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Current Issues in Liability Insurance: Whose Fault is It Anyway?

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A BRIEF HISTORY OF INSURANCE

In its earliest form, insurance was a risk mitigation mechanism utilized by merchants to limit the loss of goods by dividing goods amongst many ships. Thus, the loss of a single ship would not result in a total loss to the merchant's inventory. Subsequently, lenders offered merchants a guarantee to cancel existing loans if a shipment were lost or stolen in exchange for additional payment known as a "premium." Eventually, maritime loan terms along with associated premiums charged for loan cancellation would vary based upon the routes traveled and the time of year of the voyage. Safer routes and weather seasons would generate more favorable premiums as compared with more treacherous routes and seasons. This practice continued until the mid-14th century at which time insurance policies began being separated from loans.

The insurance industry experienced rapid growth towards the end of the 17th century with the expansion of Britain's empire and influence on global trade. London, England became a hub for the underwriting of risks in exchange for premium and served as the birthplace for Lloyd's of London, one of the most influential insurers in modern history.

Insurance in the United States began primarily as a hedge against the loss of buildings and goods as a result of fire. However, the insurance industry quickly evolved beyond fire insurance to provide other types of coverages including life insurance and early forms of liability coverage, forming the basis of the commercial casualty insurance we know today.

PRIMER ON INSURANCE AND ITS VARIOUS TYPES

Insurance Defined:

A contractual relationship that exists when one party (the insurer), in exchange for consideration (payment of premium), agrees to reimburse another party (the insured) for loss to a specified subject (the risk) caused by designated hazards or perils.

Insurance is a risk transfer mechanism that allows the insured to pass on a portion of its risk of loss to an insurer in exchange for premium. Insurance by its nature is not intended to cover that which is expected nor intended. Most policies contain “intentional acts” exclusions prohibiting the offending insured from recovering under its policy(ies) for any intentional acts committed by the insured resulting in a loss.

Casualty Insurance Defined:

Insurance that is designed to respond to losses caused by bodily injury to persons and property damage resulting in legal liability imposed upon the insured.

Casualty insurance protects the insured against the covered risks of bodily injury (including death) and damage to the tangible property of a third party, and is considered a third-party coverage. In other words, casualty insurance protects the insured from its own actions to third parties. The words “Casualty” and “Liability” insurance are used interchangeably in the insurance industry.

Common types of Casualty insurance include:

Commercial General Liability (“CGL”) Insurance — an insurance policy issued to businesses to protect them against liability claims alleging bodily injury (“BI”) and/or property damage (“PD”) arising out of premises, operations, products and completed operations. The CGL policy was introduced in 1986 as a successor to the “comprehensive” general liability policy.

CGL Insurance generally covers most third-party claims, including (but not limited to), bodily injury and medical expenses, property damage, and advertising injuries (e.g., libel and copyright infringement); however, it expressly excludes (i) intentional acts, and (ii) the insured’s personal property.

ISO Wording:

This insurance does not apply to:

a. Expected Or Intended Injury "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

Care Custody Control and Own, Rent, Occupy Exclusions under ISO CGL Policies:

This insurance does not apply to:

j. Damage To Property "Property damage" to: (1) **Property you own, rent, or occupy**, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property; (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises; (3) Property loaned to you; (4) **Personal property in the care, custody or control of the insured;**

Used For (Example): Tenant negligently damages Landlord's or supplier's property in Tenant's care, custody or control, or Tenant's employee intentionally causes property damage to Landlord's property.

Contractual Liability Insurance — insurance typically provided as part of a CGL policy that covers liability of the insured assumed under a written contract or agreement (or in our case, a lease) for bodily injury and property damage. Under the standard CGL policy, such coverage is often limited to liability assumed under defined “insured contracts” or to liability that the insured would have in the absence of the contract (i.e. – under common law). This coverage extends to the indemnity and provides coverage for the assumed liability.

