

ACC NCR In-House Primer - Insurance 101: Understanding How Your Liability Insurance Policies Work and Practical Tips About How to Maximize Coverage

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Our Program

- 1. Understanding Your Company's Insurance Program**
- 2. Preserving and Assessing Coverage After A Claim is Made**
- 3. The Insurance Issues Relating to the Defense of A Claim**
- 4. Resolving Claims**



Understanding Your Company's Insurance Program

■ Your Insurance Program

Key Players

- Risk Manager & Broker
 - Insurance is a “relationship” business. Brokers can be very effective at keeping communication channels open and advocating for coverage
 - Depending on the facts and applicable law, policyholders may waive privilege by providing coverage counsel and/or defense counsel generated documents, communications, mental impressions, settlement documents, etc. to broker

TIP: Make sure your broker contact is “connected” with people in the claims department for the insurer you select

■ Your Insurance Program

Examples of Standard Policies

- Commercial General Liability (“CGL”)
- Errors and Omissions Liability (“E&O”)
- Directors and Officers Liability (“D&O”)
- Employment Practice Liability (“EPL”)
- Cyber
- Property
- Auto
- Crime Insurance
- Workers Compensation

■ CGL Insurance

- Coverages
 - Bodily Injury
 - Property Damage
 - Advertising Injury
 - Personal Injury
- Occurrence Based Policies
 - Possibility of more than one policy applying
 - Possibility of older policies applying
- Claims Made Policies
 - Related claims within one year

■ E&O Liability Insurance

- Professional negligence coverage
- Typically Claims Made
- Companies providing technology services may have combined technology E&O and cyber coverage

D&O Liability Insurance

- Claim made (and reported?) during policy period
- Wrongful Act
- Insured Entities and Individual Insureds
- Examples of covered D&O claims - mismanagement, fraud, breach of fiduciary duty, negligent supervision, and securities claims
 - But also potentially antitrust claims, FCPA claims, RICO claims, and costs in responding to subpoenas/warrants
- Common exclusions
 - Prior notice exclusions
 - Professional services exclusions
 - Personal conduct exclusions

TIP: Make sure you know who is covered. D&O policy may be written only to cover officers, which would be defined by your organization. But what about other senior employees who work might not meet the officer definition?

EPL Insurance

- Typically covers “Claims” for “Employment Wrongful Acts”
- Covered Claims Include:
 - Discrimination
 - Harassment
 - Wrongful Termination
- Coverage for Other Claims
 - Whistleblower Claims
 - Wage and Hour Claims
 - Violation of Employee Privacy
 - Gender Bias
 - Labor Code Violations
 - Third Party (non-employee claims)

TIP: Definitions of “Employee,” “Wrongful Employment Act” (or equivalent), “Loss,” and “Claim” are critical

Cyber Insurance

- First Party Coverage:
 - Breach Response Costs
 - Business Interruption
 - Data Restoration
 - Cyber Extortion/Ransomware
 - Cyber Crime
- Third Party Coverage:
 - Privacy and Network Security Liability
 - Payment Card Loss
 - Regulatory Fines and Penalties
 - Media Liability
 - Defense Costs

■ Property Insurance

- Property Damage (*i.e.*, direct physical loss or damage)
- Time Element Loss (*i.e.*, loss of revenue and added expenses due to business interruption)
- Examples – fires, floods, storms, catastrophe

Common Misconceptions About Insurance Policies

- There is no insurance coverage for intentional conduct
- Only one insurance policy can apply to a loss/claim
- Giving notice of a claim will increase your premium
- All insurance policies have the same terms
- Insurance law is the same state to state

Deconstructing the Policy

Elements of The Policy

- 1) Declarations Page
- 2) Coverage Grant
- 3) Exclusions
- 4) Definitions
- 5) Notice Provisions
- 6) Endorsements

TIP: Read the policies carefully and ensure that your organization's policies and procedures comport with actual policy requirements. If they do not, and there's a good reason for that, consider having the broker reach out to negotiate adjustments

■ Placement

- Understand your company's general philosophy and risk tolerance
- External factors outside your control may dictate pricing and return on investment
- Reading and deconstructing the policies will help you navigate conversations with business partners while still deferring to experts where appropriate
- Update approved vendors/counsel updated regularly

Preserving and Assessing Coverage After a Claim is Made

Practical Tips for Preserving and Maximizing Coverage

- Make sure you have systems in place to quickly identify all potentially applicable insurance policies in the event of a claim
- Provide notice under any insurance policy potentially impacted by the claim
- If allegations in an underlying complaint potentially fall within coverage, your insurer is obligated to defend
- Record, record, record – in the event of a potential loss, be sure to maintain data about the specifics of any monetary losses, loss of use, defense costs, etc. that may be recoverable. Consider establishing a separate cost center or having routine meetings with your accounting counterparts.

