

Risk Management for Lawyers and Law Firms

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From Swiss Re SONAR – New Emerging Risk Insights, May 2015:

“The sooner we anticipate risk, the more effective we’ll be at prevention and preparation”

Translation – think hard in advance about how things can go sideways

Enterprise Risk Management

ERM is a framework for risk management - the process of minimizing risk within an organization. It includes:

- Risk mapping
- Assessing those risks and their potential impact
- Determining the organization's ability to operate and fulfil its obligations in the face of the risks
- Developing a response to these risks
- Monitoring the business environment the organization operates in
- Monitoring a risk if it materializes and the response
- If a risk materializes, conducting an assessment once resolved to learn from the experience and outcome

- For lawyers, how you manage risk can impact your relationship with your clients, the regulator and your insurer.
- Though LIANS provides insurance, it is only for one type of the insurable risks you face – the provision of legal services
- For all other insurable risks you may have, you have to look to the commercial insurance market (assuming you do not want to assume them yourself)

Insurance Policies 101

- Insurance policies are contracts whereby for a stipulated consideration (premium) one party (insurer) undertakes to compensate another (the insured or a third party) for loss on a specified subject caused by specified perils

(From thelawdictionary.org/insurance)

- They contain terms, conditions and exclusions, some of which are required by statute and others that are contractual between the parties, any one of which can limit coverage, some (but not many) of which can be negotiated

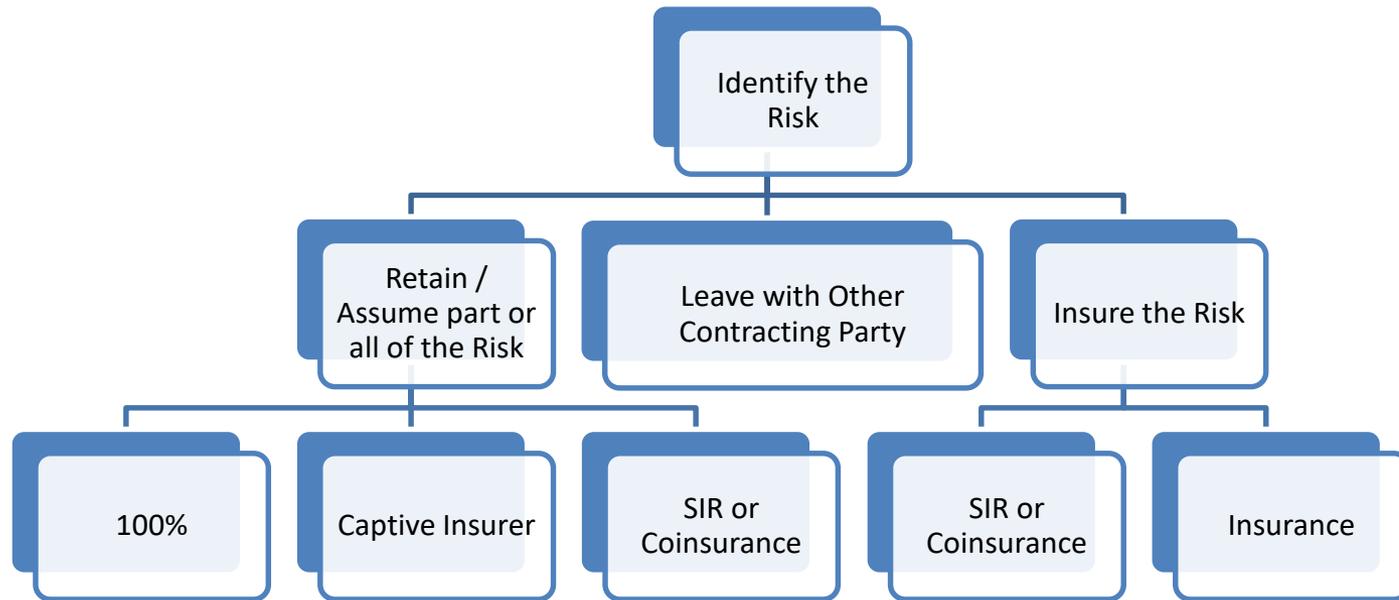
Risk Identification

- You have to be aware of, understand and appreciate the risks your business faces
- Organizations with the ability to do so should consider appointing a risk officer. In some regulated sectors such as financial institutions, this office is required or at least highly recommended.

Risk Assessment

- Once you have identified your risks, you have to decide which you can assume or are prepared to assume and which you cannot assume. If the risk is one that you are not prepared for or able to assume, you have to find a solution.
- One solution is the negative solution – don't do the activity and in some cases that is the only solution
- An alternative solution is the positive solution, particularly for those things that you have to do but cannot assume the risk of. This is to have someone else assume the risk of doing it. This is where insurance comes into play – it is the business of transferring risk.