Used For (Example): Tenant assumes risk under the lease for any and all bodily injury occurring within the premises, including bodily injury occurring as a result of landlord's joint or contributory negligence.

NOTE: This coverage used to be known as “broad-form contractual liability” coverage but carriers, realizing it was a misnomer, moved away from the “broad-form” descriptor.

Umbrella & Excess Liability Insurance — policies designed to provide protection against catastrophic losses that are generally written above various primary liability policies, such as the CGL policy, commercial auto policy and employer’s liability portion of workers’ compensation coverage. Umbrella policies serve three primary purposes*:

- 1) provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims;
- 2) under certain scenarios, “drops down” and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and
- 3) provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR).

Ultimately, umbrella policies increase liability limits for a business and offer more risk protection.

NOTE: Umbrella policies tend to have more inexpensive premiums, since the umbrella insurer knows such insurance is excess of primary coverage. Umbrella insurers also may not necessarily have the same ratings as the primary carrier.

Workers’ Compensation— policies that, in addition to other coverages, provide medical benefits and/or wage replacement to employees that are injured during the course and scope of their employment.

Used For (Example): Tenant’s employee falls off of a ladder and is injured while stocking shelves within the leased retail premises.

Employer’s Liability — typically written as a supplement to the Workers’ Compensation policy form and intended to pick up employee injury or illness claims that are not clearly defined and/or clearly compensable under existing statutory guidelines. Often this coverage part responds to allegations of gross negligence resulting in employee injury, illness or death.

Used For (Example): Employee becomes ill with a severe case of COVID-19 and alleges employer did not provide necessary personal protective equipment (“PPE”).

Professional Liability — policies that, in addition to other coverages, provide coverage for bodily injury, property damage and economic loss as a result of professional negligence on the part of the insured. Policies are typically held by individuals providing advice as part of their service - such as doctors, lawyers, architects engineers, insurance agents, or various types of contractors. Neither bodily injury nor property damage are conditions precedent to triggering economic loss coverage under a professional liability policy. Unlike many other liability policies, professional liability policies do not allow for additional insured status as the claimant is expected to file a first-party claim directly against the insured and the insured’s carrier rather than seek defense and indemnification for third-party claims.

Used For (Example): Tenant, a primary care physician, leases space in landlord’s center for a small primary care practice and commits medical malpractice on a patient.

Commercial Automobile Liability — policies designed to provide both bodily injury and property damage coverage associated with an automobile accident or other vehicle damage caused by a vehicle owned, leased, rented, borrowed or otherwise used by the insured.

Used For (Example): Tenant, a caterer, leases space in landlord’s center for a catering business, which delivers food from the premises to customers. Tenant’s business vehicle damages landlord’s property.

Liquor Liability — also known as “dramshop”, is liability coverage for businesses that sell, serve, distribute, manufacture or supply alcoholic beverages. In addition to other protections, liquor liability insurance protects third parties from the insured’s sale of alcoholic beverages to intoxicated customers and minors.

Used For (Example): Tenant, a restaurant, leases space in Landlord's center for a restaurant and over-serves a customer who, upon leaving the premises, causes a vehicular accident resulting in injuries to customer and third-parties, as well as damage to each of their property.

Environmental Liability — policies designed to provide coverage for bodily injury, property damage, or injury or damage of actual, alleged or threatened hazardous material losses, including coverage for pollution clean-up.

Used For (Example): Tenant's business involves hazardous materials, and in the course of tenant's business, there is a hazardous materials loss.

**note that each policy is written differently and it should not be assumed that any/all policies will respond in the manner described above – thus, it is important to obtain copies of policies and complete a full review of coverage terms, conditions, limitations and exclusions in order to be able to identify any key coverage limitations which could be problematic for the insured and/or additional insureds*

Property Insurance Defined:

Insures against damage to buildings and contents due to a covered cause of loss, such as a fire or windstorm. The policy may also cover loss of income or increase in expenses that result from the property damage (PD). Property insurance generally covers loss arising from physical damage to real or personal property owned by the insured, but it can sometimes be extended to include non-owned property in the care, custody or control of the insured.

