

AAPA Conference

Port Administration & Legal Issues

Risk Management Issues: Loss Mitigation Strategies for Ports

Waterfront Plaza Hotel
Jack London Square
Oakland, California
March 7, 2017
2:00 – 3:15 PM

GOAL FOR TODAY

Share ideas and experiences regarding loss mitigation and cost recovery tools and strategies for ports, and discuss key insurance available for loss mitigation.



SPEAKERS

Moderator

Michele Heffes, Esq.

Assistant Port Attorney, Port of Oakland

Panel

John D. Green, Esq.

Partner, Farella Braun + Martel LLP

Robert M. Horkovich, Esq.

Managing Shareholder, Anderson Kill



WHAT WE ARE GOING TO COVER TODAY

- Environmental insurance: historical and modern forms, and problems and strategies in accessing each
- Public officials liability insurance: its unique features and potential value
- Short summary of other risks facing ports now and in the future, and the insurance which might mitigate them



ENVIRONMENTAL INSURANCE: THE PORT OF OAKLAND EXPERIENCE

- Insurance archeology efforts to locate historical commercial general liability and other policies
- Placement of site-specific Cost Cap/Pollution Liability Policies and then Port-wide Pollution Liability Policies



COORDINATED APPROACH: COST RECOVERY IN THE CONTEXT OF DEVELOPMENT

- Very practical issue facing policyholder ports
- Tension between maximizing insurance coverage (and pursuit of PRPs) during an active development project
- Recent experience: Runway Safety Area



OLD POLICIES MAY PROVIDE ENVIRONMENTAL COVERAGE

- Liability Policies Issued To You And Others
- Must Prove Existence And Terms Of Policies
- Successor Insurance Companies May Still Be Liable For Acquired, Out-Of-Business Companies
- It's Never Too Late To Find Policies



COVERAGE UNDER HISTORICAL LIABILITY POLICIES

- CGL Policies Most Fertile Source
- Property Coverage Less Likely
- Goal: Get Everything And Review



HOW TO FIND OLD POLICIES

- Your Own Files And Records
 - Risk Management Department
 - Real Estate Leases
 - Tenant Files
 - Accounting Department
 - Outside Counsel And Accountants
 - Brokers And Agents
- Former Employees, Especially Risk Managers
- Archaeology Groups
- The Government/Military



KEY BENEFITS OF OLD CGL POLICIES

- Policy In Effect When Accident/Incident Causing Damages Occurred Provides Coverage
- No Pollution Exclusions Until Mid-1970s
- Defense Obligation Broad; Investigations And Related Efforts Likely Covered
- Defense Costs Don't Deplete Limits
- Indemnity Coverage For Damages, Settlements And Clean-Up Costs



IMPORTANT TO GIVE NOTICE AND UPDATES

- Provide Notice As Soon As Possible
 - Of “occurrence” (accident or event)
 - Of “claim” (will be broadly construed if not defined)
- Limit Expenditures Until Give Notice; Don't Violate No Voluntary Payments Clauses
- Provide Frequent Updates



CHOICE OF COUNSEL

- Defense With Or Without Reservation Of Rights
- In California And Some Other States, More Flexibility For Insured If Insurer Issues A Reservation
- Panel Counsel Issues



KEY CHALLENGES

- Proving Occurrence Before Or During Policy Period
- Lost Policies
- Insolvencies



PROVING OCCURRENCES

- Historical Records
- News Sources
- Aerial Maps/Photos
- Prior Claims And Settlements
- Employees And Consultants – Sometimes The Best Resource



