



Certified Cargo Screeners: New Exposures Require Insurance Examination

For Indirect Air Carriers, Freight Forwarders and other entities venturing into the Certified Cargo Screening role, there are important risk management considerations that must be addressed. Some may ask why this is an issue now especially when some of us have been inspecting freight all along, albeit at a lesser volume. It's a valid question and one that is best answered by pointing out that there have been many holes in past insurance products that simply could not be filled, especially for small to medium-sized businesses. Even larger cargo handlers have gone without adequate coverage due to what was available.

What are the Exposures if I Become a Certified Cargo Screening Facility (CCSF)?

It's easiest to understand the exposures of air cargo screening by breaking them down by the types of insurance coverage that will respond. However, as we go through these, keep in mind that any insurance discussion which touches upon terrorism coverage has no precedence; no one knows for certain how post 9/11 terrorism coverage will respond since thankfully, there have been no major terrorist incidents on U.S. soil since September 11, 2001.

EXPOSURE/COVERAGE: Bodily Injury and Physical Damage to Third Parties

A General Liability policy responds to claims for bodily injury and physical damage to third parties, but has significant coverage exclusions. For example, there are exclusions pertaining to professional liability claims, as well as for claims involving acts of war or terrorism.

War or Terrorism — this exclusion in your general liability policy means you are not covered for terrorist incidents unless you have specifically purchased terrorism coverage under the Federally-mandated Terrorist Risk Insurance Act (TRIA coverage). Your insurance provider is required to offer the option to purchase TRIA coverage within 30 days of your policy's inception or renewal. Even with the purchase of TRIA, the terrorist event must be certified as a terrorist incident by the government. Furthermore, terms also state that nuclear, chemical, and biological attacks are excluded from TRIA coverage.

EXPOSURE/COVERAGE: Bodily Injury to Employees

Worker's Compensation covers injuries and loss of income to workers who become sick or injured as a result of job related activities; TRIA coverage is automatically included for terrorism related injuries.

EXPOSURE/COVERAGE: Physical Damage of Owned Premises

Physical loss or damage coverage for a CCSF's owned premises is available. However, standard property policies exclude loss or damage due to terrorist related incidents. You can fill part of this void by buying TRIA coverage to supplement your policy. There is an added cost for TRIA coverage, but it is generally not excessive and has definite merit under appropriate circumstances. Discuss TRIA options with your insurance provider before securing your policy.

EXPOSURE/COVERAGE: Physical Damage to Cargo Being Inspected

CCSFs may unintentionally cause damage to freight or shipping containers as a result of improperly unpacking and repacking for screening purposes. There is debate as to whether a CCSF can successfully hide behind the 'Government Contractor Defense' that essentially says, "Because we were acting under the direction of the government, we cannot be held liable." There have been historical damage claims against air and ocean freight, where cargo handlers have both won, and lost, using this defense. A properly designed 'Terms and Conditions of Service' contract, properly designed cargo liability insurance, and a properly designed Errors & Omissions (E&O) policy can all assist in protecting your company from this exposure. A major pitfall however, is assuming any policy will fully or automatically cover terrorist incidents. We recommend a thorough review of all your policies to ensure proper coverage and to understand where the gaps may lie.

EXPOSURE/COVERAGE: Professional Liability (E&O) including Consequential Damages

Professional Liability – this exclusion in your General Liability (GL) policy typically means that your insurance does not apply to claims arising out of the rendering or failure to render any professional service, as those exposures are expected to be insured under a separate E&O policy. ‘Professional services’ can be considered as any activity from which you derive income or any services that you provide to your customer base. So in a case of an explosive detonating before the goods have been inspected, there is potentially GL coverage, assuming the explosive was not purposely set as part of a terrorist threat or plot; but if that same explosive detonates after the CCSF inspected the goods and failed to detect it, there may not be coverage under a GL policy if it is determined that the incident should have been covered under an E&O policy. (Note that while E&O insurance provides coverage for property damage and consequential losses, it does not provide coverage for claims involving death or bodily injury.)

Consequential damages are financial losses suffered over and above freight costs, such as lost profits or the costs of delay. Examples of how this exposure could affect a CCSF:

- If your screening obtains a false positive and your customer’s goods are detained by a U.S. government agency. This prompts your customer to look to you for recovery of losses suffered as a result of its cargo being held and delayed.
- If your screening obtains a false positive that requires authorities to further examine your customer’s cargo, and in the process the cargo becomes damaged. Or, the consignee simply rejects the freight due to visible signs of package tampering due to the further examining which occurred.

Consequential Damages are another exposure that may be minimized using a properly designed ‘Terms and Conditions of Service’ contract. Properly designed E&O insurance is also important to protect CCSFs from this exposure. E&O insurance, as is the case with GL, does not automatically provide coverage for terrorist incidents. So again, purchasing TRIA coverage with your E&O policy is something to consider.

The SAFETY Act – Liability Exposure Assistance

While the Transportation Security Administration (TSA) is charged with directly overseeing the CCSP, the Department of Homeland Security (DHS) is encouraging cargo handlers to become CCSFs by offering a program to minimize their exposure. The DHS ‘Support Anti-Terrorism by Fostering Effective Technologies Act’ of 2002 (SAFETY Act) is essentially a program designed to cap the liability of developers and users of anti-terrorism technology.

Anti-terrorism technology developers and users who wish to participate in the SAFETY Act program in order to cap their limit of liability must secure the minimum levels of insurance required by DHS. The level of insurance required is currently being determined on a case-by-case basis until the program further develops.

In addition, DHS requires SAFETY Act program participants to purchase TRIA coverage as part of their general liability and umbrella policies. While most insurance companies are required to offer TRIA coverage at the time of purchasing a new or renewal policy, they are not obligated to offer the coverage mid-term if you declined the initial offer. Therefore, remember to consider your TRIA coverage option carefully at the inception or renewal of your policies.

Risk Management Planning for those Interested in Becoming a CCSF

If you’re considering becoming a CCSF, you will inevitably need to re-think exposures and examine your insurance coverage as part of your overall management and planning. While this task may seem confusing and overwhelming, working with an insurance provider current on these and other critical trade issues affecting your industry, can make a difference in your company’s long-term success.

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