Property insurance generally covers loss arising from physical damage to real or personal property owned by the insured, and is considered a first-party coverage. In other words, property insurance protects the insured from other party's actions that damage the insured's property.

Property Insurance generally covers the insured's personal property against loss such as fire and theft, and can - in limited circumstances - include loss of income or expenses as a result of such loss.

All leases should clearly stipulate which party is insuring what property/improvements (including leasehold tenant improvements) and for how much.

In typical triple net leases, it is not unusual for a landlord to shift the risk of property damage and liability claims to a tenant for claims resulting from a tenant's negligence or intentional misconduct, even though (i) tenant contributes to the payment of the insurance premiums through operating costs, and (ii) tenant will be responsible for its own property damage and liability claims even if they are caused by landlord's negligence. Tenants should be careful to make sure their insurance policies do not contain exclusions that would make certain landlord-transferred risks uninsured claims under tenant's insurance policies. If a tenant believes such gaps in coverage exist as created by landlord's transfer of its own risks to tenant via the lease, many property insurance carriers are willing to provide "contingent coverage" which in many instances will provide additional protection for the insured tenant:

Contingent Property Insurance Coverage:

Allows the insured to secure coverage for property damage on an excess and/or contingent basis in the event the primary Property coverage does not / will not respond to a certain loss scenario. This is often secured by Landlords as a safety net when a Tenant provides Property insurance on Landlord-owned assets in accordance with applicable Lease provisions (such as a build to suit single tenant property). Oftentimes contingent coverage can be secured at a fraction of the Property program rate (range = 15-30%) since the insurance carrier's expectation is that the coverage would be triggered only under extremely limited scenarios. Insureds are expected to provide the insurance carrier with current and renewal evidence of the primary Property insurance coverage on the insured asset as well as a copy of the lease provisions specifying which party is to provide Property insurance. We do not recommend writing contingent Property coverage requirements into leases as it could appear the parties are seeking redundancy in their Property insurance placements and carriers, regardless of how much insurance is placed on an insured asset will only indemnify the parties equal to the value of the asset / indemnification owed (i.e. – one claim payment with no "stacking" of limits).

Glossary of Casualty Insurance Terms:

Additional Insured	<p>The person or entity added to the policy (e.g., not automatically insured) to recover insurance proceeds if such person or entity has an insurable interest in the property, which protects that interest in the event coverage for the insured party is denied due to negligent actions.</p> <p><u>NOTE:</u> This can only be done via endorsement.</p> <p><u>NOTE:</u> Additional insureds are different than loss payees, as additional insureds receive only liability protection and loss payees receive only property damage coverage.</p>
A.M. Best Rating	<p>A.M. Best rates the various insurance carriers. The rating is comprised of two scores - (1) the overall financial stability and management of the insurance carrier [A, B or C, + / -], and (2) the insurance carrier's net worth [XV - I].</p>