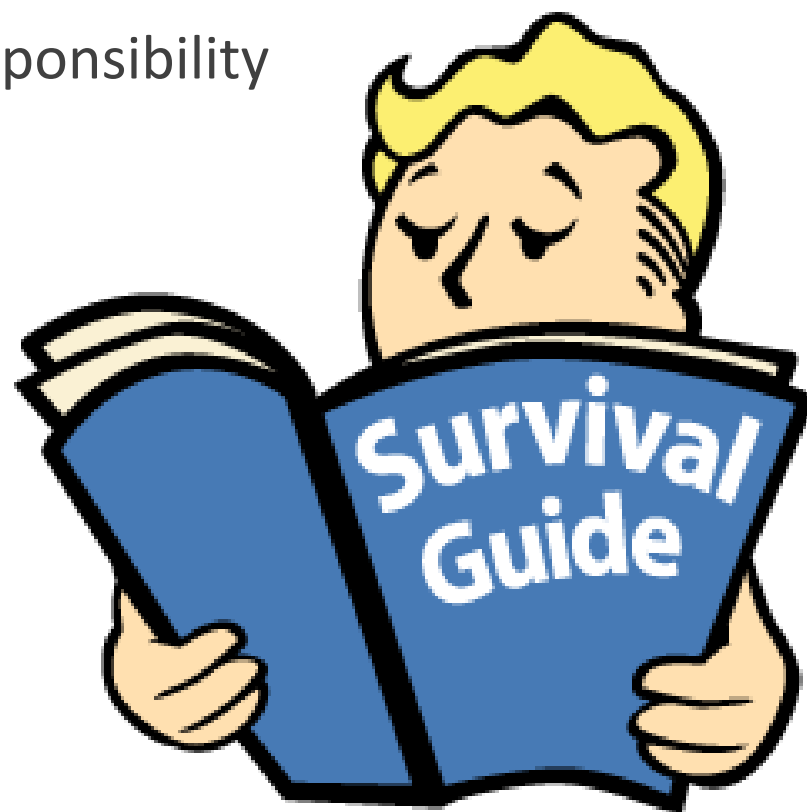
PROVING TERMS OF LOST POLICIES

- Access CAPA And Other Agencies
- Series Of Old Policies
- Prior Settlements Of Non-Environmental Claims



INSOLVENCY/ACQUIRED INSURANCE COMPANIES

- Insurance Often Survives Insolvency
- Acquiring Company May Have Responsibility



ADDITIONAL INSURED RIGHTS

- Independent And Separate
- Policy Language Specific
- Usually Not Extinguished By Buy Out Between Insurer And Named Insured

**KNOW
YOUR
RIGHTS**

MODERN POLICIES

- Fluid market which ebbs and flows based on insurance company interest and perceived value



THE GENESIS OF ENVIRONMENTAL IMPAIRMENT LIABILITY (EIL) INSURANCE

in the beginning...

- Early CGL Policies did not exclude pollution
- Mid-70s, a limited (qualified) polluter's exclusion was added
- Interpretation was controversial
- EIL Policies emerged to fill the potential gap in coverage



**IF YOU DON'T THINK YOU
NEED POLLUTION
INSURANCE,
TAKE A CLOSER LOOK**

What you're looking at is water pollution. Magnified 250 times. It's not visible to the naked eye. Even the trained naked eye. Nevertheless, the polluter is responsible for the costly and time consuming process of cleaning it up.

This particular pollution was caused by oil. But it's only one of hundreds of forms of pollution, any of which you can be causing to the water, the air, or the soil. Unintentionally. And without realizing it.

The cost of cleaning up environmental pollution can put a firm out of business. Especially a small firm. And that's why The Travelers Environmental Hazard (EH) Policy was created.

The Travelers EH Policy provides much broader coverage than other policies. For example:

- Automatic, Comprehensive pollution liability coverage. Many other policies require each business site to be added to the policy; if the site is not described, there is no coverage.
- A separate limit of liability for Products and Completed Operations exposures. Most other policies share the pollution liability limit with the normal Products and Completed Operations losses. As a result, if normal losses exhaust your limits, there is no coverage for pollution losses.
- Retroactive liability. Since the EH policy normally has no retroactive date, full coverage is available for prior acts which result in claims made during the EH policy period.
- Difference in Conditions Coverage. Those deliberate discharges (such as carefully treated waste waters) which were not expected or intended to cause damages and which were nevertheless excluded in the past are now covered under the EH policy.

For details on The Travelers Environmental Hazard Policy, contact your independent Travelers agent or broker.

Pollution is everybody's problem. At The Travelers, we're as concerned with protecting future generations as we are with protecting this one.



BUSINESS INSURANCE
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THE TRAVELERS



The Travelers Indemnity Company and Its Affiliated Companies, Hartford, CT 06115



**BUSINESS
INSURANCE**
April 22, 1991
Page 15

It's been quite awhile since a single source could insure the world from environmental risks.

We don't pretend to be in Noah's league. But when it comes to protecting you from environmental risks, we come awfully close.

At Commerce & Industry Insurance Company, we can now provide specialized environmental coverages to businesses worldwide.

That means we can still offer you everything from our traditional casualty coverages and property insurance for preferred and standard risks to the latest in environmental insurance protection. All with local service through an unparalleled network of offices across the country.

And like Noah, we're up on the latest changes in the climate so we're able to develop new products to make sure you stay covered.

For more information, contact your local representative. After all, an offer like this doesn't come along every day.

BUSINESS INSURANCE
APRIL 22, 1991
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AIG World leaders in insurance and financial services.

Commerce & Industry Insurance Company, a member company of American International Group, Inc.



**BUSINESS
INSURANCE**
December 18, 1995
at 7

Remember When Environmental Accidents Were Fun For The Whole Family?

What you may not remember is that when others viewed environmental risk management as science fiction, our specialists were pioneering the field. And because we continue to evolve with the industry's ever-changing needs, we understand that progressive risk management can only come from a willingness to take intelligent, informed risks ourselves.

By forming an active partnership with our agents, brokers and customers, the Zurich-American Environmental

Group forges a bond of shared expertise that stretches the boundaries when it comes to creative risk management products and solutions.

We're willing to take risks other companies won't. And we'll service our policies in a way other companies can't. Because we're backed by the financial strength, stability and The Power of Partnership only The Worldwide Zurich Insurance Group can provide. For more information, contact your agent or broker, or call 1-800-382-2150.



