Briefing

BURGES SALMON

Insurance

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Double insurance and indemnities

Businesses can find they have placed more than one insurance policy which could respond to an incident. Does that mean that they have obtained additional protection, or one insurer will simply not respond, or both will point to the other - or has the business simply wasted money paying one of the premiums? This is the law of 'double insurance.'

Double insurance occurs when a business has insurance cover in respect of the same risk and subject matter from more than one insurer. Double insurance is not of itself a problem, but it can lead to insurers arguing about whether they need to pay out at all causing unwanted delay in the processing of claims. This briefing looks at instances where double insurance may arise and the practical implications for businesses.

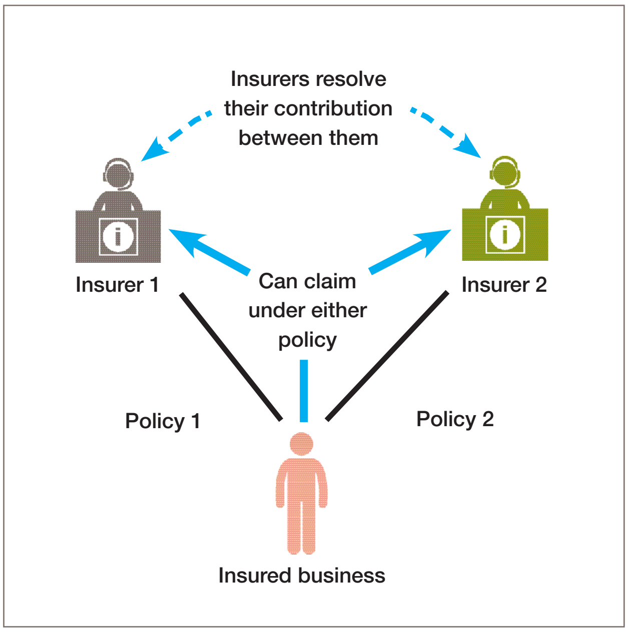
Double insurance must be distinguished from layering of cover. Layering is where policies are placed with different insurers to cover different levels of exposure i.e. the first losses are covered by one insurer up to the limit specified in that policy, above that policy limit another insurer will pay out up to the limit specified in that policy and so on (the first layer is often referred to as 'primary' and additional layers as 'excess'). In such cases there is no overlap or duplication of insurance as the excess insurer does not have to pay out until the limit on the underlying policy is paid in full by the primary insurer.

General principles

The first point on double insurance is that, in principle, a business should not be left without an insurance payment. Where there is double insurance, and a business wants to claim in respect of a loss covered by the two (or more) policies, it will (absent some specific wording in the policy) be entitled to claim under whichever policy it prefers.

The insurer that does pay out in respect of the doubly insured risk will have a right of contribution from the other insurer who has provided identical cover. So, if a business does claim under one policy and not the other, the insurer who has not paid out is likely to have to pay a share to the insurer who has paid out.

So why does this cause problems for insureds? First, many policies contain clauses which prevent an insured claiming under the policy if there is other insurance covering the same loss. If one policy contains this wording, there is no difficulty because the insured can simply claim on the other policy (there will be no right of contribution between insurers as there is no double insurance). If both policies contain this clause, then again there is no problem for the insured, as the clauses effectively cancel each other out and the insured can claim on either policy for its loss (with the paying insurer claiming a right of contribution from the other insurer). The problem is that the wording of these 'other insurance' clauses is not standard and this can lead to disputes between insurers as to which policy should respond, leaving the insured waiting for payment of its claim.



Having double insurance does not increase the amount of cover the insured has. Therefore, it does not make sense to pay for more insurance then the business needs. In addition, double insurance can lead to disputes between insurers and delay in claims payment. It is sensible to analyse the insurance that the business has to protect its interests and identify and remove any unnecessary insurance cover. When analysing whether there is double insurance it is important to look at the interest being protected as well as the property (if relevant) and the risks being insured against.

Indemnity + insurance = double insurance?

Care needs to be taken by businesses when contractual indemnities are given in respect of risks that may also be covered by insurance. In some circumstances, it is intended that the indemnity be called on first with the indemnifying party then claiming on insurance (for example with directors and officers liability insurance, the company is often required to indemnify the directors and then seek reimbursement under the policy from insurers).

However, in other situations the indemnity may be intended to be secondary to the insurance. In these cases, care must be taken to ensure that the indemnity is not caught by ‘other insurance’ provisions or that the indemnity arrangements do not provide insurers with scope to argue that there should be a right of contribution by the insurer against the indemnifier.

Practical considerations

On a practical level, if an insured has double insurance it may well be paying too much for its insurance. There can also be delays before the claim is paid out if there are arguments between the insurers as to which policy should respond. Aside from interest, the insured will not be compensated for any losses it sustains as a result of such delay.

In most instances, businesses will not want overlapping policies. This is so that the cover is clear, the insured is not paying too much for it, and any claims made under the policy can be settled as quickly as possible.

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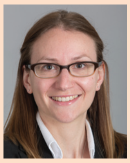
Kari has a wealth of experience in insurance law and regulation, acting for insurance companies, banks and corporates in many different jurisdictions on both contentious and non-contentious matters.



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