programs and In-House Counsel

*Factors Influencing an Effective **Insurance** Program*

To have an effective ***insurance*** program, it is important that In-House Counsel:

- understand the risks and mitigation or transfer options;
- develop partnerships with experts in your risks, including ***insurance*** brokers, coverage counsel and your auditor's ***insurance*** claims arm;
- educate yourself on the coverages available and transfer options;
- use the right application process;
- obtain the right coverages; and
- monitor your risk profile so that coverage can be amended as needed.

Critical Role of In-House Counsel in the Application Process

The in-house counsel plays an important role in ensuring that the application process is carried out properly. Brokers find that in-house counsel bring important discipline to, and can enhance, the application process. The most important role in-house counsel can plan is properly characterizing the operations of the organization, and ensuring that all of its operations are adequately covered, or if there is to be any self-***insurance***, that this is done deliberately rather than inadvertently because adequate coverage was not secured.

Ensuring Others in the Organization Understand their Legal Obligations

As a person with legal training, in-house counsel can and should ensure that those in the organization involved in the application process understand their legal obligations and have the systems in place to ensure that the duties in respect of completing ***insurance*** applications are understood and adhered to. Depending on the size of the organization, the application process could be extensive. As an example, a company with many divisions may have the division heads or representatives complete risk assessment documents that feed into the application. In-house counsel can play an important role in educating the individual(s) who purchase ***insurance*** for the organization as to the existence of the duty of utmost good faith and the consequent requirement to disclose all matters relevant to the risk being insured. Failure to fulfill this duty puts the organization at risk that the ***insurance*** may be cancelled if there was a material misrepresentation or an undisclosed material change in risk.

Determining Disclosure of Risk and Risk Management

The legal training of in-house counsel also puts them in a good position to determine how risks and the corporation's risk management activities are disclosed to the underwriters. Strategies to mitigate or reduce risks may not be part of the ***insurance*** application, but proper disclosure to the broker or the insurer may reduce premiums. Additionally, if there are contractual arrangements with suppliers and vendors that require one's organization to be added to those parties' ***insurance*** policies (either as additional insureds or to provide contingent business interruption ***insurance*** in the event of a loss), or if those parties are required to be added to the company's ***insurance*** policies by contract, in-house counsel is well-placed to ensure this is done.

Reviewing the Application Form and Policy Terms

In-house counsel should review the application form and in particular, any warranties, representations or policy terms that accompany it. Severability can be extremely important. Some misrepresentations made by the officer(s) who fill out the application should not adversely affect the coverage for innocent insureds, for example.

Addressing Misrepresentations

Another reason for in-house counsel being involved in the application process is so that they can be aware of and address misrepresentations that are discovered subsequently. Depending on the circumstances, misrepresentations are not necessarily fatal, and their early disclosure can avoid the risk of having the policy declared void when a claim is subsequently made. As trained lawyers, in-house counsel are well suited to address this with the assistance of the broker. Additionally, any misrepresentation that was unintentional or not fraudulent can be best addressed by in-house counsel, so inadvertent non-disclosure is not usually problematic.

Role of In-House Counsel

Determination of the point at which in-house counsel gets involved in the purchase, review and renewal process depends on the size of the organization. Counsel at a smaller firm with no risk management expertise may have responsibility for the entire process, including risk assessment, application completion, negotiation and claims management. In a smaller organization, partnering with the chief financial officer ("CFO") may net excellent results, as the CFO can evaluate the cost of risk and identify alternatives to commercial ***insurance*** in harder markets, including self-***insurance*** or the creation of a captive ***insurance*** company. A captive is a closely held ***insurance*** company, typically formed to insure the risks of a large corporation or a number of similar corporations it is normally incorporated in a jurisdiction such as Bermuda, and is entirely owned by its member insureds, who seek to reduce the cost of risk by removing the profit and overhead from their premiums. Captives are a viable option if the risks they insure are priced correctly, and very costly if not. A larger organization may have a risk management team. In cases where the risk management team is sound and experienced, in-house counsel will want to strategize with the team to identify where counsel can add value to the process, including assessments of legal agreements requiring ***insurance*** coverage, a review of indemnity language or duties owed in the organization's contracts or documents, and participation in the negotiation process and reviews of policy terms and conditions. For almost all commercial ***insurance***, a broker is well-placed to provide advice on ***insurance*** needs and available coverages.

In-house counsel works with the external ***insurance*** providers in the negotiation of coverage as well as of claims services. The role of in-house counsel could include negotiating ***insurance*** policies and may include negotiating for policy interaction with an organization's bank/financial risk cover.

Current as of: ***01/26/2024***