The Power of Partnership™ in Environmental Insurance

A MEMBER OF THE WORLDWIDE ZURICH INSURANCE GROUP

POLLUTION LEGAL LIABILITY (PLL) INSURANCE

1990s to Present

- Increasingly specialized
 - Cleanup costs and claim costs for pollution conditions
- Detailed underwriting/tight targeting of specific types of policyholders
 - Pre-existing conditions sometimes covered; disclosure requirements
- Coverage depends on definition of “Pollution Conditions”/“Pollution Event”

CAUTION: BE CAREFUL OF:

- Process of making disclosures during underwriting can be costly and time consuming
- Pre-existing conditions sometimes excluded
- “Known Conditions” Exclusions - who needs to know what?
- “Related Site Development” Exclusion
- Reporting requirements/give notice as soon as possible



HOW TO AVOID THEM

- Closely examine conditions and exclusions and think about them as if you were submitting a claim
- Make full disclosure of all known environmental problems
- Give notice early and often; claims made
- Keep insurance company informed of contact with environmental regulatory agencies
- Copy the insurance company on reports regularly submitted to the environmental authorities

PRACTICE POINTERS

- Keep Informed Regarding The Market
 - Very fluid
 - Lots of price variation from year to year
 - Terms sometimes negotiable, be sure to ask
- Good Record Keeping Can Aid/Simplify Underwriting Process
 - Keep database of reports
 - History of operations important
 - Regulatory directives can be key
 - Push back on brokers



PUBLIC OFFICIALS LIABILITY INSURANCE

- Very Different From Standard Liability Insurance
- Protects Commissioners, Managers, Employees And Other Public Officials From Risk
- Covers Errors And Omissions By Those Acting For Port
- Limitations
 - Deductible/SIR often high
 - Exclusions can be broad



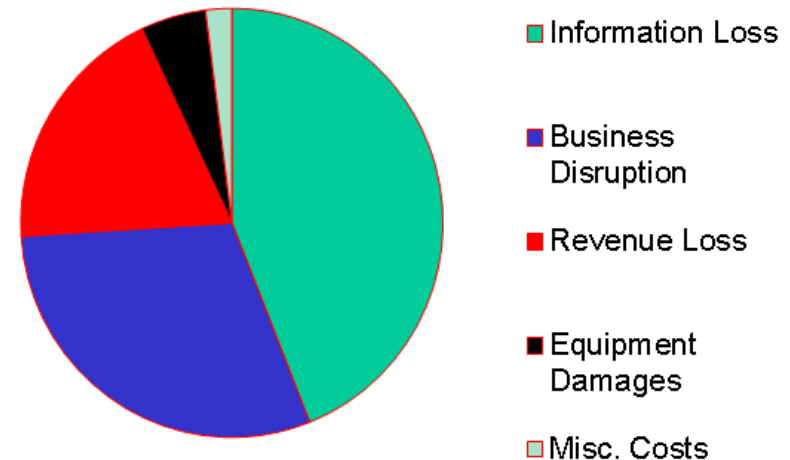
OTHER RISKS AND INSURANCE TO COVER THEM



DATA SECURITY BREACHES

WHAT ARE THE EFFECTS?

- Information Loss – 44%
- Business Disruption – 30%
- Revenue Loss – 19%
- Equipment Damages – 5%
- Other Miscellaneous Costs – 2%¹



¹2013 Cost of Data Breach Study: Global Analysis, Ponemon Institute, May 2013.

<http://www.ponemon.org/local/upload/file/2013%20Report%20GLOBAL%20CODB%20FINAL%205-2.pdf>

WHAT'S THE COST?

AVERAGE RESOLUTION TIME:
24 days



AVERAGE COST:
\$5.4 Million²



²2013 Cost of Data Breach Study: Global Analysis, Ponemon Institute, June 2013.

http://www.symantec.com/about/news/release/article.jsp?prid=20130605_01&om_ext_cid=biz_socmed_twitter_facebook_mar_ketwire_linkedin_2013Jun_worldwide_CostofaDataBreach

COVERAGE UNDER CGL?

- IP Exposure
- Data Loss
- Business Interruption
- Third Party Losses
- Privacy



WHEN CONVENTIONAL COVERAGE IS *NOT* ENOUGH



CYBER POLICIES!

CURRENTLY AVAILABLE CYBER INSURANCE

- Privacy Injury Liability
- Privacy Regulatory Proceedings and PCI Fines
- Network and Content Liability
- Crisis Management Fund
- Network Loss or Damage
- Business Interruption
- Electronic Theft
- Network Extortion



THINGS TO DO

- Understand your exposure
- Review your insurance policies and request extensions of cyber/data/electronic coverage on existing policies
- Avoid new exclusions
- Avoid gaps
- Enlist an expert consultant or broker
- Consider panel on cyber policies
- **DO NOT TAKE “NO” FOR AN ANSWER!**



