



# Crisis Management and Incident Response: Using Insurance as a Loss Mitigation and Business Resiliency Tool

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## **I. Crisis Management Planning**

Corporations from time to time will face significant incidents—from data breaches to natural disasters—that require coordinated crisis response plans. Even detailed plans can fall short, however, when companies fail to coordinate with their risk management leaders and insurance brokers on proper response actions in the event of a crisis. This can cause problems in incident response, particularly in catastrophic situations because the financial stakes can be high so that insurance companies may look for opportunities to reduce coverage. Moreover, cost recovery against other responsible parties can be harder to obtain if it is considered too late in the process and does not give other potentially responsible parties the opportunity to be involved in critical decisions if they will be expected to contribute to the response costs. Companies should include a protocol relating to insurance indemnification and other cost recovery as part of their incident response plans so they are ready to quickly and effectively react to any crisis situation.

## **II. Insurance Programs Should Prepare for the Worst For Effective Crisis Planning**

When building an insurance program, it is important for policyholders to consider all lines of insurance which could respond to incidents they are most likely to face. A technology company, financial institution, or company that maintains customer personal or financial information will focus on protecting against a cybersecurity event, whereas a company located near a coast will pay particular attention to coverage for hurricane losses. But beyond the obvious policies (i.e., cyber insurance for a data breach or commercial property insurance for a hurricane),

companies should build insurance programs that offer coverage under a variety of different policies. For example, a sub-limit providing investigations coverage under a D&O policy may offset certain expenses on a first-dollar basis after a data breach—like attorneys’ fees for defending against subpoenas to directors or officers or a derivative demand investigation on the entity—even if the company’s cyber insurance is the primary coverage for most other costs incurred due to the breach. There are often costs associated with a significant crisis where applicable insurance is contained in a number of different policies.

It is also helpful to involve insurance experts during the process of purchasing insurance to ensure that the broadest coverage is secured and the strongest policy language possible is negotiated. Brokers will be familiar with what policy enhancements are available in the marketplace, whereas coverage counsel can provide policy language and gap analysis based on case law developments. Just as importantly, by involving coverage counsel and the brokers in the process early, they will already have a baseline familiarity with the insurance program when called on for response to a crisis, allowing them to get up-to-speed more quickly during the emergency.

### **III. Secure Pre-Approval for a Crisis Response Team**

In the event of a significant incident, particularly one that is accompanied by heavy media coverage, the affected company will need to hire a variety of consultants, PR firms, and other vendors. Depending on the terms and conditions of the applicable insurance policy, some or all of these costs may be reimbursable, but such reimbursement is typically predicated on the prior written consent or

approval of the insurer. Insurers are often willing to pre-approve vendors, as well as outside legal counsel. Seeking these pre-approvals at the time policies are purchased is time well spent. Care should be taken at renewal each year to review the outside consultant list to make sure that preferred vendors are approved for particular types of incidents. Not only is it one less thing to do when emergency arises, many insurers refuse to pay costs incurred prior to approving vendors, and there may not be time to secure insurance approval before incurring vendor costs immediately in the aftermath of an emergency. It streamlines the process—and potentially increases recoverable expenses—to let the insurers know that pre-approved vendors will be retained.

#### **IV. Identify All Potential Sources of Recovery**

Clearly a cyber-insurance policy will respond to a data breach, as a commercial property policy responds after a property loss, but there are often other potential sources of recovery. As part of incident response, other contracts should be identified such as contracts with vendors, suppliers, and manufacturers that could contain indemnification or additional insured status requirements. Time is of the essence in reviewing these documents, as with traditional insurance because additional insureds must also comply with prompt notice requirements. It is helpful to consider noting these cost recovery opportunities and notice requirements in a contract summary relating to each significant vendor agreement.

#### **V. Take Care with the Content of the Notice Submissions**

In the event of a crisis, the requirements in the notice provisions of the insurance policies must be complied with. These provisions contain time limitations

in which a claim must be submitted and detailed instructions regarding where to send the notice and what to include with any notice submission. Beyond simply complying with the time limitations on notice specified in the policies, it is important to provide notice as quickly as possible to ensure that monies spent prior to notice being provided are reimbursed. In addition, to preserve the right to seek coverage under more than one line of insurance, notice must be provided to each insurer consistent with that insurer's notice provisions. It is also helpful to provide notice to all of the excess insurers that you expect may be needed, even if those coverages will not be triggered until the primary coverage is exhausted.

