A Registrar, a Broker and an Underwriter Walk into a Bar...: Advanced Topics in Insurance

Erika Franek: Head Registrar, LACMA

Diane Jackson: COO & Director of Finance, Huntington T. Block Insurance Agency, Inc.

Richard Northcott: Director, High Value Cargo, IRONSHORE / PEMBROKE
The Five Stages of Absolute Liability

- Stage 1: Denial
Examples of Absolute Liability

• In the event of theft, loss or complete destruction, the Borrower agrees to accept absolute responsibility for the Object at the value indicated in this agreement.

• The Borrower will be liable to Lender for any loss or damage of any part of the Artwork(s) not covered and compensated by the insurance.

• The Borrower is responsible to make good any damages to the object that occur within the loan period.

• The Borrower agrees to insure the loan for the duration of the loan period against loss or damage of any kind.

• Borrower also agrees to indemnify the Lender for any claim settlement from Borrower’s insurance that is inadequate in the opinion of the Lender.
The Five Stages of Absolute Liability

Stage 2: Anger
Absolute Liability: Broker Perspective

- Never sign the agreement without discussing with someone
- Negotiate with the Lender. No contract is written in stone
- Ask Lender to insert “subject to the policy exclusion”
- Review policy exclusions and any other concerns in the loan agreement with someone else in the museum
- Have a clear list of items resolved and remaining problem areas, negotiations could be easier if you show you are willing to work with the lender on some issues
- Get to final position and then refer to Museum Director to determine how to proceed
Absolute Liability: Underwriter Perspective

• No clear legal definition
• May mean different things in different jurisdictions
• What might Absolute Liability cover that Commercial insurance does not?
• This is a slightly problematic question, as the term is rarely defined in the loan agreement, and to the best of my knowledge there is no specific case law that defines it in this specific speciality niche. It is thus tricky to give a totally accurate answer, but it would certainly give the upper hand to a lenders lawyers in a legal battle. Some of the areas to consider would be:
Potential Exclusions or Areas of Liability

- Wear and Tear
- Gradual Deterioration
- Inherent Vice
- War
- Terrorism
- Nuclear Risks
- Radioactive Contamination
- Biological or Chemical Weapon events
- Natural Catastrophes, Windstorm, Earthquake etc.
- Confiscation, Expropriation, Misappropriation
- Jurisdiction clauses

- Inalienability clauses
- Defective Title
- Fakes and Forgeries
- Reputational damage, bad publicity
- Mis-attribution or change of expert opinion of attribution or provenance
- Climatic Conditions, extremes of light or temperature, sonic boom, lightning strikes
- Change in Market value
- Change in public perception or image of the artist
- Infidelity of employees or directors
Absolute Liability: Underwriter Perspective

- Some of the above list are often included in Museum insurance policies but not all.
- Each insurance policy needs to be scrutinized to analyse what is or is not covered.
- There are significant differences in coverage across the globe.
- Differences in coverage from insurer to insurer.
The Five Stages of Absolute Liability

Stage 3: Bargaining
The Five Stages of Absolute Liability

Stage 4:
Depression
The Five Stages of Absolute Liability

Stage 5: Acceptance
Difference in Conditions Policy

• Difference in Conditions (DIC) policy provides expanded coverage for some perils that are not covered by standard insurance policies. DIC policies are designed to fill the gaps in insurance coverage. Look to specialty insurers (such as Lloyds) to fill these gaps in coverage that traditional insurance will not provide and that cannot be negotiated out of the loan agreement.

• DIC policy can vary depending on underlying insurance policy but some examples of what would need to be included in DIC policy are as follow:
  – Wear and Tear
  – Gradual Deterioration
  – Inherent Vice
  – War
  – Terrorism
  – Nuclear Risks
  – Radioactive Contamination
Difference in Conditions Policy

• Is it useful
• What additional coverage are you getting
• What still remains not covered by the combined insurances
• Clear process for claims and dispute resolution
Endorsements

• **Endorsement:** is a document attached to an insurance contract that amends the policy in some way. An endorsement may add, remove or alter the scope of coverage under the policy.

• Policies are different but some examples where you may need an endorsements are as follows:
  – Naming a lender as additional insured or loss payee
  – Changing valuation if lender wants something specific
  – Naming specific appraisers or conservators in the event of a loss
  – Request notification of cancellation of policy beyond what is listed in the policy
  – Museum Clause or inalienability
Endorsement Samples

EXAMPLES:

• Lender must be added as additional insured and loss payee. It is understood and agreed that “Lender Name” is added as additional insured and loss payee with respect to the following item(s) as their respective interest may appear.

• The Borrower will be liable up to the full amount of the agreed insurance value or the current market value at the time of loss, whichever is greater. It is understood and agreed that the Valuation in the event of loss or damage to the below listed item(s) is amended to agreed amount or current market value at the time of loss, whichever is greater.

• In the event of cancellation of the policy the Lender must be given 90 days notice. It is understood and agreed that in the event of cancellation of the policy the below lender will receive 90 days written notice.
Endorsement Samples

• In the event of any loss, Borrower and Lender agree that Christie’s shall serve as appraiser and Amann & Estabrook Conservation as conservators.

It is understood and agreed that in the event of loss or damage to the below listed item(s) it has been agreed that the conservator will be Amann & Esabrook Conservation and Christie’s as the appraiser.

• If an insurance event occurs, including total loss or damage, the objects remain the property of the Museum, irrespective of the extent of the damage and the amount of indemnity. The reason for this is that the objects are part of the “lenders country” cultural heritage.

It is understood and agreed that Notwithstanding the nature and total amount of the damage, Insured Property for which total loss has been paid, shall remain the property of the person or persons who legally held the ownership at the time immediately prior to the loss, and the amount payable shall not exceed the insured value agreed to between the Insured and owners.
Endorsements

- Volume
- Specific scenario requirements
- Take care in drafting of words
- Copy and paste from Loan agreements
TRIPRA

- TRIPRA is a federal "backstop" for insurance claims related to acts of terrorism. The Act "provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism."

- Act must be certified by the Secretary of the Treasury with the Secretary of State and the Attorney General

- A single terrorist act must cause aggregate losses in excess of $5 million

- Trigger amount increases from $100 million in losses to $200 million, in $20 million increments that started in January 2016 through 2020.

- Companies Aggregate retention (deductible) increases by $2 billion a year from $27.5 billion to $37.5 billion.

- Cap on Government assistance is $100 billion a year
Full Terrorism

- Contract certainty, as this is a claim-tested product with prompt loss payouts
- No need for Government to certify the act as a Terrorism loss
- Coverage can extend internationally
- Coverage can be tailored to what the insured needs
- If your institution has a large deductible you get a lower deductible on a separate policy
Other Coverages Related to Terrorism

• Active Shooter / Lone Wolf coverage
• Crisis Management Fees coverage
• Risk evaluation overseas
• Information sources