



RIMS Oregon Chapter Meeting

Venue:
November 16, 2017
Time:

EMERGING LEGAL ISSUES IN RISK MANAGEMENT



SPEAKER:



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Raymond A. Mascia, Jr. is an attorney in Anderson Kill's New York office. His practice concentrates in commercial litigation and insurance coverage litigation exclusively on behalf of policyholders. He has extensive experience in insurance coverage matters in state and federal court involving general liability, professional liability, and property insurance.

TOPICS

- Cyber Liability Claims and Coverage
- Claims Made Trigger Confusion
- Duty To Report Excluded Claims
- Coverage for Class Actions
- Excess Settlement Trap



CYBER LIABILITY CLAIMS AND COVERAGE



DATA SECURITY BREACHES

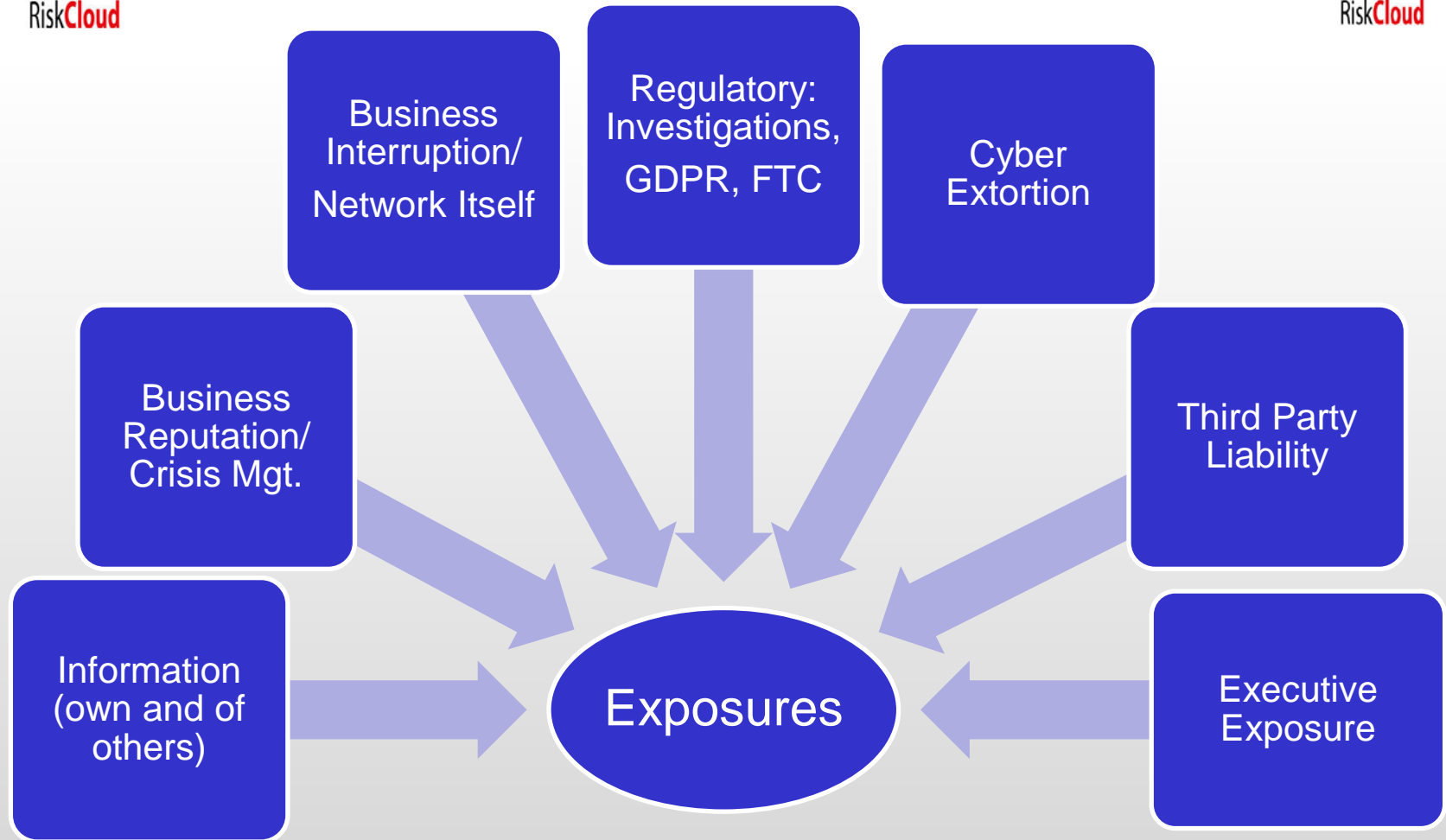
EXPOSURES VARY

EVERYONE IS AT RISK FOR A COMPROMISE

- **YAHOO ACQUISITION PRICE ADJUSTMENT—MORE THAN 1/3 OF A BILLION DOLLARS**
- **Hacks of OPM databases compromised 22.1 million people, federal authorities say**
<https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/>
- **Lessons From the Ashley Madison and Sony Pictures Hack**
- **Sony Pictures connection to SWIFT Theft?**
- **Ransomware on the rise: Health and legal sectors increasingly targeted / navigating Bitcoin**
- **German Steel Mill, pipeline, transportation and infrastructure risk**
- **FTC powers**
- **Class Action Suits Get life from 7th Circuit and 2 settlements in Home Depot breach litigation**
- **Email and password data for more than 68 million Dropbox users is for sale in the darknet marketplace: commonalities with Yahoo in terms of timeline and realization of scope?**
- **Last month's WannaCry ransomware attack on NHS, Telefonica and numerous others**



POTENTIAL EXPOSURES



DEALING WITH A SECURITY BREACH

- Data Breach Team and Plan needs to be in place
- Compliance with State Notice
- Make sure your insurance provides coverage where cloud used
