

Preparing for Disaster: A 12-Step Program for the Practical Policyholder

by Eugene R. Anderson

The most salient disaster threats constantly change—as news of major data breaches and intensifying natural disasters constantly reminds us. Best practices for maximizing insurance recovery in the wake of disaster remain surprisingly constant, however. Searching its archives recently, Anderson Kill happened on this remarkably timeless 1993 disaster prep guide for policyholders by the late Eugene R. Anderson, founder of Anderson Kill and of insurance recovery as a distinct legal practice area. We invite you to take a short trip back in time and make sure you are ready to maximize insurance recovery when tomorrow’s disaster strikes.

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When it comes to disasters, insurance companies are the masters of the game. While corporations are exposed to business-threatening disasters (e.g., earthquakes, hurricanes, liability for gradual or sudden environmental damage) about once every 30 years, major insurance companies face disaster claims every day. Policyholders stand little chance of obtaining the coverage they paid for, unless they prepare in advance of disaster to limit the scope of losses and educate themselves in the rules of insurance coverage.

To prepare for disaster, policyholders must learn to think more like insurance companies. The following 12 steps may help policyholders plan for the inevitable disaster and minimize the impact of the event on their business.

1. DEVELOP A THOROUGH CONTINGENCY PLAN.

A well-designed contingency plan can save policyholders money—and headaches. When developing a contingency plan, policyholders should:

- Devise a recovery timetable for business operations.
- Make a “loss estimate and priorities” chart.

- Locate primary and backup “hot sites” for business operations.
- Line up outside vendors and “outsourcers” for essential business operations (e.g., offsite computer services).
- Stock up on building supplies—when disaster strikes, prices invariably rise.
- Establish a communications link to key customers and, if necessary, the media.
- Policyholders should look within their own industries to see whether their competitors are willing to share resources when disaster strikes.

2. MAKE SURE THAT YOUR INSURANCE COMPANIES PROVIDE LOSS-CONTROL SERVICES.

Loss control is one of the five services insurance companies regularly provide for their policy-holders. Insurance companies gain a large part of their advantage from information gathered by their loss-control experts, the so-called “eyes and ears” of the underwriting department. Insurance company experts may help policyholders take precautions against certain types of future risks, and gather information on which policyholders can base their future insurance needs.

3. SEARCH FOR OLD INSURANCE POLICIES.

Finding old policies—or evidence of their existence—is one of the most important steps in disaster preparation. In the environmental insurance coverage context, older policies may be particularly valuable because: (a) courts generally have held that older standard-language comprehensive general liability insurance (CGL) policies provide coverage for gradual environmental liability and asbestos exposure; and (b) these policies do not contain exclusions typically found in later policies.

If copies of these policies cannot be located, the policyholder should begin searching for “secondary evidence” of coverage—correspondence, claims files, management reports, corporate records, ledger entries, licenses, U.S. Navy records, umbrella

and excess policy schedules, and records maintained by domestic brokers and agents at Lloyd's of London.

4. REVIEW ALL INSURANCE POLICIES.

Divide the policies into the following groups:

1. Comprehensive General Liability (CGL) insurance policies that were purchased prior to 1966
2. CGL insurance policies that were purchased from 1966 to 1970
3. CGL insurance policies that were purchased from 1970 to 1985
4. Post-1985 CGL insurance policies
5. Personal injury liability insurance coverage (usually sold with general liability policies and with umbrella policies)
6. First party property damage insurance policies
7. Specialized insurance policies, including environmental impairment liability (EIL) insurance
8. Insurance policies of predecessor organizations
9. Other parties' insurance coverage (OPI)
10. Policies where your organization is listed as an "additional insured"

Groups one through four recognize that CGL insurance policy forms have been revised over the years. Groups five through seven recognize that different types of insurance policies provide different types of coverage. Groups eight through ten recognize that insurance sold to another entity also may provide coverage.

