Top Ten Things Inside Counsel Need to Know about Insurance:
Avoiding the Traps and Seizing the Opportunities

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The Top Ten “Need to Know”
1. Multiple Roles of Brokers
2. Insurance Contract Negotiation Challenges
3. The Curious World of Policy Documentation
4. Claims-Made/Occurrence Reported Traps
5. Policy Application Traps
6. Fielding Insurer Coverage Positions and Information Requests
7. Coordinating Underlying Defense and Preservation of Coverage
8. The Privilege Waiver Risks
9. Arbitration vs. Litigation: Why Insurers Like Arbitration
10. Insurance Assets in the Transactional Context

1. Multiple Roles of Brokers
Multiple Roles of Brokers

- Multiple Rules of Brokers
  - Agent of Policyholder
  - Agent of Insurer
- The Economics
  - Fixed Fee
  - Commissions
  - Contingent Commissions

Multiple Roles of Brokers (Cont’d)

- The Relationship Between Insurers and Brokers
  - Prior/Future Employment
  - Claims Counsel
  - Broker As Insurer
  - Broker As Reinsurance Broker
- Contracts With Brokers
  - Limitation of Liability
  - Cap on Damages
  - Sphere of Activities
  - Record-Keeping/Communication

Multiple Roles of Brokers (Cont’d)

- What to Watch Out For
  - Statements of Brokers Binding Policyholder
  - Negotiating Policy
  - Claims Handling
  - Communications Between Policyholder and Broker May or May not be Privileged
    - The Agency Issue
  - Do You Have/Have a Right to Receive Broker’s Communications With Insurers
Multiple Roles of Brokers (Cont’d)

• Other Take-Aways
  • Ensure Expertise is Brought to Bear
  • Clear Understanding of Broker’s Role (Not Authorized to Bind Policyholder, Absent Consent)

Insurance Contract Negotiation Challenges

• Insurance Contract Negotiations: Challenges and Opportunities
  • Focus on Policy Wording (not pricing)
  • Understanding What Can and Cannot Be Negotiated
    • Line of Coverage
    • Type of Policy Provision
    • Broker Input
Insurance Contract Negotiation Challenges (Cont’d)

- Risk of Negotiating History Impacting Coverage
  - Parol Evidence
  - Integration Clause
  - “Clarification” Versus Change
- Role of Inside Counsel
  - Understanding Legal Risks
  - Understanding What Is and Just As Importantly What Is Not Covered
  - Early Involvement
  - “Bad Cop”

3. The Curious World of Policy Documentation

- Applications for Insurance
  - Typically identify the essential terms
  - Often attached or incorporated into insurance policy
  - Potential Traps:
    - Inaccuracies and omissions
    - Basis for future misrepresentation claim by insurer

Common incorporation language:
This Policy has been issued by us in reliance upon the statements made by you or your authorized representative in the written Application for this Policy, and, if applicable, applications for prior Policies issued by us of which this is a continuous renewal, which Application(s) are attached to and form a part of this Policy.
Policy Documentation (continued)

- Binders and Cover Notes
  - Generally temporary
  - Potential Traps:
    - Frequently inaccurate
    - Boilerplate is ominous
    - Absence of opportunity for review
  - Opportunity: Manage the process
    - Broker attention and accountability
    - Establish draft review and approval process

Example of Boilerplate in Binder:
This is a temporary and conditional binder and is conditioned upon underwriter’s receipt of the additional information specified above. If any such information is not received, reviewed and accepted on or before date specified above, then this binder and any policy issued pursuant thereto will be automatically null and void ab initio and have no effect.

Policy Documentation (continued)

- Policies
  - Declarations
  - General Terms and Conditions
  - Endorsements
- Certificates of Insurance
  - Coverage extended to third parties
  - Potential Traps:
    - Not policies; coverage exists through policy terms (i.e., definition of Named Insured) or endorsement
    - May contain discrepancies

Sample ACORD Certificate:
THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFER NO RIGHTS UPON THE CERTIFICATE HOLDER. IMPORTANT: If the certificate holder is an Additional Insured, the policy(ies) must be endorsed.