	<u>NOTE</u> : A-/X is a typical, acceptable rating.
Blanket Policy	Coverage that insures multiple properties under one policy.
Certificates of Insurance	Standard forms published by ACORD that are often used as a quick and easy reference point regarding the required insurance. <u>NOTE</u> : Certificates of insurance do not provide binding evidence of coverage and often should not be viewed as sufficient proof that the insured party has adequate coverage. Other items, such as copies of key endorsements and/or policy forms, may be required.
"Claims made" policies	Policies that cover claims filed during the policy period for claims that occurred during the policy period or an earlier policy period provided that the policy "retroactive date" precedes the date the claim is made. <u>NOTE</u> : Supplemental coverage is available to cover outlying claims, known as "nose" and "tail" coverage.
Deductible	The amount the insurer will deduct from the loss before paying up to its policy limits. <u>NOTE</u> : Typically, higher deductibles results in lower premiums; therefore, it is typical for a landlord to pass through reasonable deductibles to tenants if there is a loss.
ISO Forms	Insurance Services Offices forms, upon which most policies are written, or in the case of carrier "manuscript" forms, serve as the basis upon which the carrier form has been developed.
Limit	The total amount the insurance company will pay the insured for such claim.
Named Insured	The party that pays the premium, and for whom the insurance policy is underwritten.
"Occurrence" policies	Policies that cover claims that occur during the policy period, even if the claim is filed after the expiration of the policy period.
Self-Insurance	When the insured assumes the risk of loss by setting aside an amount of its own monies in the event of any losses that occur—losses that could ordinarily be covered under an insurance program.
Self-Insured Retention ("SIR")	A dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss. Credit risk within the SIR lies with the insured, as opposed to the insurer (carriers ultimately bear the credit risk for claimed amounts within deductibles should the insured default upon their deductible obligation). Carriers typically do not require nor desire to be notified about claim amounts within SIR's unless or until there is a reasonable expectation that the SIR will be breached.

HOW INSURANCE IS USED IN LEASES

The purpose of the Lease is to clearly and definitively memorialize the responsibilities, expectations, and appropriate allocation of risk between the parties. This allocation of risk is memorialized through the insurance, indemnity, and waiver of claims/subrogation provisions:

- Insurance: Each party insures their actions against third parties and their own property against damage or loss by fire or other casualty.
- Indemnity: The parties expressly allocate liability for bodily injury and property damage, which might result in a party assuming liability for damage and/or loss for which it might not otherwise be liable.
- Waiver of Claims / Waiver of Subrogation: Each party agrees to waive claims caused by the other, regardless of cause, that are coverable by insurance (including a waiver of subrogation by such party's property insurer). The waiver of claims is designed to prevent a double recovery by the damaged party,

and the waiver of subrogation is designed to protect the agreement that each party bear the risk of loss for that which it insured by preventing the subrogation by the damaged party's insurance company.

The intent of this allocation is that neither party will have (or will have few) uninsured risks, and both parties can protect the economic deal they have struck.

Typical Tenant Casualty Insurance Requirements

Generally speaking, a landlord will require the following types of insurance from a tenant to ensure that (i) tenant will be able to pay for any damages or injuries caused by tenant to a third party (including other tenants, employees, and customers), (ii) tenant will be able to continue to pay the rent and satisfy all other monetary obligations under the lease in the event of a claim from a third party (including other tenants, employees, and customers), and (iii) landlord will not have to cover the cost of an accident or injury at tenant's business.

1. Commercial General Liability: CGL Policies are currently written with a "combined single limit" per occurrence for bodily injury and property damage.

Typical Limits: \$1,000,000.00 with respect to injury or death of any number of persons and property damage per occurrence and \$2,000,000.00 dedicated or per location aggregate

NOTE: If your lease form uses the phrase "comprehensive general liability insurance", or distinguishes between limits of property damage and bodily injury - it is time to update your form

2. Workers' Compensation: Most states have laws requiring businesses to carry workers' compensation; however, those requirements and exemptions can vary from state to state and can depend upon the applicable business

Typical Limits: Limits of not less than that required by applicable laws, covering all of tenant's employees at the premises

NOTE: Consider addressing contractors, vendors, temporary employees, etc.

3. Employer's Liability:

Typical Limits: Limits of not less than \$1,000,000.00 per employee accident or disease

4. Umbrella: This is also known as an "excess liability policy"

Typical Limits: Limits of not less than \$1,000,000.00 - \$3,000,000.00 per occurrence

NOTE: Consider increasing limits of tenant's insurance by requiring umbrella coverage dependent upon the risk of use. For example, fitness users, restaurant/food operators, supermarkets, etc. may warrant higher limits

5. Commercial Automobile Liability: Add if tenant owns and/or uses any vehicle as part of its business to cover risks of accidents, theft or vandalism.