- Notice all potentially applicable insurance



INSURANCE POLICIES THAT POTENTIALLY COVER CYBER CLAIMS

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



PROTECTING POLICYHOLDER'S RIGHTS IN THE IMMEDIATE AFTERMATH OF A NATURAL DISASTER

- Reviewing Insurance Policies
 - Give Notice
 - Beware of Time Periods
- Undertaking (and Documenting) Emergency and Temporary Repairs
- Preliminary Preparation of the Claim
- Diligent Pursuit of Insurance Proceeds



D&O COVERAGE FOR CLIMATE CHANGE - RELATED LAWSUITS

- Fossil fuel companies and utilities.
- Shareholder resolutions related to climate change have been on the rise.
- Investors have demanded increased disclosure of climate change-related risk.



D&O COVERAGE FOR CLIMATE CHANGE - RELATED LAWSUITS

- Government regulators are taking action on climate change disclosures.
- In November 2015, the New York Attorney General subpoenaed ExxonMobil for internal documents related to climate change.
- In March 2016, a coalition of state attorneys general announced that they will work together to investigate corporations that may have misled the public about climate change.
- On April 13, 2016, Exxon sued a private law firm after it sent a subpoena on behalf of the Attorney General of the U.S. Virgin Islands.

D&O COVERAGE FOR CLIMATE CHANGE - RELATED LAWSUITS

- D&O coverage for claims related to concealment, misrepresentation, and mismanagement of climate change-related risk?
- Pollution exclusion?
- At least one court has rejected the application of the pollution exclusion to D&O claims stemming from alleged disclosure failures regarding environmental liabilities. *See In re Sealed Air Corp. v. Royal Indem. Co.*, 404 N.J. Super. 363 (2008).



D&O COVERAGE FOR CLIMATE CHANGE - RELATED LAWSUITS

- Seek a carve-out for climate change related securities lawsuits.
- Some insurance companies are offering new insurance policies to address climate change and environmental liability losses.