While most attention regarding notice provisions focuses on the timing, the content of the notice is also important. The notice must provide all information required by the policy and the depth of detail required varies widely among different policies. Beyond simply complying with the policy requirements it is useful to have coverage counsel review notices going to the insurers to make sure the language of the notice is not inadvertently limiting the potential recovery. Coverage can be jeopardized by addressing "why or how" an incident occurred too early in the investigation, whether in the notice submission or other early communications with an insurer. Trying to answer the "why and how" questions can lead to inaccurate speculation, which sometimes inaccurately suggests that the loss was due to an excluded cause. Instead it is better to focus on reporting facts like "what is happening and where" (i.e., flames in certain area, computer system non-responsive, etc.). Very often, people think that they know what triggered an

event, but after more time passes it appears less clear. Companies should avoid speculation about causes or parroting talking points from the media. In some of the worst hurricanes causing significant damage it became very important as to whether water or wind caused the damage (water is often an excluded cause, whereas wind damage is often covered). Some companies had to back-track once they took a position that was not ultimately accurate and instead negatively impacted insurance available by being too quick to suggest a cause of loss. Even something as seemingly innocuous as calling a “tropical storm” a “hurricane”, just because the weather centers do, may create unnecessary issues for some companies who have limitations on insurance for damage due to “hurricanes.” For these reasons, keeping notice submissions and early communications purely factual is prudent.

Because forensic consultants often are required to immediately work on determining the cause of the incident, the legal team should be involved to ensure that the consultants do not use unnecessary coverage-defeating or indemnity defeating language to describe the incident without regard for the consequences.

## **VI. Communications to the Insurers Must be Coordinated**

Insurance adjusters and representatives will arrive on site shortly after an incident occurs, informally asking questions and gathering as much information as they can. Formal information requests and interviews typically will follow. As insurers may be looking to limit their exposure to the losses the incident causes, lawyers with cost recovery experience can meet with the adjusters and insurance representatives that arrive at the site early (or start asking for information right

away in the event of an event like a cyber-attack without physical loss). These individuals know how to handle the extensive information requests that will be received from the insurers and can coordinate responses with the rest of the team. Appointing a knowledgeable individual decreases the risk of making early statements that could diminish coverage before the cause and scope of the incident is determined. Consistent messaging is also critical. Responses will be required for the public, regulators, sometimes congressional committees, and others. Insurance requires policyholders to comply with a “duty to cooperate” with the insurance companies. Keeping your insurers up-to-date on communications, damages and costs can lead to reimbursements more quickly.

Another benefit of involving coverage counsel from the start in insurance-related communications is that it provides more of the company’s communications with the attorney-client privilege. Strategic discussions with brokers, vendors, or others hired to respond to a crisis may remain privileged if the discussions involve counsel. No privilege will attach if these discussions are led by a broker or other non-lawyer in the absence of any lawyers. Even though communications with the insurer are not protected by privilege, make sure the legal team provides guidance prior to communications with the insurer, even if the broker or claims team handles the actual conversations with the insurer.

## **VII. Document Communications with the Insurers**

It is critical to track what communications have or have not been sent to or received from the insurers. Having a single person or small team responsible for all communications can help reduce confusion. Regardless of whether communications

go through one point person, a simple communications “tracking chart” is an effective way to document the communications history. It is useful to maintain a list of persons involved in the communication, the date of the communication, the type of communication (i.e., email, letter, phone call), and a short note describing the content of the communication. If there are later coverage or cost-recovery disputes, records of communications will help prove the claim and may form the basis of later bad faith claims.

### **VIII. Mitigate Losses as a Prudent Uninsured**

Mitigating costs is vital for several reasons. First, even if there is a well-developed insurance program in place, some costs may be not covered for any number of reasons. Because insurance or an indemnifying party will often not reimburse all of the losses, cost recovery must be conducted as if you were a prudent uninsured. Second, even if a third-party (insurer or indemnifying party) is ultimately liable for some of the losses, there is a duty to mitigate to prove to insurers and indemnifying parties that best efforts were used to reduce losses. This protects against an argument that indemnifying parties should not be liable for the entire loss. Document efforts to investigate and mitigate the incident, and record efforts in real time to create a more accurate and defensible record, rather than trying to re-create your investigation and mitigation efforts months later.

