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The business of relationships.

RDA RODRÍGUEZ DÁVALOS
ABOGADOS

**MEXICO & U.S.A.
INSURANCE RECOVERY
IN THE ENERGY SECTOR**

AUGUST 9, 2017
MEXICO CITY

Presented by



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TIME	SESSION	SPEAKERS
18:00 - 18:15	Registry	
18:15 - 18:25	Event Opening	Jesús Rodríguez Dávalos Founding Partner, RDA
18:25 - 18:30	Introduction to Insurance in the US on the Energy Sector	John Ellison and John Shugrue Partners, Reed Smith
18:30 - 18:35	Introduction to Insurance in Mexico on the Energy Sector	Carlos A. Flores Partner, RDA
18:35 - 18:55	Overview of Third Party Liability Insurance in the USA	Kevin Dreher Partner, Reed Smith
18:55 - 19:15	Overview of First Party Insurance in the USA	John Ellison Partner, Reed Smith
19:15 - 19:35	Overview of First Party and Third Party Liability Insurance in Mexico	Carlos A. Flores Partner, RDA
19:35 - 19:55	Insurance Recovery in the USA and Mexico	John Shugrue, Partner, Reed Smith & Carlos A. Flores Partner, RDA
19:55 - 20:00	Event Closure	Jesús Rodríguez Dávalos Founding Partner, RDA
20:00	Networking Cocktail	

OVERVIEW OF THIRD PARTY LIABILITY INSURANCE IN THE USA

- Commercial General Liability (CGL) Coverage:
 - ❖ Covers Bodily Injury and Property Damage as well as Personal & Advertising Injury.
 - ❖ “Occurrence” Based – Focus on Timing of Damage.
 - ❖ Duty to Defend – Focus on Potential Coverage.
 - ❖ Common Coverage Issues/Exclusions.

 - Pollution Coverage in Energy Industry.
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THIRD PARTY LIABILITY COVERAGES

- Standard insuring agreement provides:

"We will pay all sums that you become legally obligated to pay as damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this insurance applies. We will have the right and duty to defend you against any "suit" seeking those damages."

WHAT IS “BODILY INJURY” OR “PROPERTY DAMAGE”

- *“Bodily Injury” typically defined as “sickness or disease, including any death resulting therefrom.”*
- *“Property Damage” typically defined as:*

“(1) physical injury to or destruction of tangible property which occurs during the policy period, including loss of use thereof at any time resulting therefrom or (2) loss of use of tangible property that has not been physically injured or destroyed, provided the loss of use is caused by an occurrence during the policy period.”

WHAT IS AN “OCCURRENCE” FOR PURPOSES OF TRIGGERING COVERAGE

- ▶ The “bodily injury” or “property damage” must be caused by an “occurrence” that takes place during the policy period.
- ▶ “Occurrence” is defined as an “accident, including continuous or repeated exposure to the same general harmful conditions”.

WHAT IS THE TRIGGER OF COVERAGE

- The time when bodily injury or property damage occurred:
 1. Exposure: first exposure to harmful conditions.
 2. Manifestation: BI/PD first manifests itself.
 3. Injury In Fact: BI/PD first commenced.
 4. Continuous: Entire time between first exposure and first manifestation.

 - Single or multiple occurrences for long tails (asbestos, construction defect, and environmental) can trigger multiple policies.
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THE DUTY TO DEFEND

- A duty to defend arises by virtue of a “suit” seeking damages *potentially* covered by the duty to indemnify clause (“We will have the right and duty to defend you against any “suit” seeking those damages.”)
 - “Suit” includes actions filed in a court of law and in ADR.
 - Defense costs outside of limits.
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TRIGGERING THE DUTY TO DEFEND

- “Potentially” covered is broad standard.
 - Determined exclusively from the language of the policy and the complaint.
 - ❖ Do facts alleged arguably or potentially come within scope of coverage?
 - ❖ Some courts allow review of actual facts to find but not to eliminate a duty.
 - Facts alleged v. legal theories asserted.
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COMMON COVERAGE ISSUES IN ENERGY INDUSTRY

