

December 11, 2009

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Insurance Recovery For Dubai Credit Default Losses

The recent announcement by the government of Dubai that it would be seeking a stand-still on debt repayments by Dubai World, and its subsidiary, Nakheel PJSC, has shaken the global financial markets and investment community. In the immediate wake of Dubai's announcement, creditors have begun to review their rights under UAE federal insolvency law and the law of other potentially applicable jurisdictions, as well as examining other available options for minimizing the financial impact of Dubai's credit crisis. This Alert is designed to assist companies by providing a general overview of the applicable insurance coverages that may cover such losses and discussing considerations for developing a plan to pursue potential insurance recovery.

The Potentially Available Insurance

In view of the magnitude of the potential losses at hand, companies directly and indirectly impacted should undertake a prompt and thorough assessment of the potential for existing insurance coverages to respond and cover these losses. Affected companies should determine what types of insurance in their existing programs might provide coverage for trade credit losses and analyze the specific coverage afforded by all such potentially applicable insurance policies. Such analysis should include the following:

- **Credit Risk Insurance.** Many companies selling products or services on credit terms (and financial institutions financing those sales) have insurance policies that protect the company from losses on account of trade receivables or "bad debt" —*i.e.*, when a buyer/customer is not able to pay because, for example, of unexpected credit loss resulting from insolvency, bankruptcy or protracted default.

The insurance policies containing these types of coverages may take a variety of different forms. These policies generally are referred to as "trade credit," "credit risk," or "trade risk" insurance policies, but they also are given other names, such as "accounts receivable," "business credit," or "bad debt" insurance policies. This is a principal type of insurance that is likely to be called upon to pay for losses relating to financial transactions at issue.

Credit risk insurance may have been purchased to indemnify a company for "contract frustration" under a specific contract providing coverage in the event of termination, non-performance or non-payment by the counter-party to the contract. This insurance has been available and underwritten to provide payment protection for contractors under construction contracts.

Sometimes credit risk coverage is purchased in conjunction with political risk insurance, and some policies cover both commercial and political risk, including, for example, government interventions, currency inconvertibility, expropriation, and changes in import or export regulations.

Trade credit insurance can be underwritten to cover domestic business, export business, or both. Likewise, policies may cover an entire business or may be targeted to cover only certain accounts, certain product lines, or sales to certain countries.

In assessing coverage, it is important to note that trade credit or credit risk insurance can be complex, and policy wordings differ substantially.

Companies that have purchased trade credit or credit risk insurance should seek to take advantage of the coverage the policies may provide by undertaking a careful review and examination of the specific policy wordings, looking for insuring language that may provide a path to coverage.

- ***Coverage Under Other Types Of Insurance Policies.*** Although credit risk insurance policies may be the main sources of coverage for losses arising from payment defaults by counterparties in business transactions, affected companies should check all relevant insurance policies for potential coverage. For example, there may be surety bonds that insure against non-performance of a contract by other parties.
- ***“Additional Insured” Coverage.*** Companies also should determine if “additional insured” coverage is available. Many insurance policies provide coverage, not only to the company that purchased the insurance, but also to “additional insureds” — typically other companies with whom the “named insured” does business. Accordingly, the analysis of available insurance should not end with the affected company’s own policies, but also should include consideration of the potential for coverage under insurance policies purchased by others involved in financial transactions at issue.

Protecting And Maximizing Coverage

Most insurance policies purport to identify specific procedures that should be followed in presenting a claim (notice, proof of loss, suit limitation, etc.), and

some of these procedures may have timing deadlines associated with them. Moreover, the manner in which a claim is presented can sometimes have an impact on the ultimate recovery. Among other things, companies aware of a loss relating to the current situation should act promptly to maximize any insurance recovery by taking the following actions.

- ***Provide Timely Notice Under All Potentially Applicable Policies.*** Many insurance policies, including trade credit insurance policies, contain “notice” provisions that require companies to act quickly in order to protect their rights to coverage. Failure to strictly comply with time and notice requirements may result in a denial of coverage. Accordingly, companies should promptly provide notice of loss to all potentially responsible insurers, even if the full details remain unknown. The notice can be supplemented at a later date.
- ***Timely Submit Any Required Proof Of Loss.*** Many insurance policies, including trade credit insurance policies, state a specific time period within which a sworn proof of loss must be submitted. Failure to submit a timely sworn proof of loss may result in a denial of coverage. Again, the initial submission may be supplemented, if the full details of the loss remain unknown by the policy deadline.
- ***Pay Attention To Policy Warranties And Conditions.*** Insurance policies generally contain policy conditions, such as the “notice” and “proof of loss” conditions discussed above. Some insurance policies include express “warranties.” Trade credit insurance policies, for example, may contain a warranty stating that the company will not agree to an alteration to the terms and conditions of the insured contract - including payment terms. Companies should pay attention to conditions and warranties, since violations of these terms (such as renegotiating payment terms), as with any of the terms of the contract, may

serve as the basis for insurers attempting to nullify the coverage.

- **Identify Earliest Date For Filing Suit.** Many insurance policies contain a specific “suit limitation” provision that provides a specific date by which suit must be filed. Failure to file a timely lawsuit may serve as the basis for insurers to deny coverage. Policies in general have suit limitation provisions ranging from 1 to 3 years, compared to much longer statutory limitations periods applicable to other types of contracts.
- **Identify And Understand Arbitration Provisions.** Many insurance policies, including many trade credit insurance policies, contain mandatory arbitration provisions, often coupled with choice-of-law clauses that specify the law of the jurisdiction to govern any dispute. These provisions must be carefully analyzed to determine how coverage rights under the policy may be interpreted and enforced under the specified law and arbitration procedure.
- **Challenge A Denial Of Coverage.** Insurers frequently issue an initial denial for a claim whenever there is any plausible basis for doing so. Rarely is it wise to accept an insurer’s opinion about what may or may not be covered, or to accept initial denial of a substantial claim, without first consulting with lawyers experienced in acting on behalf of corporate insurance policyholders. Although policyholders may be required to aggressively pursue their insurance claims, and even litigate or arbitrate, to ensure they receive the benefits of the coverage they purchased, it may be possible to obtain significant coverage despite initial resistance by insurers to pay claims. Nor

does a coverage denial necessarily mean litigation or arbitration. Sometimes careful presentation of a claim followed by forceful negotiations are enough pushback to cause an insurer to reconsider its coverage position.

Assessing The Adequacy Of Insurance For Future Claims

As the recent Dubai-related events illustrate, shaken prosperity reveals unsuspected threats. The risk of loss can be addressed in corporate insurance programs. As part of an overall and comprehensive evaluation of their insurance programs, companies should evaluate their trade credit insurance, if any, and may wish to consider the potential benefits of purchasing such coverage – in addition to analyzing the adequacy of their insurance programs as a whole. Companies should remember that specific policy wording and insurance limits may have a significant impact on the scope of insurance recovery. Lawyers experienced in acting on behalf of insureds can assist companies in evaluating the strengths and weaknesses of their current insurance programs and in negotiating the terms and conditions of new and renewal coverages to improve the scope of coverage.

Conclusion

No potential asset of a company should be overlooked to respond to losses occasioned by the current financial crisis. An effective strategy for pursuing insurance coverage for losses at issue must be based on the specific facts of each individual situation, the specific insurance coverages purchased, policy language and applicable law. With the assistance of experienced lawyers, companies facing actual or potential trade credit losses in the wake of the current worldwide economic recession will be in the best possible position to maximize available insurance coverage to respond to such losses.

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