### **IX. Good Planning Leads to Effective Incident Response**

Proper planning for incident response and incorporating cost recovery measures into incident response plans enhances the likelihood of maximizing recoveries. Thoughtful crisis management planning is much more than good risk

management and loss prevention strategy. It is an essential business resilience tool.

**X. Crisis Event Coverage: Summary and Nature of the Coverage**

The scope of crisis response coverage varies widely by the particular risk being insured, the issuing company, and the policy form utilized. The term “crisis response” is not uniformly used in the insurance market to describe functionally equivalent coverage<sup>1</sup>, which is also referred to as “crisis management” coverage, “crisis communications” coverage, and “crisis management response” coverage, “crisis resilience” coverage and “crisis assistance” coverage, among others. By whatever name, a nearly universal feature of the coverage is the payment or reimbursement of expenses incurred after a liability event for the services of communications, public relations or other media-savvy professionals to bolster or restore public confidence, mitigate reputational injury, and effectively manage public statements and communications to avoid or minimize adverse media coverage in the aftermath of the crisis. The coverage also typically extends to medical, funeral, psychological counseling, travel, and temporary living expenses related to the crisis event.

Crisis response coverage has been referred to as a “liability mitigation tool,” and a unique feature of the cover is that both the carrier and policyholder benefit

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<sup>1</sup> American International Group, Inc. possesses a trademark for CrisisResponse®, an insurance product first introduced in 1999, discussed more fully below. (See U.S. Patent and Trademark Registration No. 2633559, <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:drnqkn.2.3>).

significantly when it is invoked. This is due to the fact that company liability for an insured event can either be mitigated or exacerbated by public perception of the crisis event, and this is affected by how it is responded to and managed by the insured. The insured has a significant interest in mitigating damage to its business reputation and not jeopardizing future business prospects; the insurer has a keen interest in seeing that the insured's post-crisis actions are helpful rather than harmful, and that its response is cast in the most favorable light possible. This is so because the same sound-bite absorbing public judging the company in the immediate aftermath of the event will feed the jury pool ultimately deciding questions of liability and damages. There are other typical features of the coverage, which are addressed more fully below.

Depending on the form, and whether it is add-on coverage to a policy or is an integrated component of a policy, the coverage is often subject to sub-limits in amounts significantly less than the limit of the liability coverage.

## **XI. The Origin of Crisis Event Coverage**

The element of crisis response coverage insuring the cost and expense of retaining professionals with particular and necessary expertise in the management and handling of the potentially insured event has its origin in policies insuring risk that effectively mandate the use of such professional services. For example, Kidnap, Ransom and Extortion coverage typically includes not just the payment of ransom, but the expenses incurred in obtaining the release of kidnapping or

hijacking victims, such as the services of security consultants, hostage negotiation experts, and other crisis response professionals<sup>2</sup>.

For example, in *Hargrove v. Underwriters at Lloyd's, London*<sup>3</sup>, 937 F. Supp. 595 (S.D. Tex. 1996), the court described an employee kidnap and ransom policy insuring a World Bank/United Nations-founded organization operating in Columbia which was invoked by the insured organization when an employee was kidnapped by the Columbian guerrilla group FARC in 1994. The policy expressly provided that the insurer would not be involved in the day-to-day handling of any kidnapping or in substantive decision-making regarding strategy or the payment of ransom so as “[t]o avoid the appearance that the Underwriters placed their economic interest over the interests of the hostage.” *Id.* at 597. “Instead, the Policy provides that in the event of a kidnapping, Corporate Risk International (CRI), a crisis management company, will advise and assist [the insured] in the negotiations for the release of the hostage.” *Id.* A material - if not the key - component of the coverage is access to expert services necessary to effectively respond to the ransom/extortion demand.

No later than 1999<sup>4</sup>, American International Group (AIG) launched a crisis response product that transported the concept of coverage for the expense of crisis response expertise into its commercial excess and commercial umbrella offering.

