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Live Webinar
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1:00 pm – 2:00 pm

ANDERSON KILL'S 26TH ANNUAL POLICYHOLDER ADVISOR WEBINAR SEMINAR SERIES SESSION 2: “AVOIDING LIABILITY MINESHAFTS WITH M&A DUE DILIGENCE”

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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.
Managing Shareholder (Firm)
Anderson Kill P.C.
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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. 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, the top insurance recovery jury verdict in the United States, seven landmark state Supreme Court decisions, eight jury verdicts and nine bench trial decisions in favor of the policyholder.

Bob has assisted numerous corporations in merger and acquisition transactions; helping the teams identify and manage the risks and insurance assets involved.

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SPEAKER:

Brittany Leonard, Esq.
General Counsel
Civix
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Brittany is an attorney turned experienced corporate counsel and business director. After starting her career in a traditional law firm, she knew with her background in business – both by degree and working experience – that she had more to offer. Her passion is seeing businesses thrive and helping facilitate those successes. She has directed and collaborated with internal departments from marketing, data analysis, human resources, and finance, leading teams in a wide range of business transactions.

Brittany has in-depth experience in reviewing a variety of contracts, including nondisclosures, licensing, marketing, partnership, SaaS, vendor documents, and government agreements. She offers a unique approach by being able to look at a document from both business and legal perspectives. She's also highly experienced in litigation, mediation, managing outside counsel, and protecting intellectual property through trademarks. As General Counsel, Brittany manages Civix's legal team with a focus on contract negotiations, intellectual property, compliance, global HR situations for risk management, and M&A transactions.

In the community, Brittany volunteers at Give Kids the World and is on the Board of Directors for the Association of Corporate Counsel. Brittany is a Summa Cum Laude graduate of the University of Central Florida with a Bachelors in Business Administration. She received her Juris Doctor degree from the Florida A&M College of Law, where she was the Valedictorian of her class.

I. WHO SHOULD BE ON THE DUE DILIGENCE TEAM IN ADDITION TO GENERAL COUNSEL?

A. What is the value of the Risk Manager on the team?

B. Adding internal and external experts.

II. HOW RISK MANAGERS CAN ASSIST IN VALUATIONS AND MERGERS

A. If involved early, insurance professionals can add value.

B. Deal makers negotiate sharing of liabilities in a vacuum.

C. In determining whether or not to assume or refuse liabilities in a deal or whether the deal is worth it, availability of insurance must be analyzed.

D. Impact on acquisition price by risk managers' investigation and analysis.

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III. KNOW THE STRUCTURE OF THE INSURANCE PROGRAM OF YOUR COMPANY AND THE MERGER CANDIDATE COMPANY

A. INFORMATION GATHERING

1. Know what you know.

2. Know what you don't know.

3. The time to get the information from others is when you have the upper hand – when interest in the deal is high – not after the deal is done.

B. WHAT IS THE HISTORY OF THE TARGET COMPANY'S INSURANCE PROGRAM?

- What companies and lines of coverage have been added?
- What companies (possibly now spun-off) still can make claims under the target company's historic insurance program?

IV. UNDERSTANDING YOUR NEW POTENTIAL LIABILITIES

A. What coverage is required for exposures you are buying?

B. What are the liabilities – historical and projected?

C. Is there a gap between present coverage and anticipated liabilities?

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V. EVALUATING THE CLAIMS EXPERIENCE OF THE TARGET COMPANY

A. Reporting past claims.

1. Loss runs received. Understanding them.

2. How is the target company reporting them?

    a. What is its reserving practices?

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VI. CLAIMS EXPERIENCE

B. IBNR.

C. Anticipated future claims.

D. Breaking down your analysis regarding long tail claims.

   1. Separate each area of long-tail liability: environmental clean-up, toxic torts, product liability, etc.

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VII. USE MULTIPLE SCENARIOS FOR MODELING

A. Best Case: Nuisance claims, lots of defense costs and no indemnity;

B. Most Probable: Moderate liability; and

C. Worst Case: Catastrophic liability, "bet the company" liability.

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VIII. VALUING HISTORIC INSURANCE ASSETS

1. Old coverage programs must be reviewed for:

   a. Erosion.

