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IN-HOUSE OPS

What Counsel Must Do to Maximize Insurance Coverage

Insurance policies are complex contracts that require counsel's oversight. Job 1 is to demarcate the broker's role

By Finley T. Harckham / Anderson Kill

Insurance policies are complex contracts, often riddled with pitfalls for the policyholder. The pursuit of a claim in the wake of a loss is equally fraught. Yet all too many companies entrust their assets and their very survival to insurance policies that are vetted by neither in-house counsel nor a broker with the mandate or the know-how to ensure the coverage grant and policy terms are well-matched to the company's risks. Similarly, companies too often fail to avail themselves of the expertise required to expedite and maximize a claim.

For an attorney unfamiliar with the nuances of insurance policies and the claims process, a broker can provide invaluable support – *if* the broker is explicitly tasked with helping the company assess its coverage needs and analyze policies purporting to provide it. Not all brokers are equipped to perform these tasks, and not all policyholders want them to. Counsel's first task, then, is to determine what kind of broker support is needed and to make sure that the appropriate broker is bound by contract to provide it. A written agreement that addresses the scope of services provided is essential.

To determine that scope, counsel needs a full grasp of the core tasks in which the broker may (or may not) be called upon to assist (for an outline of those tasks, see Insurance Due Diligence below).

Finley T. Harckham
Shareholder in the New York office of Anderson Kill.
fharckham@andersonkill.com

Spell Out the Broker's Role

Misunderstanding about what exactly is expected of a broker is far more likely in the absence of a written contract. The contract should not only identify the lines of coverage the broker is authorized to procure, but also clearly indicate whether the broker is expected to provide advice and expertise to assist the client in their selection of insurance or handling of claims, and to provide other services, as opposed to simply serving in the role of an order taker who shops for what the client has asked for

Such clarity is important not only so the parties to the contract have a clear understanding of their roles but also to indicate where responsibility lies if the insurance that is obtained or the broker services provided turn out to not meet the client's needs. In many jurisdictions, there is a legal presumption that a broker is merely an order taker who owes no duty to the client beyond procuring the insurance coverage that was requested or reporting an inability to do so. Further, a burden is often placed upon the client to read and understand the policies that have been obtained for them, even if the client has no expertise in insurance. These presumptions have resulted in many clients, who believed they were entitled to rely upon the expertise and advice of the broker, finding that they have no legal recourse when their coverage turns out to not be what they expected.

> ***All too often companies fail to avail themselves of the expertise required to expedite and maximize a claim.***

That predicament can often be avoided by entering into a written contract with the broker that establishes the type of special relationship some courts find necessary in order to impose liability upon a broker for obtaining inadequate or unsuitable insurance. The agreement should specify that the client is relying upon the advice and expertise of the broker and that the broker's agreement to assume that role is a material consideration in being retained. The broker may require

a fee in order to assume the role of advisor, and if so, the client must decide whether it is worth the cost.

Insurance Due Diligence

While a broker can provide vital assistance in the purchase of insurance and pursuit of claims, it's ultimately up to in-house counsel to vet insurance contracts and to hold insurance companies to their responsibilities at claim time. That entails executing the tasks outlined below, with or without close assistance from a broker.

Before coverage is bound: Counsel should analyze the contracts being offered with the company's major liability and loss exposures in mind. Insurance policies for businesses are typically complex, lengthy contracts written in arcane language, with many exclusions that take away with the left hand much of the coverage seemingly proffered with the right. Many of the key provisions found in standard form policies have been interpreted by the courts and are best understood in light of that case law.

Most policies consist largely of standard forms, many of which remain unchanged from year to year. The broker can be asked to identify all changes in coverage. Moreover, excess policies often "follow form" to primary policies. So reviewing higher-layer policies in a tower of insurance is typically far less involved than gaining an understanding of primary policies. Care must be taken, however, to ensure that excess policies do not have less advantageous terms, if possible, and that if they do, any policies at higher levels do not follow form to them.