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<sup>2</sup> See ISO form CR 00 40 08 13.

<sup>3</sup> For an interesting summary of the history of Lloyd’s kidnap risk business, see Clendenin, Meadow, “No Concessions” With No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy, 56 *Emory L.J.* 741, 750-751 (2006).

<sup>4</sup> See n. 1, and reference to first use in commerce of CrisisResponse® in 1999.

This is generally understood to be the genesis of what is now the nearly-universal inclusion of crisis response coverage in some form or fashion in U.S.-issued commercial excess and umbrella policies. As already noted, the coverage is offered in the amount of sub-limits only, not in the full amount of the liability limits of the policy<sup>5</sup>. The AIG coverage was ultimately offered in the form of CrisisResponse® directly integrated with AIG’s Umbrella Prime<sup>SM</sup> (stand-alone umbrella) and Prime Express<sup>SM</sup> (follow form excess) policies, and via similar crisis response coverage that was added by certain AIG member companies as an endorsement to umbrella and follow form excess forms that did not integrated CrisisResponse® coverage (“Crisis Response Coverage Extension Endorsement”).

## **XII. Crisis Response Coverage on Other Risks and Issuing Companies**

Over time, crisis response coverage has made its way far beyond the standard commercial umbrella and excess forms of a multitude of carriers, and has a presence in nearly every insurance line, including primary coverage forms. It is in fact difficult to find a space that does not include crisis response as at least an optional coverage offering. Aviation, healthcare, environmental, professional liability, transportation and logistics, D&O, E&O, real estate management, hospitality and education related policies (by way of limited example only) now offer crisis response coverage. In 2011, AIG introduced the stand-alone product ReputationGuard® not subject to the typical sub-limits, and covering the cost of

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<sup>5</sup> However, in the same 1999 time frame, AIG launched a CrisisFund product with significantly higher limits (up to \$1 million) for crises related to 1) the price of stock or securities; 2) hostile take over; and 3) employment practices. (See <http://ir.aigcorporate.com/phoenix.zhtml?c=76115&p=irol-newsArticle&ID=232541>).

access to “world-class communications experts” to protect a company’s reputation and brand value by managing reputation threats and mitigating the impact of negative publicity<sup>6</sup>. Since that time, numerous other companies have launched reputation protection products, including but not limited to Allianz (Reputation Protect), Zurich (BrandAssurance), MunichRe (Reputation Risk Insurance), as well as reputation products geared toward particular service industry segments.

### **XIII. Typical Crisis Coverage**

The features of the crisis response coverage included in AIG’s Umbrella Prime<sup>SM</sup> and Prime Express<sup>SM</sup> forms; in AIG’s Crisis Response Coverage Extension Endorsement; and in the comparable forms of other carriers, vary by form and company. There are typical components, however. AIG’s forms are utilized below to outline the scope and limitations of the typical crisis response coverage.

#### **A. AIG Umbrella Prime<sup>SM</sup> and Prime Express<sup>SM</sup> Coverage**

Under the Umbrella Prime<sup>SM</sup> and Prime Express<sup>SM</sup> forms, the insurer will advance “CrisisResponse Costs to third parties on behalf of the named insured<sup>7</sup> and will pay “Crisis Management Loss” on behalf of the named insured arising from a “Crisis Management Event” first commencing during the policy period, up to the stated sublimit of coverage.

The term “CrisisResponse Costs” is defined to mean enumerated, “reasonable and necessary” expenses incurred during and directly caused by a “Crisis

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<sup>6</sup> See Erik Holm, *Got a Crisis? Tap AIG (Really)*, Wall St. J., Oct. 12, 2011, (<https://www.wsj.com/articles/SB10001424052970203499704576624703997791390>);

<sup>7</sup> This coverage is provided “regardless of fault”.

Management Event” “provided that such expenses have been preapproved by us and may be associated with damages that would be covered by this policy.” The enumerated expenses are:

1. medical expenses;
2. funeral expenses;
3. psychological counseling;
4. travel expenses;
5. temporary living expenses;
6. expenses to secure the scene of a “Crisis Management Event”; and
7. any other expenses pre-approved by the insurer.