To Assume or Insure – The Thought Process



Insurance Programs

- Insurance is not a panacea for all that ails you. It is important to have controls and processes to mitigate the effects of risk.
- If you are using insurance for this, specific policies do specific things and cover specific events and even with an extensive program, there may be gaps in coverage

Corporate Risk Insurance

- Corporate risk refers to the liabilities and dangers that corporations face
- Though not a corporation in the typical sense, law firms, as businesses, face many similar risks including:
 - management liability if lawyers sit on outside boards
 - employment practices liability if the firm has employees
 - professional liability for errors and omissions
 - crime / fidelity especially for transactional practices
 - kidnap, ransom and extortion especially for firms with international travel
 - cyber and privacy

Classes of Insurance

Generally, corporate risk coverages come within the following classes:

- **Liability**
 - insurance...(a) against liability arising out of bodily injury to, or the disability or death of, a person, including an employee; (b) against liability arising out of the loss of, or damage to, property; or (c) if the policy includes the insurance described in paragraph (a), against expenses arising out of bodily injury to a person other than the insured or a member of the insured's family, whether or not liability exists.
- **Property**
 - insurance against the loss of, or damage to, property and includes insurance against loss caused by forgery.
- **Fidelity**
 - (a) insurance against loss caused by the theft, the abuse of trust or the unfaithful performance of duties, by a person in a position of trust; and (b) insurance under which an insurer undertakes to guarantee the proper fulfilment of the duties of an office.

Types of Coverage

Within these classes are the primary policies and coverages available to businesses for risk transfer:

- Directors and Officers
- Employment Practices
- Fiduciary
- Errors and Omissions / Professional Liability
- Crime / Fidelity
- Kidnap and Ransom / Extortion
- Cyber / Privacy and Security Breach

Insurance Considerations

- When considering insurance coverage, it is important to look at all terms and conditions, not just the insuring agreements
- Terms are often defined with specific meaning different from normal business usage
- Policies contain retentions / deductibles, terms, conditions and exclusions that set out when coverage starts, what is not covered, coverage triggers, sub-limits, etc.

The requirement for certain coverages can be grouped into three categories:

- Mandatory - insurance that is legally or contractually required, e.g. by regulators such as the NSBS / LIANS or lenders
- Optional - used to manage risk exposures but do not critically affect business performance. Procurement considerations include risk / reward, value for money, risk appetite, limits, deductibles, terms and conditions.
- Business Critical - insurance that is critical to your operations

(From: Business Critical Insurance – Identifying Those Insurances that Support the Business and its Strategy Guide 2015, Airmic, www.airmic.com)

Commercial General Liability

- A standard insurance policy issued to businesses to protect against liability claims for bodily injury and property damage arising out of premises, operations, products, completed operations and advertising and personal injury

Property

- Insurance against damage to buildings and contents due to a covered cause of loss, such as a fire
- The policy may also cover loss of income or increase in expenses that result from the property damage
- Often named perils but can be all risks

Business Interruption

- Commercial property insurance covering a business' loss of income when damage to its premises by a covered cause of loss causes a slowdown or suspension of operations
- Coverage applies to loss suffered during the time required to repair or replace the damaged property but can extend to loss suffered after completion of repairs for a specified number of days

Errors and Omissions / Professional Liability

- Liability coverage designed to protect professionals from liability incurred as a result of errors and omissions in performing their professional services, e.g. LIANS coverage
- Generally only cover economic or financial losses suffered by third parties but there are exceptions such as doctors and architects as though bodily injury and property damage are typically covered under CGL policies, CGL typically excludes claims arising from professional services
- Typically claims-made (LIANS is a hybrid exception)
- Defence costs are typically included in the limit and therefore will, often substantially, reduce the policy's limits

Directors and Officers

- Liability coverage for directors and officers for claims made against them while serving on a board of directors and/or acting as a corporate officer
- In effect a management errors and omissions policy covering claims arising from managerial decisions that have adverse financial consequences
- Defence costs are typically included in the limit and therefore will, often substantially, reduce the policy's limits
- Written on a claims-made basis
- Can be duty to defend or indemnification
- Cover general damages but typically exclude bodily injury and property damage and may exclude punitive, exemplary, aggravated and multiple damages
- Can cover criminal defence costs for certain offences
- Directors and officers should refer to the organization's by-laws to see what types of claims the company covers and whether an additional indemnity from the company is necessary.
- Lawyers sitting on external Boards and Committees should consider ODL coverage

