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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Why In-House Counsel Should Care About Business Insurance



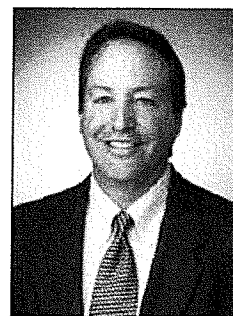
INSIGHTS

Law360, New York (October 20, 2015, 11:00 AM ET) -- In-house attorneys often are engaged in matters involving business insurance, including risk management, insuring real and personal property or negotiating deals where liability or other types of insurance are required by their organizations. In fact, risk management, contract management and the in-house legal function often blur and overlap in managing complex or emergency catastrophic insurance issues. The very notion of insurance is based on risk and probability. When a company purchases insurance, it is purchasing based on the risk that something negative may happen and insurance rates take into consideration the probability that it will happen. With automobile insurance, for example, not all drivers are created equal. Teenage or elderly drivers may statistically be involved in more traffic accidents and thus may be a higher risk in the insurance process and pay higher premiums. Businesses that operate on the Gulf Coast, for example, face increased risk of hurricanes and residual flooding and (hopefully) have added flood protection provisions or riders in their policies that businesses operating in the Midwest may not. Insurance companies ensure their profitability by being able to assess risk and probability of loss with some degree of precision.

Insurance, therefore, is one risk management strategy, along with:

- Avoidance — get out of that business
- Loss control — try to prevent the loss
- Noninsurance transfer — transfer the risk to someone else in a contract
- Retention — choosing to self-insure the risk

Because of the often overlapping role of in-house counsel in business risk management, attorneys should work within their companies to help develop an insurance program management strategy. This may be easier said than done in some smaller companies, which may lack separate functions to manage business insurance issues because of limited resources to devote a full-time attorney or attorneys to a noncore business function. In other cases, business insurance matters are outsourced for management. No matter how small the department, however, in-house counsel should not hide from the risk management process involved in managing insurance issues and should actively embrace the challenge as an opportunity to build an appropriate toolkit (excess liability chart, country of origin information checklist, etc.) and become a subject-matter expert on such issues. Knowing the basics of issues such as additional insured status, subrogation or primary/noncontributory language will broaden the knowledge of in-house counsel that can be leveraged as a competitive advantage (both personally and on behalf of clients).



Doug H. Deems



A. Peter Prinsen



Wendy E. Scaringe

In-house counsel often becomes engaged in the business insurance process through questions arising:

- in contract negotiations and deal making;
- in hiring subcontractors, suppliers and vendors;
- when performing services;
- when a dispute arises; and/or
- when the company is sued or is the subject of an investigation (Connecticut Commission on Human Rights and Opportunities, Occupational Safety and Health Administration whistleblower, etc.)

Third-Party vs. First-Party Insurance

In-house counsel and generally those in the executive suite of any business are well-familiar with the types of challenges that can come from third-party insurance matters, where the company is seeking protection from a claim brought by a third-party against the organization. Customers and clients, visitors to a specific business site that may involve hazards, the general public, shareholders and employees all are potential sources for lawsuits and insurance disputes.

Common third-party insurance policies include commercial general liability insurance, business automobile insurance, professional liability insurance and workers compensation insurance. The following are important considerations for in-house counsel in connection with third-party liability insurance policies:

1. *Prompt notice to the insurance company.* A delay in providing notice to an insurance company of a claim made against you may permit the insurance company to deny coverage for the claim, despite the fact that it is otherwise covered under the insurance policy.
2. *Occurrence versus claims-made policies.* Occurrence-based policies provide coverage for claims that occur within the policy period. In contrast, claims-made policies provide coverage for a claim when that claim is first made against the insured. This is irrespective of when the occurrence took place (except if it is prior to a "retroactive date," which is an agreed upon date in the policy that should be pushed as far back in time as possible). It is critically important to place umbrella and excess claims made insurance policies on notice at the time the claim is first made against you. Failure to do this may result in that umbrella or excess coverage being lost.
3. *Duty to defend or duty to indemnify.* A duty to defend policy may, in certain states, provide a broader obligation on the part of the insurance company to defend the insured than a duty to indemnify policy. That obligation may actually extend to parts of the claim that are not covered by the policy. Duty to indemnify policies, on the other hand, do not generally "pay on behalf of" the insured for counsel fees, but rather require the insured to pay and be reimbursed. On the other hand, a duty to indemnify policy may give the insured the opportunity to select their own counsel to defend them in claims made against them.

Other types of third-party coverages that in-house counsel may be asked to manage include:

- *Director and Officers Liability* — which covers wrongful acts of directors and officers as respective of their duties for company
- *Fiduciary Liability* — which covers the insured company and trustees' personal liability relative to wrongful acts related to the handling of the company's retirement plans and benefit plans
- *Employment Practices Liability* — which covers issues such as wrongful termination, discrimination or employee harassment

With first-party insurance, the company is seeking coverage protection from physical damage to a

company's property or property in a company's care, custody or control; loss of profits and continuing expenses resulting from a covered loss to the company or a key vendor/supplier; extra expenses; other key extensions (for example, claim preparation expense, accounts receivable, demolition/debris removal, etc.)

