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Are You Covered?

Understanding Vendor Endorsements and Harmonizing Risk Transfer Arrangements

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Program Overview

1. How to Transfer Risk and Obtain Additional Insured Coverage?
 - Via Indemnity and Insurance Provisions in Commercial Agreements
 - Via Vendor Endorsements and Additional Insured Provisions in Insurance Policies
2. What is a Vendor Endorsement and What Type of Coverage Is Available?
3. Key Exclusions and Issues that May Arise
4. Establishing Loss Control and Claims Submission Strategies

Mitigating Risk Through Risk Transfer

- Shifting responsibility for loss or damage from one party to another for loss/damage/claims arising from activities defined by contract between the parties
- Does NOT absolve you of liability
- Gives you a pocket from which to pay
- Only as good as the person making the promise – which is why insurance should be required

Harmonizing Risk Transfer Through Commercial Agreements and Insurance Policies

- Commercial Agreements
 - Indemnification Agreements
 - Hold Harmless/Defense Provisions
 - Insurance Requirements
- Insurance Policies
 - Vendor Endorsements and Additional Policy Provisions

Harmonizing Indemnity Provisions with Insurance

- Commercial Agreement should include Indemnity agreements to identify who is responsible to pay for defense and loss if liability arises pursuant to parties' contractual relationship
- Commercial Agreement should include insurance provision to identify who must maintain insurance (i.e. Indemnitor)
- Commercial Agreement should identify which party must add the other as an Additional Insured via Vendor Endorsement
- Indemnitor's insurance should be made available as primary insurance to pay for defense and loss incurred by indemnitee (and Indemnitor)
- Requiring Additional Insured Coverage increases chances Indemnitor is able to meet indemnification obligation to pay for Indemnitee's defense and loss
- Shifts payment obligation to Indemnitor's insurer (and Indemnitor)

Contractual Insurance Requirements

Indemnitee (Company B) should require in parties' agreement that Indemnitor (Company A):

- Maintain insurance to cover any loss arising under the agreement (including types, limits, layers)
 - Add Indemnitee as an “Additional Insured” to pay for its defense and any loss arising from a claim under the parties' agreement
 - “Additional Insured” status should be required on as many types/layers of cover deemed relevant to risks in contract
 - Insurance required should be relevant and proportionate to risks inherent in contract
 - Failure to maintain required insurance may give rise to claim for breach of contract

Insurance Requirements – What to Ask For?

- Indemnitor must add Indemnitee as “Additional Insured” under specific type of insurance, and specify limits and time period
- Insurance provided by Indemnitor is primary insurance
- Insurer must agree to Waiver of Subrogation including claims against Indemnitee
- Indemnity must confirm insurance by providing:
 - Certificate of Insurance (aka “proof” of insurance)
 - Copies of applicable insurance policies

Vendor Endorsement: What is It?

- A vendor endorsement extends insurance coverage under a CGL policy to a business/vendor where, by contract, the policyholder is required to provide coverage to the vendor for alleged and actual liability arising from the policyholder's work or services performed under the contract.
- Includes defense and indemnity.

Vendor Endorsement: What is It?

- Vendor Endorsement Extends Coverage to Additional Insureds As Required by Contract With the Policyholder
- It amends “Who Is An Insured” section of policy
 - Example: “Who Is An Insured is amended to include as an ***additional insured*** any person or organization whom you are required to add as an additional insured on this policy under a written contract or written agreement. Such person or organization is an additional insured only with respect to liability for ‘***bodily injury***’, ‘***property damage***’ or ‘***personal and advertising injury***....”

Vendor Endorsement: What is It?

- Extends only where alleged liability caused, in whole or in part, by:
 1. Policyholder's acts or omissions; or
 2. Acts or omissions of those acting on Policyholder's behalf
- Acts giving rise to alleged liability must be tied to performance under the contract
- Coverage for "Additional Insured" is no broader than what is required by contract

Duties of “Additional Insured” and Conditions

- Duties
 - Provide Notice “As Soon As Practicable” of an “Occurrence”
 - Provide Notice “As Soon As Practicable” of a claim or “Suit”
- Conditions
 - Additional Insurance coverage is primary provided specified in contract
 - Typically Limits of Insurance available to “Additional Insured” are the lessor of: (a) those in contract; or (b) limits under Policy.

