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Always on Your Mind: Why Insurance Should Be an Integral Part of a Company's Loss Prevention Strategy

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Over the past several years, businesses of all sizes have seen a proliferation of risks to their bottom lines, both from potential direct losses such as property damage and business interruption, and from potential third-party claims. These include natural disasters that are increasing both in frequency and severity; expanding cybersecurity threats; increased government regulations and investigations; and trends toward more wage and hour lawsuits and consumer class actions against companies.

In addressing these increasing risks, businesses understandably tend to focus on loss prevention and on engaging counsel and consultants to defend them and to minimize the amount of money that they need to pay out for claims or other losses.

In addition, however, a business's insurance coverage program can be a critical corporate asset in helping to protect profitability when substantial losses occur. As a Florida newspaper noted a few years ago concerning insurance coverage issues over defective Chinese drywall, "It may not be the sexiest of topics, but the intricacies of insurance policies may prove to be paramount in deciding who winds up footing the bill."

And insurance considerations go well beyond the actual recovery of insurance proceeds after a loss. These considerations start much earlier, before a loss even occurs. Some key examples include: (1) planning against risks by ensuring that a business has the right insurance policies and provisions in place; (2) navigating the interplay between the defense of third-party claims and insurance considerations, such as the selection, control, and payment of defense counsel; and (3) structuring corporate transaction documents to ensure that insurance assets are treated in the manner that the parties intended.

Disputes involving insurance coverage often turn on the interpretation of the precise language used in a policy. A single sentence or phrase can make the difference between an insured's ability to recover from its insurer or being forced to foot the bill alone. For instance, during the aftermath of the terrorist attacks on 9/11, U.S. Airways and United Airlines both made business interruption insurance claims based on the closure of Ronald Reagan National Airport, and both airlines separately litigated their coverage rights with their insurers based on disputes over a particular provision of the airlines' respective policies. U.S. Airways won its lawsuit, while United lost, based simply on a nuanced difference between the wording of the provisions at issue in the two policies.

Although insurance considerations may seem separate from the defense of an underlying claim, they are often closely related. Even when an insurer agrees to provide coverage during the pendency of an underlying lawsuit, most insurers will also reserve their rights to later deny coverage. Thus, a business's interests and its insurer's interests are generally not identical.

There are several ways in which defense considerations and insurance considerations overlap. For example:

- There will be a need to determine when and how a business should give notice of a claim, or potential claim, to prevent the loss of insurance rights based on a mere technicality;
- There may be issues regarding whether the policyholder or the insurer gets to select defense counsel, and who gets to direct defense strategy;
- There may be issues regarding the insurer's payment of defense counsel's fees, such as insurer efforts to impose billing guidelines that might not be appropriate given the nature of the underlying claims;
- There often will be a need to provide insurers with information about the claims and the defense effort, yet this must be done in a way that does not waive privilege as to third parties, particularly underlying claimants;
- There may be a need to communicate with the business's insurance brokers, but this likewise must be done carefully, with privilege considerations in mind; and
- If and when an opportunity to settle an underlying claim arises, a business should handle that opportunity in a way that puts the business in the best possible position to secure insurance coverage for any ultimate settlement.

Experienced coverage counsel can coordinate with a business's defense counsel to navigate these waters, e.g., by negotiating non-waiver agreements with insurers to protect privileged defense information, and by coordinating communications with brokers. The earlier a business involves coverage counsel in the defense of underlying claims, the easier it will be for the company and its counsel to coordinate these overlapping issues.

Another example: Over time, many companies find value in changing their corporate structure, including selling off business units. However, unless a business is careful in wording its corporate transactions, the insurance assets of the selling entity may not get treated in the manner intended. Courts may or may not, for example, find that insurance follows liability by operation of law, so if the intention is to transfer not only certain liabilities of the business unit, but also certain of the selling entity's insurance assets to cover those liabilities, that intention has to be communicated in particular ways in the transactional documents, based on applicable case law. Again, the details are crucial, and insurance coverage counsel can advise a business on key language to include in corporate transactions to ensure that insurance rights are transferred during the corporate restructuring.

Given the overlap between insurance considerations and the defense of claims and other loss prevention efforts, insurance should be considered at the same early stages as those other efforts. Deferring insurance issues to a later point can have unintended and significant adverse consequences.

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