

EQUITY RISK PARTNERS

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Gabe Levitt: Hello everyone. My name is Gabe Levitt. And on behalf of Equity Risk Partners, I want to welcome you all to the first Webinar in our Executive Advisory series.

Today's session, as you know, is entitled "Insurance Issues Surrounding Bankruptcy in Private Equity Transactions."

Before we begin I do want to take care of a couple housekeeping items. First, if you aren't already aware, the audio for this conference is available both through the live meeting Web Interface and on a telephone conference line. The dial-in phone number is listed on the cover page of the presentation that you see right now on Live Meeting.

If you do plan to participate by phone while also watching the slides online, we suggest that you turn down your speakers to avoid the echo of both audio inputs.

Second, we will and do encourage questions throughout the presentation and discussion. There is a mechanism for submitting questions electronically on the Live Meeting Web interface under the Q&A Toolbar.

If you are participating by phone, are not in front of a computer, and would like to ask questions, you'll have to save those questions until the end of the prepared materials at which point we'll take the phone lines off of mute and allow you to ask questions by phone.

Finally, there will be audio replay of this call made available. We will send around email instructions explaining how that can be accessed. And if anyone would like a written transcript of the call, we can make that available as well by request next week.

So with that out of the way, why don't we go ahead and get started. I know that many of today's call participants are clients, prospects, carriers and others who are familiar with our firm.

But for those of you who aren't, Equity Risk Partners is the only full-service insurance brokerage firm exclusively focused on serving the needs of private equity funds and of portfolio companies.

We assist private equity clients in addressing their fund level partnership, liability and other exposures. We conduct comprehensive insurance and

benefits due diligence in the context of investment transactions. And we serve as the ongoing insurance broker and risk management consultant to portfolio companies.

Given the economic environment in which our clients have been operating over the past several months, the focus on insurance issues associated with bankruptcy and distress has increased significantly in recent times - as you would expect.

A detailed discussion on this topic and everything it entails could easily fill a weeklong seminar rather than the 30 or 45 minutes that we've allotted today.

And while we do plan to delve deeper into certain bankruptcy related issues on future calls, the bulk of today's discussion will revolve around proactive initiatives that private funds and portfolio companies can take, together with their insurance advisors, to help ensure that executive liability coverage for individual directors and officers is protected in the event of a bankruptcy.

We will also touch on, toward the end of the call, at a high level, executive liability, property and casualty and employee benefit issues that potential buyers of companies or assets out of bankruptcy should assess during the diligence process - again working with their insurance and legal advisors.

So now I'd like to introduce our guest speakers. We are very pleased to have with us today two very distinguished and experienced attorneys who can provide and will provide a legal perspective on the issues being discussed.

First is Carl Metzger who is a litigation partner with Goodwin Procter in Boston and has spent the past 18 years representing private equity firms and corporate clients in a wide variety of complex business litigation and risk management matters including directors' and officers' liability, liability risk mitigation and insurance coverage disputes. Many of these have involved bankruptcy situations.

Carl speaks nationally on private equity topics and has been noted by the New York Times as "an authority" on litigation topics and private equity. Carl welcome.

Jim Riddle, our other guest speaker, is a litigation partner with Holland and Knight in San Francisco and brings 25 years of experience advising Fortune 1000 clients in a wide range of insurance coverage matters.

His legal insurance expertise spans directors' and officers' and professional liability, self insurance, insurance regulation, reinsurance, captive insurance and a whole host of other areas of risk management.

And like Carl, Jim has encountered a significant number of bankruptcy cases over his career including several over the past year. Jim, welcome.

Jim Riddle: Gabe you're too kind. I have a suspicion that we may run short on time at the end and I just wanted to say something while I had the opportunity about our kind sponsor if I may.

Gabe Levitt: Please do.

Jim Riddle: I have known the good people at Equity Risk Partners since before there was an Equity Risk Partners. And from my perspective and the 25 years that I've been doing this, you folks are some of the most capable and responsive folks I've had the pleasure of working with.

So I think your clients ought to know, or potential clients ought to know, that they are good hands with you folks and that your efforts to keep them informed as evidenced by this fine program are impressive indeed. You and your staff should be commended for what you do and have put together.

