

# ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



## Ensuring Recovery Under Trade Credit Insurance Policies

By Peter A. Halprin, Esq., MCI Arb

**T**rade credit insurance policies are designed to protect policyholders in the event that a domestic or overseas customer or financing recipient becomes insolvent or defaults on a payment. A number of insurance companies sell this insurance to help policyholders reduce their risks in international (as well as domestic) trade. Policyholders, however, can face significant hurdles when trying to recover insurance proceeds even in the event of a covered cause of loss. This article highlights a potential challenge for policyholders and suggests ways to maximize recovery.

Trade credit insurance, as defined in this article, refers to insurance against the failure to pay trade debts in connection with a specific transaction or a portfolio of transactions or operations. It is distinguished here from accounts receivable insurance, which is designed to protect companies against loss on receivables.

Potential policyholders for such policies include commodity traders, banks and financial institutions, forfeiters, contractors and exporters.

### Insurance Companies Often Argue Nondisclosure Defense to Avoid Paying Claims

One of the greatest challenges for policyholders is in trade credit policy provisions that void coverage *ab initio* where a policyholder allegedly made misrepresentations in the application for insurance. In some instances, this duty is ongoing and extends throughout the policy period.

To avoid the “harsh remedy,” three strategies can be helpful both at the outset and in a post-loss dispute.

### Disclose, Disclose, Disclose

Applications for such insurance require detailed financial information such as sales data, debts, credit exposure and payment terms for all of the parties, and sometimes even proposed parties to the underlying transactions. Policyholders should make expansive disclosures with regard to such information, and work closely with joint insureds, additional insureds and any other potential partner in the transaction to make a full and complete disclosure.

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## Be Helpful

Policyholders and their brokers should always ask the insurance companies if they need anything further or have additional questions. If the insurance companies do not respond in the affirmative, this helps to establish a record of helpfulness and reasonableness on the part of the policyholder, and the satisfaction of any queries on the part of the insurance company. Periodic inquiries of this nature through binding, as well as updates on the status of a deal, will further this narrative.

## Materiality — No Harm, No Foul

Insurance companies may raise the non-disclosure defense even if a claim is otherwise valid (though in the U.K., recently passed Insurance Act 2015<sup>1</sup> may alter the viability of this defense in effected policies under English law). Under such circumstances, materiality becomes a key issue. It is a fact-intensive query and can require extensive discovery. The policyholder can look to prior transactions

with the same insurance company, either with the same policyholder or with another policyholder underwriting the same risk, to make the case that the policy would have been issued in the same manner if the disclosure had been made. Internal insurance company materials such as underwriting manuals and guidelines will also be helpful in this respect.

## Conclusion

Because nondisclosure is the easiest defense for an insurance company to raise in these cases, particularly in the context of transaction-specific insurance, policyholders must start thinking about this issue from the outset. A proactive and cooperative approach will help get claims paid. If, however, a claim is challenged, policyholders should look to prior policies and claims, as well as internal insurance company documents, to establish the non-materiality of any alleged misrepresentation.▲

<sup>1</sup>See: <http://tinyurl.com/k9dm5a7>

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## About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ and Dallas, TX.

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