Choice of law and arbitration: Many commercial insurance policies contain problematic choice-of-law provisions. The insurance companies' favorite choice is New York law, which is worse for policyholders than the laws of most other states in certain respects. For example, under New York law, in most instances there is no cause of action available to corporations for an insurance company's bad faith.

Many insurance policies contain mandatory arbitration clauses. Counsel should carefully weigh the advantages and disadvantages of litigation versus arbitration and review the specifics of any arbitration provision in policies under consideration.

Policyholders receive at least two potential benefits from resolving their coverage disputes through litigation instead of arbitration. First, all courts in the U.S. apply rules of insurance policy interpretation that are favorable in some respects to policyholders as the party that did not draft the contract. Most notably, insurance policy coverage granting provisions are to be construed broadly while exclusions are to be viewed narrowly, and ambiguities are to be resolved in favor of coverage. These rules are applied in some arbitrations, but their use is specifically prohibited under certain arbitration clauses, and in general, arbitrators are granted broad latitude under the law to depart from a strict application of legal precedent.

Manuscript provisions: Many insurance policies contain both standard forms and "manuscript provisions" drafted for a particular policyholder. Counsel should be involved in the negotiation of manuscript provisions for two reasons. First, such provisions must clearly reflect the agreement of the parties, since if a dispute arises over their meaning, the policyholder may not be entitled to application of the reasonable expectations doctrine, which holds that the insurance company provides the contract wording and must be held accountable for any ambiguity. Second, the participation of counsel in the company's evaluation and drafting of such provisions might provide attorney-client privilege or attorney work product protection against disclosure of internal communications in a coverage action over the meaning of a manuscript provision.

Review applications: Counsel's role is also vital in the insurance application process. It is important to ensure complete disclosure in insurance applications because material omissions can result in rescission of the insurance policy. Applications for insurance policies typically require disclosure of known claims, losses and risk exposures. Often, in-house counsel are particularly knowledgeable about those items and may be able to identify omissions in the disclosures prepared by risk management.

Evaluate coverage: Large and complex insurance claims almost inevitably involve issues of contract interpretation and other matters for which the policyholder requires legal expertise.

A coverage opinion from counsel should be obtained whenever an insurance company asserts, or it appears from the policy, that coverage may not be provided for an important claim. The application of insurance policy provisions to a particular claim is often unclear, and the meanings of numerous standard form clauses have been interpreted differently by the courts of different states. Therefore, determining which state's law applies and researching applicable case law can be important to a coverage analysis. Moreover, whether an exclusion applies to a claim may depend upon a determination of the proximate cause of a loss, injury or damage – legal issues best addressed by counsel.

While brokers often have a productive role to play in the handling of the claim, they generally are not trained in insurance policy interpretation. They may be able to tell counsel how the insurance company typically handles the type of claim in question – but not how it *should* be handled.

The assistance of counsel is often needed to obtain a clear understanding of the insurance company's coverage position because so-called reservation of rights letters often provide no meaningful information. Those letters typically lack any meaningful statement of facts relating to the claim and simply quote various insurance policy provisions as providing possible grounds for a denial, without explaining why they may be applicable. They also typically conclude with a blanket statement that the insurance company reserves all of its rights to deny coverage on any ground whatsoever. This type of letter is a self-serving effort to satisfy the insurance company's obligation to promptly articulate the grounds upon which coverage may be denied, but it is deliberately vague in order not to limit its options. Policyholders need a clear and specific statement of any possible grounds for denial so they can provide additional information and assess their coverage. Counsel are often best equipped to demand meaningful coverage positions from insurance companies.

In conclusion, in-house counsel can help ensure that the insurance coverage purchased meets the company's needs and that the protection paid for is not lost in the pursuit of a recovery. Brokers can provide vital assistance in fulfillment of these responsibilities, but their expertise is complementary to, not a substitute for, legal analysis and judgment.