Missing Policies: Secondary Evidence

- Evidentiary standard
  - Preponderance of the evidence vs. clear and convincing evidence
- Secondary evidence
  - Testimony of witnesses
  - Policy jackets
  - Declarations page or face sheet
  - Endorsements
  - Certificates of insurance provided to third parties
  - Correspondence relating to placement
  - References in subsequent policies
  - Excess policies that refer to underlying policies
  - Premium invoices and payments
  - Schedules of insurance
4. Claims-Made / Occurrence Reported Traps

Claims-Made/Occurrence Reported Traps

- The Triggering Event/What Has to Happen During the Policy Period?
  - Occurrence-Based
    - “Occurrence”
    - “Bodily Injury/Property Damage”
    - “Offense”
  - Claims-Made
    - Claim Made Against Policyholder
    - Claim Reported to Insurer
    - Claim Made and Reported to Insurer

Claims-Made/Occurrence Reported Traps (Cont’d)

- The Claims-Made Traps: Context
  - Notice Requirements
    - Occurrence-Based Policies
    - Claim-Made Policies
    - No Prejudice
    - Grace Periods
  - The Policy Application Questions
    - Reason to Know of Circumstances that Could Give Rise to a Claim
    - Consequences
Claims-Made/Occurrence Reported Traps (Cont'd)

- Is it a Claim?
- Impact on Subsequent Claims
- Are the Claims Interrelated?
- The Prior Notice Exclusion
- Notice of Circumstances -- Benefit/Risk
- Role of Inside Counsel
  - Involvement in Notice
    - Occurrence Versus Claims Made
  - End of Policy Period Claims Canvassing
  - Attention to Wording of Claims Communications

Policy Application Traps

- Rescission: One Scary View of the Law in Many States
  - Misleading or Incomplete Information Voids All Coverage For All Insureds
  - Low Materiality Threshold
  - No Scienter Requirement in Some States
  - Not Just Limited to D&O
- A More Positive Spin
  - Scienter in Pennsylvania
  - “Severability” Clauses
    - The Terms Vary A LOT, However

6. Policy Application Traps
Policy Application Traps (Cont’d)

- Role of Inside Counsel
  - Attention to Policy Application Answers
  - Efforts to Avoid Need to Answer Problematic Questions
  - Interplay With Claims Canvassing

6. Fielding Insurer Coverage Positions and Information Requests

Coverage Positions or Equivocation

- Coverage Position Letters
  - Description of claim
  - Review of key policy provisions
  - Statement of coverage position
    - Acknowledgement of coverage subject to reservation of rights
    - Denial of coverage on multiple grounds subject to reservation of rights
- Policyholder Response
- No Position Taken / Equivocation
  - Stated need for additional information
Information Requests

- Full extent of claim unknown
- Information necessary to evaluate coverage
- Requests for information
  - Numerous
  - Voluminous
  - Never-ending
- Policies often contain numerous provisions supporting an insurer’s desire for information

Potentially Relevant Policy Provisions

- Cooperation clause: “The Insured shall cooperate with the Company and, upon the Company’s request assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity . . . .”
- Defense and settlement provision: “The Insurer has the right to associate with any Insured in the defense and settlement of any Claim.”
- Information sharing provision: “Upon request of the Insurer, the Insured shall provide copies of all pleadings filed, summaries of all discovery undertaken, and shall give the Insurer such other information and cooperation as the Insurer may reasonably require.”
- Coverage determination provision: “We have the right to review all documentation necessary in order to reach an opinion as to the applicability of coverage under this Policy.”
Policyholder-Insurer Conflicts May Arise During the Defense of a Claim

- Duty to defend vs. duty to indemnify defense costs
- The implications of a broad duty to defend
  - The “four corners rule” of defense coverage
  - Covered and non-covered claims/counts
  - Damages in excess of coverage
  - Defense provided under reservation of rights

Standard Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit” that may result. But . . .

Defense Under Reservation of Rights

- Panel counsel
  - Potentially divided loyalties
- Right to independent counsel
  - “Cumis counsel”: Landmark 1984 California Court of Appeal decision establishing right to independent counsel when a conflict of interest arises
  - When does the right to independent counsel arise?
    - Jurisdictions are split over potential vs. actual conflicts
  - Must insured advise policyholder of right to independent counsel?
    - Jurisdictions are split

Control of Defense and Settlement of Underlying Claim

- Control of Defense
  - Insurer’s defense obligation supported by policyholder’s “cooperation” obligations
  - Insurer’s control of defense is checked by its obligation of good faith and fair dealing
- Control of settlement
  - Again, insurer’s authority to settle is checked by its obligation of good faith and fair dealing
  - Settlements that impair insured’s interests
  - Settlement by policyholder without insurer’s consent
8. The Privilege Waiver Risks

Attorney-Client Privilege

- Not just a litigation issue
- During claims handling and during discovery, insurer seeks to pierce the Insured’s attorney-client privilege to gain access to protected documents and communications
- Three common insurer arguments:
  - The “at issue” argument
  - The “cooperation clause” argument
  - The “common interest” argument