- Interplay between Contractual Indemnity Agreements, Insurance Requirements and Additional Insured Status.
 - Blanket Additional Insured Provisions.
 - ❖ Written Contract.
 - ❖ Required to be Named as Additional Insured.
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OIL & GAS ANTI-INDEMNIFICATION STATUTES



- Anti-Indemnification Statutes May Limit Obligations.
 - ❖ Legislative efforts to limit or prohibit the indemnification in the oil and gas industry for a party's own fault.
 - ❖ Anti-indemnity statutes also impact insurance for any indemnification obligations in oil & gas contracts.
 - ❖ Texas and Louisiana have passed them.



COMMON CGL COVERAGE EXCLUSIONS



- Known Loss.
- Expected or Intended Injury.
- Contractual Assumption of Liability (except some “indemnity agreements” concerning “tort” liability).
- Owned Property.
- Pollution (“sudden and accidental”; “absolute”; “total”).



POLLUTION COVERAGE UNDER CONTROL OF WELL POLICIES

- OEE coverage (Operator's Extra Expense)
 - ❖ Available to oil or gas well operators that covers the cost of regaining control after well blowout
 - CCC (Care, Custody & Control) covers liability for Bodily Injury and Property Damage as a result of a well blowout
 - ❖ Sudden and Accidental Seepage and Pollution
 - ❖ Includes clean-up costs
 - ❖ Includes defense expenses
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POLLUTION LIABILITY COVERAGE



- Covers third-party “Bodily injury” and “Property Damage” claims stemming from pollution incidents
 - ❖ Leaking fuel storage tanks, accidents resulting in chemical spills, or contaminated water supplies
- Covers government, or third party mandated clean-up costs



OVERVIEW OF PROPERTY INSURANCE



- Be prepared — if you have a large property loss, you will have a coverage dispute with your property insurance company. Why?
 - ❖ Property insurance policies are unlike liability insurance policies in that disputes typically do not involve the question of coverage but the question of how much coverage.
 - ❖ The standard-form provisions in a property insurance policy for determining the amount of a loss are drafted so vaguely that they ensure disputes will arise as to the amount owed.
 - ❖ There is little case law to guide parties in disputes.
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OVERVIEW OF PROPERTY INSURANCE

- **Three Basic Types of Coverage Provided by Property Policies:**
 - ❖ Property Damage.
 - ❖ Business Income.
 - ❖ Extra Expense.



EXAMPLES OF ENERGY INDUSTRY FIRST PARTY CLAIMS

- Refinery or other production facility incidents.
 - Pipeline ruptures or failures.
 - Damage to supply chain members.
 - Natural disasters such as hurricanes, earthquakes, etc.
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BUSINESS INCOME (OR “BUSINESS INTERRUPTION”)

- “We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct physical loss of or damage to property. . . . The loss or damage must be caused by or a result from a Covered Cause of Loss.”
 - “Business Income”: designed to pay the profits and unavoidable continuing expenses caused by an interruption of the policyholder’s business.
 - “Period of Restoration”
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POTENTIAL HURDLES – BUSINESS INCOME



- Amount of Damages:
 - ❖ What is the “business” that suffered a loss -- the business as a whole or a small sector of the business?
 - ❖ What amount of historical data measures loss? The previous month? The previous year?
 - ❖ What about cyclical businesses?
 - ❖ Measure is based on forecasts, not “actual” damages.
 - Interruption: Was there a “suspension” of operations? Is a suspension of part of your client’s operations sufficient?
 - Length of Period of Interruption.
 - Causation.
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THE CAUSATION DISPUTE

- Peril or physical damage?
 - ❖ The ISO Business Income form specifically excludes losses “incurred as a result unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located” (e.g., windstorm, quake)
 - ❖ Company and manuscript forms do not generally contain this exclusion.
 - ❖ Implications.
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OTHER BI HURDLES

