

Enterprise Risk Management: Identifying and Mitigating Insurable Risks, Evaluating Likelihood of Business Insurance Claims

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In-House Counsel's Role in Insurance Management

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OVERVIEW

1. Focus upon insurance risk management
Not
Broader enterprise risk management
2. Focus upon the role of in-house counsel
 - As Doer
 - or
 - Supervisor of outside counsel

OVERVIEW (cont'd)

- Relationship between in-house counsel and risk manager
- Contracts with insurance brokers
- Obtaining and evaluating coverage
- Insurance policy interpretation
- Pursuing coverage claims
- Settlement of coverage claims
- Best practices checklist

Relationship Between Counsel and Risk Manager

- Clearly define roles
- Communicate
- Work collaboratively

Relationship With Insurance Brokers

- Range from informal to specific
 - Broker of record letters
 - Services contracts

Broker of Record Letters

- Authorize broker to shop for you
- Do not address
 - Any other duties
 - Broker's compensation

Broker of Record Letters (cont'd)

- Broker is merely an order taker
 - Must obtain what was requested
 - or
 - Report that it could not
- No duty to provide advice

Broker of Record Letters (cont'd)

- Broker will be paid commissions
- How much?
 - Wholesale broker commissions?
 - Contingent fees?

Comprehensive Broker Services Contracts

- Should include:
 - Scope of services
 - Order taker or advisor?
 - What advice?
 - What other services?

Comprehensive Broker Services Contracts (cont'd)

- Should include:
 - Fees to be paid by client
 - How commissions are to be treated
 - Credited to client
 - Kept by broker
 - Disclosure of all forms of compensation to broker

Insurance Policy Interpretation

General Principles:

- Reasonable expectations doctrine
- Contra proferentum
- Coverage grants construed broadly
- Exclusions interpreted narrowly

Insurance Policy Interpretation (cont'd)

- The importance of applicable law
 - Insurance policies are governed by state law
 - Interpretations of standard forms can vary significantly
 - Examples:
 - Coverage for subcontractor negligence
 - Enforcement of anticoncurrent causation clauses
 - “sudden and accidental”

Insurance Policy Interpretation (cont'd)

- Choice-of-laws tests vary
- Each court applies its own test

Obtaining Insurance

- Scope of coverage and exclusions
 - Do they correspond with the risk profile?
 - May require legal analysis

Obtaining Insurance (cont'd)

- Manuscript provisions
 - Require careful analysis
 - May not be interpreted in policyholder's favor

Obtaining Insurance (cont'd)

- Dispute Resolution Clauses
 - Arbitration?
 - Where?
 - Which Arbitration Rules?

Obtaining Insurance (cont'd)

- Choice-of-Laws
 - Which jurisdiction?
 - Significance?
 - Modifications to legal principles?

Obtaining Insurance (cont'd)

This Policy shall be governed by and construed in accordance with the internal laws of the State of New York; provided, however, that the provisions, exclusions and conditions of this Policy are to be construed in an even-handed fashion as between the Insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions. (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company and without reference to parol evidence).

The Pursuit of Coverage Claims

- Protection of sensitive information
- When counsel should communicate directly with insurers
- Roles of in-house and outside counsel

Claim Pursuit – Best Practices

- Identify all potential sources of coverage
 - Different lines of coverage
 - Different years of coverage
 - Other parties' coverage

Claim Pursuit – Best Practices (cont'd)

- Perform a coverage analysis
 - Include choice-of-laws considerations
 - Consider retaining outside counsel

Claim Pursuit – Best Practices

- Satisfy all conditions to coverage
 - Prompt notice
 - Cooperation
 - Consent to settle
 - Loss mitigation

Claim Pursuit – Best Practices (cont'd)

- Assemble the right team
 - Broker
 - Risk manager
 - Outside professionals

Claim Pursuit – Best Practices (cont'd)

- Develop a plan for moving the claim to prompt resolution
- Document everything

Claim Pursuit – Best Practices (cont'd)

- Dealing with reservations of rights
 - Incomplete coverage positions
 - Conflicts

Resolving Coverage Disputes

Bad faith claims

- Can be very powerful
- Examples

Resolving Coverage Disputes (cont'd)

Arbitration

- London and Bermuda arbitrations
 - Unique proceedings
 - Loser pays attorneys fees
 - Is the deck stacked against you?

Resolving Coverage Disputes (cont'd)

Settlements

- Releases and indemnifications
 - Address before the payment is agreed
 - Scope of release
 - Claim
 - Occurrence
 - Policy

Resolving Coverage Disputes (cont'd)

Settlements

- Scope of Indemnification
 - Parties
 - Claims

Resolving Coverage Disputes (cont'd)

Appraisal of property loss damages

- Procedure
- Limit of quantum, not coverage