Gabe Levitt: Jim, those are very nice comments. We appreciate it and have enjoyed working with you as well over the last several years.

If we flip now to Slide 1, this is the first of several slides we'll speak to that address protective provisions that companies and private equity funds can think about and should think about with their insurance brokers in order to preserve D&O coverage in the event of a bankruptcy.

Jim, if you can talk about the potential for a directors' and officers' liability policy and any claims payments therefrom to become assets of a bankruptcy estate and what the implications of that could be for individual directors or officers that would be helpful.

Jim Riddle: Okay. Yes, I think it's a good place to start, because of the significance of some of the policy language that we're going to discuss, the order of payments provision and some of the other language that we'll look at a little bit later,

will be more clear if you understand that the significance of what happens if a directors' and officers' policy becomes "property of the estate."

Of course if there's never any lawsuits against any of the individual insureds, then it really doesn't much matter whether a bankruptcy court ultimately deems the policy to be property of the estate or not.

It's when the directors and officers have been sued or may be sued during the pendency of bankruptcy that one troublesome issue rears its ugly head. And that is, in my view, that insurers become reluctant to fund the defense of the individual directors and officers if there's a risk that the policy will be deemed property of the estate.

And, of course, if the insurer is reluctant to fund the defense, that means that the individuals could be left to fund their own defense until the issue of whether the policy is property of the estate is resolved.

Now how can this be you might ask? You know, why would an insurer who's otherwise recognized an obligation to fund the defense insurers be reluctant to do so if there's a risk that the policy will be considered property of the estate?

The answer to that question lies in the automatic stay in bankruptcy, because the automatic stay applies to any and all transactions that occur not only after bankruptcy begins, but during a certain period before bankruptcy begins. So, if the insurance policy is deemed at any point to be property of the estate, then any payments that are made out of that policy that reduce the limits of the policy - like payments for defense costs on behalf of individuals - would need to be approved in advance by the bankruptcy court.

If an insurer makes those payments without first getting bankruptcy court approval, then it could end up paying benefits under the policy twice.

What happens from there can get quite complicated. And it depends on the status of the litigation against the directors and officers, how aggressive they are in forcing the carrier's hand to make payments despite uncertainty as to whether the policy will be considered property of the estate, even how knowledgeable the bankruptcy judge is about insurance issues can affect how this issue is resolved.

But the whole point is as long as that policy could be considered property of the estate, the insurer has to tread very carefully on how it responds to claims for benefits on behalf of the individual.

So I would say the bottom line, the thing to take away from this is that it is best from the standpoint of an insured if a policy doesn't smell, taste, sound or look like property of the estate. The order of payments clause, which you see on this slide, is one of the sorts of clauses, sorts of policy language that can help an insured's cause, can help avoid a policy being considered or deemed by the bankruptcy court to be property of the estate.

Gabe Levitt: Carl, maybe you can jump in and talk specifically about how the order of payments provision works and why it's useful and important.

Carl Metzger: Sure. The bottom line is, there are a number of provisions in any D&O policy that you're going to want to make sure are properly addressed in order to prepare for the possibility of a bankruptcy and making sure that the D&O insurance is there to protect you.

The order of payments provision is one of the most critical. And basically it expresses the intent that I think everyone has which is that the D&O policy is there principally to protect the directors and officers just as the name suggests.

Because you could have the possibility of the proceeds of the policy being deemed an asset of the estate, we want to make that crystal clear. And so the order of payments provision essentially dictates that in a bankruptcy situation, the proceeds of the policy first and foremost are there to protect the individual. Individuals get their claims get paid first versus claims against the entity or other rights the entity might have to recover under the policy.

On the next slide, what we've included here is just some sample policy language of an order of payments provision. We're not saying that this is the model language. Indeed, in some ways, I prefer to have some tweaks to what you see here. But this is the language that's used by one of the major carriers.

We're not going to go through it line by line, but we just wanted you to have in the slides an example of what we're talking about in terms of typical order of payment provision language.

