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Prior Litigation Can Affect New Policy Coverage

Insurer competition in prices on directors and officers (D&O) insurance makes switching carriers an attractive option at times. However, there are several elements to this important policy that should be considered before moving from one company to the next.

One such element is commonly called "Prior and Pending Litigation." Specifically, the new policy may include a stipulation that litigation begun prior to a certain date is not covered by the new policy. If the policy specifies "all prior," beware: This could impose a significant gap in coverage for your directors and officers.



For example, say a lawsuit is brought over a defective product years before the new D&O policy takes effect. Sometime after the policy's effective date, that product's claim creates a major financial crisis for the company, which results in a D&O lawsuit. If the initial product's lawsuit was brought before the D&O policy's Prior and Pending Litigation date, the insurance company could deny coverage for the resulting financial crisis due to the fact that it arose out of prior litigation.

We'd like to help you minimize gaps in coverage for your firm. Call us for information before you make any decisions about switching policies. ■

Rising D&O Claims Spur Coverage Choices

Directors and officers liability claims are on the rise and expected to continue growing in numbers worldwide as a result of the recent credit and market difficulties. Most D&O liability insurance policies are designed to cover wrongful acts. These often include actions such as breach of duty, neglect, error, misstatement, and omissions or acts by directors and officers in their capacity as such.

Most policies will cover the cost of claims arising from negligent acts. Additionally, many will also cover intentional acts as long as the court

determines that the consequence of the act was unintentional. What's important to note is that, regardless of intent, such acts are not covered by standard general liability insurance.

A typical D&O policy is very broad, offering considerable security to businesses needing financial support for defense of a lawsuit and any resulting damages. More companies are offering D&O coverage tailored to business size, and prices are competitive.

For more information on D&O coverage for your firm, call our service team today. ■

Rejecting Recommended Settlements Can Cost You



Some directors and officers (D&O) liability policies include what is commonly called the “Hammer Clause.” This clause states that, should the policy owner (“insured”) refuse a settlement recommended by the insurance company, the insurer’s liability is limited to the recommended amount. Depending on the severity of the claim and the final judgment in court, such a clause could result in a significant portion of a judgment being paid by the insured.

Some D&O providers allow the policy to be amended to place a percentage cap on the insured’s liability under refused settlements. Other providers make it possible to completely remove the clause from the policy.

Is there a Hammer Clause in your firm’s D&O policy? We can help you understand what this clause means to your firm and what options you may have to lessen its potential blow. Call today! ■

Design and Build Growing in Popularity

Lower costs and having a single point of responsibility are the main advantages of housing both design and building in the same firm, according to a ZweigWhite design-build survey. A commercial general liability (CGL) policy doesn’t cover the expanded liability risk that comes with design and build operations, but professional liability can help.

Even firms that subcontract work out don’t shift all the risk, and hold harmless provisions cannot be considered a catchall. A design-builder’s obligation to the client is not relieved by the inability to collect for damages from subs. A professional liability policy is probably the best option.

Design-builders also need to consid-

er direct and contingent liability. Most insurers cover both, but that should be confirmed since claims can be brought against the firm for faulty work done by subs, especially claims of negligence in hiring or of failure to oversee work.

In general, professional liability policies contain exclusions—things that are not covered. These exclusions vary based on the insurer and the policy chosen. Professionals, however, can often get some of the exclusions removed or modified via an endorsement.

Our service team can assist your firm with professional liability insurance choices and modifications to policies. Give us a call to find out more. ■

Does Your Firm Have Cyber Liability Risk?

How serious is your firm’s cyber liability risk? According to the 2007 CSI Computer Crime and Security Survey, 46% of companies had experienced one or more security incidents in the prior 12 months.

More concerning is the severity. The average reported loss in 2007 increased to \$350,424 from \$168,000 the previous year.

Yet, despite the obvious spike in activity, private firms continue to forgo purchasing insurance coverage for cyber risks—a classification of losses including security breaches, lost data, damage to hardware, and other costs attributed to cyber attack. A recent survey by a national insurance company reveals that more than 90% of private companies do not purchase cyber liability insurance. One in two companies cite “low risk/no exposure” as the reason



for not purchasing coverage. Others don’t purchase the coverage because they do not understand the substantial risk a cyber threat can pose to the company’s bottom line.

For more information on the rapid expansion of cyber liability and your firm’s risk, call our service team today. ■

Hiring and Firing At Will

Many organizations are “at-will” employers, subscribing to the doctrine used in most states that employees are hired for no specific time period with no contractual relationship, and employment can be terminated by either party for no reason or without notice.

The problem faced by at-will employers is that the doctrine can conflict with state and federal laws that give protected status to some workers against adverse employment actions. Protected status varies by state but often includes race, ethnicity, natural origin, color, creed, age, sex, marital status, medical condi-

tions, sexual orientation, disability, and military status. If an employee charges that their employment



was terminated based on a protected status, it becomes the responsibility of the employer to prove otherwise.

Defeating such charges requires documentation of incidents and detailed records of complaints, among other things. Often, charges result in court action and legal fees. The expenses associated with defending a charge filed against an employer for a violation of protected status are not normally covered by general liability insurance. Rather, an employment practices liability insurance (EPLI) policy could be needed to lessen the financial blow of such claims.

For more information about adding EPLI to your business’s insurance portfolio, call our service team today. ■

Notify Your Insurer Promptly

When is the right time to notify your professional liability insurance company of a potential claim?

Most liability claims don’t happen overnight. Their slow-developing nature typically begins with a complaint and ends with a court proceeding. Usually, the time between the beginning and the end is several months or longer. Unfortunately, many business owners wait until late in the process to notify the insurance company of the situation. Instead, they may employ their own counsel to research the issue or simply hope the whole thing just “goes away.”

Both of these methods risk sacrificing coverage for a potential lia-

bility claim, even if the nature of the claim is covered by the policy. The reason is that most professional liability policies specifically state that the policyholder should notify the insurance company when

This allows the insurance company much more time to prepare a defense.

aware of a situation that might give rise to a claim. This allows the insurance company much more time to prepare a defense. If the business owner waits too long, the insurance company might not have

adequate time and choose to settle. Or worse, the insurance company may deny any responsibility, referring to the policy language that suggests it is allowed to do so if not notified promptly.

Further, most policies state that the insurance company determines how the defense will operate, including what counsel is to be used. While it may be possible to employ your own counsel, this must be approved by the insurance company for it to pay.

Review your professional liability policy for information on the right time to notify the insurance company of potential liability. For more information, give our service team a call. ■

**Thank you for
your referrals.**

If you're pleased with us, spread the word! We'll be happy to give the same great service to all of your friends and business associates.

Insuring Plan Administrators in a Bear Market

Bear markets place significant burden on employee benefit administrators. When things aren't going well, those suffering losses often look to administrators for an explanation or to place blame. Moreover, attorneys are on the prowl to bring suit against employers whose funds have depreciated substantially or have failed altogether.

Some business insurance policies include limited liability coverage for errors and omissions in administration of employee benefits, but most do not cover fiduciary liability. For those that don't, and to cover wrongful acts under ERISA, employers likely need a separate liability policy often called fiduciary liability.

Fiduciary liability insurance pays the legal liability arising from claims of imprudent handling of employee funds, and it protects the personal assets of plan administrators from allegations of breach of duties.

For more information on your potential risk and insuring against it, call our service team today. ■