CLAIM TRIGGER: GROUPING TOGETHER RELATED CLAIMS

- Definition of **Claim**
- Definition of **Loss**
- Definition of **Related Claims**
- Definition of **Interrelated Wrongful Act**
- Definition of **Occurrence**
- Batch Clause
- Provisions relating to limits and deductibles.
- Provisions relating to trigger and notice



WHAT'S A POLICYHOLDER TO DO?

- Give notice for claims to multiple towers if there is any issue of interrelatedness or relation back.



DUTY TO REPORT EXCLUDED CLAIMS

- Insurance Company is arguing that policyholders have a duty to report all claims
 - even if excluded
 - or renewal policies can be reformed or rescinded



CASE HISTORY

- Policyholder seeks coverage under E&O policy
- The issue is which policy period applies
- Ins Co. argues that excluded claim should have been reported in year #1
 - Even though it was an excluded “fee dispute”
- Seeks to reform policy year #2 for changes supposedly needed due to lack of notice of the fee dispute

WHAT'S A POLICYHOLDER TO DO?

➤ Report all claims

OR

➤ Get written advice from broker that notice is unnecessary.



COVERAGE FOR CLASS ACTIONS

- Many class actions are covered by CGL Policies
 - At least the defense obligation
- But coverage is typically denied
 - On grounds of no allegations of:
 - Bodily injury, or
 - Third-party property damage,
 - Or, conversely, on allegations of breach of contract or the Economic Loss Doctrine.

CLASS ACTIONS (CONT'D)

Class Actions Require:

- Common issues must predominate over individual issues
- So they rarely seek damages for
 - Individual harm from personal injury
 - Unique damages for property damage



CLASS ACTIONS (CONT'D)

However, many class actions allege:

- Generalized adverse physical effects
 - e.g., cell phone radiation
- Generalized adverse impact on thirty party property
 - e.g., adulterated fuel oil
- Personal injury invasion of privacy rights



KEY EXCLUSIONS OR PRODUCT LIABILITY

- Damage to your “Product”
 - No coverage for repairing or replacing a defective product
- Damage to “Impaired Property”
 - No coverage for loss in value or use to third party’s property from product’s failure to function as intended and where property can be restored to use by removal or repair of product
- Product Recalls – the “Sistership Exclusion”
 - No coverage for recalls by you or others as a result of a defect

EXCESS SETTLEMENT TRAP

- Settlements with primary or low level excess carriers
 - For less than the full limit
 - May be argued to forfeit higher layers of coverage



REACHING EXCESS POLICIES

Traditional Rule – *Zeig v. Mass. Bonding & Ins. Co.* (2nd Cir. 1928) [A. Hand]

- Excess Coverage was triggered after primary policy was “exhausted in the payment of claims to the full amount of the expressed limits.”
- Court held that primary insurer need not have actually paid its full limits (or anything)
- Rationales:
 - policy did not explicitly require payment of underlying limits in cash
 - public policy favors settlements

REACHING EXCESS POLICIES

After Many Decades, Certain Insurance Companies Have Recently Decided to Try to Get Around Zeig and its progeny, arguing that they have no payment obligation unless underlying coverage is paid in full.

- Strategies
 - Change policy language
 - Argue that literal interpretation of language offends public policy favoring settlements of disputes

REACHING EXCESS POLICIES

Qualcomm v. Lloyd's, 161 Cal. App. 4th 184 (2008)

- Excess policy was triggered by payment of “the full amount” of underlying coverage.
- Court found for Lloyd's, and criticized Zeig's reliance upon public policy.