Gabe Levitt: Thank you Carl. And as Carl noted, this is sample language. The language will vary from carrier to carrier policy form and is often highly negotiated. So again, you'll want to make sure that your insurance broker is working with

you and working with the carrier to negotiate the most favorable wording possible for this provision.

If we move down to the next slide, Carl, can you speak to this issue as well - the bankruptcy trustee carveback to the insured versus insured exclusion and why the exclusion can be problematic in a bankruptcy scenario?

Carl Metzger: Yes, and the big picture here is just to know that this is another one of the key provisions in the policy that needs to be addressed and can be addressed long before there's ever a bankruptcy. You may never have a bankruptcy, but you still want to get this provision right whether you're buying D&O insurance for the first time for a portfolio company or even if that company is just renewing its D&O insurance.

What this issue relates to is an exclusion that's in every D&O insurance policy out there. And many of you I'm sure have heard of it. It's called the insured versus insured exclusion. Just like it sounds, it means that a claim by one insured against another is not going to be covered by the D&O policy.

So if you had one director suing another director or even a former director or a former CEO -- it can be an officer too -- you know, anyone who falls within the definition of insured suing another insured, that's not going to be a covered claim.

Well the problem in a bankruptcy context is that if you have a company that's filed for bankruptcy and let's say you have a bankruptcy trustee, that

bankruptcy trustee technically, from a legal perspective, is standing in the shoes of the company.

Remember from our discussion about the order of payments provision, the company is also an insured under the policy. So unless the issue we're discussing now is addressed, you could have a situation where a bankruptcy trustee is hostile to the former directors and officers of the company and brings claims against them, that would not be covered under the D&O policy because of this insured versus insured exclusion.

The way we deal with this is to get what's referred to as a carveback to that exclusion. Meaning it's a way of narrowing the exclusion to say that it doesn't apply in the bankruptcy context where a trustee or a bankruptcy receiver or a creditor's committee or any similar entity, someone who is assigned rights to be the trustee or receiver, is bringing claims against insureds under the D&O policy.

So this is critical because as I'm sure many of you know, claims in that context are not that uncommon. If you don't have this carveback to the insured versus insured exclusion, it could potentially mean you have no coverage under your D&O policy for such claims.

Again on the next slide we've included sample carveback language for the insured versus insured exclusion. It's really that last arrowed point at the bottom.

Again, this is not put here as model language, but sample language from a major carrier. There are tweaks that your insurance broker or your counsel

might suggest to this language. There are a couple other things I like to add in, for example, specifically mentioning creditor's committee. But sometimes you have to ask for those in order to get them.

Gabe Levitt: Great. Thank you, Carl. Jim, do you have an additional comment here?

Jim Riddle: Carl has hit the nail right on the head when he said this is one of those exclusions that you'll always want to take a very close look at regardless of whether you're renewing or purchasing for the first time. The implications of a broad insured versus insured exclusion can be pretty significant even outside the bankruptcy context

I've litigated a number of claims in which folks who were involved in the suits were people who at one time had some involvement with the company, maybe even brief stints on the board of directors.

In some of the old and very broad iterations of the insured versus insured exclusion, anyone who was ever a director or an officer of the company without any time limitation is considered an insured. And that has caused some real problems in resolving the coverage issue for the current directors and officers when somebody who was involved in the company a long, long time ago is involved in the suit currently.

So you want to not only make sure that you've got a carveback for a bankruptcy, but certainly want to make sure that the definition of insured and the scope of the insured versus insured exclusion is to your liking before you go forward.

Gabe Levitt: Yes, that's a great point, Jim. I'm glad you mentioned it. And just so people on the call know, there are a host of other carvebacks to the insured versus insured exclusion outside of the bankruptcy context that you would want in your policy.

For example, private equity firms who have their own private equity liability insurance policy, there are some specific carve backs that just you as a private equity firm should make sure that you have for the insured versus insured exclusion in your policy. We will speak about that policy in a little bit greater length in a future slide

There are ways to balance the desire to continue to insure all past, present and future directors and officers from a favorable standpoint but use the carve outs to that exclusion to make sure that as Carl and Jim said , someone that was with the company a long time ago who's involved in the suit as a plaintiff doesn't accidentally trigger that provision.