Typical Limits: Limits of not less than \$1,000,000 per accident

6. Liquor Liability: Add if tenant has the right to sell and/or service alcohol from the premises. If Tenant is not permitted to do so, but might occasionally serve alcohol without a charge, a host liquor liability coverage requirement might be appropriate.

Typical Limits: Limits of not less than \$1,000,000.00 - \$3,000,000.00 per occurrence

NOTE: Do not allow for exclusions or limitations on assault and battery.

7. Environmental Liability: Add if tenant will be using/storing treating or remediating hazardous materials in the ordinary course of tenant's business

Typical Limits: Limits of not less than \$1,000,000.00 each loss / policy aggregate

8. Professional Liability: Add if tenant is a professional and will be practicing in the premises (e.g., doctor) as well as for certain third-party property managers ("Property Manager's E&O")

Typical Limits: Limits of not less than \$1,000,000.00 each claim / policy aggregate

NOTE: Additional considerations may be required to ensure coverage is adequate for all professional exposures. The defense of such claim is typically provided within the limit, thereby eroding that limit.

Typical Landlord Casualty Insurance Requirements

Landlords typically do not put the limits of their insurance in their form lease, as such policies are generally carried on a blanket basis, and landlords want the flexibility to modify coverage; however, landlords typically do carry CGL. For landlords, CGL is typically for bodily injury and property damage arising from landlord's ownership, management, use and/or operation of the common areas with coverage limits as may be required by landlord's mortgage.

Additional Insurance Considerations

In addition to addressing the limits above, also consider adding the following requirements:

- Require the insured's insurance company to be licensed within the applicable state, with a minimum A.M. Best rating.
- Require tenant to provide certificates of insurance upon entry, and regularly during the term.
- Require tenant to provide (or its insurer to provide) notice of any change in coverage, cancelation, expiration, replacement or other similar change to the policy.
- Consider adding the right to require additional policies that may be reasonably necessary based upon the use of the property over time.
- If a party is added as an additional insured, require the insured party's coverage is primary and non-contributory.

NOTE: In order to effectively add additional insured coverage, be sure to use language similar to the following:

Tenant shall name Landlord parties as additional insureds under Tenant's Commercial General Liability, Commercial Automobile Liability and Umbrella / Excess Liability policies as respects liability arising from use, operation or maintenance of the Premises by or on behalf of Tenant.

- Consider adding the right to procure insurance on the non-insuring party's behalf, at their cost, if they fail to obtain.

Indemnity

The purpose of a contractual indemnity provision is to expressly allocate risk of liability for bodily injury and property damage amongst the parties. As a result of this allocation, the parties may ultimately agree to assume liability for damage and/or loss for which it might not otherwise be liable. Without an indemnity provision, the rights of the parties are governed by common law causes of action, and such actions (i) may create uncertainty as to which party is responsible (and therefore make it difficult to ascertain what insurance may be required), (ii) may not make the damaged party whole, and (iii) may create unlimited exposure to the at-fault party. At the end of the day, the indemnity is either compensation to the damaged party for loss or damage that has already occurred, or a guarantee to repay the damaged party for loss or damage that may occur in the future.

Furthermore, the applicability of the insurance provisions flow from the indemnity - most indemnity provisions are a form of insurable contractual liability. Therefore, it is essential that the indemnification provision be read together with the insurance provisions to ensure they are consistent.

NOTE: Since an indemnity is ultimately tied to compensation, an indemnity is only as good as the party that gives it. If the party giving the indemnity has no assets, the indemnity will similarly be limited.

Waiver of Claims / Waiver of Subrogation

The waiver of claims is designed to prevent a double recovery by the damaged party, and the waiver of subrogation is designed to protect the agreement that each party bear the risk of loss for that which it insured by preventing the subrogation by the damaged party's insurance company.

Subrogation is the right of the insurer to "step into the shoes" of the insured and pursue any right of action the insured may have against the party that caused the loss. When the insurer pays a claim, the insurer is assigned the insured's right to pursue the party that is liable for the claim. Ultimately, subrogation allows the insurer to be made whole after having paid out the claim to the insured.