Employment Practices Liability

- Liability coverage for wrongful acts arising from employment
- Insureds include directors, officers, management personnel and employees
- Exclusions include bodily injury, property damage and intentional and dishonest acts
- Written on a claims-made basis
- Defence costs are often included in the limit and therefore will, often substantially, reduce the policy's limits

Fiduciary

- Liability insurance covering the responsibilities of trustees, employers, fiduciaries and professional administrators of employee benefit / pension plans and the plan itself with respect to errors and omissions in the administration of the plan

Crime / Fidelity

- Property coverage designed to protect businesses against the risks of robbery, embezzlement, employee theft, etc
- Commercial crime policies often provide several different types of crime coverage, such as employee dishonesty, forgery or alteration coverage, computer fraud coverage, funds transfer fraud coverage, money and securities coverage and money orders and counterfeit money coverage

Kidnap, Ransom and Extortion

- Specialty crime coverage that insures against loss by the surrender of property (e.g. paying a ransom) as a result of a threat of harm to a named insured, an employee, or a relative or guest of the insured or the insured's employees.

Cyber and Privacy

- Policies cover a variety of liability and property losses that may result when a business engages in electronic activities
- Covers a business' liability for a data breach when customers' personal information is exposed or stolen by someone accessing the firm's electronic network
- Coverage can include expenses associated with data breaches including notification costs, credit monitoring, costs to defend claims by regulators, fines and penalties, loss resulting from identity theft
- Coverage can also include liability arising from website media content, property exposures from business interruption, data loss/destruction, computer fraud, funds transfer loss and cyber extortion.

Other Types of Insurance That May Pop Up In Your Practices and Client Matters (but remember – you are not insurance brokers)

- Surety
- Legal Expense
- Marine
- Credit
- Credit Protection
- Mortgage
- Title

- Surety – when an insurer undertakes to guarantee the due performance of a contract or undertaking or the payment of a penalty or indemnity for any default. In the construction context, performance bonds and labour and materials bonds.
- Legal Expense - insurance for costs incurred by a person or persons for the legal services specified in the policy, including any retainer and fees incurred for the services, and other costs incurred in respect of the provision of the services

- Marine - insurance against
 - (a) liability arising out of
 - (i) bodily injury to, or the death of, a person, or
 - (ii) the loss of, or damage to, property, or
 - (b) the loss of, or damage to, property,occurring during a voyage or marine adventure at sea or on an inland waterway, or during a delay or a transit other than by water that is incidental to a voyage or marine adventure at sea or on an inland waterway

- Credit - insurance against loss to a person who has granted credit if the loss is the result of the insolvency or default of the person to whom the credit was given.
- Credit Protection - insurance whereby an insurer undertakes to pay off credit balances or debts of an individual, in whole or in part, in the event of an impairment or potential impairment in the individual's income or ability to earn an income
- Mortgage - insurance against loss caused by default on the part of a borrower under a loan secured by a mortgage or charge on, or other security interest in, real property

- Title - insurance against loss or damage caused by
 - (a) the existence of a mortgage, charge, lien, encumbrance, servitude or any other restriction on real property;
 - (b) the existence of a mortgage, charge, lien, pledge, encumbrance or any other restriction on personal property;
 - (c) a defect in any document that evidences the creation of any restriction referred to in paragraph (a) or (b);
 - (d) a defect in the title to property; or
 - (e) any other matter affecting the title to property or affecting the right to the use and enjoyment of property.

- Representations and Warranties Insurance
 - offloads exposures related to representations and warranties when buying or selling assets to a third party insurer:
 - for sellers, permits a clean exit post closing
 - for purchasers, a simpler avenue of recourse if there is an issue with the seller's reps or warranties
 - deductible / retention for the party giving the rep tied to a percentage of the purchase price
 - policy limit often tied to a percentage of the transaction price
 - coverage has a survival period such as three years post closing
 - buyer benefit - mitigates against issues if former management who stand behind the reps and warranties is retained post closing
 - may make the negotiation of reps and warranties easier if the party giving them knows that the recourse will be someone other than itself though the retention will keep them involved

Total Cost of Risk

- ERM and risk generally have a cost for a business which comes from both the cost of the risk itself and the cost to control the risk
- Cost of control includes insurance premiums, training, audit, goodwill, reputation and risk management
- Cost of risk includes retained claim costs, legal fees and damages, credit costs, penalties, time, reputation damage, loss of confidence, uncertainty
- The trick is to find the right balance for the organization at issue

(From: Zurich Insider – What is the Total Cost of Risk Infographic, July 2015)

Thank you. Questions?

Thank you for your invitation.

For more information on the LIANS insurance program including excess insurance, please go to our website www.lians.ca

LIANS 2018 Annual Report contains a summary of our 2018 financial statement and a recap of year. It is posted on our website.