The Limits of “Additional Insured” Coverage

- Some policies limit “additional insured” coverage to the minimum amount of coverage required by contractual insurance requirements.
- Some policies limit “additional insured” coverage to the scope of indemnity provided by the contractual insurance requirements.
- Some policies do neither, which poses possible problems and complications for the party extending its coverage to “additional insureds.” (Example: BP vs. Transocean)

“Additional Insured” or “Named Insured”

- A party may ask to be specifically added by name directly into another’s policy via endorsement specifically naming Indemnatee as an “additional insured.”
- This results in broader coverage for that party than provided by the vendor’s endorsement because it makes the party an “insured” for all coverage provided by the policy, not just the narrow vendors’ coverage.
- Even though “named” in the policy, the party does not become a “named insured” unless the policy so states.

Types of Coverage Extended

- Types of Coverage Extended Through Vendors
Endorsement in a Commercial General Liability Policy
 - We will pay those sums that the insured becomes legally obligated to pay as damages because of [Coverage A for “Property Damage” or “Bodily Injury”] or [**Coverage B for “personal and advertising injury”**] to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for [Coverage A or B] to which this insurance does not apply.

Coverage A (CGL)

- “Property Damage”
 - Physical injury to tangible property, including all resulting loss of use...
 - Loss of use of tangible property that is not physically injured...
- “Bodily Injury”
 - Bodily injury, sickness or disease sustained by a person including death...

Coverage B (CGL)

- “Personal and Advertising Injury” means “injury, including consequential ‘bodily injury,’ arising out of...:
 - a) False arrest, detention or imprisonment;
 - b) Malicious prosecution;
 - c) The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d) Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
 - e) Oral or written publication, in any manner, of material that violates a person’s right of privacy;
 - f) The use of another’s advertising idea in your ‘advertisement’; or
 - g) Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’

Scope of “Personal and Ad Injury Coverage”

- Alleged Liability Must Arguably Fall Within 1 of the 7 Listed Offenses (a-g). Unlike Coverage A, it is the offense alleged in the “Suit”, not the injury allegedly suffered, that triggers coverage.
- The insurance company must defend any “suit” seeking “damages.”

“Suit” is defined as:

a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. “Suit” includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Scope of “Personal and Ad Injury Coverage”

- “Personal Injury” Coverage equated with offenses “a-e”.
 - Offense/Wrongful Conduct Must:
 - Arise out of Your Business
 - Occur during the policy period and Occur in Coverage Territory
 - **Cannot** occur in the course of advertising
 - “Suit” typically must state enumerated offenses as cause of action such as “malicious prosecution” but not wrongful litigation conduct
 - Defamation/Disparagement (Offense “d”) and Violation of Privacy (offense “e”) only covered if arising from a “publication”
 - Tria Beauty, Inc. v. National Fire Ins. Co. of Hartford, 2013 WL 2181649 (N.D. Cal. May 20, 2013)
 - Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am., 761 F. Supp. 2d 904 (N.D. Cal. 2011), affirmed by 2012 WL 5385598 (9th Cir. Nov. 5, 2012)

Scope of “Personal and Ad Injury Coverage”

- “Advertising Injury” Coverage equated with offenses “f-g”.
- Offense/Wrongful Conduct must:
 - Arise out of your “Advertisement”
 - Occur during the policy period and Occur in Coverage Territory
- “Advertisement” means “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters....”
 - Includes ads on the internet, web sites, and similar electronic means
 - Must be a causal connection between injury and advertisement
 - Single solicitation of customer may be sufficient (states vary)
 - Must relate to insured’s goods, products or services

Scope of “Personal and Ad Injury Coverage”

- Types of “Advertising Injury” Claims Typically Covered:
 - Defamation or Disparagement/false or misleading statements regarding competitor or its goods in an Advertisement
 - Misappropriation/Passing Off arising from an Advertisement (states vary)
 - Copyright Infringement, Including Trade Dress or Trademark Title or Slogans if in an Advertisement (exception to an exclusion)
- No coverage if offense “intentional” – often applies to IP based torts
- Patent Infringement typically Not covered because no “Advertisement” and specifically excluded.

Key Exclusions Applicable to Coverage B

- Infringement Of Copyright, Patent, Trademark Or Trade Secret
 - Insurance does not apply to “Personal and advertising injury arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.”
 - 1st Exception: Exclusion does not apply to “the use of another’s advertising idea in your ‘advertisement’.”
 - 2nd Exception: Exclusion does not apply to “infringement, in your ‘advertisement’, of copyright, trade dress or slogan.”

