



AAPA Port Administration and  
Legal Issues Seminar

Port Everglades Cruise Terminal  
Fort Lauderdale, FL  
February 13, 2019  
1:30 pm – 2:30 pm

# RISK MANAGEMENT ISSUES: MAXIMIZING RECOVERIES OF INSURANCE CLAIMS



# Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

# SPEAKER:



Robert M. Horkovich, Esq.  
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Robert M. Horkovich is "the 'go-to person' in the area of insurance recovery," according to a client cited by Chambers USA, which has recognized Mr. Horkovich as a leading insurance recovery attorney every year since 2005. According to Chambers, Mr. Horkovich "has a strong 'client-first' attitude" and "is recognized in the market for his leading trial and negotiation skills, with an undisputed national presence."

Bob has obtained over \$5 billion in settlements and judgments from insurance companies for his clients over the past decade. Bob is a trial lawyer with substantial experience in trying complex insurance coverage actions on behalf of corporate policyholders and governmental entities. His victories include one of the top 10 jury verdicts in the United States in 2003, the top insurance recovery jury verdict in the United States in 2005, seven landmark state Supreme Court decisions, eight jury verdicts and nine bench trial decisions in favor of the policyholder since 1994.

Benchmark deemed Anderson Kill a recommended litigation firm in New York recognizing Bob in 2016 as the top 10 insurance coverage lawyer in the US. Benchmark cites a frequent opponent in court who observes, "I would say that a good percentage of my time is spent fending off the likes of Bob Horkovich, but that's not an accurate summation because there is nobody exactly like Bob! He has done a great job with that firm, and no one fights harder for his clients. He really looks out for them like family." That explains why Law360 named Bob as an "Insurance MVP" by Law360 in 2012 and 2018 and was named Lexis/Nexis "Policyholder Lawyer of the Year" in 2009. He is rated "AV® Preeminent™ Peer Review Rated" with a 5.0 out of 5.0 rating in Martindale Hubbell.

Mr. Horkovich has been selected by his peers for inclusion in Best Lawyers for insurance law in every year since 2009 and Super Lawyers for Insurance Coverage since 2006.

He has been selected as a Fellow of the American Bar Foundation, the premier institute for social science research regarding law in the USA, an honor limited to one-third of one percent of the lawyers in America.

# ENVIRONMENTAL ISSUES FACING PORTS: USING ALREADY PURCHASED INSURANCE POLICIES TO COVER ENVIRONMENTAL LIABILITIES



# OLD INSURANCE POLICIES MAY COVER TODAY'S PROBLEM.

- Liability Insurance Policies (General, Umbrella, EIL, etc.).
- WQIS.
- Ship Scrapping.
- Additional Insured Under Other Entity's Insurance Program.



The Policies in Effect When the Property Damage Occurred May Provide Coverage for Liabilities Imposed Today.

# POTENTIAL BENEFITS:

- Defense (Pays Fees of Lawyers Dealing With Environmental Authorities) (Also May Pay For Investigation: RI/FS Costs).
  - Standard is any Possibility of Coverage.
- Indemnity (Pays Settlements, Judgments and Clean-Up Costs).



# FIND OLD INSURANCE POLICIES.

- Own Insurance Files (Storage).
- All Brokers/Agents (Existing and Old).
- Outside Accountants.
- Outside Counsel.
- U.S. Navy (Maryland Warehouse).
- Insurance Archeologists.



# NOTICE.

- Notice of An Occurrence (An Event or Happening That Might Result in a Claim Against the Policyholder).
- Notice of A Claim (Claim or Threat Against Policyholder).
- When?
- To Whom?
- How?





# WHAT NEXT?

- Identify/Collect/Preserve Records.
- Determine Policy Erosion/Settlement/Release.
- Provide Reasonable Cooperation. Remember Reinsurance.
- Provide Updates. Use Material Already Assembled.
- Value Claim.
- Discuss Settlement.
- Cost/Benefit Analysis of Pursuing Coverage.



