

Proven Strategies For Effective Risk Transfer and Maximizing Insurance Recovery

Darin J. McMullen, Attorney, Anderson Kill & Olick

As corporations deal with continuing financial challenges and budget pressures, maximizing insurance coverage and effectively transferring risk have never been more critical. Each of these goals requires an approach that embraces far more than simply buying and renewing the right policies or relying upon form indemnification language. Successful risk transfer necessitates careful and comprehensive analysis and strategy well prior to the occurrence of a loss or claim. The difference between an insurance claim being paid or denied may hinge on adherence to key principles. Following these proven strategies will vastly increase the odds that your company maximizes insurance recovery and effectively transfers risk.

1. Keep The Ultimate Goals In Focus.

The most fundamental, yet often overlooked, concept in insurance is simple — a policyholder buys insurance in order to transfer risk before a loss occurs. Similarly, the goal of contractual indemnification provisions is to transfer risk from one party to another. Policyholders should give careful consideration to evaluating risks, reducing risk, and determining their specific tolerance for risk prior to purchasing insurance policies or entering into indemnification agreements with business partners. The requisite considerations are fluid and vary with a challenging and evolving business climate. Accordingly, your insurance program and methods of contractually transferring risk should be assessed and reevaluated periodically in order to meet the demands of dynamic market conditions.

2. A Team Game. The identification of risks, the purchase of insurance and the proper and effective handling of insurance claims should be conducted through an inclusive organization-wide process. By utilizing a pre-defined team of individuals, your organization can minimize the possibility that a risk is not identified or that some aspect of an insurance claim is overlooked. It is especially critical to assemble your team before a loss occurs so that

critical time is not lost to determination of who will handle specific aspects of the claim process. This pre-emptive approach to assembling your insurance team applies both to your own employees and to external personnel who will be involved in the process, such as claims adjusters, accountants, experts and coverage counsel.

3. Insurance is a Key Asset. Treat it Like One. Insurance policies should be thought of as critical assets and treated as the equivalent of cash. Insurance serves as a significant defense against unanticipated liability, as certain types of claims, including environmental liability claims, may not reveal themselves until decades after the damage occurs. As a result, policies that were purchased decades ago may prove to be the most valuable assets in your insurance portfolio. In our digital age, we recommend scanning and properly securing a digital image of all policies so that you can readily access these assets when coverage is sought years after the policy was purchased.

4. Utilize A Structured Contract Review Process. Corporations should avoid the trap of simply using indemnification language that was used in previous contracts and agreements. Indemnification agreements are not “one size fits all” and language that may have worked perfectly for Business Relationship A may be wrong for Business Relationship B. Accordingly, your organization should analyze and review proposed indemnification language prior to every transaction. Particular attention should be paid to issues such as choice of law, which can greatly impact the enforceability of indemnification provisions, as well as insurance requirements.

5. Pay Attention to Certificates of Insurance. The activities of outside contractors and vendors often generate claims against those who hire them, including the types of frivolous lawsuits which increase in difficult economic times. As such, all contracts with outside vendors should, at a minimum, require that your organiza-

tion be listed as an additional insured, and all vendors should be required to provide proof of compliance with the contractual requirements. It is important to recognize that not all additional insured endorsements are the same. When drafting insurance contractual requirement provisions, give specific attention to the form of the additional insured endorsement required. Corporations should make sure that there are procedures in place to receive and store the evidence of insurance received from contractors.

6. Think ‘Insurance’ After a Loss. Whether you’re confronted by receipt of a lawsuit, a demand letter, an interruption of services, or financial loss (property damage, theft, etc.), your first question should be whether the loss is covered by insurance. At a time when corporate budgets are being slashed, insurance is an invaluable resource. The analysis of available insurance should not end with the organization’s own policies, but must also consider the insurance and indemnification obligation of any third-party, such as contractors. If your organization is listed as an additional insured, the contractor’s policy should function as if it were written for your benefit, if possible including a defense obligation.

7. Give Timely Notice of a Claim or Loss. Timely notice is a requirement under most insurance policies. All too often, policyholders get caught up in defending a lawsuit or responding to an economic loss and forget to inform their insurance company. Do not wait to give notice and give your insurance company an opening to disclaim coverage based upon late notice. Note, too, that receiving formal notice of a suit is not the only event that should prompt you to give notice to your insurance company. We recommend, too, that you yourselves send notice directly to the insurance company. If a broker/agent is utilized, make sure the broker copies you on the notice to the insurance company.

continued on page 7

continued from page 6

8. Give Notice Under all Potentially Applicable Insurance Policies. When a claim comes in, coverage may potentially exist under multiple insurance policies, such as General Liability Policies, Directors and Officers Policies, and Employment Practices Liability Policies, and span multiple policy years. This is often the case where a suit includes multiple counts and the individual counts may trigger different policies.

9. Don't Take No for an Answer. Denial letters should not be automatically accepted as the final word on a claim. Such letters should be analyzed and, where appropriate, challenged. Every year sophisticated policyholders walk away from millions of dollars in insurance coverage by passively accepting insurance companies' wrongful or erroneous denials. A policyholder's determination and persistence is often the difference between having a claim paid and paying for losses out of pocket.

Darin J. McMullen is an attorney in the Philadelphia office of Anderson Kill & Olick. His policyholder-only practice spans many areas of insurance recovery and he has represented many corporate policyholders in litigation throughout the United States. He also has a broad commercial and employment litigation background as well as providing clients with employment advice. He can be reached at dmcullen@andersonkill.com or 267.216.2708.