An insurer's subrogation rights can be waived either: (i) expressly, or (ii) indirectly by the insured waiving its own rights to recover against third parties, which thereby extinguishes the insurer's right of subrogation. For the express waiver - this can only be done by the insurer, so it would happen by way of endorsement in the insurance policy. While the parties can require that such endorsement be included in the policy, the insurer is not a party to the Lease, so there is no guarantee there will be an express waiver. In most cases, an insurer's rights of subrogation are indirectly waived by its insured's waiver of claims in the Lease. Since the insurer's rights can be no greater than the insured's rights, with no rights of action by the insured, the insurer has no right of subrogation.

Typically, waiver of claims and waiver of subrogation in leases is limited to property insurance; however, it also applies to CGL and workers' compensation insurance.

GCL (Example): Tenant, a restaurant operator, leases space in landlord's center. A fire occurs in tenant's premises, injuring a customer. Tenant is found liable to the customer for tort damages; however, it is determined that the fire was due to a failure in landlord's electrical system within the walls of the premises. Tenant's CGL insurer pays the damages to the customer, but pursues tenant's right of action against landlord in a subrogation action. If successful, tenant's insurer would recover the damages it paid to the customer as tort damages from landlord.

In CGL policies, waiver of subrogation is known as "Waiver of Transfer of Rights of Recovery Against Others to Us".

Workers' Compensation (Example): Tenant leases space in landlord's center. Tenant hires a contracting firm to perform some maintenance of tenant's equipment. During the maintenance of such equipment, one of the contractor's employees is injured by a falling ceiling tile (which landlord maintains). The contracting firm's insurer awards its employee benefits under its Workers' Compensation policy, but pursues the contracting firm's right of action against landlord in a subrogation action for landlord's failure to maintain.

NOTE: Unlike waiver of claims for first-party property insurance claims, third parties cannot waive claims in a lease, as they are not a party to the lease. Therefore, injured third parties are not prevented from seeking reimbursement from landlord and/or tenant; however, that third party would be required to reimburse the insurer that paid the initial claim to prevent double recovery.

NOTE: Waivers of subrogation are not broadly excluded by any states, but certain states limit their application similar to anti-indemnity statutes; therefore, be sure to consult your insurance broker.

CHANGES IN INSURANCE COVERAGES

Despite the insurance industry's best efforts to maintain profitability by managing risk and exposure relative to premium collected, early adoption of "broad-form" / comprehensive policy wording created an environment in which insurance carriers have consistently struggled to stay ahead of the curve. Unforeseen loss events and litigation tactics have exposed carriers to liabilities they claim to have not contemplated in their underwriting of risks nor intended to cover. As such, carriers are constantly revising coverage forms with the intent of limiting or otherwise restricting coverage for which insureds often believed they were clearly entitled to coverage or for which a gray area existed with enough ambiguity that long-tail coverage disputes have become the norm. Carriers will argue that these unforeseen circumstances cannot be factored into their ratings, and thus premium calculations fall woefully short resulting in "loss ratios" excess of 100%, meaning carriers lose money and subsequently resort back to limiting capacity, increasing rates and deductibles, and further restricting coverage. Thus, it is critical that each party to a lease fully understand and expressly state what liabilities it is assuming while marrying its insurance program to suit the agreed terms in order to ensure the insurance program will respond in the manner expected.

Historic Trends in Exclusions

Below are some examples of large liability losses, which resulted in insurance carriers excluding the applicable coverage from casualty insurance, where such claims had been previously insurable, and the resulting lease response:

- a) Asbestos - \$100Bn in claims – Carriers began excluding coverage for asbestos claims circa 1985-1986. According to AM Best, overall asbestos loss payments have exceeded \$2 billion a year since 2002, while annual environmental loss payments have declined since peaking at \$2 billion in the late 1990s, although payouts still have averaged just under \$800 million a year over the past 10 years.