If we move forward to Slide 5, this is another provision that's been a little bit more recent in its emergence and carrier policy forms referred to as a bankruptcy endorsement.

This goes back to the concept that Jim talked about in terms of the automatic stay, which again refers to when a company files a petition for bankruptcy there's a court injunction called an automatic stay. That effectively is intended to protect the assets of the company and the company itself from creditors taking funds out of the company before an orderly and prioritized payment

system can be established for distribution of remaining company assets to proper constituents.

And so to the extent a D&O policy ultimately is deemed to be an asset of the estate, you want to do everything that you can to ensure that payments to individual directors and officers to fund their defense costs for claims and ultimately to fund judgments and settlements are not restricted by this automatic stay.

One way that a few carriers have started introducing to their policy forms that can help in this initiative is the bankruptcy endorsement.

The next slide here has some sample language for you to read at your leisure. But the net effect of this is that at the inception of the policy, the language steps into the place of all the insureds and, on their behalf, says we as insureds do not object to any attempts by any insureds to receive payments under this policy and receive any relief from attempts by a bankruptcy court or a bankruptcy trustee to impose the automatic stay on the payment of those proceeds.

So again, this is yet another area where individual insureds are looking to protect their rights to receive payments under a policy in a bankruptcy scenario.

Carl or (Jim), anything else to add on this slide?

Jim Riddle: This is the sort of language that has been needed for a long time. Because I can tell you even the bankruptcy judges are not on the same page when it

comes to how they should handle a directors' and officers' policy, whether they should consider it property of the estate or not.

Anything that you can put on that contract that will give a bankruptcy judge some guidance as to how to negotiate this issue is going to make life a lot easier for everyone involved. It's going to minimize the expense involved, get the benefits rolling to the folks who need it the most, and make it easier for the carrier to administer the claim as well.

So this is a very good development and I hope it catches on and becomes commonplace throughout the industry.

Gabe Levitt: Jim), I think a key word you used there is guidance to the bankruptcy judge because a number of these provisions just because they're in the policy don't necessarily mean that that's ultimately what the bankruptcy judge is going to do. But to Jim's point, it shows what the intention of the parties was at the time the contract, which is this policy, was being negotiated.

In a bankruptcy situation, you will still have your counsel in front of a bankruptcy judge having to argue that these provisions should apply because it's ultimately the bankruptcy judge's decision.

And those comments apply more broadly to all of these different provisions and all of these scenarios that you can contemplate in the bankruptcy court which is that it really is on a case-by-case basis how these things are traded on a state by state basis.

So the best thing that you can possibly do is prepare yourself in as many different ways and with as many different protective provisions and defenses as possible to ensure the best outcome.

So as we move to the next topic, Slide 7 involves a provision in directors' and officers' liability and other claims made policies whereby upon a change of control the policy ceases to provide coverage for any claims arising from alleged wrongful acts which occur after the change of control for the remainder of the policy period.

What becomes problematic is that often times bankruptcy, liquidation, and similar proceedings are included in the standard policy definition of change of control.

What we recommend is negotiating at the inception of the policy or at renewal of the policy any reference to bankruptcy or similar proceedings from the change of control definition. Then, the policy will remain fully in force and fully active to respond to ongoing alleged wrongful acts of directors and officers until the natural expiration of the policy irrespective of whether those acts occurred before or after the bankruptcy filing.

Ideally, being able to maintain that policy through its natural expiration will take you through the remainder of the bankruptcy period and a new prospective policy can be placed to the extent that that company emerges from bankruptcy.

However, if the policy does expire while the company is still in bankruptcy, it is possible that the carrier won't be willing to renew that policy, or even if it is, there may not be sufficient funds available to pay the renewal premium.

Thus, there may be a period where current acts of insureds remain uncovered. What you want to do there again is make sure that you and your broker are communicating with the carrier throughout the process and increase the likelihood that you're going to be able to renew that policy even while in bankruptcy so that there is no lack of continuity of coverage there.

If we go back to claims that arise for acts which are alleged to have occurred prior to the bankruptcy or prior to the change of control, if that bankruptcy is ultimately deemed to be a change of control, coverage for those claims will continue to exist; but only until the natural expiration of the policy.

