

Stranger in a Strange Land

By William G. Passannante and Cort T. Malone

Four steps to maximize insurance coverage for non-U.S. businesses with U.S. operations that may be subject to long term liabilities.

If you are general counsel, a risk manager, or any other upper-level executive for a U.S. company with a non-U.S. corporate parent, you understand all too well that the tort and liability insurance system in the United States often makes non-U.S. business owners feel like strangers in a strange land.

Non-U.S. corporations that have U.S. operations through subsidiaries eventually will face the U.S. tort system. Claims for asbestos, environmental harm, lead exposure, and many other long term exposure or “toxic tort” situations all should be covered by insurance. Described below are four basic steps for maximizing insurance protection when faced with U.S.-based liabilities.

Think Insurance After a Loss

Whenever your company is served with a lawsuit or receives a claim letter, or whenever the company suffers a significant financial loss, immediately inquire whether it is covered by insurance. For example, employee lawsuits often are covered by a company’s workers compensation and employer liability policies - but few file claims. The company should also analyze other sources of insurance, e.g., a contractual indemnitor or other companies’ insurance policies that may list the company as a named insured under a vendor endorsement or pursuant to a contractual coverage endorsement.

Give Prompt Notice Of Claims

Insurance policies usually contain notice provisions requiring that claims be filed within a specific time frame following the loss or emergence of a potential liability. While most states require the insurance company to show prejudice before denying coverage on these grounds, failure to comply with notice provisions often triggers costly and time-consuming legal battles – and sometimes results in loss of coverage.

Notice should be given to every potentially applicable insurance company. If the claim for insurance coverage is related to a product, the policyholder should give notice to every insurance company that sold the policyholder insurance coverage from at least the date the product was first marketed to the date of the “occurrence” or of the actual or potential claim. Have your insurance agent or broker give written notice to all possibly implicated insurance companies. Do not rely on the broker’s or agent’s word that there is no insurance coverage. Verify that the agent or broker has promptly forwarded the notice to each of them.

Preserve and Locate Insurance Policies

Past insurance policies — especially older liability policies that were written on a broad basis with few exclusions and no aggregate limits — are valuable corporate assets and should be searched for, collected, and cataloged, as should copies of current policies. Make certain that copies of insurance policies issued to corporations and other entities acquired by your company through purchase, merger, or otherwise are turned over to your company.

If a particular policy cannot be found, secondary sources may be used to demonstrate that the policy was purchased. Companies known as “insurance archaeologists” specialize in locating old policies. And never forget, despite repeated insurance company statements to the contrary, that insurance companies should have copies of the insurance policies purchased from them.

When You Make a Claim, Don’t Accept No for an Answer

Insurance companies routinely deny claims, even if they have no basis. If you do not challenge a denial of coverage, the matter will end there. Make your insurance company spell out the basis for the denial.

Read your policy to see if it says what the insurance company says it does; and then read it again to see if any other provisions alter the insurance company's interpretation. The difference between coverage and non-coverage often directly reflects the determination and persistence of the individual policyholder.

About the Authors

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