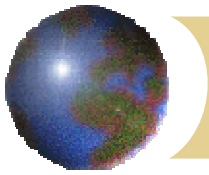


***PROTECTION AGAINST
TECHNOLOGY RISKS: IS
TRADITIONAL INSURANCE
ADEQUATE?***

William R. Denny

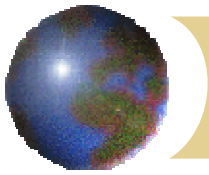
Potter Anderson & Corroon LLP

September 20, 2006



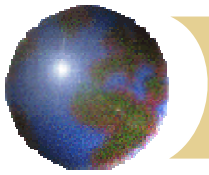
Agenda

- ✚ What is Covered by Traditional Insurance?
- ✚ Additional Insured Status
- ✚ Specialty Coverages
- ✚ Checklist for Insurance Clauses
- ✚ Lawyers' Duty to Advise Clients



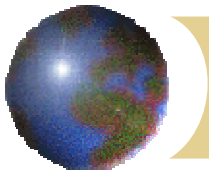
Traditional Types of Insurance

- ⊕ Commercial General Liability (CGL)
- ⊕ Errors & Omissions (E&O)
- ⊕ Comprehensive Property and Casualty
- ⊕ Automobile
- ⊕ Workers Compensation
- ⊕ Employee Fidelity



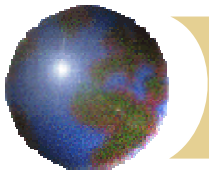
Insurance Principles

- ✚ First Party or Third Party
- ✚ Occurrence v. Claims Made Trigger
- ✚ Coverage for Indemnity and Defense
 - ▣ Defense applies at outset
 - ▣ Defense broader than indemnity
 - ▣ Defense may be on top of policy limits



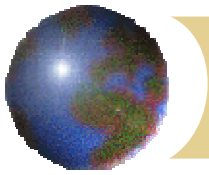
Coverage Provided: CGL

- ✚ Third Party Liability Arising Out Of:
 - ✚ Bodily Injury
 - ✚ Property Damage
 - ✚ Personal and Advertising Injury



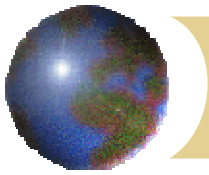
Property Damage

- ✚ Property damage includes:
 - ✚ Physical injury to tangible property, and
 - ✚ Loss of use of tangible property that is not physically injured
- ✚ Software or data generally deemed to be intangible property



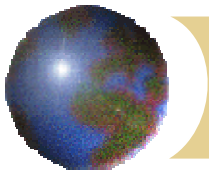
Personal and Advertising Injury

- ✚ CGL Policy (ISO 2001 Form) Covers:
 - ✚ Injury
 - ✚ Caused by an “Offence”, Including
 - Slander or Libel
 - Violation of a Person’s Right of Privacy
 - Infringement of Copyright, Trade Dress or Slogan in your Advertisement
 - ✚ Committed in the Course of Advertising your Goods, Products or Services.



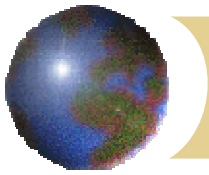
Three Steps to Coverage

- ✚ Is there advertising activity?
- ✚ Is there an advertising injury offense?
- ✚ Is there a causal nexus between the advertising activity and the offense?



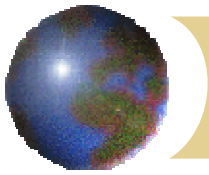
Exclusions: Advertising Injury

- ✦ Knowing Violation of Rights of Another
- ✦ Material Published with Knowledge of Falsity
- ✦ Material Published Prior to Policy Period
- ✦ Liability Assumed in a Contract
- ✦ Liability Arising out of Breach of Contract
- ✦ Infringement of Copyright, Patent, Trademark or Trade Secret
- ✦ Insureds in Media and Internet Type Business
- ✦ Electronic Chatrooms or Bulletin Boards
- ✦ Unauthorized Use of Another's Name or Product



Other Problems of Coverage

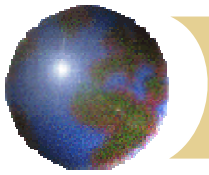
- ✿ Must be the insured's advertising activity
- ✿ Trademark infringement not specifically listed, but may fall within:
 - ▣ Misappropriation of style of doing business
 - ▣ Infringement of title or slogan
- ✿ Coverage trigger for “Invasion of Privacy” typically dissemination, not gathering
- ✿ Patent infringement typically not covered



CGL Exclusions By Endorsement

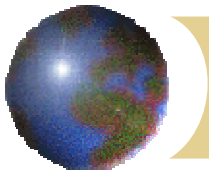
- ❖ Programming errors
- ❖ Contract performance disputes
- ❖ Professional services liability
 - ❑ Computer Software
 - ❑ Electronic Data Processing





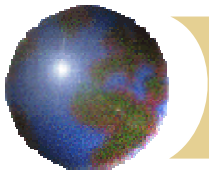
Coverage Provided: E&O

- ✿ Third party liability arising out of
 - a negligent act, error or omission
 - in the performance of the insured's professional services
- ✿ Examples:
 - Failure of product to perform its function
 - Failure to perform services per contract