The term “Crisis Management Loss” is defined to mean identified amounts incurred during a “Crisis Management Event”. The identified amounts are:

1. amounts for the reasonable and necessary fees and expenses incurred by a Crisis Management Firm in the performance of Crisis Management Services for the Named Insured solely arising from a covered Crisis Management Event; and
2. amounts for reasonable and necessary printing, advertising of materials or travel by directors, officers, employees or agents of the Named Insured or a Crisis Management Firm incurred at the direction of a Crisis Management Firm, solely arising from a covered Crisis Management Event.

The term “Crisis Management Event” is defined to mean:

an Occurrence that in the good faith opinion of a Key Executive of the Named Insured, in the absence of Crisis Management Services, has or may result in:

1. damages covered by this policy that are in excess of the total applicable limits of Scheduled Underlying Insurance or the Self-Insured Retention; and
2. significant adverse regional or national media coverage.

Crisis Management Event will include, without limitation, man-made disasters such as explosions, major crashes, multiple deaths, burns, dismemberment, traumatic brain injury, permanent paralysis, or

contamination of food, drink or pharmaceuticals, provided that any damages arising out of any of the aforementioned must be covered under this policy.

The term “Crisis Management Firm” is defined to mean firms identified in a schedule attached to the policy hired by the Named Insured to perform Crisis Management Services in connection with a Crisis Management Event.

Under the Umbrella Prime<sup>SM</sup> and Prime Express<sup>SM</sup> forms then, the definition of “CrisisResponse Costs” effects a limitation on the coverage to “reasonable and necessary” expenses incurred “during” and “directly caused by” a “Crisis Management Event” that are preapproved by the carrier. If these conditions are met, the coverage is triggered so long as the costs/expenses “*may be* associated with damages that *would be* covered by this policy.” (Emphasis supplied). The definition of “Crisis Management Event” effects additional limitations and restates others: for there to be such an event, there must be an “Occurrence” and “damages covered by this policy.” The requirement of covered damages is repeated for a second time in the definition of “Crisis Management Event” after the enumeration of particular events within the definitions (“explosions” and “contamination of food, drink or pharmaceuticals” for example) with the qualification “provided that any damages arising out of any of the aforementioned must be covered under this policy.” The forms do not expressly state that the coverage is limited to “bodily injury” and “property damage” coverage, although the definition of “Crisis Management Event” arguably suggests this expectation on the part of the insurer.

The definition of “Crisis Management Loss” creates similar limitations on that coverage. As with coverage for “CrisisResponse Costs”, the amounts must be

“reasonable and necessary” fees and expenses or printing, advertising, mailing or travel “solely arising from a *covered* Crisis Management Event” (emphasis supplied). A “Crisis Management Loss” in turn requires a “Crisis Management Event” which as already noted requires an “Occurrence”, and twice notes the requirement of damages covered under the policy.

With these conditions met, the typical policy affords coverage for “CrisisResponse Costs in the amount of \$250,000 and “Crisis Management Loss” in the amount of \$50,000. As noted, the coverage is not subject to a Retained Limit, and so the coverage applies first dollar, regardless of the exhaustion of underlying coverage, so long as the requirements of an “Occurrence”, covered damages, and “reasonable and necessary” expenses incurred “during” and “directly caused by” a “Crisis Management Event” are met.

**B. AIG Crisis Response Coverage Extension Endorsement**

As noted, crisis response coverage is also effected by certain AIG member companies via a Crisis Response Coverage Extension Endorsement which may be attached to a policy without integrated CrisisResponse® coverage.

Under this form, the insurer will reimburse or pay on behalf of the named insured “reasonable and necessary” “crisis response costs” and/or “crisis management loss” arising out of either 1) “bodily injury’ or ‘property damage’ for which coverage is provided under this policy” or 2) “imminent injury” with respect to a “crisis event” to which the insurance applies. The coverage is limited to the stated sub-limits, but no self-insured retention or deductible applies. A separate

provision provides that for the coverage to apply, the “crisis response costs” and/or “crisis management loss” must arise out of a “crisis event” and that the “bodily injury”, “property damage” or “imminent injury” take place in the coverage territory and “commence[ ] to occur during the policy period.” Furthermore, for the coverage to apply the “crisis response costs” and/or “crisis management loss” cannot arise out of any fact, circumstanced, pre-existing condition, situation, “bodily injury”, “property damage”, or “imminent injury” that you, prior to the inception date of the policy, knew, or reasonably should have known, could lead to, cause or result in such “crisis response costs” and/or “crisis management loss”.