5. MAKE CERTAIN YOU ARE ADEQUATELY INSURED FOR OTHER BUSINESS LIABILITIES.

Business organizations should consider many different types of insurance policies. Some policies are specially tailored to particular industries—for example, wire-transfer insurance for the banking industry. Other policies—such as first-party property insurance, directors and officers (D&O) liability insurance, malpractice insurance, and employee dishonesty coverage—are essential to most business organizations. With the consultation of a good insurance broker or risk management consultant, the policyholder should be able to determine whether it is adequately insured for the liabilities and losses it is likely to face.

6. MAKE USE OF YOUR BROKER'S OR RISK MANAGEMENT CONSULTANT'S EXPERTISE AND KNOWLEDGE OF THE INSURANCE MARKET.

Brokers and risk management consultants are excellent sources

of knowledge on a wide variety of insurance and risk-management related matters: the types of coverage necessary to protect a policyholder against different losses; the best policies available in today's market; the history and claims-paying practices of particular insurance companies. In addition, brokers can be used to process claims. When disputes arise regarding claims, they can also be effective as intermediaries.

7. ENCOURAGE RISK MANAGERS AND CORPORATE COUNSEL TO WORK TOGETHER.

Corporate counsel and risk managers are natural allies—or so they should be. Too many organizations, however, fail to exploit the common interests of these professionals. The risk manager's job is to help the policyholder minimize risk and purchase adequate insurance to protect against those risks. Corporate counsel's job is to advise and prepare the policyholder on legal questions, and to respond adequately—and promptly—to real or threatened losses. Both professions are in the business of minimizing losses and maximizing coverage. By working together, risk managers and corporate counsel are better positioned to get the job done.

8. REVIEW YOUR RECORDS-RETENTION PRACTICES.

The policyholder must eliminate any practice that leads to the destruction of any documentation of insurance coverage.

9. BEWARE THE PITFALLS OF SELF-INSURANCE.

In many cases, self-insurance amounts to "no insurance." There may be even greater perils for the so-called "self-insured." A number of insurance companies have suggested that uninsured corporations owe the same duties that primary insurance companies owe to excess insurance companies. Like it or not, policyholders must accept the risk that courts may treat "self-insureds" the way they would insurance companies—with all the attendant duties, responsibilities and obligations.

10. BE AWARE OF DUTIES TO THE PUBLIC.

Insurance companies claim to play an active part in protecting the public. This responsibility falls equally on the parties on the opposite side of the insurance equation—the purchasers of insurance. Insurance protects not only policyholders, but also injured parties, neighbors, the community, stockholders, creditors and employees. Solid contingency plans and insurance-recovery strategies help protect the many parties that depend on the well-being of corporate policyholders.

11. KEEP ALIVE YOUR COMPANY HISTORY.

Policyholders may never reach the level of expertise attained by insurance companies, but they can devise ways of keeping alive their company histories. Policyholders should insist on: (a) adequately maintained records; (b) periodic studies of loss and disaster; and (c) written “histories” of their organizations and their industries.

12. GIVE NOTICE TO ALL INSURANCE COMPANIES “AS SOON AS PRACTICABLE.”

Many policyholders habitually decline to give notice of smaller losses, reasoning that it is better to take small losses now than it is to pay higher premiums later. There used to be a “custom of the trade” in the insurance industry that late or delayed notice would not result in the forfeiture of insurance coverage. Insurance companies now deny the existence of that custom, and aggressively deny claims on the basis that notice was late.

While notice does not guarantee coverage, insurance compa-

nies will argue that failure to give notice results in the forfeiture of coverage. Policyholders should notify all of their insurance companies of any and all claims that are potentially covered.

A POUND OF CURE

To prepare for the inevitable “30-year disaster,” policyholders must learn to think more like insurance companies, planning in advance of disasters to limit losses and understanding the rules of coverage. As one insurance company has said, “[t]he insured is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company...The insurer is a professional defender of lawsuits.” While policyholders may never become masters of the game, careful preparation may help level the playing field. ■

Eugene R. Anderson (1927-2010), the founder of Anderson Kill, was a pioneer in insurance coverage litigation and was often described as the “dean of policyholders’ attorneys,” as noted by BusinessWeek.