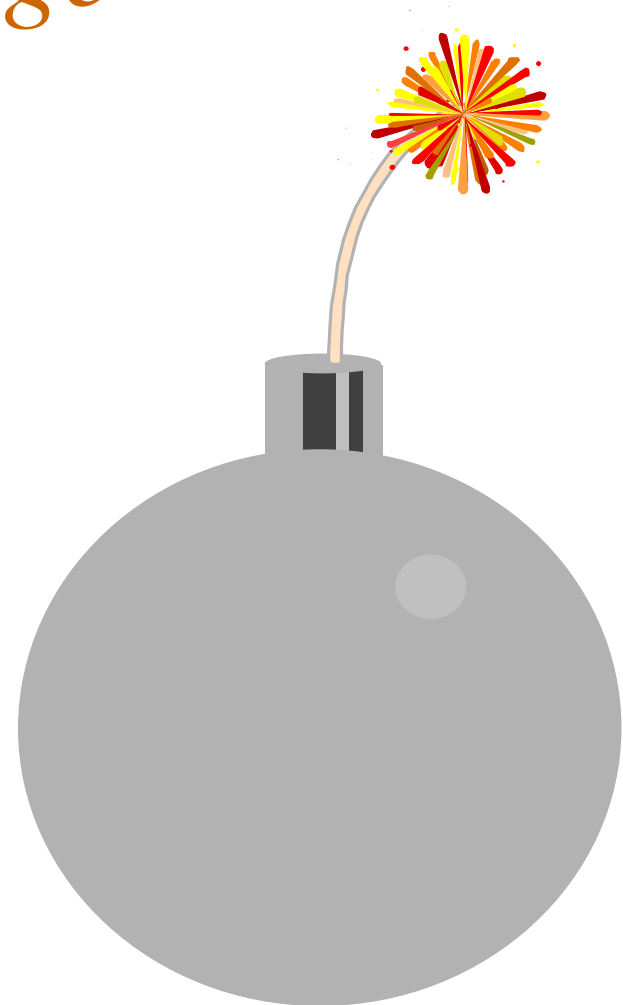
Defenses to E&O Coverage

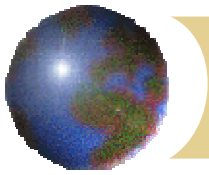
- ✿ Non-negligent error
- ✿ Meaning of “professional services”
 - ▣ Liability must arise out of special risks inherent in the practice of the profession
 - ▣ Interpreting relationship as “sale of goods” would bar coverage (dominant purpose test)
- ✿ Often applies only to consequential damages (i.e., loss of income due to failure)



Defenses to E&O Coverage

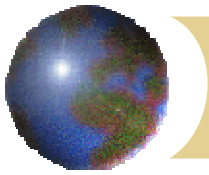
- ⊕ Economic loss doctrine
 - ⊞ Applies to “tort” malpractice claims
 - ⊞ Requires third party damage to person or property
- ⊕ Exclusion for damage to tangible property
- ⊕ Express warranty exclusion





Common Endorsements to E&O

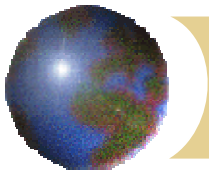
- ✿ Intellectual property infringement
 - ▣ Infringement of patent, copyright, trademark, trade name, trade dress, trade secret, and any other intellectual property
- ✿ Computer virus
 - ▣ Unauthorized access to electronic systems
 - ▣ Damage caused by computer viruses and worms



Checklist for Insurance Clauses

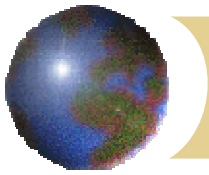
- ⊕ Vendor Maintains Insurance for:
 - ▣ General Liability
 - ▣ Professional Errors and Omissions
 - ▣ Intellectual Property Infringement
 - ▣ Defamation and Privacy
 - ▣ Other Traditional Insurance

- ⊕ Licensee Maintains Insurance for:
 - ▣ General Liability, Property
 - ▣ Business Interruption



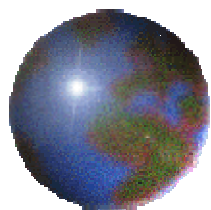
Checklist for Insurance Clauses

- ❖ Contractual Indemnification
- ❖ Spell out Types of Risks
- ❖ Primary and noncontributory
- ❖ Name Licensee as Additional Insured
 - ❑ Licensee to Approve Amount and Companies
 - ❑ 30-Day Notice of Cancellation or Change
- ❖ Provide Evidence of Insurance
 - ❑ Right to Obtain Insurance, Charge Vendor
 - ❑ Provide Replacement or Renewal Coverage



Lawyers' Duty to Advise Clients

- ✿ Possibility of Insurance Coverage
- ✿ Place Insurers on Notice of Claims
 - *Darby & Darby v. VSI International* (N.Y. Ct. App. 2000)
 - *Jordache Enterprises v. Brobeck Phleger & Harrison* (Cal. Supr. 1998)

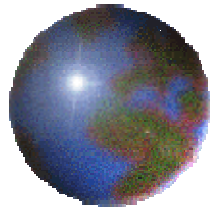


Questions?

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*21st Century Risks and Age-
Old Insurance Clauses:
Negotiating Insurance Provisions
in IT Contracts*

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