



What Every Lawyer Should Know About Insurance In The M & A Context

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Outline of Topics

- Common Types of Commercial Insurance
- Due Diligence Issues
- “Tail” and other Post-Closing Issues
- Drafting Insurance-Related Provisions

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Common Types of Commercial Insurance

- First Party
 - Property (Buildings and Business Personal Property)
 - Time Element (Loss of Business Income/Extra Expense)
 - Crime (Employee Theft, Off Premises Thefts, etc.)

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Common Types of Commercial Insurance

- Third Party
 - Commercial General Liability (CGL)
 - Workers Comp/Employers Liability
 - Directors & Officers Liability
 - Fiduciary Liability
 - Employment Practices Liability
 - Professional Liability/E & O
 - Umbrella/Excess Liability

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Common Types of Commercial Insurance

- “Occurrence-Based” Liability Policies
 - Cover “occurrences” taking place during policy period regardless of when claim is filed
 - e.g., 2007 policy covers liability from bodily injury that occurred in 2007

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Common Types of Commercial Insurance

- “Claims-Made” Liability Policies
 - Cover “claims-made” during the Policy Period regardless of when injury or act giving rise to injury took place
 - e.g., 2008 policy covers claim made this year even though it’s based on 2006 financials
 - Beware of “Retroactive Dates”

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Common Types of Commercial Liability Insurance

- Commercial General Liability Insurance
 - Property Damage and Bodily Injury
 - Separate limits for products/completed operations
 - Personal Injury and Advertising Injury
 - Typically “Occurrence” Based Coverage

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Common Types of Commercial Liability Insurance

- Workers Compensation and Employers Liability
 - Workers Compensation
 - Statutory benefits for bodily injury by accident or disease
 - No other limits
 - Medical expenses
 - Lost wages
 - Accident must occur during policy period or last exposure to conditions causing disease must occur during policy period

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Common Types of Commercial Liability Insurance

- Workers Compensation and Employers Liability (cont'd.)
 - Employers Liability
 - “Other” damages arising from occupational injuries
 - Third-party-over actions
 - Loss of consortium
 - Dual capacity claims

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Common Types of Commercial Liability Insurance

- Directors & Officers Liability Insurance
 - Non-indemnified/Non-Indemnifiable Claims
 - Company Reimbursement for Indemnified Claims
 - Entity Coverage
 - Limited coverage for publicly-held companies
 - Securities claims
 - Employment practices claims (sometimes)
 - Typically “claims-made” coverage

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Common Types of Commercial Liability Insurance

- Miscellaneous
 - Fiduciary Liability
 - Employee Benefit Plans
 - EPL
 - Discrimination, Harassment, etc.
 - Professional Liability
 - Liability from Provision of “Professional Services”

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Alternative Arrangements

- Large Deductible Plans
- Retrospectively Rated Plans
- Captive Insurance Companies

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Alternative Arrangements

- Captive Insurance Companies
 - Formalized Self-Insurance
 - Change of Control Issues
 - Financial Stability Issues
 - Financial Statements
 - Reserve Adequacy/Actuarial Analyses

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Commercial Insurance Considerations/Applications

- Acquisition Due Diligence
 - “Insurance Policy Archeology”
 - Asset Acquisitions
 - Schedule of all liability policies for last 7-10 years
 - Exception = some claims-made policies
 - Stock Purchase
 - Schedule of all liability policies since formation
 - Same exception

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Commercial Insurance Considerations/Applications

- Acquisition Due Diligence (cont'd.)
 - Copies of all occurrence-based liability policies for at least last 3 years (preferably 6)
 - Copies of all current property and claims-made policies
 - Copies of all policies with pending claims

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Commercial Insurance Considerations/Applications

■ Acquisition Due Diligence (cont'd.)

- What to Look for (Third Party Policies)
 - Types of coverage
 - Insurer name
 - A.M. Best rating
 - Are they solvent?
 - Insureds
 - Target and all subsidiaries, etc.

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Commercial Insurance Considerations/Applications

■ Acquisition Due Diligence (cont'd.)

- What to look for
 - Additional insureds
 - Policy period
 - Premiums
 - Retrospectively rated?
 - Subject to audit?
 - Policy limits and deductibles
 - Captive arrangements

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Commercial Insurance Considerations/Applications

■ Acquisition Due Diligence (cont'd.)

– What to Look for (First Party Policies)

- Schedule of all current policies
 - Locations covered
 - Insurer and insured
 - Mortgagees/loss payees
 - Limits/deductibles
 - Policy period

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Commercial Insurance Considerations/Applications

■ Acquisition Due Diligence (cont'd.)

– Claims Loss Runs

- Identify extraordinary claims
- Denied claims
- Are any limits exhausted/severely depleted?

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Post-Closing Issues

- How will coverage be maintained for acquired entities?
 - Integration
 - Stand-alone

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Post-Closing Issues

- Change of Control Issues
 - Do policies contain Change of Control Provisions?
 - Check all policies
 - D & O, EPL, Fiduciary are most common
 - Possibly Professional Liability

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Post-Closing Issues

- Change of Control Issues (cont'd.)
 - Provisions typically put claims-made policies into run-off
 - Run-off continues for remainder of policy period
 - Only covers claims based on pre-closing “Wrongful Acts”

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Post-Closing Issues

- “Tails”
 - What they do
 - Extend time to make claims under claims-made policy
 - Typically 1, 3, or 6 years
 - Usually only get remaining limit
 - Who pays for it?
 - Premiums can be significant
 - 100-300%+ is common

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Post-Closing Issues

- “Tails” (cont'd.)
 - Usually purchase from current insurer
 - Many pitfalls with buying from other insurers

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Insurance-related Provisions For Deal Agreements

- Usually Most Important to Acquirer
 - But “tail” issues usually of greater importance to seller

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Insurance-related Provisions For Deal Agreements

- Reps and Warranties
 - Adequate insurance is and has been maintained
 - Schedule of current policies
 - Prior years' occurrence-based policies
 - Policies with pending claims
 - Sound insurers
 - A.M. Best ratings
 - Adequate funding of captive

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Insurance-related Provisions For Deal Agreements

- Reps and Warranties (cont'd.)
 - Identification of occurrence-based policies with significant depletion of limits
 - Identification of policies with pending cancellations/non-renewals
 - Identification of material claims issues

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Insurance-related Provisions For Deal Agreements

- “Tails”
 - Who will pay for the “tail”?
 - Consider caps
 - How long will the “tail(s)” be?

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Questions & Answers

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