

Prevent the Event

Developing An Insurance Response Plan

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J E N N E R & B L O C K

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Aftermath of September 11th

- ▶ Dire Predictions
 - ✓ Rising Cost of Commercial Insurance?
 - ✓ Some Types of Coverage Not Available?
 - ✓ Insurer Insolvency?

Aftermath of September 11th

- ▶ 6 Months Later
 - ✓ Transactions Proceeding
 - ✓ Some Insurers Offering Terrorism Coverage
 - ✓ WTC Losses \$70 billion
 - ✓ Insurers Say They Have Sufficient Capital But Are Worried About Future Attack

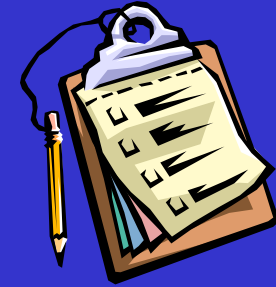
Goals of Your Insurance Response Plan

- ▶ Resuming the Business
- ▶ Asset Recovery
- ▶ Restoration
- ▶ Control and Minimize Costs

Steps for Developing Insurance Response Plan



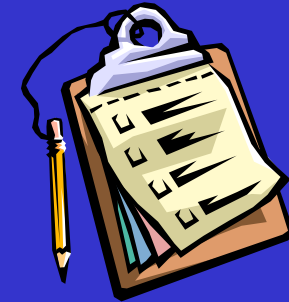
- ▶ Conduct an Internal Insurance Audit
- ▶ Procure Necessary Insurance
- ▶ Develop Plan for Responding to an Emergency



Internal Audit

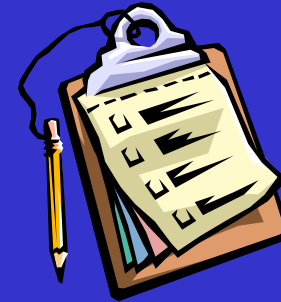
- ▶ Elements of an Internal Insurance Audit
 - ✓ What are the threats to the business?
 - ✓ What are the consequences?
 - ✓ What are the costs?
 - ✓ What is company's current insurance coverage and where are the gaps in coverage?

Internal Audit



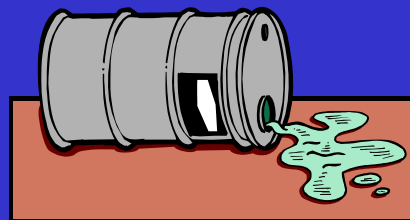
- ▶ Identify Possible Threats
 - ✓ Human
 - ✓ Technical
 - ✓ Natural

Internal Audit

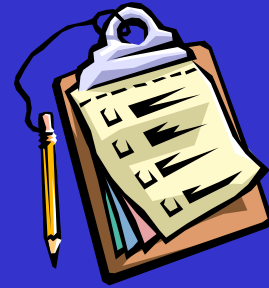


▶ Human Threats

- ✓ Terrorism
- ✓ Explosion
- ✓ Chemical Spill
- ✓ Biological Contamination
- ✓ Radiation
- ✓ Riot
- ✓ Vehicle Crash
- ✓ Work Stoppage

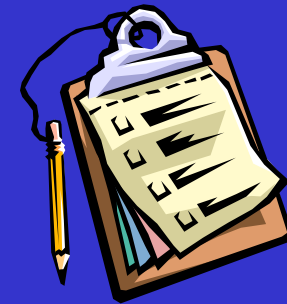


Internal Audit



- ▶ Technical Threats
 - ✓ Power Failure
 - ✓ Ventilation Failure
 - ✓ Computer Failure
 - ✓ Telecommunication Failure
 - ✓ Gas Leak
 - ✓ Equipment Failure