# INSURANCE COMPANY DEFENSES.

- Polluter's Exclusions (1973/1985).
- Clean-Up Costs As "Damages".
- Allocation: All Sums v. Pro Rata.
- Adversity Needed for Defense.
- Owned Property.
- Expected/Intended.



# INSURANCE RECOVERY FOR HURRICANES AND OTHER NATURAL DISASTERS



# THE KEY CONCEPT: “EFFICIENT PROXIMATE CAUSE”

- An insurance company is liable for losses proximately caused by a peril covered by its policy.
- The proximate cause of a loss is a dominant, effective or operative cause.
- It is not necessarily the first, last or only cause.

# LOSSES ARE COVERED WHEN WIND IS THE “EFFICIENT PROXIMATE CAUSE,” EVEN IF OTHER PERILS CONTRIBUTED TO THE LOSS.

- **Louisiana Supreme Court**  
Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Cont’l Ins. Co. of N.Y., 112 So. 2d 680, 683 (La. 1959)
- **Mississippi Supreme Court**  
Glens Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator, 130 So. 2d 262, 270 (Miss. 1961)
- **Alabama Supreme Court**  
Western Assur. Co. v. Hann, 78 So. 232, 236 (Ala. 1917)

# IT ALL COMES DOWN TO THE FACTS

- Coverage found because four witnesses saw house blown off its pilings, rather than being washed away.  
Picone v. Manhattan Fire & Marine Ins. Co., 218 La. 546 (1950).
- Coverage found because witnesses saw water drain away from building, showing roof collapsed from wind.  
New Hampshire Fire Ins. Co. v. Kochton Plywood & Veneer Co., 242 Miss. 169 (1961).
- Coverage found because of testimony of neighbor who drove near house shortly before it disappeared.  
U.S. Fid. & Guar. Co. v. Morgan, 399 S.W.2d 537 (Tex. 1966).

# THE “ANTI-CONCURRENT CAUSATION” CLAUSE

“We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”

Insurance Services Office Causes of Loss-Special Form (CP 10 30 04 02), accompanying Building and Personal Property Coverage Form (CP 00 10 04 02).

# ARE THESE CLAUSES ENFORCEABLE?

- Not in Washington State. “[B]y drafting variations in exclusionary clause language an insurer may [not] circumvent the “efficient proximate cause” rule . . .” Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 416 (Wash. 1989).
- Not in West Virginia. Murray v. State Farm Fire & Cas. Co., 509 S. E. 2d 1 (W. Va. 1998).



# ARE THESE CLAUSES ENFORCEABLE? (CONT'D)

- Thus Far, Not in Mississippi.  
Leonard v. Nationwide Mutual Ins. Co., 2006 WL 2352961 (S.D. Miss, August 15, 2006)
- If enforced, clauses “would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy. . . I do not believe this is a reasonable interpretation of the policy.”

# ARE THESE CLAUSES ENFORCEABLE? (CONT'D)

- Yes, in Utah.  
Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272 (Utah 1993).
- To be determined in Louisiana and Texas.  
NB: Legislation precluding the enforcement of these clauses has been under consideration in Louisiana.

# OTHER RELEVANT DOCTRINES . . .

- *Contra Proferentem*
- Common law doctrines of good faith and fair dealing
- State consumer protection statutes, including bad faith and timely payment of claims
- Policyholder's Reasonable Expectations Doctrine

# LESSONS LEARNED:

## 1. ANTI-CONCURRENT CAUSATION CLAUSES

### What To Do About Anti-concurrent Causation Clauses?

- Avoid entirely – broker forms
- Revise or even flip them during placement
- If necessary – choose the least onerous
- Submit claims with the clauses in mind
- Challenge enforceability:
  - Based upon state law proximate causation rule (good cases in CA, WA, WV)
  - Based upon reasonable expectations doctrine (Mississippi – federal district court – overruled)
  - But, provisions have been upheld in New York, Nevada, Alaska
  - Choice-of-laws is important



