

RISK MANAGEMENT ISSUES: LOSS MITIGATION STRATEGIES FOR PORT AUTHORITIES

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I. Meat and Potatoes (Basic Maritime Primaries)

- Protection & Indemnity (P&I)
- Commercial General Liability (land-based)
- Marine General Liability
- Legal Liability (Specialty Policies)
- Hull Insurance

Protection & Indemnity (P&I)

- Broad coverage for both personal injury and property damage associated with virtually all operations of a vessel, exclusive of workers compensation insurance.
- Covers liabilities to both the vessel and the crew. Can include wreck removal.

P&I: Typical Insuring Agreement

“The Assurer hereby undertakes to make good to the Assured or the Assured’s executors, administrators and/or successors all such loss and/or damage and/or expense as the Assured shall **as owners** of the **vessel named** herein have become **liable to pay and shall pay** on account of the liabilities, risks, events and/or happenings set forth:”

Contractual Liability Coverage

Get it!!!

Commercial General Liability

- Typical language: coverage for “all sums which the Assured shall become legally liable to pay or by contract or agreement become liable to pay in respect of claims made against the Assured for damages of whatsoever nature, on account of: (1) personal injuries . . . ; (2) property damage”

Maritime General Liability

- Combines traditional CGL policies with maritime liabilities. Designed to cover land-based and maritime exposures.
- Language can vary, so policies should be reviewed carefully at time of purchase.

Legal Liability

Coverage for other people's property in the care and custody of the policyholder, such as:

- Terminal Operators' Liability
- Marina Operators' Liability
- Shiprepairer's Liability
- Stevedores' Liability
- Wharfingers' Liability

Hull Insurance

- Coverage for physical damage to an owned or chartered vessel, salvage costs and limited property damage (collision and towage liability) for the operation of that vessel.
- Can include coverage for vessels under construction (Builders' Risk) and marine inventory held for sale (Boat Dealers' Physical Damage).

Which Insurer Pays First?

The other ones . . .

II. Side Dishes (Non-Marine Primaries)

- Auto: property damage to own vehicles; bodily injury to third-parties.
- Property: covers buildings, yards, boilers, business interruption.
- Inland Marine: covers mobile equipment, such as cranes and lifts.

Non-Marine Primaries (cont.)

- Liquor Liability
- Workers Compensation
- EPLI; EBLI (Fiduciary)
- D&O; E&O
- Foreign (Property, Liability, Auto, Comp)

III. Doused in Gravy (Marine Excess)

- Bumbershoots
- NOT the annual international music and arts festival held every Labor Day weekend in Seattle, Washington
- A colloquial term coined in the 19th Century, as a combination of “umbrella” and “parachute.”

Bumbershoot Policies

- Excess of primary policies, providing higher limits and filling in gaps.
- Stands over most of the primaries: CGL, Legal Liability, P&I, Hull, Commercial Auto, EPLI, etc.

Typical Insuring Agreement

- All P&I risks
- Collision
- Salvage
- Sue and labor
- Legally obligated/contractually obligated because of BI and PD
- Excess of legal liability policies
- Excess of auto, etc., liabilities insured by primaries

Two Bumbershoot Givens

- Cannot get coverage for **known** liability exposures, deliberately left uninsured by primaries.
- Sublimits not divulged and scheduled do not count as underlying coverage.

Frequent Bumbershoot Exclusions

- Breach of Fiduciary Duty
- Discrimination
- ERISA
- Employment-Related Practices
- Workers Compensation
- Fraud, Infidelity, Dishonesty, Crime
- Fines, Penalties, Punitive Damages
- Pollution
- War

IV. High-Calorie Desserts (Coverage for Excluded Risks)

- Flood Insurance: covers physical damage to buildings and their contents, if damaged by flood.
- Pollution Insurance: tailored coverage for risks such as environmental impairment at a site, underground storage tanks, vessel pollution.

V. Loss Mitigation Strategies (Counting Your Calories)

1. Before or immediately after the loss, when the loss itself can be mitigated: Implicit or explicit loss mitigation provisions in generic property and liability policies.
2. After the damage has been done: Individually tailored Loss Mitigation Insurance (LMI) policies that control policyholders' financial exposure based on previously occurring loss.



Before the Damage is Done: Loss Mitigation in Property Policies:

- Typically referred to as “sue and labor” clauses.
- Impose a duty on policyholder to mitigate, and a corresponding duty on insurance company to reimburse policyholder for mitigation costs.

Before the Damage is Done: Loss Mitigation in Liability Policies:

- Historically, liability policies less likely to address loss mitigation explicitly, however the doctrine of loss mitigation in the liability context is well-developed.
- Potential coverage for mitigating measures taken either before or after the liability-creating event.

Hoechst Celanese v. National Union **(Del. Super. Ct. Apr. 22, 1994)**

- Costs of fixing potentially hazardous plumbing systems before an injury occurred was covered loss mitigation cost even though actual damage had not yet occurred.
- Coverage found despite lack of explicit grant of coverage: loss mitigation costs “are covered by standard-form CGL policies such as the ones at issue in this case absent exclusionary language in the policy.”



