

Investigating International Developments in eCommerce Insurance Policies

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Goals For Today's Presentation

- ◆ For the Uninitiated, to Gain an Understanding of How E-Commerce Risks Play Out in Insurance Issues, and How to Address Such Issues in an Insurance Programme
- ◆ For Those Already in the Process of Implementing an E-Commerce Insurance Strategy, to Obtain Reassurance and Food for Thought



Bringing Order To Chaos

- ◆ There is No Consensus on How Best to Insure E-Commerce Risks
 - Some insurers are selling new stand-alone e-commerce insurance policies; some insurers are questioning the need for or viability of the new cover
 - Some brokers are pushing the idea of buying the new stand-alone e-commerce insurance; some brokers are recommending amending traditional policies; some brokers are recommending the use of ART



Bringing Order To Chaos (cont'd)

- ◆ No Consensus on How Best to Insure E-Commerce Risks (cont'd)
 - Most large US and UK companies do not want to buy the new e-commerce insurance policies, and are insisting on their carriers amending policies
 - Recent developments in case law in the US make some of these issues even more difficult to address
 - It is anticipated that the same issues that are playing out in the US and UK, are or soon will be playing out in Australia



E-Commerce Insurance Strategies

- ◆ Conduct an Insurance Programme Audit
 - Look for potential gaps in coverage provided by traditional policies
 - RM should work closely with IS for risk identification and assessment (what is high frequency/low severity and what is low frequency/high severity e-commerce risk)
 - Use new stand-alone e-commerce policies as guide
- ◆ Discuss, Decide On and Implement Changes to The Insurance Programme
 - Add new policies to the programme?
 - Amend traditional policies with express e-commerce language?
 - Address “primacy” issues between overlapping coverages along the way?



Insurance Programme Audit Issues

- ◆ Standard Commercial Property Insurance
 - “Physical loss or damage” requirement to trigger “property” coverage and “time element” coverage (e.g., business interruption, extra expense, etc.)
 - Impact of the *Ingram* case on the issue of what constitutes “physical loss or damage”
 - “Indemnity period” issues for losses involving computer data, software and programs
 - “Employee dishonesty” exclusion
 - Liability coverage issues for property in care, custody or control of insured



Insurance Programme Audit (cont'd)

- ◆ Standard Commercial Crime Insurance
 - Exclusions for “time element” losses (e.g., business interruption, extra expense, etc.)
 - Valuation for stolen property is lesser of actual cash value or replacement cost
 - Liability coverage issues
 - ◆ Any liability coverage at all?
 - ◆ What about liability arising from use of stolen property of others?



Insurance Programme Audit (cont'd)

- ◆ Standard Kidnap and Ransom Insurance
 - Requirement of threat to do “physical damage” in narrow policies
 - Computer coverage, if any, in broader policies is typically limited to threat of spreading a virus
 - ◆ What about threat of hacking without spreading a virus (e.g., stealing, corrupting, deleting data or information)?
 - ◆ What about threat of a denial of service attack?



Insurance Programme Audit (cont'd)

◆ CGL and Umbrella Liability Insurance

- Invasion of privacy: liability for merely gathering information not necessarily covered
- Intellectual property infringement: coverage is (a) limited to injuries causally connected to insured's advertising activities, and (b) not well suited to publishing and media risks
- Claims alleging injury to, loss of use of or denial of access to computer data, software, programs, websites or networks: might not be covered depending upon the facts at issue, and development of insurance law on certain issues
- Professional services liability: coverage is limited by various definitions and exclusions (claims for pure financial loss likely not covered)



Insurance Programme Audit (cont'd)

◆ Professional Liability Insurance

- Can cover some of the gaps in traditional CGL and Umbrella Liability insurance
 - ◆ what about intellectual property infringement and media liability risks?
 - ◆ what about denial of service losses sustained by the insured's customers, clients and vendors?

◆ Media Liability Insurance

- Can cover some of the gaps in traditional CGL and Umbrella Liability insurance
 - ◆ what about professional services liability for technology errors & omissions?
 - ◆ what about IP infringement where the infringing item is not in the media that is published, broadcast or used in advertising?



