Insurance Basics for Nonprofits and Associations

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Introduction

- Venable and its insurance group
- Insurance is largely governed by state law, so issues/law vary from state to state
- Policies and wording vary from year to year and from insurer to insurer
- New issues arise all the time (e.g., COVID)
- No legal advice provided today



Insurance 101

- Insurance: Protection against unexpected financial loss
 - An insurance policy is a contract that obligates the insurance carrier to pay for such unexpected loss of the insured, subject to the terms and conditions of the policy and up to the limits of the policy
- Insurance policies are either occurrence-based or claims-made
 - **Occurrence-Based**: Provides coverage if injury/bad action <u>occurred during the policy period</u>
 - Does not matter when the insured receives a demand from the third party, even years later (asbestos example)
 - **Claims-Made**: Provides coverage if <u>third-party demand (claim) is made during the policy</u>, <u>period even if the injury / bad action occurred prior thereto</u>



Insurance Coverage – The Basics...

Commercial General Liability

• Bodily injury / property damage to third parties

• Property

- Loss or damage to insured's real property or personal property
- Loss of business income due to covered hazard

Employment Practices Liability

• Claims for wrongful termination, harassment, etc.

• Auto

• Damage to insured's vehicles; liability to others arising out of use of covered vehicles



Insurance Coverage – Usually...

- Umbrella / Excess
 - Additional limits for certain coverages

• Directors and Officers Liability

• "Wrongful Acts" of company, directors, officers, and others

• Cyber

• Cyber attacks, ransomware, violation of privacy regulations, etc.

Event Cancellation

• Lost revenue / incurred expenses for event that is cancellated/curtailed

• Fiduciary Liability (if relevant)

• Wrongful acts in management/administration of benefit plans

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Insurance Coverage – Less Common...

Coverages that are more tailored to specific risk profile:

- Product Liability
- Environmental
- Professional Liability (E&O)
- Builder's Risk
- Crime



How Much Insurance Do I Need?

- This is largely a business question, but it could be addressed by contract
- For each policy, consider:
 - What does a worst-case scenario look like?
 - If defense costs erode limits, will the remaining limits be adequate for settlements/judgments?
 - How many insureds are covered under the policy?
 - Do I have other options to cover the loss (e.g., contractual indemnities), or is insurance my only protection?
- Your broker can likely provide a benchmarking analysis, which provides information on the types/limits of insurance that similarly situated organizations typically purchase





Broker or Lawyer

Role of the Broker

- Gather all available options for the client and clearly explain how they differ
 - Similar to buying a car there are many options (for example, different carriers, different pricing, different "bells and whistles," etc.)
- Providing notice to the insurance carrier

Role of the Lawyer

- Privileged communications
- Reviewing insurance policies/program for gaps/issues
- Coverage disputes
- Defense of underlying claims





When to Report to Insurer... Now!

- In general, insureds should notify their insurance carriers anytime they become aware of an event that **<u>could</u>** result in a covered claim
 - This will often "hold the spot" under the current insurance policy
- Many insureds are hesitant to report a claim or an event that may result in a claim
 - In general, there is often no material downside to reporting early and often
 - But there *is* typically a real downside if you wait too long or don't report at all
- Clients often worry about premium increases as a result of reporting
 - In general, premiums go up as a result of covered claims





Coverage Is Triggered – Now What?

Appointment of defense counsel

- If policy is "duty to defend," carrier generally has right to appoint defense counsel. If policy is "duty to reimburse," insured generally has right to select defense counsel (subject to carrier's approval of rates)
- Best to have your preferred defense counsel pre-approved by the carrier by endorsement

Settlement Decisions

- Insured must have <u>insurer consent</u> before making settlement offers / counteroffers
- Many jurisdictions require carrier to fund a reasonable settlement demand that is within policy limits in order to protect insured from the risks of litigation
 - Know your state's requirements and push the carrier accordingly



Common Insurance Issues

- Defense Costs Inside or Outside Limits
 - Best to have a policy where defense costs are <u>outside</u> (and therefore do not erode) available limits
- Exclusions
 - Always be aware of exclusions in each policy there are many!

Retroactive Date

- Applicable only to claims-made policies; acts as cutoff date for insured "wrongful acts"
- Best to have policy with no retroactive date or as far back as possible
- Who Is the Insured?
 - Best to be listed as Named Insured or at least <u>explicitly</u> listed as an Additional Insured



Using Contracts to Mitigate Risk



Alternate Risk Mitigation Tool: Contractual Indemnity

- You can require a contractual counterparty to provide protection in certain instances
 - Example: [Party A] shall defend (with counsel reasonably acceptable to [Party B]), indemnify, and hold harmless [Party B] and its successors, directors, officers, employees, subsidiaries, shareholders, parent and affiliated companies, from and against any and all claims, losses, liabilities, costs, expenses, obligations, attorney's fees, court costs, interest, fines, penalties, and damages of any kind arising out of or related in any way to [Party A's] services provided in connection with this agreement.
- Be ready: Counterparty may insist on making the indemnification provision mutual (i.e., both parties agree to indemnify each other)
- Pro: Counterparty may be more cooperative and fast-acting than insurance company and indemnity may be broader than insurance
- Con: Counterparty may not have funds to fulfill indemnity obligation or may refuse



Placing Insurance Requirements on Counterparty

- Consider requiring contractual counterparty to maintain certain insurance coverage during/after course of contractual relationship:
 - Minimum coverage types and limits
 - Additional insured status
 - Primary insurance
 - Insurance carrier rating
 - Waiver of subrogation
- Request copies of the actual policies, not just certificates of insurance
 - <u>Certificates are usually non-binding and may</u> <u>include mistakes</u>





Subrogation

- Subrogation is the ability of an insurer, standing in the shoes of the insured, to pursue others (non-insureds) to recover amounts paid under the insurance
 - It is provided for under applicable law and/or the insurance policy language
- If an insurance carrier waives these rights, that means the carrier cannot pursue others to recover the amounts incurred
- When requiring contractual counterparty to maintain insurance, such insurance should waive subrogation so the carrier can't seek contribution from you



How Can We Help?

- Advise regarding coverage needed to address client's risk profile
- Evaluate coverage for claims and potential claims
- Communicate with insurers
- Advocate for coverage (letter writing, mediation, arbitration, litigation, etc.)
- Drafting contractual provisions related to indemnity and insurance requirements
- Risk management advice
- Lost policies
- Other: captives, pools, third-party claims handler issues, etc.

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Questions?



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