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Alternate Sources of Insurance Recovery

In today's economic climate, vigilance regarding the pursuit of every potential source of indemnity for business-related losses is more critical than ever. As always, a company should consider whether a loss might be covered under its own insurance. However, it must also consider whether other sources of insurance are available. Those sources include, among others:

- Insurance issued to corporate predecessors;
- Insurance issued to another entity, such as a supplier, distributor, contractor or retailer, among others, which either names a company as an *additional insured* or should do so based on a contractual relationship or tort principles; and
- Insurance issued to a company which, on its face, does not *appear* to cover the kind of loss the company has sustained, but in fact should apply.

1. Predecessor's Insurance Coverage

Many companies have been involved in some form of corporate transaction, whether it be a merger, acquisition, spin-off or reorganization. Those transactions can impact the availability of insurance coverage for all entities involved and may

provide an unexpected source of recovery following a loss. The method used in the transaction as well as whether and how insurance rights are addressed can affect future coverage. While the exact results are fact-intensive and jurisdiction-specific, the following points may be helpful in assessing the availability of insurance rights following a corporate transaction:

Stock Sale: Insurance rights typically remain the same following a stock sale because there is no change to the corporate entity itself, only to the owners of the corporation. Accordingly, if a company was acquired through a stock sale, policies in place prior to the sale should continue to afford coverage for the surviving entity.

Where there has been a spin-off or the sale of a wholly-owned subsidiary, however, the insurance policies in force at the time of the sale typically are not transferred with the subsidiary to its new owner because the named insured on those policies remains the former parent company. That named insured entity continues to have an ongoing business concern that will likely require insurance coverage. Nevertheless, properly noticed claims or losses, relating to the spun-off entity, that precede the spin-off still should be covered under the original policies. Thus, where a spin-off is concerned, it is important to negotiate appropriate indemnification or make other

arrangements for pre-sale losses or occurrences. Where possible, the parent entity's insurers should be notified of the contemplated sale and an attempt should be made to negotiate a coverage extension to ensure that coverage is in place for the spun-off entity following the transaction.

Asset Purchases: Determining the availability of insurance following an asset purchase is more complex, although typically the acquiring company does not obtain the insurance rights of the selling company. If the purchase transaction included an agreement to transfer insurance rights, consideration must be given to any *consent to assignment* clause within the policy, which often precludes such transfer without express written consent from the insurer(s). Some exceptions have been made to the preclusion of assignment, however, particularly where the transfer occurs post-loss or where an entire product line is purchased and the loss stems from that product line.

Mergers: Insurance rights typically move to the successor or surviving corporation following a merger because the acquiring corporation inherits all of the rights and obligations of the merged company. Accordingly, if a company acquired another company through merger, the merged company's insurance policies will typically remain effective to cover losses stemming from that company's operations. It is important, however, to keep in mind that the successor corporation is typically not covered for losses stemming from its own operations, especially its pre-merger operations. In addition, there is a minority view in some

jurisdictions, notably in California, that the surviving corporation does not obtain the insurance rights. As with asset purchase transactions, a review of the merger transaction documents and policy assignment provisions may also be helpful to determine any specific assignments of rights under the merged company's insurance.

If a company has suffered a loss, be sure to consider whether the insurance policies issued to its predecessors or other related companies may provide coverage. In addition, if a company is considering a future corporate transaction, be sure to expressly address insurance rights in the transaction documents, in the event some confusion or complication arises in the future, and be familiar with the likely outcome of such a provision.

2. Additional Insured Status

An *additional insured* is a company that would not generally be included as an insured under the insurance policy of another company, but is named as an insured because the other company desires or is required to provide a certain degree of protection to the additional insured. Additional insureds often request and receive a certificate of insurance demonstrating its status as well as a notice of cancellation when the insurance is terminated. An additional insured, while entitled to the same coverage as the named insured, does not have any rights to instruct or request that the insurer make policy modifications, cancellations or other changes. A company might add another as an additional insured for a number of reasons, including:

- to cap potential liability exposure for the additional insured;
- to protect the additional insured's assets, equity interests and loans;
- to transfer and/or reduce the additional insured's risk;
- to place liability on the party in control, rather than on the additional insured;
- to help reduce the likelihood of litigation between the two parties;
- to enhance the likelihood of cooperation between the parties; and
- to help facilitate a deal between the two parties.

Additional insured status is often conferred in the following scenarios:

Company Procedure: A company may, pursuant to its practices and procedures, include as additional insureds all entities with which it has a certain type of contractual relationship. Or, it may insist that a certain category of companies include it as an additional insured. For instance, a manufacturer may insist that it be listed as an additional insured by all raw material suppliers.

Contractual Compliance: Performance, service or outsourcing contracts often contain additional insured requirements. Governmental entities, for example, typically mandate that all contracts with service providers require that the governmental entity is named as an additional insured.

Organizations or Groups that Require Protection: Additional insured

status also is often used to protect certain categories of people such as:

- property owners on the policies of contractors;
- general contractors on the policies of subcontractors;
- property owners on the policies of lessees or tenants;
- lessors of leased equipment on the policies of lessees; and
- retailers and distributors on the policies of manufacturers.

Implied Additional Insured: In certain circumstances, a company may qualify as an additional insured even in the absence of an express policy endorsement. If a named insured contracts to include another company as an additional insured, but fails to do so, that company may still be protected. Courts that recognize such implied additional insured status typically do so only where the risk to the insurer is not increased and the implied insured is within a class of entities intended to benefit under the named insured's policy. Where a company seeking implied status does not fit those requirements, it is not entitled to coverage, but it may nonetheless be protected from subrogation claims made by the insurer to cover payments made on behalf of the named insured.

While having additional insured status can benefit a company by providing an alternate or additional source of

insurance coverage, it may not be ideal for every business transaction. Be sure to consider a company's particular circumstances, especially the amount of potential liability involved, and consider seeking the advice of an insurance attorney should you require further assistance.

3. Other Lines of Coverage

Oftentimes, a loss may appear to fit one particular type of insurance, but further investigation reveals that other available insurance also applies. If a company has multiple lines of coverage, all potentially available lines should be considered in connection with any loss.

For example, while commercial general liability policies have traditionally been thought of as affording coverage for "bodily injury" and "property damage," courts have also found that coverage exists for certain types of intellectual property claims, such as patent infringements and misappropriation of trade secrets and sensitive business information and data, under the policy's advertising injury section.

As another example, first-party property insurance is typically thought of as providing coverage for loss to the policyholder's own property. However, many first-party property policies also provide what is known as business interruption or business income insurance. This coverage is designed with the goal of preserving the continuity of the policyholder's earnings during

a period of suspension of operations, following some form of physical damage to the policyholder's property, a key supplier's property or an important customer's property, or property nearby one of those locations. Thus, for instance, if a company's production is halted as a result of the unavailability of a raw material because the supplier of that material is suffering the effects of a hurricane, the company may be able to recoup its lost income. The exact phrasing of the coverage will determine whether and for what duration coverage may be afforded.

Never assume coverage is unavailable for a particular type of loss. Review and analyze each available policy and seek the assistance of an insurance attorney if necessary.

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If a company has suffered a loss, be sure to take its corporate history, contracts with outside entities and *all* lines of insurance into account even if, at first glance, they do not appear to cover the loss. Additionally, if a company is considering a corporate transaction, new contract or the purchase or renewal of insurance coverage, be sure to consider the above or consult with an insurance attorney.

Hunton & Williams' Insurance Litigation and Recovery attorneys are always available to answer any questions you may have regarding insurance coverage, or to assist you in obtaining the coverage to which a company is entitled.