- Coverage wording is often ambiguous
 - The underlying promise of indemnity can give way to “winners” and “losers”
 - ❖ All wish to determine the “true covered loss”, but it is very difficult to know what that is
 - Neither party anticipates major losses
 - ❖ Today, the “working layer” is typically self-insured
 - ❖ BI losses can be many times the PD amount
 - Neither party wishes to “lose”
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OTHER BUSINESS INCOME COVERAGES AND COVERAGE ISSUES

- Contingent Business Income.
 - Contingent Extra Expense.
 - Leader Property.
 - Civil or Military Authority.
 - Service Interruption.
 - Ingress/Egress.
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PROCESS TIMETABLE

- Length of interruption is controlling.
 - One claim or interim submissions?
 - Milestones used for scheduling:
 - ❖ Timing of significant incurred costs.
 - ❖ Date of final repairs.
 - ❖ Date supplier/contractor invoices received/approved and booked.
 - ❖ Resumption of normal operations.
 - ❖ Restoration of business.
 - Schedule experts meetings in advance.
 - Schedule adjustment meetings in advance.
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HOW TO FILE AND AGGRESSIVELY PURSUE A BUSINESS INCOME CLAIM

- Remain aware and proactive throughout the entire claims process until you are paid; do not be naïve.
 - Find your policies and pore over them to see what you purchased.
 - You should give notice. There is no harm in doing so and the failure to do so can be disastrous.
 - You should properly quantify your claim. If it is big enough, you should consider hiring an accounting firm that specializes in property insurance coverage accounting.
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HOW TO FILE AND AGGRESSIVELY PURSUE A BUSINESS INCOME CLAIM (CONT'D)

- You should write letters and demand information and positions on coverage and explanations on coverage.
 - You should confirm all conversations in writing immediately.
 - Negotiation.
 - Subrogation.
 - You should be aware of other deadlines in the policies.
 - Challenge denials of coverage: insurance companies allocate by hassle, and the squeaky wheel (complaining, letter-writing policyholder) gets the grease (the coverage it purchased).
 - You should endeavor to avoid appraisal.
 - If necessary, you should commence litigation.
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INSURANCE RECOVERY IN THE USA

- Three Major Options for Obtaining Insurance Recovery in USA:
 - ❖ Negotiation/Mediation.
 - ❖ Arbitration.
 - ❖ Litigation.
 - Dispute Resolution mechanisms may be specified/ required by policy terms.
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INSURANCE RECOVERY IN THE USA

- Negotiation/mediation of insurance claims.
 - Negotiation of claim with insurers:
 - ❖ Direct negotiations without lawyers.
 - ❖ Negotiations involving lawyers.
 - ❖ Broker claim advocates.
 - ❖ Claim consultants.



INSURANCE RECOVERY IN THE USA



➤ Mediation of insurance claims:

- ❖ Mediation involves a neutral third-party to facilitate negotiations.
- ❖ Non-Binding.
- ❖ Some policies require mediation or specify mediation as an option for dispute resolution.



INSURANCE RECOVERY IN THE USA

- Arbitration of insurance claims:
 - ❖ May be formal or informal
 - ❖ Formal arbitration = American Arbitration Association (AAA), JAMS or similar organizations.
 - ❖ Informal Arbitration = CPR Non-administered arbitration.
 - ❖ Single arbitrator/3-arbitrator panel.
 - ❖ Selection of arbitrators is critical.
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INSURANCE RECOVERY IN THE USA

➤ Arbitration of insurance claims:

- ❖ United States/London/Bermuda arbitration options.
 - ❖ Arbitration usually is BINDING on the parties.
 - ❖ Arbitration usually is a CONFIDENTIAL proceeding.
 - ❖ Arbitration may involve streamlined process versus litigation – but this is not always true.
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INSURANCE RECOVERY IN THE USA



- Litigation of insurance claims.
 - United States courts:
 - ❖ State courts – each of the 50 states has own court system.
 - ❖ Federal courts – District Courts in every state.
 - ❖ Jurisdictional requirements.
 - ❖ Procedural issues/scope of discovery.
 - English courts:
 - ❖ Different process/procedure.
 - ❖ Pre-trial discovery and proceedings more limited than in US.
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CONTACT INFORMATION

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