These are mostly annual policies, so given the fact that it can take years for claims against directors and officers to ultimately emerge for those alleged acts, these individuals want to make sure that they have the ability to submit these claims whenever they arise and have coverage for them.

The best way to extend the reporting period for these claims beyond the natural expiration of the policy is through the purchase of what is known as tail or run-off coverage.

Typically, a D&O policy will include, at inception, an option which can be triggered at the expiration of the policy at the request of the insured for a predetermined additional premium to extend the reporting period for claims

which arise from acts alleged to have occurred before the policy expired for one year after the policy expires.

However, as I just noted, one additional year beyond the policy expiration may not be long enough for the insureds to feel comfortable that all claims will have arisen so that they can report those claims to their carrier.

So we recommend trying to pre-negotiate terms for three and six year tails so that those options can be triggered in the future, but prior to the termination of coverage.

The related issue here is not only how long of a tail you should consider buying, but when you actual purchase the tail coverage, particularly if that company ultimately files for bankruptcy.

Because by the time the company actually files, there may not be enough money left to pay for the tail coverage, or the court or the bankruptcy trustee may not allow what company proceeds may remain to be used to purchase this tail.

So you may want to consider prepaying for this tail particularly if it looks like a bankruptcy filing may be possible sometime in the near future.

Jim, maybe can you jump in and talk a bit about when companies may want to consider triggering a tail coverage option and how the courts may treat the payment of these premiums depending on the timing?

Jim Riddle: I'd love to. You are now on the topic of termination of the policy, whether it's through a change of control or whether it's through the natural expiration, whether it's through cancellation by the carrier. I've seen in certain cases, when a company goes into bankruptcy and there's a lot of time left on the policy and the company's got the option ability to cancel, I've seen the bankruptcy trustee try to cancel policies and recover premium.

For any reason, if the policy is expiring, that's where the rubber in my view, that's where the rubber really meets the road. And if you're an individual insured, it can get very hot and very smelly very quick.

The reason for that is that once coverage ceases under a claims made policy -- and a directors' and officers' policy is typically a claims made policy, the policy gives the insureds only a very limited time within which to be sued and still be covered.

As Gabe has pointed out, you can purchase an extended reporting period that will extend the time in which suits can be filed against you and you can still be covered.

There is also a very short window typically granted at the end of most policies without charge somewhere on the order of 60 days or 90 days typically in which a claim can be made and still be considered a claim first made during the pendency of the policy.

But the bottom line is that if a claimant, a potential plaintiff drags his or her feet in bringing suit against an individual insured, that insured can be left high

and dry without any protection under a D&O policy unless they can extend that period to report claims or in some other fashion preserve the coverage.

Now again, buying an extended reporting period helps greatly. But how many companies staring at bankruptcy have the funds to make that purchase?

Obviously, if you're staring at a bankruptcy, funds are very limited. Extended reporting periods are very expensive. Typically, and Gabe can speak to this better than I can, the extended reporting premium can equal the premium for the policy itself and sometimes multiples of the policy premium for a period as short as one or two or three years.

Second of all, if precious funds are used on the eve of bankruptcy to prepay an extended reporting period for the benefit of a handful of executives, do you think the purchase is going to survive a call back by the trustee or angry creditors once bankruptcy is initiated?

These are the kinds of things you have to think about when you're trying to plan for the onset of bankruptcy and the termination or the expiration of the policy.

And as Gabe pointed out, good luck convincing a bankruptcy trustee once bankruptcy is initiated to use precious bankruptcy funds to purchase an extended reporting period on your behalf.

If you're a worried director or officer, I think you want all the certainty you can get that the coverage that was purchased for you way back when will be there, once the policy expires.

Fortunately there is in my opinion, a very underutilized and often unappreciated or underappreciated tool that's built into every claims made policy that I've dealt which provides some of the enhanced certainty that I'm speaking about.

This silver bullet, if you will, has to be handled very carefully or its benefits can be lost. And I'll explain how.

The silver bullet that I'm referring to is commonly known as a notice of circumstances that regulators in virtually every state require claims made insurers to build into the policy.