Also, the “crisis response costs” and/or “crisis management loss” must be incurred within 30 days after the commencement date of the “crisis event”.

The term “crisis response costs” is defined to mean

1. reasonable and necessary “emergency transport expenses”<sup>8</sup>, “emergency psychology expenses”<sup>9</sup>, funeral expenses, travel expenses, and temporary living expenses incurred by you to provide relief and/or support to “affected persons”, and
2. expenses incurred by you to secure the scene of a “crisis event”.

“Crisis response costs” shall not include “defense costs” or “crisis management loss”.

The term “crisis management loss” is defined to mean:

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<sup>8</sup> Defined to mean “reasonable and necessary emergency transport expenses, occurring within 24-hours after a “crisis event”, to transport an “affected person” sustaining “bodily injury” in a “crisis event” to a medical treatment facility.

<sup>9</sup> Defined to mean “reasonable and necessary expenses for psychology or counseling services provided to ‘affected persons’ and incurred within the first fourteen (14) days after a ‘crisis event’. This does not include the costs or expenses of any mediations or hospitalizations. Such psychology or counseling services must be approved by the ‘crisis management firm’.”

Reasonable and necessary fees and expenses charged by a “crisis management firm” or your employees in providing public relations and media management services for the purpose of maintain and restoring public confidence in you. These expenses may include printing, advertising, or mailing of materials to manage reputational risk. This does not include the salaries of your employees.

“Imminent injury” is defined to mean “the actual and immediate threat of ‘bodily injury’ or ‘property damage’”.

“Crisis event” is defined to mean:

1. An emergency situation including, but not limited to, a manmade disaster, such as arson, a bombing, the taking of hostages, a mass shooting, terrorism (if covered under the policy only), intentional contamination of food, drink or pharmaceuticals or the actual or alleged mishandling of a natural disaster, that results in covered “bodily injury”, “property damage” or “imminent injury” to any person; and
2. Such emergency situation as has been associated with or may reasonably be associated with significant adverse regional or national news media coverage.

The term “crisis management firm” is defined to mean “a public relations firm or crisis management firm, assigned or approved by us in writing, that is hired by you to perform services of the type covered under ‘crisis management loss’ in connection with a ‘crisis event’”.

In addition to being subject to all exclusions in the form to which the Endorsement is attached, two other exclusions are expressly added: there is no coverage for “crisis response costs” or “crisis management loss” resulting from “bodily injury”, “property damage” or “imminent injury” that occurred prior to the date of any acquisition of or merger with another entity, and there is no coverage for “crisis response costs or “crisis management loss” arising out of infectious diseases

or illnesses caused by any bacterium, virus, or fungus. However, this exclusion does not include, food-borne illnesses or defective vaccines.

Under the Crisis Response Coverage Extension Endorsement then, the “crisis response costs” an/or “crisis management loss” must be “reasonable and necessary”. The coverage is expressly limited to “bodily injury” and “property damage” covered by the policy, either actual or imminent, and must “commence[ ] to occur during the policy period.” The coverage therefore expressly does not apply to “personal and advertising injury”. The “crisis response costs” and/or “crisis management loss” must arise out of a “crisis event”. While the Endorsement undertakes to identify particular “crisis event[s]” expressly within the coverage (bombing, shooting, intentional contamination of food/drink/pharmaceuticals for example), the definition specifically states that the covered events are “not limited to” those enumerated.

There are other restrictions and limitations included in the Endorsement. As noted for example, there is a known loss limitation pursuant to which there is no coverage for any “fact, circumstance, pre-existing condition, situation, ‘bodily injury’, ‘property damage’ or ‘imminent injury’ known or which should reasonably have been known to the named insured prior to policy inception would result in “crisis response costs” and/or “crisis management loss”. As also noted, “crisis response costs” and/or “crisis management loss” must be incurred within 30 days after the commencement of the “crisis event”. Finally, and as also previously noted, there is an exclusion for “crisis response costs” and “crisis management loss” occurring prior to the date of acquisition of or merger with another entity, and those

arising out of infectious diseases or illnesses caused by an bacterium, virus or fungus (with an exception for food-borne illnesses and defective vaccines).