# DON'T OVERLOOK OTHER VALUABLE TIME ELEMENT COVERAGES:

- Contingent Business Interruption (CBI) Coverage
- Dependent or Attraction Property Coverage
- Civil Authority Coverage
- Rental Income / Value Coverage
- Leasehold Interest Coverage
- Extra Expense Coverage
- Expediting Costs Coverage



# DON'T OVERLOOK OTHER VALUABLE COVERAGES:

## *1. COVERAGES THAT DON'T REQUIRE DAMAGE TO YOUR PROPERTY*

- Contingent Business Interruption
  - Based on damage to suppliers' or customers' property
  - Period of recovery tied to time needed to restore suppliers' or customers' property
- Dependent or Attraction Property
  - Based on damage to property that attracts business to you
  - Period of recovery tied to time needed to restore attraction property
- Service Interruption
  - Based on damage that interrupts utilities (for time beyond waiting period)
- Civil Authority
  - Based on government order that prohibits access to your property

# DON'T OVERLOOK OTHER VALUABLE COVERAGES: (CONT'D)

## 2. *ORDINANCE OR LAW COVERAGE*

- Covers “Demolition Costs” or “Increased Costs of Construction” due to enforcement of ordinance or law following a loss.
- Applies to damaged and **undamaged property**.
- Proximate cause can be an issue.
- Beware traps when mitigating loss by replacing with existing property.



# DON'T OVERLOOK OTHER VALUABLE COVERAGES: (CONT'D)

## 3. *RENTAL INCOME / VALUE COVERAGE*

- As drafted, many Rental Coverage provisions can be seen as an alternative or supplement to Business Income coverage.
- Provide coverage for the actual loss sustained by the policyholder in the form of:
  - rental income from rented portions of the property under leases in force at the time of the loss;
  - rental income reasonably expected from the rental of portions of the property that were not rented at the time of the loss; and
  - the fair rental value for portions of the property occupied by the policyholder.



# DON'T OVERLOOK OTHER VALUABLE COVERAGES: (CONT'D)

## 4. *EXTRA EXPENSE COVERAGE*

- Typically covers reasonable and necessary costs incurred to temporarily repair damage to insured property or to expedite the permanent repair or replacement of damage to insured property.
- Similar to Extra Expense coverage, which includes a component similar to “expediting expense” (e.g., cost to rush repairs in order to reduce business income losses), which often requires that the expense be incurred to reduce the amount of the loss.
- Expediting Costs coverage does not necessarily require reduction of loss.

# FEMA AND INSURANCE:

- FEMA relief paid by Federal government to State and local governments
- Insurance payments to public and private policyholders.
- The Key Overlap – Private Insurance deducted from FEMA payments, based solely on FEMA's *Estimate* of Private Insurance Recovery.
  - Importance of having your FEMA and Insurance teams working together.



# COVERAGE FOR EXCLUDED RISKS

- Flood Insurance: covers physical damage to buildings and their contents, if damaged by flood. (sub-limits).
- Post-1985 Pollution Insurance: tailored coverage for risks such as environmental impairment at a site, underground storage tanks, vessel pollution.



# CYBER RISKS AND INSURANCE TO COVER THEM



# POLICIES COVERING CYBER LOSSES

- Take Inventory of Policies
- GL, D&O, E&O, Crime, All Risk Property, Cyber Policies
- 1<sup>st</sup> Party, 3<sup>rd</sup> Party, Hybrid Coverage Issues



# TYPES OF INSURANCE POLICIES

- Errors & Omissions Liability  
Directors & Officers Liability
- General Liability  
Umbrella Liability
- Broad Form Property
- Cyber Extensions on FIB/Fidelity
- Specialized Cyber