What the clause provides is that if an insured during the pendency of a policy gives the insurer notice of an event or circumstance that could give rise to a claim then - there's some noise in the background here - then any claim subsequently made will be deemed a claim first made on the date the notice was given.

Jim Riddle: If proper notice is given during the policy period, in other words, before expiration, then a claim that's made long after the policy expires has to be accepted as a claim - as if it was a claim first made on the day that notice was provided.

Now of course all other terms of the policy still apply like limits and other exclusions. But at least the question of whether the claim comes too late has been avoided.

And the best thing of all from an insured's perspective, of course, with a notice of circumstances is unlike an extended reporting period, a notice of circumstances costs nothing except perhaps what you pay me or Carl or Gabe to advise you how to submit it.

So if you're looking at a potential expiration of a policy and as an insured and you are aware of circumstances or events -- and often during the period before bankruptcy those circumstances and events seem to multiply -- if you're aware of them and there's a possibility of giving rise to litigation in the future, you're well advised to provide that particular notice to your carrier. This is especially true if you're not going to be able to afford an extended reporting period or you're not going to be able to renew the coverage and keep your retroactive date so that you've got coverage going forward.

Gabe Levitt: That's a great point and something that we encourage all of our clients to do even absent a bankruptcy situation - keep everyone aware of circumstances that may give rise to claims and timely notice them to their carriers.

We do have a question that was submitted while you were talking, Jim, and I think you touched on a little bit, which is "would the purchase of an extended reporting period prior to bankruptcy be a preference payment?"

This is something that Carl, you and I talked about yesterday and the answer was "it depends."

Jim Riddle: Yes, if there's a legitimate business reason for it. You might debate whether protecting certain individuals going forward is a legitimate business reason, but if the company can support that decision on a sensible business judgment

basis than it won't be considered a preference because generally, there has to be some fraudulent element in the transaction to give the bankruptcy court permission to undo it.

You would obviously want to consult with a bankruptcy attorney if you're contemplating prepaying or doing a transaction that would extend coverage and bankruptcy is looming. But it's doable from what I'm told.

Gabe Levitt:

Thank you, Jim..

On this next slide, we discuss another mechanism for ensuring the D&O coverage and limits are available to the individual directors and officers - clearly the theme here.

As Carl discussed in the order of payment section, typically D&O policies include coverage for both individuals, which is referred to as side A coverage, and for the entity, which is covered under sides B and C of the policy. And I won't spend the time to distinguish between side B and side C unless people want me to.

Typically, the first line of protection for individuals if a claim arises is indemnification from the company of which they're a director or officer.

However, if that company is either prohibited by law from indemnifying these individuals or has insufficient funds to do so such as in a bankruptcy or insolvency, the side A coverage in a D&O policy would step in.

So in order to help ensure that there are sufficient limits for those individuals, there are a couple of different options that you can consider, one being to

purchase a separate side A policy that sits on top of the traditional side A/B/C policy but has limits exclusively for the individual directors and officers.

Secondly, another alternative that carriers have recently been offering - particularly to private companies - and one that may be more economical for some private companies is to include excess side A limits within an A, B and C policy.

So the limits attributable to side A in that policy will be greater than those for the entity under B and C.

Thus far, we have really focused solely on D&O policies at the corporate or portfolio company level, but we want to briefly change gears here and talk about something that Carl alluded to earlier, which is protection for the private equity funds who invest in these companies and their professionals who sit on portfolio company boards of directors.

I expect that many of the funds who are represented on this call purchase what is known as general partnership liability or private equity fund liability coverage.

And just for your reference, a GPL policy provides management liability and professional liability coverage to the fund and its partners, employees, directors, advisory board members and all the related entities.

And one particular coverage component of every GPL policy which is particularly relevant to this discussion is what's known as Outside Directorship Liability or ODL coverage.

ODL basically provides an extra layer of D&O protection for fund professionals who sit on portfolio company boards in the event that that company is both unable to indemnify those individuals for a D&O claim and the limits of that portfolio company's own D&O policy have been exhausted or are otherwise unavailable.