Lease Response: Landlords now typically require full environmental indemnities from a tenant for any action that results in hazardous materials contamination. Tenants typically require the same from landlord, together with an indemnity for hazardous materials present prior to tenant's occupancy. Additionally, in some states, asbestos reports are becoming more common.

- b) Pollutants – enactment of two major environmental laws in the 1970s and early 1980s imposed environmental liabilities on business and industry that changed the way society and law viewed responsibility for environmental contamination. The Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") attached environmental liability to companies through the full life cycle of hazardous waste in addition to imposing liability without regard to fault. As companies began realizing the extent of their potential environmental liabilities, claims were filed under CGL policies, testing the "sudden and accidental" CGL pollution exclusion. Carriers sought to deny coverage where possible claiming that pollution that had accumulated over time did not meet the definition of "sudden and accidental" and thus, was excluded under the CGL policy. However, many state courts sided with insureds in such coverage disputes which ultimately led carriers to develop and roll out the "Absolute Pollution Exclusion" in 1985 which removed coverage for bodily injury and property damage that arose from the release of pollutants regardless of whether pollutants were released quickly or gradually. The coverage void that was created in the CGL policy for most types of pollution was initially addressed by AIG via release of their Contractor's Pollution Liability policy in 1986. Today there are dozens of insurers providing environmental insurance with more than 100 policy forms available in the marketplace.

Lease Response: [see above]. Additionally, if a tenant's use will likely result in the presence of hazardous materials, a landlord will typically expressly require this type of insurance.

- c) Silica / Mixed Dust – although the first silica-related lawsuits in the U.S. were filed in the 1930s related to employee exposure during mining activities, silica / mixed dust mass tort actions began ramping up around the time insurers began attaching asbestos exclusions to liability policies in the mid-1980s. As with asbestos and environmental exclusions, insurers eventually sought to exclude silica claims from commercial liability policies with the introduction of silica exclusions to liability policies in the early 2000s. Although not as monetarily significant for the insurance industry as asbestos litigation, it is estimated that carriers have paid billions of dollars globally to settle silicosis claims under workers' compensation and third-party liability policies. It should be noted that some limited coverage for silica-related exposure and illness is still available today under certain environmental policy forms.
- d) Mold – the proliferation of toxic mold claims began in the early 2000s. Fearing similar exposure to what they incurred via asbestos claims, carriers began adding mold, microorganism, fungi and bacteria exclusions to their policy forms circa 2002. Although some carve-backs are available for consumables (cheese, yogurts, etc. in the hospitality industry), coverage has generally been pushed towards environmental policies where coverage, if any, is often narrowly defined and heavily sub-limited.

Lease Response: [see above].

NOTE: When addressing mold in a lease in connection with hazardous materials, the parties should limit mold to toxic mold that the parties would be required by law to remediate.

- e) Terrorism – prior to the September 11th, 2001 attacks on the World Trade Center and the Pentagon, terrorism coverage was usually included in general insurance policies without an additional cost to insureds. After the attacks, coverage became prohibitively expensive, if offered at all, and the insurance industry lobbied state regulators to allow full terrorism exclusions, which was ultimately approved by 47 states with some limited carve-backs including claims under workers' compensation. After intense lobbying by businesses and industries which could no longer obtain terrorism insurance, despite requirements in many loan documents requiring same, Congress passed the Terrorism Risk Insurance Act ("TRIA") in 2002. TRIA was initially created as a temporary three-year federal program allowing the federal government to share monetary losses with insurers due to a terrorist attack. Subsequently, TRIA has been renewed four times, with the most recent reauthorization being adopted in 2019 for a term set to expire December 31, 2027. TRIA requires insurers to make terrorism coverage available to commercial policyholders but does not require insureds to purchase it.