TIP: Ensure processes are in place for prompt notification of any potential claim. If Legal is responsible for noticing claims, ensure that the enterprise knows who to notify – earlier is better.

■ Notice

- Critical part of the claims process
- Reporting to multiple lines of insurance
- Reporting to excess insurers
- Reporting to insurance companies as an additional insured
- Issues presented by bordereau reporting

TIPS:

- Do not characterize the claim
- Follow the requirements of the policy
- Reference “and all other potentially applicable policies”
- Do not forget about additional insured coverage
- Be mindful of the prior notice exclusion

■ Assessing Coverage

- Consider the language of the policy
- Which state(s) law applies
- Consider statements in underwriting, marketing material, and regulatory filings
- Review the Insurer's conduct

■ Construing the Language in the Policy

- Rules of Construction
 - Broad duty to defend standard
 - Are there any allegations that potentially fall within the scope of coverage?
 - Insurers bear burden of proving exclusion
 - Ambiguities are construed in favor of coverage
- How are key terms used elsewhere in the policy?
- Are provisions inconsistent with each other?
- Does the insurer's construction make the coverage largely worthless or illusory?

The Language in the Policy – Phrases that Broaden and Narrow Coverage

- “arising out of”
- “caused by”
- “found to be”
- “final adjudication”

■ The Language Outside the Policy

- What language could the insurer have used?
- Is other language available that would have clearly excluded coverage?
- Is the scope of coverage broader than in other available policies?

[NOTE: Split of authority = ambiguity]

■ Determining the Applicable Law

- Insurance is state-law specific
- Application of a different state law could lead to a completely different result
- The selection of forum determines the choice of law

TIP: Reject Insurer's attempt to include law choice of law provisions or choice of forum

■ Insurer's Representations Regarding Coverage

- Underwriting Information
 - Did the underwriter make any representations regarding coverage prior to placement?
 - Did the policyholder pay additional premiums for specific types of coverage?
- Regulatory Filings – admissions in publicly-available filings regarding what is intended
- Marketing Materials – statements like those you are facing will be covered

■ The Insurer's Conduct Can Impact Coverage

- An insurer's failure to assert a defense in its reservation of rights may lead to a waiver of the un-asserted defense.
 - *See Central Armature Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283 (D.D.C. 1980); *Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley Inc.*, 32 F. Supp. 2d 14 (D.D.C. 1998)
- Breach of the Duty to Defend – an insurer that breaches its duty to defend may be precluded from challenging indemnity coverage
- Failure to file with Regulators – in some states, failure to file may render unfiled form void
 - *E.g., Bailey v. Fed. Ins. Co.*, 214 F. Supp. 3d 1228, 1238 (N.D. Ala. 2016)

Provide Information Your Insurer Needs To Resolve Your Claim Without Waiving Privilege

- Certain requests are reasonable
- Some requests are to satisfy reinsurers
- Watch out for requests designed to defeat coverage
- Some states have common interest protections

TIP: Don't get bullied by the insurer's overly broad assertions of the cooperation clause

The Insurance Issues Relating to Defense of Claims

Tension Created When Your Insurer Agrees to Defend Under a Reservation of Rights

- Acceptance: Insurer's complete acceptance of the defense of third-party claim
- ROR: Insurer's defense subject to a complete reservation of rights
- Stealth ROR: Insurer's defense of a third-party claim when insured is "under-insured"
- Denial

TIP: Know what entitles insured to independent counsel under the applicable law

Who Controls the Defense?