The “At Issue” Argument

- Argument: In making a claim for coverage, the insured placed “at issue” all documents and communications related to the underlying claim

Koppers Three-Part Test:
The exception applies where “(1) the assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) the ordinarily-privileged information is relevant to the case; and (3) the likelihood of chilling the type of ordinarily-privileged communication is outweighed by the unfairness to the seeking party if privilege is found.”
Cooperation Clause Argument

- **Argument:** The cooperation obligation imposed by most liability policies obligates the policyholder to share with the insurer all documents, including privileged documents, related to the underlying action.
  - **Potential Trap:** Breadth of cooperation clause and other policy provisions
  - Viewed as contractual waiver of any right to withhold privileged documents

“Common Interest” Argument

- **Argument:** The policyholder and the insurer share a “common interest” in the defense of the underlying claim such that communications between the policyholder and defense counsel are not privileged.
  - When insurer agrees to defend, the “common interest” doctrine protects the insurer and the policyholder in the joint defense of the claim.
  - When insurer rejects duty to defend, courts reach conflicting results whether the “common interest” doctrine applies.
  - Court’s inquiry should focus on expectation of confidentiality.

9. Arbitration vs. Litigation: Why Insurers Like Arbitration
The Benefits of Arbitration

- **Economy**
  - **Opportunity:** Typically less costly because of reduced discovery
  - Document discovery but limited written discovery
  - Typically no deposition discovery
  - Typically fewer discovery motions
  - **Trap:** The arbitration of contentious coverage disputes is not “inexpensive”
    - Document discovery still costly
    - Added expenses include the cost of the arbitrator(s), the cost of the hearing venue and higher transcription costs at the hearing(s)

- **Efficiency**
  - **Opportunity:** Typically resolved more quickly than courtroom proceedings
  - **Trap:** But not always . . .
    - Arbitrator and party schedules are often difficult to coordinate, resulting in delay
    - A complex dispute will still be subject to a phased schedule to allow for orderly document exchanges, motions practice, pre-hearing submissions, evidentiary hearing and post-hearing submissions

- **Avoidance of creation of precedent**
  - This is perceived as a significant benefit by insurers; less so by policyholders
  - Perception by insurers that courts have found coverage where none was intended
  - **Policy interpretation dependent upon:**
    - Language of policies (often ambiguous)
    - Extrinsic evidence
Typical Arbitration Provision (#1)

Dispute Resolution:
The arbitration tribunal shall unless the parties agree otherwise consist of persons (including those who have retired) with not less than ten years experience of international insurance or reinsurance business as persons engaged in such business or advising such business in a professional capacity.

The tribunal shall not be bound by the formal rules of evidence. The tribunal shall have power to fix all procedural rules relating to the conduct of the arbitration.

... The tribunal shall within sixty days of reaching its decision in the Arbitration issue to the parties its written and reasoned award. The award shall be final and binding on the parties who covenant to carry out the same.

... The seat of the arbitration shall be the city in which the Insured’s headquarters is located unless some other place is mutually agreed upon by the Company and the Insured.

Typical Arbitration Provision (#2)

Arbitration.

Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act of 1996 (“Act”) and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows:

... The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including without limitation discovery by the parties.

... The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing and shall cause a copy thereof to be served on all the parties thereto. ... Without limiting the foregoing, the parties waive any right to appeal to, and/or seek collateral review of the decision of the Board of Arbitration by, any court or other body to the fullest extent permitted by applicable law.

Arbitration Provision Traps and Opportunities

- Proscribed arbitrator credentials
- Arbitrator freedom to determine procedural rules
- Location of the “seat” of arbitration
- Choice of law
- “Reasoned” awards
- Finality
Insurance Assets in Transactional Context

- Stock Versus Asset Deals
  - Stock -- Generally Not An Issue
  - Asset Deals -- Potentially An Issue
- The Problem In Asset Deals
  - Anti-Assignment Clauses
  - Is The Buyer an Insured?
- Typical Goal
  - Match Up Insurance Assets With Losses/Liabilities

Insurance Assets in Transactional Context (Cont’d)

- Points To Consider
  - Distinction Between Proceeds/Policies
  - Universe of Insurance Policies
  - Rights To Control Communications/Litigation
  - Responsibility For Self-Insurance
  - Disputes Over Limits
  - Interplay With Go-Forward Program
  - Tail Coverage
### Contact Information:

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