Internal Audit

▶ Natural Threats

✓ Flood

✓ Fire

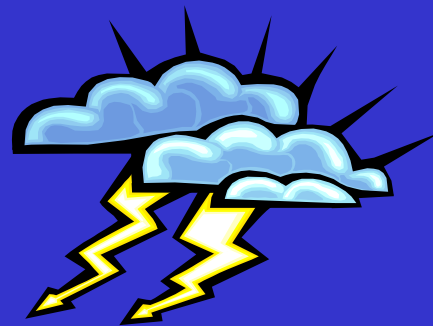
✓ Wind

✓ Storm

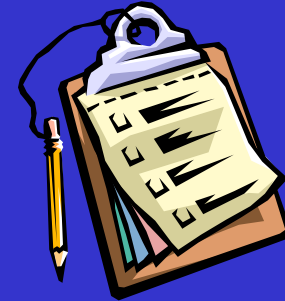
✓ Tornado

✓ Hurricane

✓ Earthquake

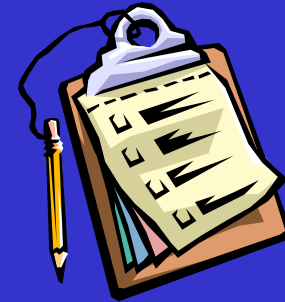


Internal Audit



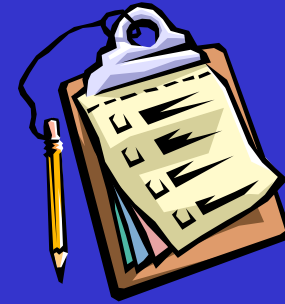
- ▶ What are the Consequences?
 - ✓ Personal injury
 - ✓ Personnel availability
 - ✓ Property damage
 - ✓ Loss of assets
 - ✓ Loss of operating ability

Internal Audit



- ▶ What is the Cost?
 - ✓ Cash Value of Assets
 - ✓ Replacement Value
 - ✓ Recovery Expenses
 - ✓ Other Liability





Internal Audit

- ▶ Evaluate Current Insurance Coverage
 - ✓ Scope and Amount of Coverage
 - ✓ Exclusions to Coverage
 - ✓ Gaps in Coverage

Procure Insurance

- ▶ Types of Coverage
- ▶ Types of Policies
- ▶ Policy Exclusions
- ▶ Policy Endorsements



Procure Insurance



- ▶ Examples of Insurance Coverage
 - ✓ Property
 - ✓ Equipment
 - ✓ Business Interruption (actual loss v. profits)
 - ✓ Extra Expense
 - ✓ Expediting Expense
 - ✓ Liability (CGL, auto, workers comp., umbrella)
 - ✓ Environmental (stop loss, liability, specialized)

Procure Insurance



- ▶ Types of Policies
 - ✓ All Risk: covers everything except exclusions named in policy
 - ✓ Specified Risk - Basic: named perils such as fire, lightning, wind
 - ✓ Specified Risk - Broad: additional perils such as roof collapse, aircraft crash

Procure Insurance



- ▶ Review Policy Exclusions
 - ✓ War
 - ✓ Terrorism
 - ✓ Nuclear
 - ✓ Environmental (UST, asbestos, "absolute")
 - ✓ Many Other Exclusions
- ▶ Add Back Coverage By Endorsement

Now I Have The Policy, What Do I Do With It?

Insurance policies are vital company documents –

Keep policies in a safe place.



Develop Insurance Response Plan

- ▶ Identify Responsible Person For Insurance
- ▶ Create Plan for Submitting Timely Claims
- ▶ Follow Policy Provisions to Maximize Coverage

Insurance Response Plan



- ▶ Identify Responsible Person for Insurance
 - ✓ Knows Where Policies Are Located
 - ✓ Knows Key Policy Terms
 - ✓ Knows How to Make Claims and Correspond with Insurers
 - ✓ Able to Manage Resources During a Crisis

Insurance Response Plan



- ▶ Create Plan for Submitting Timely Claims
 - ✓ List of Policies and Key Provisions
 - ✓ Easy Access to Policies – Backup Copies
 - ✓ List of Insurer Contacts
 - ✓ Form Letter for Making Claims
 - ✓ Follow Up on Claims – Keep Insurers Informed

Insurance Response Plan

- ▶ Follow Policy Provisions to Maximize Coverage
 - ✓ Mitigate Damages
 - ✓ Other Requirements

Summary

- ▶ Plan Your Insurance Response
- ▶ Implement Your Insurance Response
 - ✓ Promptly Notify Your Insurer of Claims
- ▶ Improve Your Plan

Prevent the Event

The Business Of The Continuity Of Business

James A. Vroman

Co Chair of Jenner & Block's

Environmental, Energy & Natural
Resources Practice

The Chicago Flood

- ▶ Approaching 10 - Year Anniversary
- ▶ Reminds Us Not All Man-Made Disasters Are Acts Of Terrorism
- ▶ And That A Disaster May Not Pose A Threat To Lives Or Human Health
- ▶ But Can Certainly Interrupt And Suspend Business Operations

Comprehensive Disaster Plan Must Have Two Components

- ▶ A “Disaster” Element That Addresses Health & Safety Of Employees, Visitors And Customers
- ▶ Sabotage Of Products Is A Disaster
- ▶ Remember The “Tylenol” Scare