EXHAUSTION SETTLEMENT TRAP

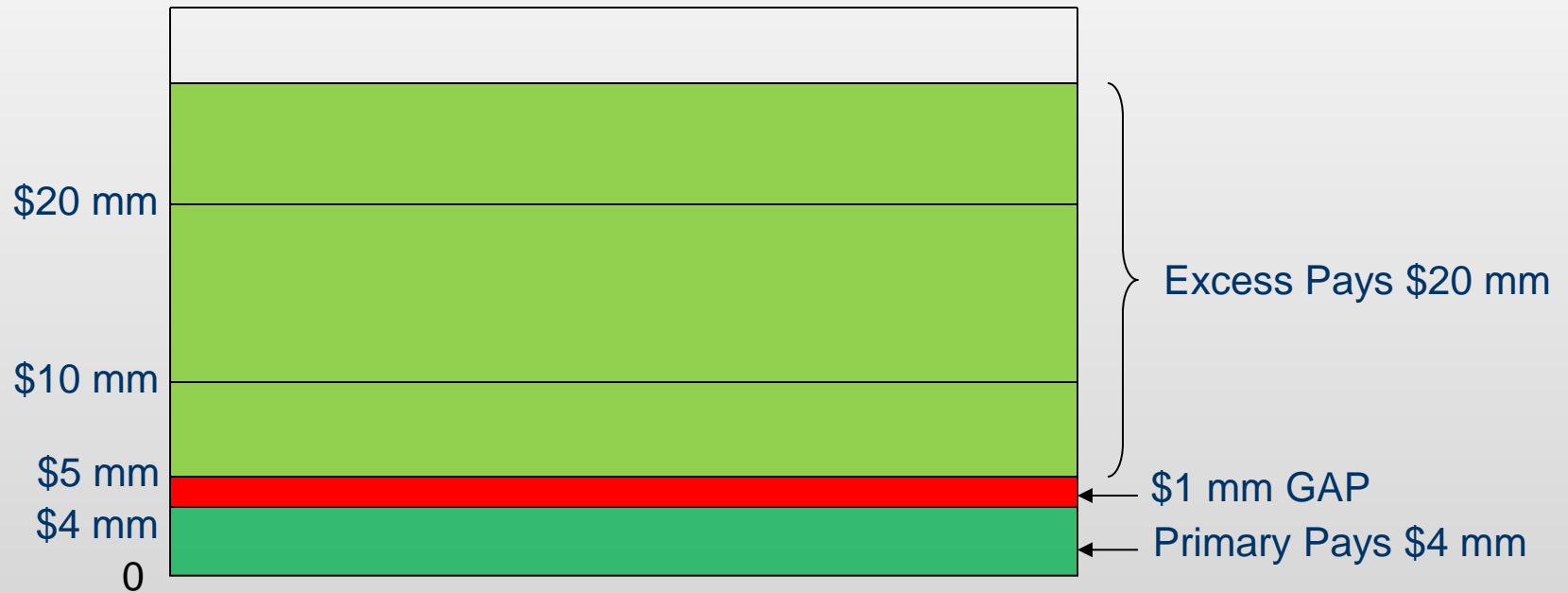
Coverage Tower

2 nd Excess - \$10 million
1 st Excess - \$10 million
Umbrella - \$5 million
Primary - \$5 million

\$30 million of coverage in 4 layers

EXHAUSTION TRAP

TRADITIONAL RULE APPLIED TO EXAMPLE
Coverage for \$25 mm settlement



EXHAUSTION TRAP

Typical Problem Language

“The Insurer shall only be liable to make payment under this policy after the total amount of all Underlying Limits of Liability has been paid in legal currency by the issuers of all Underlying Insurance as covered loss thereunder.”

EXHAUSTION SETTLEMENT TRAP

The New Landscape

1. So far, this argument has featured in excess D&O and professional liability policies
 - However, it is likely to be tried with CGL policies as well
 - Property coverage?
2. Policyholders must seek assurances from excess carriers that settlements of underlying coverage will not be used as a defense to their payment obligations
3. If assurances are not given, settle at your own risk

THANK YOU.



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