Many funds that we work with actually purchase GPL solely for the ODL component, although we feel as though there are other GPL coverage areas that are as if not more valuable than ODL.

One thing you need to be cognizant of or careful of when you purchase or renew your GPL policy, is how the entities associated with that fund are scheduled as insureds under that policy.

As all of you know, private equity funds typically have very vast and complex legal structures or legal entity structures that can include not only the general partnership and the management company, but also a variety of special purpose vehicles and intermediate holding companies to fund their individual investments in portfolio companies.

And while it is desirable and desired by the funds to include a majority of these entities in the definition of insured and have them be named as insureds to the extent they're named in a suit, one thing you want to be careful of is to not include the actual holding companies of individual operating portfolio companies.

That entity should really be covered by each portfolio company's own D&O policy. One reason that that's a concern is that if something goes wrong at the portfolio company level and the portfolio company or a bankruptcy trustee on behalf of the portfolio company ends up suing the private equity fund and its individual professionals on behalf of that company, then you may run into that "insured versus insured exclusion" that we talked about earlier, to the extent the holding company of that portfolio company is also an insured under the GPL policy.

So again, you want to work very carefully with the carrier, with your lawyer and with your insurance broker to make sure that to the extent you are scheduling individual entities as insureds on your GPL policy, that they are the correct entities and ones that you really intend to provide primary coverage for under GPL.

Finally on this point, your GPL policy should contain all of the same or many of the same protective provisions that we've talked about for corporate D&O policies in terms of carve-outs to exclusions, order of payment provisions, and the like.

Carl Metzger: Yes, and if I can just add to that, Gabe. A lot of my clients have this kind of GPL insurance - D&O insurance for a private equity firm.

But what's a little different about these policies compared to a lot of other types of insurance out there is they really need to be tailored to the particular private equity firm that they're supposed to be covering.

Bankruptcy is one important topic with respect to GPL, but there are a lot of others where there may be special considerations depending on how the firm is structured, who's running the firm, what kind of investments that they make where they're going to have to be certain nips and tucks to the language or the policy on a variety of topics.

Gabe Levitt: Great. Thanks Carl. If we flip to the next slide here, while the defensive D&O issues that we've talked about thus far today have certainly been the most prominent on the minds of our clients and ones that we get the most questions about, today's distressed environment has, as all of you know, seen a flurry of activity on the offensive side of bankruptcy.

As I noted in the beginning of the call, we certainly don't have enough time today nor do we plan to speak in detail about all of the insurance issues associated with buying a company or assets out of bankruptcy. Those will form the bases for future calls.

However, on the next couple slides, we did want to note a few areas that potential acquirers of assets or companies out of bankruptcy need to consider during due diligence and prior to closing on those deals with the help of their insurance and legal advisors.

If you look at Slide 11, in terms of executive liability, which includes not only D&O, but coverages such as employment practices liability, fiduciary liability and crime, new prospective policies will need to be placed at closing when you're buying a company out of bankruptcy.

For certain of those policies, prior acts may be able to be included in that go-forward policy. Again, that's all based on discussions and negotiations with carriers and what the preference of the buying party is going forward.

With respect to property and casualty, there may actually be economic and practical advantages to maintaining policies and programs which existed prior to and during the bankruptcy - assuming the carriers will permit assigning those policies to the newco or the new buyer.

However, this issue can be very sticky and very complicated to go through and requires a lot of analysis, especially when there are loss-sensitive workers' compensation or general liability or auto liability programs in place where you've got open claims, you've got reserves supporting those claims, and you have collateral issues to consider.

In terms of employee benefits, again there may be the ability to maintain existing programs that were in place during the bankruptcy and prior to the bankruptcy. And so your advisors need to assist you in identifying what the pros and cons are of maintaining those programs versus establishing new programs.

The legal obligations to and the impact on the current employees of those firms, the retirees, and the COBRA beneficiaries will all factor into that analysis.

If we move to the next slide, underlying a lot of those acquirer decisions and the diligence analysis that I just referenced, is an understanding of what

successor rights and successor liability may be for buyers who are thinking of taking companies out of bankruptcy or buying those assets.