# 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

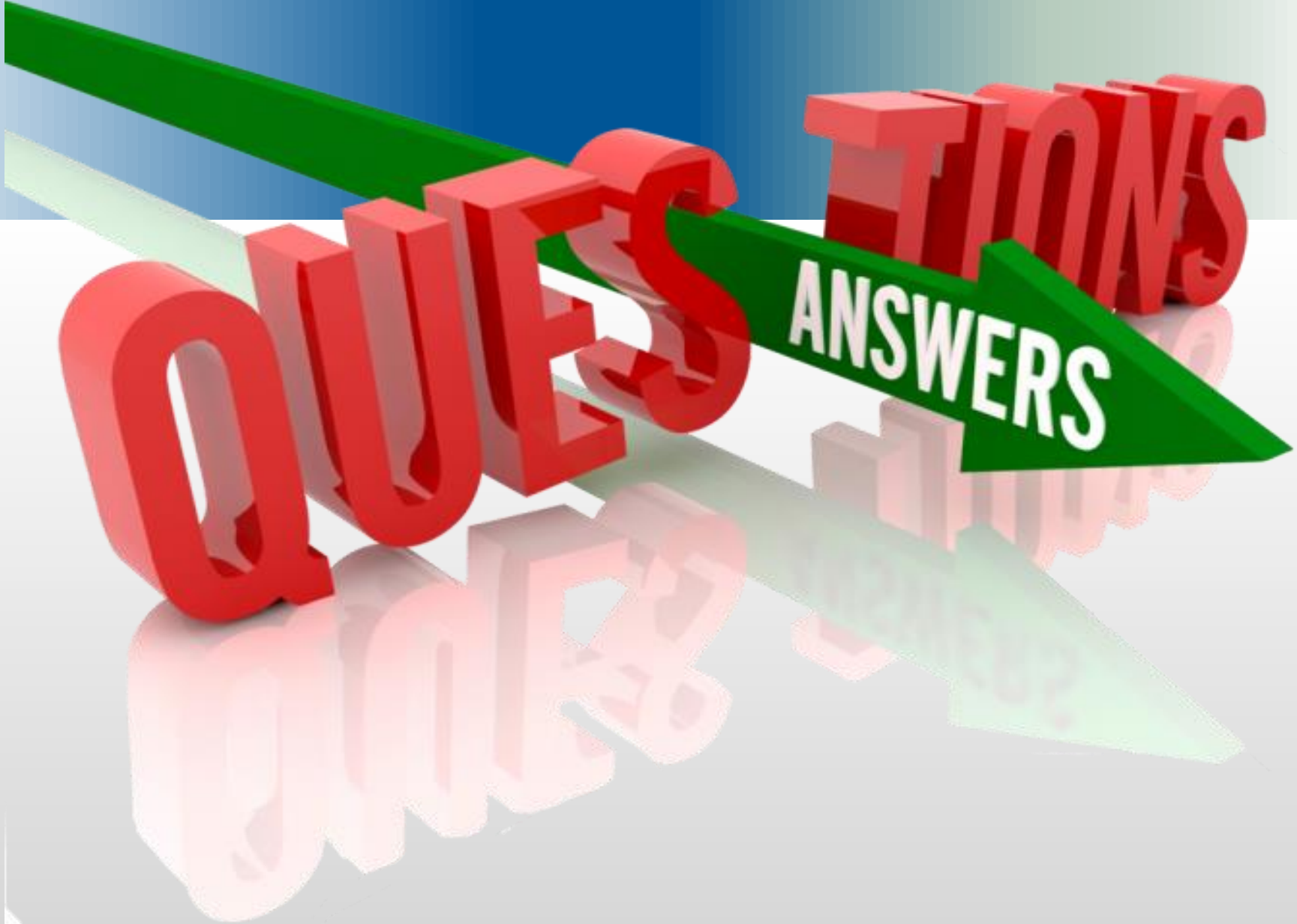
- Understand your exposure.
- Review your insurance policies and request extensions of cyber/data/electronic coverage on existing policies.
- Avoid new exclusions.
- Avoid gaps.
- Enlist an expert consultant or broker.



# 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





# THANK YOU.



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