As with the CrisisResponse® forms, where the conditions of coverage are met, “crisis response costs” are typically covered in the amount of \$250,000 and “crisis management loss” in the amount of \$50,000. As noted, the coverage is not subject to any self-insured retention or deductible.

#### **XIV. Insurance Case Law Relating to Crisis Response**

There is little case law involving disputes between carrier and policyholder over the application or scope of coverage intended to respond to a crisis event, by whatever named called. This is likely the result of two factors: the coverage at issue is relatively low – at least for those policies where the crisis response coverage is subject to a sub-limit. Consequently, any dispute over the application of the coverage is unlikely to be more than \$300,000 based upon typical maximum sub-limits. Second, and perhaps a greater consideration, is the mutually beneficial nature of the coverage. As noted, in the instance of a potentially covered crisis event, the carrier has just as great an interest in the good management of post-crisis activities, whether it is thoughtful and effective public communication about the event and how it is being addressed, or whether it is the way post-crisis response efforts are organized, provided and funded. Either way, it is difficult to find reported or electronically published decisions involving disputes over crisis response coverage included or endorsed to an umbrella or excess liability policy. Rather, the cases tend to involve other forms in which crisis response is a central component of the risk being covered.

An exception is *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2010) involving a CrisisResponse® policy issued by an AIG member company. But there, the dispute involved the application of the liability coverage to the insured's manufacture of contaminated peanut butter products resulting in a voluntary, nationwide recall. The crisis response coverage was not at issue in the litigation.

The same was true in *Hot Stuff Foods, LLC v. Houston Cas. Co.*, 2014 WL 28994 (D.S.D. Jan. 2, 2014), *aff'd in part and rev'd in part*, 771 F.3d 1071 (8<sup>th</sup> Cir. 2014), involving coverage under a Malicious Product Tampering/Accidental Product Contamination Policy for the recall of mislabeled breakfast sandwiches by the insured Hot Stuff. The court found coverage as a matter of law with issues of fact on the issue of damages. A jury awarded amounts for “recall expense and crisis response/consultant expenses” and for lost profits. Only the award for lost profits was the subject of a post trial motion by the carrier, however, not the award for crisis response expenses. 2014 WL 28994 at \*2; 771 F.3d at 1081, n.3). The scope of the crisis response coverage was consequently not disclosed or discussed.

The same or a similar Accidental Product Contamination Policy issued by the same carrier was in dispute in *Caudill Seed & Warehouse Co., Inc. v. Houston Cas. Co.*, 835 F. Supp.2d 329 (W.D. Ky. 2011). There, the coverage for Crisis Response/Consultant Expenses was revealed to arise from a component of the policy's definition of “Loss”:

All reasonable and necessary fees and expenses of Corporate Risk International; or, provided the Company has given prior written consent, fees and expenses of any other persons (including public relations consultants and recall consultants) retained by the Named Insured to assist in the

investigation of (and/or response to) an ACCIDENTAL PRODUCT CONTAMINATION.

*Id.* at 338. The insured faced liability for its sale of contaminated peanut products and alfalfa seed, and a dispute arose respecting coverage for damages it sustained as a result of product recalls, as well as for the fees of a public relations consulting firm and consulting group based upon “media attention” over one or more recalls. The facts revealed that the public relations services were not obtained from Corporate Risk International, and that the insured did not obtain the insurer’s consent to retain the public relations firm it utilized. The court agreed with Houston Casualty that coverage was absent under the circumstances:

While it may be reasonable to hire a public relations firm and a consulting group to deal with the recall, the Policy expressly requires the insured to obtain prior written consent before it will pay the fees and expenses of a public relations or recall consultant other than Corporate Risk International. Plaintiff did not obtain the necessary consent. Accordingly, the Court will grant Defendant’s motion for summary judgment as a matter of law in regards to fees for the public relations firm and the consulting group.

*Id.* at 338.

*Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd’s*, 199 Cal.App.4<sup>th</sup> 1038 (2011) involved a “TotalRecall+-Brand Protection” policy identified as “Malicious Contamination, Accidental Contamination and Products Extortion Insurance”. The policy covered “losses” defined in part to mean “Crisis Response fees”. At issue was \$12 million in coverage for the cost of recalling *e. coli* contaminated spinach, including \$125,000 for “consultant costs”. Although not clear from decision, these fees may have been within the coverage for Crisis Response fees. Reversing the trial court, the California Court of Appeal determined

that the *e. coli* outbreak was not within the policy's coverage for "Accidental Contamination" and that coverage was absent. There was no identification or discussion of the policy language addressing "Crisis Response fees" or consultant fees.

In *Cytosol Laboratories, Inc. v. Federal Ins. Co.*, 536 F. Supp.2d 80 (D. Mass. 2008), the existence of a "Products Withdrawal and Crisis Management Insurance" Endorsement added to a Federal policy affording claims-made Products/Completed Operations Liability and Commercial General Liability, and pursuant to which Federal paid costs associated with a product recall was identified as one basis on which the other, form coverage of the Products/Completed Operations-General Liability policy to which it was endorsed, did not afford coverage. *Id.* at 83.

*Catholic Medical Center v. Fireman's Fund Ins. Co.*, 2015 WL 3463417 (D.N.H. Jun. 1, 2015) involved a first party property policy issued to a hospital which contained a Crisis Management Extension Endorsement affording coverage for losses due to a "covered crisis event". There, the hospital was the site of a neurosurgery procedure on a patient later diagnosed with Creutzfeldt-Jakob Disease<sup>10</sup>, described as "communicable, incurable and fatal". The hospital was required to quarantine and ultimately destroy surgical instruments as a result, and had to suspend its neurosurgery program for approximately six months while new instruments were purchased. The Fireman's Fund property policy contained a

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<sup>10</sup> Sometimes called "mad cow disease". See <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Creutzfeldt-Jakob-Disease-Fact-Sheet>.

Health Care Extension Endorsement which in turn contained Communicable Disease Coverage and the referenced Crisis Management Coverage Extension Endorsement. The Communicable Disease Coverage defined “communicable disease” in relevant part as “any disease caused by a biological agent that may be transmitted directly or indirectly from one human or animal to another’ and a “communicable disease event” as an

Event in which a public health authority has ordered that the premises described in the Declarations be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such premises.

The Crisis Management Coverage Extension Endorsement applied to a “covered crisis event” defined as:

Necessary closure of your covered premises due to any sudden, accidental and unintentional contamination or impairment of the covered premises or other property on the covered premises which results in clear, identifiable, internal or external visible symptoms of bodily injury, illness, or death of any person(s). This includes covered premises contaminated, by communicable disease, Legionnaires’ disease, but does not include premises contaminated by other pollutants or fungi.

*Id.* at \*2. The incident was reported to the state health regulator which met with hospital personnel to formulate a response, including the quarantine and destruction of the surgical instruments. The hospital made a claim under the Communicable Disease Coverage and Crisis Management Coverage Extension Endorsement, which was denied. Fireman’s Fund contended that there was no “communicable disease event” because there was no “evacuation, decontamination or disinfection of ‘the premises’”, with “premises” defined as “that part of the location you occupy.” The court agreed: “the only action taken was with respect to

the possibly contaminated surgical instruments and . . . there was no evacuation, decontamination or disinfection of any other part of the hospital.” *Id.* at \*4. Since the surgical equipment was not “premises”, this “important gateway to coverage” was not present. Since the Crisis Management Coverage required a “covered crisis event”, in turn requiring “closure of the covered premises”, this coverage was not triggered. *Id.* at \*5.

## **XV. Conclusion**

At least with respect to coverage forms containing integrated crisis response coverage (by whatever name called) and subject to the stated sub-limit, the coverage is automatically included in the policy premium: there is no additional premium charge<sup>11</sup>. Even with typical sub-limits of just \$50,000 for the cost of public relations-related services and \$250,000 for costs incurred in responding to the crisis, the coverage is a significant resource to an insured faced with a crisis event. It furthermore reflects a rare coverage the carrier is as motivated to provide, as the insured is benefitted by invoking.

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<sup>11</sup> Some carriers may offer higher sub-limits for an additional premium charge.