

# INSURANCE BASICS FOR IN-HOUSE COUNSEL

Sept. 21, 2021  
Steve DeGeorge

Association of Corporate Counsel  
Charlotte Chapter

# Overview

- Appropriate types and amounts of coverage vary depending on nature and size of the insured's business.
- Insurance needs change as the business evolves. External developments can also affect coverage needs and offerings.
- Insurers also create new coverage exclusions in response to specific events and legal developments.
- Contents of insurance applications important.
- A knowledgeable, attentive insurance broker is essential.

# Common Types of Business Insurance

- Commercial General Liability (CGL)
- Property
- Commercial Auto
- Employment Practices Liability (EPLI)
- Professional Liability/Errors and Omissions (E&O)
- Directors and Officers (D&O)
- Cyber
- Crime/Fraud
- Workers' Compensation
- Some businesses may require all of these coverages, while others may require only a few.
- Insurers have developed specialized coverage packages for specific industries.

# Commercial General Liability

- CGL is most common and essential type of liability insurance for most businesses.
- CGL covers broad range of third-party liabilities for property damage, bodily injury and advertising injury, including non-professional negligence and product liability.
- Typically “occurrence” based coverage, subject to self-insured retention/deductible.
- “Duty to defend” usually included.
- Common exclusions for employment practices, employee injuries, professional services, auto accidents, damage to insured’s products or property, liquor liability, contractual liability, expected or intended injury, patent/trademark, firearms, pollution, asbestos and virus.
- Exclusions can be covered via endorsements or separate policies.
- Excess CGL coverage common.

# Commercial Property Insurance

- Covers damage to real property, inventory and equipment owned or leased by the insured.
- “All risk” or named perils coverage.
- Covers fire, explosions, burst pipes, vandalism, wind, water from storms, freezes.
- Covers “ensuing loss” from construction defects.
- Occurrence-based (“trigger” of coverage can be important).
- Common exclusions for construction defects, flood, earthquake, named storms, vehicles, property of others, money/securities, electronic data and equipment breakdown.
- Replacement cost vs. actual cash value.
- Business interruption losses. (Major issue for COVID-related shutdowns.)
- “Ordinance or law” coverage (ADA, fire sprinklers, mechanical systems).

# Commercial Auto Insurance

- Covers property damage and bodily injuries related to operation of vehicles owned or leased by the insured, operated by insured's employees.
- Coverages similar to personal auto, including liability (*e.g.*, negligence), collision, medical payments, uninsured/underinsured motorist.
- Common exclusions are expected or intended injury, contractual liability, employee injuries and pollution.

# Employment Practices Liability Insurance

- EPLI covers claims made by insured's employees and prospective employees.
- Covers claims based on alleged wrongful hiring, promotion/demotion, retention and termination.
- Covers employment-based discrimination, harassment and retaliation based on protected status (age, race, ethnicity, gender, disability).
- May be claims-made or occurrence based.
- Typically includes duty to defend.
- Common exclusions for property damage, bodily injury, wage/hour claims, ERISA, OSHA and NLRA violations, crimes, contractual liability and expected or intended injury.

# Professional Liability/Errors and Omissions Insurance

- Covers claims based on negligence in performing professional services.
- Sometime referred to as “malpractice” insurance.
- Fills CGL gap created by professional services exclusion.
- Covers physicians, attorneys, engineers, accountants, real estate brokers, consultants and counselors/therapists.
- Exclusions depend on nature of professional services, but common exclusions for property damage, bodily injuries, employment practices, auto injuries and intentional conduct.
- Some states require certain professionals (physicians, attorneys) to carry E&O insurance.
- Not required for North Carolina attorneys, but annual certification required.
- Typically claims made coverage, with duty to defend.



# Directors & Officers Insurance

- Liability coverage for directors, executives and certain management personnel.
- Covers individual officers and directors, as well as company that indemnifies officers and directors.
- Essential to attract outside directors.
- Common exclusions for intentional misconduct, professional services, contractual liability, property damage, bodily injuries, insured v. insured.
- Typically claims made, with duty to defend.

# Cyber Insurance

- Covers various computer-related losses, including data breaches, malware infections, cyber extortion, ransomware, and other network security incidents.
- Essential for businesses in possession of financial or medical information.
- Relatively new type of coverage, so coverage parameters and law evolving.
- Can provide both first-party (insured) and third-party (customer) coverages.
- Common exclusions for property damage, bodily injury, contractual liability, portable devices, certain network interruptions and inadequate security measures (may be based on representations in application).
- Typically claims made, with duty to defend.

# Crime/Fraud Insurance

- Covers employee theft, forgery, burglary, counterfeit instruments and impersonation fraud.
- Unsettled issue whether crime/fraud insurance covers fraud-induced electronic funds transfer.
- May provide both first-party and third-party coverages.
- Common exclusions for professional negligence, data theft, property damage and bodily injury.
- Coverage triggered by discovery or loss sustained.

# Workers' Compensation Insurance

- Covers injuries sustained by employees.
- Employee injuries generally excluded from other types of insurance.
- Workers' compensation insurance mandated by statute. North Carolina requires workers' compensation insurance for employers with three or more employees.
- Workers' compensation is employee's exclusive remedy, absent intentional conduct substantially certain to cause bodily injury.
- Employers not required to provide workers' compensation insurance to true independent contractors.