After the Damage is Done: Loss Mitigation Insurance Policies

1. Initially became popular in late 1990s, early 2000s.
2. Purpose of LMI is to provide insurance coverage where a loss has already occurred, but the extent of its financial ramifications is still unclear.

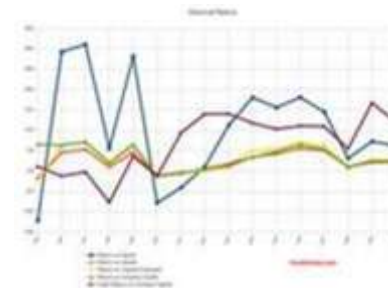
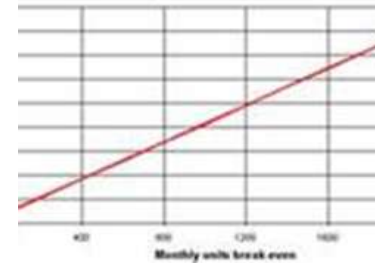
After the Damage is Done: Loss Mitigation Insurance – Benefits

1. Allows risk managers to neatly address long-term outstanding litigation that, without LMI, would produce great uncertainty (could just as easily lead to millions of dollars of liability as to no liability whatsoever).
2. Helpful in context of mergers and acquisitions – LMI policies reassure buyers that a pending loss will not potentially prove so costly as to significantly lessen the selling company's value.



Loss Mitigation Insurance – Benefits (cont'd)

1. Helps policyholder pay for financially damaging loss via steady, known premium payments, rather than unpredictable lump sum verdicts/damage awards.
2. Policyholders may purchase insurance to cover portions of a damage award exceeding X million dollars, giving policyholder clear understanding of maximum possible exposure.



General Tips When a Loss Occurs or Is Threatening to Occur

1. Always seek to mitigate the loss, even if question of coverage is not clear and you do not hold a LMIP – better safe than sorry, from business and insurance perspectives.
2. Always give insurance company early notice of loss mitigation costs to be incurred.



VI. Getting The Most Out of Your Meal

Claims adjusters now are, or are instructed by, lawyers.

- Less flexibility in settling claims.
- Established custom and practice are replaced by strict contractual interpretations.
- For policyholders – *not* a good thing.

Which Means – No Surprise . . .

- An unprecedented number of lawsuits
 - Narrowing (or confusing!) coverages.
 - The evolution of new coverage exclusions.
- Policy wording is more important than ever.

Policyholders Need To Speak Up

- **Locate** all of your insurance policies
- Remember that **property damage, business income, contingent business income and extra expense** coverage may be available
- Remember that time element coverage may be available **even without direct physical loss or damage**

Speaking Up (cont.)

- Secure tolling agreements with your insurance company to **protect your rights**.
- Consider help in submitting your claim, including your **broker, public adjuster** and attorney.
- Consider whether insurance coverage may be available under **other insurance policies**.
- Do not overlook **indemnification agreements**.

Time Element Coverage

- Business Interruption/Delay in Completion
- Contingent Business Interruption
- Civil Authority
- Ingress/Egress

**Don't Be Shy
About Getting What You Want.**

Remember – You Pre-Paid for Your Meal!



Take Notice Requirements Seriously

- Establish procedures within the Company
- Ask broker to give notice on all potentially applicable policies.
 - Primary
 - Bumbershoot/Umbrella/Excess
 - All possible coverage periods
- Late notice can lead to forfeiture.
 - Occurrence-based policies
 - Claims-made policies

Take *All* Deadlines Seriously

- Proofs of loss
- Contractual suit limitation periods
- Random deadlines set in insurance company correspondence
- Statutes of limitation

Take Claim Adjusting Seriously

- Assemble An Appropriate Claim Team
(Insurance Companies Will Have Theirs).
 - Lawyers
 - Accountants
 - Adjusters
 - Investigators
 - Don't be outgunned from the start
- Identify strengths, weaknesses, gray areas.
 - Present the claim accordingly

Take Control of Your Claim

- Establish a reasonable recovery goal.
- Develop a plan to achieve it.
- Take the initiative in moving the claim.
 - Request a timetable.
 - Respond timely to information requests.
 - Persist in requesting a coverage determination.

Use Good Table Manners!

- Don't bicker over burdensome or repetitive requests
 - Keep copies of all information you provide.
 - When they ask twice, just send another copy.
- Don't go on the defensive.
 - No insurer hate-mail.
- Deprive your insurer of defenses that:
 - Policyholder failed to cooperate
 - Policyholder conduct prejudiced insurer's rights
 - Policyholder forfeited coverage

Do Not Fear Insurer Retaliation

- Plenty of insurance companies want your business
- An insurer that does not pay claims is worse than useless

Conclusion

1. Assess your risks and purchase the policies that you need.
2. Read them!



3. If a loss has occurred already, consider LMI.

Thank You

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