      - Toxic tort claims, environmental clean-up claims, product liability claims.

   b. Settlements and Commutations.

   c. Claims-made coverage conversion.

IX. VALUING HISTORIC INSURANCE ASSETS

1. Old policies must be reviewed for:

   a. Exclusions.

   b. Limiting Clauses: deemer or non-cumulation.

   c. Claims-made or occurrence-based?

   d. Aggregate limits/no aggregate limits.

   e. Related-corporation combined limits?

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X. IDENTIFY HISTORIC INSURANCE PROGRAM GAPS

1. Retrospective premiums.
2. Fronting policies.
3. Insolvent insurance gaps.
4. High deductibles.
5. Captives.

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XI. ANALYZING POTENTIAL GAPS DUE TO LONG TAIL CLAIMS

1. Trigger: First exposure data.
2. What state's law likely will govern application of the liabilities to the coverage?
3. How are "gaps" dealt with?
4. What is cut-off period for allocating liability?
5. Are liabilities applied to a year in excess of coverage?
6. How many occurrences are applied?
7. How many deductibles are applied?

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XII. ALLOCATION OF PREMIUMS

A. Allocation by business unit.

B. Impact on business plan.

C. Expectation by business units.

XIII.THE IMPACT OF CONTRACT INDEMNIFICATION LANGUAGE ON INSURANCE

A. Looking at standard contracts with suppliers and vendors.

B. Begin the process of educating the sales force.

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XIV.EXTRACTING VALUE

A. Evaluate return premiums due.

B. Modify or extract investments in captives.

XV.USING YOUR ANALYSIS

A. Providing advice as to how to structure the deal with liability and insurance information in hand.

1. What price reduction should you demand?

2. What is your risk tolerance?

3. Identifying positive insurance assets that could be brought in.

B. Consider structured indemnities, finite risk vehicles, captives, special purpose insurance.

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BIGGEST ISSUES IN M&A TRANSACTIONS

1. One attorney being a roadblock because they don’t want the deal to get done
   a. Alleviate:
      i. Outside counsel/ Third Party
      ii. Reassure attorney doing deal
2. Disclosures- partial or misleading
   a. Alleviate:
      i. Deep due diligence dive

BIGGEST ISSUES IN M&A TRANSACTIONS (CONT'D)

3. Sellers that casually run their business and then struggle to provide due diligence
    a. Alleviate:
        i. Ask questions
        ii. Dive deep into documents
        iii. Follow the trail
4. Sellers over-inflating the value of their business because of their personal connection to it or need for value add
    a. Alleviate:
        i. Deep dive into financials
        ii. Create a pattern and history of revenue

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BIGGEST ISSUES IN M&A TRANSACTIONS (CONT'D)

5. Mindset of the parties to work together (or not).
   a. Alleviate:
      i. Dive into do they really want this or need to do this
      ii. Employee morale
6. Whether they see representation and warranty insurance now the norm versus getting an indemnity from the seller
   a. False sense of security
7. Change of control issues
   a. Unreasonable, don't understand, aloof
8. Specific regulatory or IP issues
9. Review the characterization of funded indebtedness – generally a deduction from the purchase price.

BIGGEST ISSUES IN M&A TRANSACTIONS (CONT'D)

10. Important provisions to review in target's client contracts:
    a. Effect of a change of control.
    b. Consents that may be required for a change of control.
    c. Pricing, term, and termination.
    d. Indemnification and liabilities.
        i. Responsibility of sponsor upon closing.

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BIGGEST ISSUES IN M&A TRANSACTIONS (CONT'D)

e. Issues in employment agreements to consider:
   i. Severance provisions:
   ii. Automatic vesting of stock options or performance bonuses.
   iii. Change of control agreements.
   iv. Golden parachutes.
   v. Good reason termination agreements.
   vi. Non-competition, non-solicitation, and confidentiality covenants.
   vii. Assignment of work product provisions.
   viii. Affiliate loans – loans made by target to employees.

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BIGGEST ISSUES IN M&A TRANSACTIONS (CONT'D)

f. Litigation
   i. Pending
   ii. Past
   iii. Settlements
   iv. Government

QUESTIONS?

Source: cllipartbest.com

THANK YOU.

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