- When an insurer defends subject to a reservation of rights, the law in many jurisdictions requires the insurer to relinquish control of the defense
- Law varies by state
- A punitive damages claims may be the basis for independent counsel

TIP: Legal positions aside, establish common defense goals with insurer and try to get the insurer's support for settlement strategy

■ Defense Counsel/Litigation Guidelines

- Defense counsel's ethical obligations to you and your insurer
 - The ABA Standing Committee on Ethics and Professional Responsibility and state ethics committees have developed guidelines governing panel counsel's obligation to withdraw from representation of an insured, panel counsel's obligations to abide by "panel counsel guidelines," and panel's counsel's submission of work description and legal bills to insurers and third party auditors

TIP: Use ethical rules to avoid unreasonable guidelines; set parameters of what you will accept up front

Securing Your Preferred Defense Counsel At Full Hourly Rates

- Easier in certain lines of coverage (e.g., D&O)
- Use helpful comparison
 - the firms hired by the insurers to defend their interests
 - the counsel approved by insurers in other cases
- Highlight benefits to your counsel (deep experience with this particular claim; familiarity with insurer's policies and procedures; knowledge of insured's business)
- Have objective survey of rates in jurisdiction by the type of lawyer

TIP: Sounds basic/elementary, but be sure to keep your approved vendors/counsel updated regularly. If a key lawyer moves firms, or if the enterprise changes a key vendor, be proactive in reaching out to your broker to avoid issues down the line.

■ Settling Your Claim Before Trial

- Effective ways to pressure insurers to settle lawsuits before trial
 - Ongoing defense costs that likely will exceed settlement costs
 - Defense counsel's recommendation
 - Third-Party claimant's demand within limits
 - Fund settlement under reservation of rights to cap exposure
- Consent to settle provisions:
 - Some states strictly enforce
 - Hammer Clauses
 - Excess verdict exposure
 - Defense counsel may become key witness in bad faith failure to settle context

■ Resolving Claims Disputes

Children,
let's settle this
like adults.



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■ Mediating Insurance Disputes

- Consider whether the claim is “ripe” for mediation
 - **TIP: Use mandatory mediation provisions to your advantage**
- Learn who is going to attend and authority in advance
- Selection of mediator is critical
 - Clients should use a mediator who understands insurance but does not treat the insurers like a repeat client
- Articulate the full claim (e.g., prejudgment interest, attorneys’ fees)
- Frame concerns about insurer strategies with mediator in advance

■ Litigation Strategies

- Strategy calls:
 - Where to file
 - When to file
 - How much, if any, discovery to seek
 - Whether and how quickly to file dispositive motions
- The role of extrinsic evidence
 - Extrinsic evidence can help with the construction of ambiguous policy language
 - Extrinsic evidence can help determine whether ambiguity exists
 - Types of extrinsic evidence (drafting history, claims file, reserves, reinsurance communications, treatment of similar claims under the same policy language)

How Extrinsic Evidence Can Win Cases

- Issue: whether claims that seek tort damages for mismanagement in approving loans are covered? Insurer asserts carve out from “Loss” for “unrepaid loans” precludes coverage for negligence claim relating to approval for unpaid loans
- Extrinsic Evidence: Insurer’s Coverage Summary Handbook, lists examples of covered potential claims under policy:

3. A shareholder derivative action was brought against a bank’s board of directors alleging mismanagement. The suit alleged that the directors failed to properly supervise the financial institution’s loan officers. Loans outside the individual officers’ loan authority were funded and subsequently charged off. The shareholders sought to recover the value of the charged-off loans.

- Court found the language ambiguous based on, among other things, “coverage handbooks provided . . . that indicate that the value of charged-off loan losses are covered, not excluded.”
Progressive Cas. Ins. Co. v. F.D.I.C., 926 F. Supp. 2d 1337, 1340 (N.D. Ga. 2013)

Using the Threat of Bad Faith Claims Effectively

- Consider the extent and likelihood of insurer's liability for bad faith damages
 - What standard applies for establishing bad faith?
 - How bad are the bad faith facts?
 - Do you have an exposure in excess of limits claim?
 - Do you have other significant consequential damages?
- Merely threatening bad faith rarely promotes resolution
 - Threat of bad faith is motivating only if the insurer believes it faces exposure for more than covered loss
 - Bad faith claims can expand the scope of discovery in litigation

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