Second Element Is The “Business Continuity” Plan

- ▶ To Insure Conduct Of Business Resumes As Soon As Reasonably Practicable
- ▶ Resources Are Available To Continue Business Operations
- ▶ This Is A Fiduciary Obligation

Plan, Plan, Plan

- ▶ Identify Different Risks And Threats - And Appropriate Response
- ▶ Provide For Flexibility
- ▶ Provide For “Breathing” Room - Reasonable Recovery Time To Restore Operations

The Law Can Provide “Breathing Room”

- ▶ Can Be Provided By Contract
- ▶ Can Be Provided By Common Law
- ▶ If In Business Of Selling Goods, Can Be Provided By Uniform Commercial Code

“Force Majeure” Clauses/“Casualty” Clauses

- ▶ Contractual Clauses That Typically Excuse Or Suspend Performance If Unanticipated Event Occurs
- ▶ May Also Identify Party Who Has Obligation To Restore/Repair Property Or Equipment
- ▶ *Courts Interpret Such Clauses Narrowly*
- ▶ *Thus, Need Specificity And Comprehensiveness!*

Service Contract Example

- ▶ Note The Litany Of Events That Can Trigger Clause – Is It Comprehensive?
- ▶ “Terrorism” Is Not Included/ It Should Be
- ▶ May Want To Include “Threatened Acts Of Terrorism” Because A Terrorist Threat Can Shut Down Operations – Anthrax Scares!
- ▶ Consider “Epidemics” And “Quarantine”

Service Contract Example

- ▶ If Contract Is For Sale Of Goods (And Contract Has Force Majeure Clause) Consider: “the threat or actual existence of condition that may affect the integrity of product.” – Tylenol Example
- ▶ Also Note Performance Is Excused During “the period such event persists.”
- ▶ Definition Problem Chicago Flood vs. WTC

Immediate Steps

- ▶ Not Necessarily Advocating Immediate Renegotiation Of Contracts
- ▶ Timing Is Key In Negotiations, May Want To Wait Until Term Of Current Contract Expires Or Other Party Suggests Change
- ▶ In The Meantime, Be Aware Of Obligations/Rights And Plan Accordingly

Common Law Doctrine Of Impossibility

- ▶ A Court Imposed Term If Contract Is Silent
- ▶ Traditional Doctrine: Performance Excused Only When Unanticipated Event Made Performance Objectively Impossible Because Subject Matter Of Contract Or Means Of Performance Destroyed
- ▶ Typically Applies To Construction Or Manufacture Of Goods

Concept Of Impracticality

- ▶ Move From Manufacturing Based Economy To Service Based
- ▶ Courts Beginning To Recognize Concept Of Impracticality – When Performance Is Made Impractical By Unanticipated Event
- ▶ A *Very* Fact Based Inquiry
- ▶ New York Courts Do Not Accept “Commercial Impracticality”
- ▶ May Not Want Common Law To Supply Terms

Uniform Commercial Code §2-615

- ▶ Provides Missing Terms In Sale Of Goods
- ▶ Delay In Delivery Or Non-Delivery Is Not A Breach If Performance As Agreed Made Impracticable By Occurrence, The Non-Occurrence Of Which Was A Basic Assumption Of Contract
- ▶ Only Protects Seller

Uniform Commercial Code §2-615

- ▶ Only Applies If Seller Has Not Assumed Risk Pursuant To Written Contract Terms
- ▶ Non-Occurrence Of Event Basic Assumption Of Parties
- ▶ Event Made Seller's Performance Impractical
- ▶ Note "Increase In Costs" Doesn't Qualify

Specifics On Business Continuity Plan

- ▶ More Than Backup Of Data On Computer Network At Offsite Location
- ▶ Should Also Include Backup Of Operational Functions
- ▶ Cross Training Of Employees On Such Procedures As Purchase Orders, Financial Reporting, Payroll
- ▶ “Business Continuity And Disaster Recovery” Tab 1

Business Continuity Plan

- ▶ Employee Calling Trees And Backup Locations For Calling Trees
- ▶ Vendor/Customer Notification/Information
- ▶ Business Recovery Work Area-Meeting Place
- ▶ Resource Acquisition
- ▶ See Tabs 2-6

Business Continuity Plan

- ▶ Good Business Plan Should Address Impracticality Issue
- ▶ But Cannot Just Prepare Plan And Put On Shelf
- ▶ May Do More Harm Than Good
- ▶ Tabletop Exercise White Paper – Tab 7