With first-party insurance, the role of in-counsel has often been limited to "after the event" assistance, including negotiating, settlement or another resolution; developing claim communications; and assessing initial scope of loss/resumption of operations. However, by getting involved in the initial coverage placement, in-house counsel have the opportunity to provide tremendous value in helping risk managers and the C-suite assess placement issues, breadth of coverage and key exclusions.

Some other major considerations for in-house counsel regarding first-party insurance include:

1. being aware of what the insurance covers ("all risk" or "named perils," for example)
2. limits of coverage to business vs. personal property
3. whether the policy covers loss of key intangible property, such as accounts receivable or electronic data
4. locality (is the property covered when moved to a new location, etc.)

When placing business interruption (BI) insurance, in-house counsel may have unique insight into key company vendors/suppliers (because they are the ones who often negotiate the vendor/supplier contracts) who should be considered for contingent business interruption. Also, the location of a company facility (Washington, D.C., etc., for example) may cause risk managers or in-house counsel to evaluate the scope of the policy's civil authority cover. Other key provisions include coverage for disruption to ingress/egress and interruption of utility service. Finally, serious consideration must be given to the appropriate waiting period, which must pass before an insured can begin recovering under its business interruption coverage. A 30-60 day waiting period may be appropriate for a publicly traded, multibillion oil and gas company, but it is hardly appropriate for a fledgling, technology-based company, which may be out of business if it cannot resume operations in seven days or less.

In-house counsel often have unique insight on the quasi-legal issues that regularly arise during insurance placement considerations/discussion. Some examples include:

- how does the policy/key states where the company operates treat issues of causation ("efficient proximate cause" vs. "anti-concurrent causation")?
- how might the policy treat a company's decision to upgrade damaged equipment?
- who pays the costs of a company's determination (potentially contractually required by a vendor/supplier, etc.) of what caused the loss?
- how does the BI coverage address post-event financial downturns?
- how does the BI coverage address contingent losses without property damage?
- how does the BI coverage address lost sales contracts due to inability to produce?

In the end, the most important roles for in-house counsel relative to the negotiation and placement of a company's coverage are: (1) articulating those risks the company has faced or has been made aware of and (2) ensuring those risks are properly addressed or at least considered during the placement process. In-house counsel is often very involved in a company's disaster recovery plan, but not as often involved in ensuring the company's insurance aligns (as much as possible) with the company's disaster recovery plan.

The In-House Expert

In most law departments, an in-house "insurance expert" will emerge. This attorney may simply interface with a separate insurance department function within the organization or he or she may have been assigned the duty of playing multiple roles within an organization that does not have a

separate insurance/risk management function. Often, the attorney tasked with insurance matters has limited resources and little formal training, but is considered the “go to” person for answering insurance issues, which can at first seem esoteric. The in-house expert will be expected to be familiar with more complex terms and processes including:

- Indemnification/Hold Harmless Agreements
- Broad Form vs. Intermediate Indemnification
- Limited Form Indemnification
- Anti-Indemnity Statutes
- General Liability Additional Insured Endorsements — Another Variation
- Old ISO Endorsements
- 07/04 Endorsements
- Manuscript Version
- New Option

Becoming an in-house insurance expert is a challenging, but not insurmountable task. As with general in-house practice, the foundation is to understand the needs of the organization. How are contracts structured? How is risk allocated? Are risks covered by an insurance product? If so, has the organization purchased a sufficient coverage amount? Is the organization’s disaster recovery plan backstopped by insurance?

Other tips for becoming an in-house insurance expert are:

- 1) *Build a partnership with your in-house risk manager.* If you do not have an in-house risk manager, foster a relationship with your insurance broker. Insurance brokers can offer value-added services and advice on coverage options. They often provide training (or will arrange it with the carrier) on topics such as certificate of insurance review and compliance to the details of contractual risk transfer. Your broker is your subject-matter expert.
- 2) *Obtain copies of your company’s insurance policies and read them and all exclusions to those policies.* Where there is insurance terminology used, ask for guidance from your risk manager or insurance broker, or do some research online at reputable websites such as IRMI.com.
- 3) *Train yourself to look for opportunities to mitigate risk through insurance products.* As in-house counsel, you are already constantly surveying your organization’s operations looking for risks. There are new options developed by insurance carriers all the time. You may learn that there is an option that allows your organization to take risk that it would not normally take because such risk can be quantified (the cost of premiums and deductibles, for example).

Becoming an in-house insurance expert can be an opportunity to develop your business acumen and add to your organization’s bottom line.

—By Doug H. Deems, The Claro Group LLC, A. Peter Prinsen, The Graham Company and Wendy E. Scaringe, Gemma Power Systems LLC

Doug Deems is general counsel and managing director at the Claro Group.

A. Peter Prinsen is vice president and general counsel at The Graham Company.

Wendy Scaringe is counsel at Gemma Power Systems.

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