

Getting The Most Out Of Your Contractual Insurance Provisions

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In business agreements of all types, it is common to require your counterpart to secure and maintain insurance for the term of the agreement. The purpose of requiring insurance is to manage and, hopefully, mitigate risk. For instance, it will help to ensure that your counterpart has coverage in the event that it faces liability arising out of its conduct in furtherance of your agreement. Further, if your contractual insurance requirements are drafted correctly, your counterpart's insurance can serve as an additional source of coverage for you in the event that you too face liability arising out of your counterpart's activities.

To determine what types of insurance are necessary for your business arrangement, you must consider the nature of the activities in which your counterpart will be engaging and the corresponding types of risks and exposures that both of you will face. In some instances, standard commercial general liability insurance and workers compensation/employers liability insurance may be sufficient. However, if your counterpart will be rendering professional services, then errors and omissions (E&O) coverage may be necessary. If goods will be shipped or otherwise in transit, you should consider requiring cargo and/or warehouse liability insurance. Again, the types of insurance necessary will be completely dependent on the nature of risks you face. Once you decide on the types of insurance you will require, you should draft your contractual insurance provisions in a manner that will maximize the benefits to you and your business. The following are just a few tips to consider when drafting your insurance requirements:

- Have your company (and, as necessary, your company's parents, affiliates, subsidiaries, directors and officers) specifically named as an Additional Insured in your counterpart's policies. By doing so, you can minimize the risk of having to claim under your own insurance in the event that you face liability arising out of your counterpart's conduct.
- Make sure that the limits of insurance are sufficient to cover any potential exposure and, in no event less than the amount otherwise carried by your counterpart.
- Do not allow your counterpart to limit the insurance obligations through sizeable deductibles or self-insured retentions (SIR). If your counterpart cannot secure first dollar coverage, then make it clear that, in the event of a claim, the counterpart is responsible for satisfying the deductible or the SIR.
- Draft your insurance requirements so that they are wholly independent of and do not impact or limit any separate indemnity obligations you may otherwise seek to impose on your counterpart.
- Expressly state that the required insurance shall not be deemed to release or diminish the liability of your counterpart.

RELATED PRACTICE AREAS

Commercial General Liability
Copyright, Trademark, and Media Liability
Credit and Mortgage Insurance
Directors and Officers Liability
Employment Practices Liability
Fidelity Bonds and Commercial Crime Policies
First-Party Property
Insurance Recovery and Counseling
Ocean Marine and Cargo Coverage
Professional Liability
Representations and Warranties
Workers' Compensation and Employers' Liability

RELATED TOPICS

Additional Insured
Contractual Insurance

- Require your counterpart's insurance to be primary and non-contributory to any coverage you maintain. With such language, in the event that you make a claim as an additional insured, your counterpart's carrier will be prohibited from seeking contribution against your own carrier.
- Require your counterpart's carrier to waive any and all rights of recovery, contribution and/or subrogation against you and your insurers. By doing so, in the event that your counterpart faces covered liability based on your conduct (either in whole or in part), its carrier will not be able to seek recovery against you.
- Require your counterpart's carriers to provide you with advance notice of any policy modification, cancellation and/or non-renewal.
- Have your counterpart specifically schedule your agreement as an Insured Contract. This will enhance the prospect of your counterpart obtaining coverage for any indemnified claim that you may have against it.
- Specify that your acceptance of an incomplete policy or your failure to identify a deficiency in the required coverage shall not be construed as a waiver of your counterpart's insurance obligations.