Jim, can you walk briefly through some of the points on this slide?

Jim Riddle: Yes, and I know time is real short, so all I'll say here to kind of sum up the points I've listed, is that if a company who is acquiring another company or the assets of another company is going to be assuming the liabilities as well as the assets, you're going to certainly want to get the benefit of any prior insurance coverage that may provide that tail coverage going forward.

And typically, occurrence policies that provide coverage for a variety of things will be triggered and coverage will be preserved if damage or injury occurs prior to the expiration of the policy so that you could have built-in value, built-in coverage in the programs that were placed in favor of the predecessor entity.

But you need to be careful about how you acquire or pass those benefits on to the acquiring company, because once the name changes, there are problems that insurance companies have and courts have deciding whether the new company ought to be an insured under the old policy.

This issue is decided on a state by state basis, so your advisor needs to be familiar with the particular state law that's going to govern your transaction.

And in addition to getting advice from the right folks, I think you want to address specifically and expressly the succession of insurance benefits in the transaction documents. That can be very helpful to the court down the line.

Finally, as you approach this issue, if you haven't already for the first time, you will quickly find that there are often "consent to assignment" clauses in the policies. Trying to find a carrier under an old policy to obtain written consent from that carrier for an assignment of the policy and the benefits can be very difficult.

The thing I would leave you with is don't worry about that. Make the request. If you don't hear back, as long as you've made the effort, the court will not hold it against you that you didn't get an answer.

And in fact, if your request was reasonable, the court will likely read into the consent to assignment clause that consent could not be withheld unreasonably and allow the benefits to be transferred if everything else is in order. So those are the only points I think folks need to take from this particular slide.

Gabe Levitt: Thanks, Jim. And again, you have to weigh the successor liability issues with the successor rights and benefits that you may want to consider pursuing when deciding whether to try and take advantage of policies that were in place previously.

Carl, any last thoughts from you?

Carl Metzger: No. I would just say that this whole bankruptcy topic is a bit of a moving target, particularly in this economy. There is going to be some new law made and already has been on some of the bankruptcy issues that could have an impact on D&O insurance as well.

So despite what we've said today, make sure that you or your advisors are keeping up to date on current developments because it is a bit of a wild west out there right now.

Gabe Levitt: Jim, anything else from you before we open the floor to questions?

Jim Riddle: No, I really echo Carl's comments. I will say that it's distressing to say the least when you're looking at a bankruptcy if you're an individual insured.

And the ability to maximize the certainty and the protection is very, very valuable and worth the time and effort that you put into it in advance.

And there are many things that you can do to create that certainty if you put the time and effort into it. So it's something that you definitely want to do.

Gabe Levitt: Great. Thank you Jim. And that concludes our prepared comments for today's call. To the extent there are any participants that want to ask questions by phone, you can do that now. You can still submit questions electronically through the Q&A Toolbar on the Live Meeting interface if you choose. Does anyone have any questions?

: Carolyn is asking which carriers do you see offering the bankruptcy endorsement? XL is the first of these carriers that's offered the endorsement and we've had discussions though I don't think we've bound policies yet with both Chubb and Houston Casualty.

XL has definitely been on the forefront of providing this, and again, it's not an automatic, but it's something that with discussion and request and negotiation that they've put into policy forms.

Jim Riddle: Yes, and I would just add that most of the major carriers are willing to work with insureds to address all of the bankruptcy issues that we've discussed today.

But usually they're topics that you as the insured or your broker or your counsel has to raise.

Gabe Levitt: Exactly. Any other questions?

Okay, well I want to first thank Carl and Jim for all the time and effort they have put into preparing for this call and for their valuable contributions to the discussion.

Carl Metzger: My pleasure. Thank you.

Jim Riddle: Likewise, my pleasure.

Gabe Levitt: And to the participants, this is the first of what we hope will be many Webinars on timely and valuable insurance topics for our clients, prospects and friends.

Thank you today for your participation and the time that you took. And we encourage you to contact us with any further questions that you may have or if we can be helpful in addressing any insurance needs that you, in your

investment activities, or your portfolio companies may have. We look forward to speaking with you all again soon.