Key Exclusions Applicable to Coverage B

- Material Published Prior to the Policy Period
 - Insurance does not apply to “Personal and advertising injury arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.”
 - Taco Bell Corp. v. Continental Cas. Co., 388 F.3d 1069, 1074 (7th Cir. 2004).
 - The complaint included allegations of misappropriation of additional “subordinate ideas” as separate torts which actually occurred during the Zurich policy period.

Key Exclusions Applicable to Coverage B

- Contractual Liability
 - Insurance does not apply to “Personal and advertising injury for which the insured has assumed liability in a contract or agreement.”
 - Exceptions:
 - “Does not apply to liability for damages that the insured would have in the absence of the contract or agreement.”
 - For Insured Contracts “...under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization.” Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.”
 - Indemnification agreement example

Key Exclusions Applicable to Coverage B

- Quality or Performance of Goods – Failure to Conform to Statements
 - Insurance does not apply to “Personal and advertising injury arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your ‘advertisement’.”
 - “Advertisement” is defined as “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters....”
 - Westfield Insurance Company v. Robinson Outdoors, Inc., 700 F.3d 1172 (8th Cir. 2012)
 - Goods did not conform to promises regarding their performance.

Key Exclusions Applicable to Coverage B

- Insureds in Media and Internet Type Business
 - Insurance does not apply to “Personal and advertising injury committed by an insured whose business is:
 - (1) Advertising, broadcasting, publishing or telecasting;
 - (2) Designing or determining content of web-sites for others; or
 - (3) An Internet search, access, content or service provider.
 - Exclusion Does not apply to offense (a)-(c).
 - Exclusion further notes that: “the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.”

Key Exclusions Applicable to Coverage B

- Insureds in Media and Internet Type Business (continued)
 - State Auto Property & Casualty Insurance Company v. Travelers Indemnity Company of America, 343 F.3d 249 (4th Cir. 2003)
 - Exclusion applies only to insureds whose “principal or primary” business is advertising.
 - Google, Bing
 - How does your policy describe your business?
 - If in the Media, Internet, Advertising Business, Consider a Multimedia Liability Insurance Policy

Key Exclusions Applicable to Coverage B

- Electronic Chatrooms or Bulletin Boards
 - The insurance does not apply to “Personal and advertising injury arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.”
 - Policy does not define “electronic chatroom” or “bulletin board”
 - Posts on Facebook, Twitter, LinkedIn, YouTube
 - Using social media to create awareness, interest or excitement in product

Key Issues to Consider When Transferring Risk

- Ensure Contractual Agreement Specifies coverage types, limits, time period and requires additional insured status – clearly and unambiguously
- Ensure Additional Insured/Vendor Endorsement coverage is effective
 - Certificate of insurance without vendor/additional insured endorsement may be challenged by insurer
 - Specific endorsement naming indemnitee is broader than blanket endorsement
 - Obtain and review copies of policies
 - Confirm Policy Provides Promised Coverage
 - Review all Indemnitor's policies to required coverage in place
 - Extended coverage – consider requiring insurance coverage for 2-5 years after completion of project/services
 - Don't Forget Supplementary Payments Provision
- Avoid Effect of Anti-Indemnification Statutes

Key Issue for Contractual Indemnity

Avoid Effect of Anti-Indemnification Statutes

- Indemnitor may extend indemnity for indemnitee's concurrent or partial negligence but not for Indemnitee's sole negligence
- Indemnitor (Company A) cannot indemnify Indemnitee (Company B) for Indemnitee's "sole negligence"
- Void and against public policy

Remember Supplementary Payments Provision

- As an “Indemnatee” by contract with policyholder, even if no insurance requirement, indemnitee remains entitled to “Supplementary Payments”
- Applies where insurer defends a “Suit” against policyholder and indemnitee also named as a party
- Includes defense for indemnitee subject to specific conditions such as:
 - “Suit” against indemnitee seeks damages assumed by policyholder in contract that is an “insured contract”;
 - Insurance applies to liability assumed by policyholder;
 - No conflict exists between policyholder and indemnitee.

Loss Control and Claims Submission Strategies

Report Claims Promptly

- Never assume Indemnitor (or someone else) will report claim to his Insurer
- Notify Indemnitor, its Insurer, and its Broker of claim immediately
- Demand immediate response to claim with acknowledgment of agreement to pay
- Notify Your Insurer and Broker of claim
- If Supplementary Payments Provision potentially triggered, ensure conditions satisfied
- Seek guidance from Coverage Counsel
- Document and Follow-up

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QUESTIONS & ANSWERS

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