Amending Insurance Programmes

- ◆ Amending Traditional Policies and/or Adding Additional Policies to One's Programme
 - New stand-alone policies can be used as a model
 - All new e-commerce coverages might be able to be added to traditional policies (in a variety of different ways)
 - ◆ “Jury still out” on ability to amend Commercial Property
 - ◆ What FM Global does in 2001 might impact the market
 - Some corporate insureds are adding policies to their programmes in addition to amending traditional policies



Amending Programmes (cont'd)

- ◆ Potential Changes to Property Policy
 - Adding express language to address coverage for denial of service attacks and what some are calling “non-physical events”
 - Detailed indemnity period provisions for time element losses involving e-commerce activities
 - Focus on service interruption issues and contingent time element e-commerce risks
 - Look at liability coverage for loss of property in the insureds care, custody or control
 - Beware of “computer virus” exclusions



Amending Programmes (cont'd)

- ◆ Potential Changes to Crime Policy
 - Deleting “potential income” exclusion (to get business interruption coverage for employee dishonesty)
 - Adding express valuation language for losses involving media (e.g., what is typically seen a Property policy or what is being seen in the new e-commerce policies)
 - Adding express provisions addressing insured’s liability for theft of property of others (e.g., customers’ credit card information—look to the new e-commerce policies)
 - Adding express provisions for e-commerce extortion risks (e.g., threat of denial of service attack—look to the new e-commerce policies)



Amending Programmes (cont'd)

- ◆ Potential Changes to Kidnap & Ransom Policy
 - Adding express language for threat of introducing a virus that will corrupt, delete or otherwise affect EDP media and other data, software, programs, etc.
 - Adding express language of threat to hack into system and corrupt, delete or otherwise affect EDP media and other data, software, programs, etc. (without use of a computer virus)
 - Adding express language for threat of what some are calling “non-physical” events, such as threat of a denial of service attack
 - Adding express language to explain what, if any, business interruption and extra expense coverage is afforded, and how the coverage works



Amending Programmes (cont'd)

- ◆ Potential Changes to CGL/Umbrella Policy
 - Do you want to amend the “invasion of privacy” coverage to delete the language regarding “publication or utterance”?
 - Do you want to add express language stating that computer data, software, programs, etc. is “tangible property”?
 - Do you want to build into your CGL or Umbrella policy coverage for professional liability, media liability and intellectual property infringement for e-commerce activities and otherwise?



Amending Programmes (cont'd)

- ◆ Potential Changes to Professional Liability Policy
 - Do you want to add express language regarding losses sustained by customers, vendors, etc. who rely on your website, intranet, etc. for ordering products and services?
 - Do you want to add express language for liability associated with hosting a website?
 - Do you want to add express language for media liability and intellectual property infringement liability relating to e-commerce activities and generally?
 - Do you want to add express language to discuss whether, and how, losses involving computer data, software, programs, etc. fall within the “property damage” exclusion?



Amending Programmes (cont'd)

- ◆ Potential Changes to Media Liability Policy
 - Do you want to add coverage for technology errors and omissions (products and services, hardware and software)? If so, think about issues raised above.
 - Do you want to add express language to confirm that the IP infringement coverage extends to the the computer data, software, programs and information used to run your website, network, computer systems, etc? (that coverage is not limited to the content of media you publish, broadcast or use in your advertising)



Amending Programmes (cont'd)

- ◆ Buying One of the New Stand-Alone E-Commerce Insurance Policies
 - Provides coverage for seemingly all first-party losses and third-party liability claims arising from e-commerce activities
 - Can be purchased on a primary basis or DIC/DIL basis
 - Limits might be meaningful now for many corporate insureds, and capacity might continue to increase
 - For a listing of carrier and forms available in the US, UK and Australia, go to IRMI.com at www.irmi.com, Expert Commentary, Insurance, Cyber Insurance



Amending Programmes (cont'd)

- ◆ Buying One of the New Stand-Alone Policies (cont'd)
 - When compared to each other and to some traditional policies, each e-commerce policy has several narrow provisions
 - Definition of “professional services”?
 - Coverage for activities of others?
 - Coverage for “patent infringement”?
 - Coverage for liability assumed by contract?
 - Coverage for liability to others caused by employee dishonesty or third-party theft?
 - Coverage for innocent computer programming errors?
 - Coverage for “natural perils”?
 - Coverage for “contingent” time element losses?
 - Coverage for theft of “trade secrets” or other “confidential information”?



Amending Programmes (cont'd)

- ◆ Insurance Wordings Must Be Analyzed at an International Level
 - Do not assume that e-commerce wordings are developing the same around the world
 - Do not assume that if you are dealing with a “global” insurer, what that insurer is offering you in Australia is the same as what it is offering others in the US or UK
 - ◆ One global insurer sells one form in the US and another in the UK, where an exclusion in the US form serves as an insuring agreement in the UK form
 - ◆ This makes no sense for a multinational corporation
 - An international comparative analysis of forms and wordings can be done, and if you do not have the expertise to do the analysis you should hire the expertise to do it for you



Concluding Thoughts

- ◆ There are any number of ways to address e-commerce insurance issues
- ◆ Risk assessment where RM and IS “partner” to identify risks to which the company is exposed
- ◆ Insurance programme audit to identify potential “gaps” for risks identified as important
- ◆ Decide upon and implement a course of action regarding the insurance programme
- ◆ Use new stand-alone policies in the programme or as a guide to amending the programme
- ◆ Insurance professionals must think “globally” about these issues, by taking into account the e-commerce wordings offered around the world