# Tendering Coverage Claims

- Importance of timing of notice/tender depends on whether policy is claims made or occurrence.
- Notice/tender during policy period condition precedent under claims made policy.
- Delayed notice under occurrence policy precludes coverage only if insurer proves substantial prejudice (North Carolina law).
- Discuss possible coverage with insurance broker or coverage attorney.
- Notify/tender if any doubt.
- Insurer will (a) acknowledge coverage; (b) acknowledge duty to defend and issue “reservation of rights” letter; or (c) deny coverage and duty to defend (may file declaratory judgment action).
- Do not accept insurer’s coverage denial.

# Rights and Duties of Insurer and Insured After Notice/Tender

- Insurer
  - Duty of good faith in claims handling
  - Duty to defend
  - Right to subrogation
- Insured
  - Duty to cooperate

# Insurer Duty of Good Faith

- After notice/tender, insurer has both common law and statutory duties with respect to claims handling.
- Duty of good faith counteracts insurer's financial interest in denying claims after loss occurs.
- Many courts recognize special or even quasi-fiduciary relationship between insurer and insured.
- Major components of good faith claims handling:
  - Duty to investigate claim
  - Duty to inform insured of claim decisions
  - Duty to settle or compromise claim against insured

# Insurer Duty to Investigate

- Insurer has duty to investigate claim to determine whether coverage exists.
- Investigation must be reasonable and insurer must bear costs.
- Must occur before insurer denies or settles insured's claim against insurer.
- In first-party policies (such as property insurance), policy often specifies the adjuster/third-party administrator the insurer must use to investigate claim and amount of covered loss.



# Insurer Duty to Inform Insured of Claim Decisions

- Must inform insured of claim decision in reasonably prompt and detailed manner.
- Insurer may waive defenses or exclusions if fails to comply with duty.
- Insurer may waive defenses or exclusions not raised in initial coverage denial.
- Failure to make timely decision may also give rise to independent liability for bad faith.

# Insurer Duty to Settle or Compromise Claims

- Corollary of insurer duty to defend. Intended to prevent insurer from improperly failing to accept a reasonable settlement that is in the best interests of the insured.
- Liability insurer generally has control of settlement within policy limits, though insured may have consent right under some policies and insured may need to consent to settlement above policy limits.
- Insurer generally has duty to reach reasonable settlement when third party makes offer within policy limits, and in some jurisdictions, when offer exceeds policy limits but is reasonable and insured willing to contribute.

# Insurer May Have Tort Liability for Bad Faith

- Insurers with some regularity fail to comply with their claims handling duties.
- North Carolina has unfair settlement practices statute defining these duties, and violation is per se violation of North Carolina Unfair and Deceptive Trade Practices Act.
- Liability entails mandatory treble damages and a discretionary award of attorney's fees.

# Insurer Duty to Defend

- Common duty in liability policies.
- Broader than any indemnity obligation: in NC, triggered if complaint against insured contains allegations creating a “mere possibility” for coverage. Analysis looks *only* to the four corners of the complaint and cannot rely on extrinsic evidence.
- When triggered, insurer must defend entire lawsuit, including claims that are not even possibly covered.
- In NC, if insurer wrongfully fails to defend, estopped from denying coverage and must pay any reasonable settlement of claim.

# Insured Duty to Cooperate

- Insured's major duty after providing notice of claim.
- Especially important in third-party context where insurer depends on facts known to insured to defend and resolve claim.
- But also exists in first-party context.
- Requires insured to:
  - Communicate with insurer and provide requested information relevant to claim
  - Help in preparation of defense
  - Execute pleadings and other litigation documents in timely fashion
  - Assist in effectuating settlement

# Insured's Duty to Cooperate

- Insurer has broad right to obtain information relevant to its investigation and defense of claim.
- Breach of duty to cooperate is material and creates powerful defense for insurer.
- Insured should document provision of information to insurer. Communicate by email or confirm oral communications.
- Where insured maintains control of defense funded by insurers, essential for defense counsel to provide prompt notice of all material developments to insurer.
- Preservation of documents relevant to claim essential, both to satisfy duty to cooperate and avoid any sanctions in coverage litigation against insurer.
- Insurer *cannot* use cooperation clause after denial of coverage as shortcut to discovery for coverage action. But pre-denial, cooperation clause will often give insurer facts relevant to coverage action.

# Insurer Right to Subrogation

- Subrogation: insurer asserts rights of insured against entity that caused loss.
- Arises upon insurer's payment of loss; may be based on contract, statute or equitable principles.
- Insurer does not need consent of insured to bring subrogation claim, absent policy provision.
- Right does not exist against insured or additional insureds ("antibusrogation rule").
- But could reach non-insureds, including employees, vendors, customers.
- Insurer may waive right by contract (including under policy) or by conduct.
- Subrogation rights need to be considered in settling coverage dispute with insurer to ensure rights of insured against other sources of recovery are not prejudiced.

# Thank you



Steve DeGeorge

704.377.8380

[sdegeorge@robinsonbradshaw.com](mailto:sdegeorge@robinsonbradshaw.com)



ROBINSON

---

BRADSHAW