Current Trends in Exclusions

Although carriers have recently attempted to embed exclusions within their policies for claims resulting from allegations of human trafficking, assault & battery, liquor liability and other claim frequency drivers, no exclusion trend has been as noteworthy as communicable disease thanks in large part to COVID-19 and the "mini-pandemics" that have preceded it. As a result:

Most property policies:

- have a clear virus exclusion; and
- require that a business income claim be presented promptly.

NOTE: This is likely why we are seeing the property insurance claims come first, as the business income and/or business interruption insurance claims must be made quickly.

Most liability policies:

- have no virus or similar exclusion (until recently); and
- are responsive to claims filed within the statute of limitations.

Insurance is based on the law of large numbers leading to predictability. COVID-19 has upended that predictability resulting in uncertainty. COVID-19 has been described as a "slow-moving catastrophe", resulting in some of the following delayed effects:

- *Workers' Compensation:* Workers' Compensation claims to date are far less significant than originally anticipated according to NCCI in spite of presumptive injury laws in various states. Regardless, employers face a significant amount of uncertainty as a result of the pandemic.
- *Employer Liability:* Employment Practices Liability and Directors' and Officers' insurance carriers are raising rates due to loss experience arising indirectly from COVID-19 exposures (e.g., wrongful discharge, discrimination, harassment, wage and hour complaints, sick leave, invasion of right of privacy, failure to provide adequate COVID-19 protection, failure to provide adequate PPE, etc.).
- The COVID-19 pandemic has further aggravated the existing hard market, affecting other lines of coverage such as umbrella/excess liability. This has resulted in reduced availability of insurance and reduced limit capacity, a lack of willingness to underwrite certain risks and classes of business, increased deductibles, new (lower) sub-limits, additional exclusions, and increased rates on the coverage provided – even for "best in class" businesses.

Reinsurers are being hit hard with COVID-19 claims outside of the U.S. where virus exclusions have not been commonplace. When reinsurance rates climb, so does the cost of insurance we purchase domestically.

Combine this with the trend of "social inflation" large jury awards and insurance companies are concerned about loss trends outstripping liability rates and rate adequacy. As such, the insurance industry has been issuing a plethora of communicable disease exclusions on almost every type of liability coverage. Interestingly, this could be construed as an admission by carriers that some coverage exists for COVID-19 under prior policy forms.

As an example of recent trends, an alternative risk transfer vehicle known as parametric insurance covered cancellation of the Wimbledon tennis tournament for a loss of over \$100M, but such coverage is no longer available at commercially reasonable rates.

Casualty Coverages Subject to COVID-19 Risk:

1. Aircraft Liability
2. Auto Liability
3. Directors' & Officers' Liability
4. Cyber Liability (employers are more vulnerable due to remote working)
5. Employer's Liability
6. Employment Practices Liability
7. Commercial General Liability
8. Marine Liability (ships)
9. Pollution Liability
10. Professional Liability (contractors, architects, engineers)
11. Umbrella / Excess Liability
12. Workers' Compensation

Examples:

- In-N-Out accused of failing to follow pandemic safety protocols, shorted workers on pay & retaliating against them for complaining.
- Bank of America accused of failing to protect unemployment benefit recipients from fraud as part of the way the bank handled the massive surge in fraud targeting California's unemployment benefits program during the pandemic.

Essentially, any coverage that includes the descriptor "liability" is likely exposed to COVID-19 litigation.

Other coverages subject to COVID-19 risk include:

1. Life insurance: COVID-related death claims are just coming into the system. Insurers ponder how to underwrite COVID-19 survivors, especially for those who were hospitalized
2. Medical insurance: What's the longevity and what's going to happen to someone's pulmonary system or heart?
3. Long term care: The long term health impact remains unknown.

Future Trends:

- COVID-19 will be the "largest event in insurance history." – Chubb CEO Evan Greenberg
- "There's a lot more litigation to come." – nearly every plaintiff's attorney
- Will there be a federal backstop similar to TRIA?
- While it is too early to accurately forecast COVID-related liability litigation, what is certain is that nationwide coverage issues that significantly impact the economy rarely get resolved quickly.