Business Litigation 2010:
Unlocking Successful Strategies for Wisconsin Companies

Insurance: How to Make the Most of It in Litigation

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Liability and Property Insurance

Directors and Officers Coverage

These policies are highly negotiable.

Of all of the policies you buy, D&O coverage is one of the most complicated and requires the most expertise and skill to negotiate.

Liability and Property Insurance

Directors & Officer's Coverage

Problem: The D&O policy offered to you by your insurer shares limits with another coverage. The two most common policies with which it might share limits are employment practices liability or fiduciary liability (covers ERISA risks) coverage. If a substantial class action fiduciary claim comes early in the policy year, directors and officers of the company could be left with little or no coverage for the rest of the policy year.

Liability and Property Insurance

Directors and Officers Coverage - Limits

Solution:

Keep D&O limits separate.

Liability and Property Insurance

Directors and Officers Coverage

Problem: Insurer offers a single limit for directors and officers and company. If all are sued, directors and officers will compete for limits with the company and there may not be enough to go around.

Liability and Property Insurance

Directors and Officers Coverage - Limits

Solutions:

(1) Obtain separate “Side A” policy for officers and directors, in which case directors and officers have their own limits; or (2) negotiate an “order of payments” provision in the D&O policy to ensure that claims against directors and officers are paid first – before claims against the company are paid.

Liability and Property Insurance

Directors and Officers Coverage

Problem: An "off the shelf" D&O policy will enable an insurer to rescind or deny coverage if there is a misrepresentation in the application. This is problematic for officers because if, for example, the CFO makes a misrepresentation in the application, all officers and directors can lose coverage.

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Liability and Property Insurance

Directors and Officers Coverage - Rescission

Solution:

Negotiate for provisions that limit the insurer's ability to rescind or deny coverage to the officer/director that made the misrepresentation.

Liability and Property Insurance

Directors and Officers Coverage

Many more examples: SEC proceedings; investigative costs in responding to derivative claims; responding to “Wells” notice.

Maximizing Your Benefits

Recognize claims that are not obviously covered, but might be:

1. Unfair competition and tortious interference. *See Curtis-Universal, Inc. v. Sheboygan Emergency Med. Serv., Inc.*, 43 F.3d 1119 (7th Cir. 1994).
2. Trademark infringement. *See Acuity v. Bagadia*, 31 Wis. 2d 197 (2008).

Maximizing the Benefits

If more than one policy covers the claim on a primary basis, make strategic decisions about which policy(ies) you want to cover the claim.

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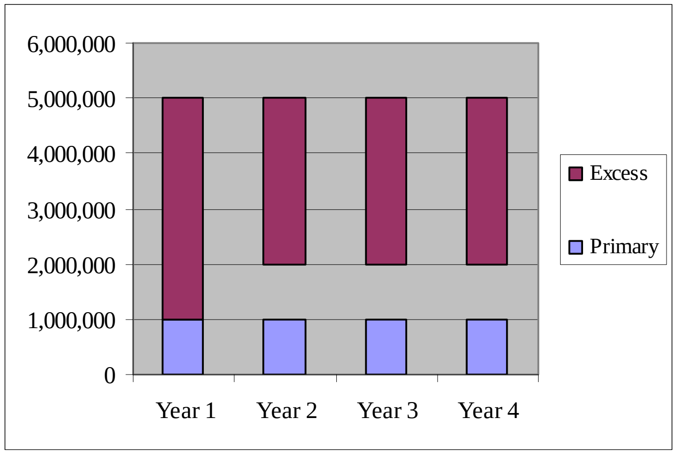
Maximizing the Benefits

When a multi-year loss triggers multiple general liability policies, the "all sums" language in any triggered primary policy makes any one insurer jointly and severally liable for the entire loss. *See Plastics Engineering Co. v. Liberty Mut. Ins. Co.*, 315 Wis. 2d 556 (2009). In 2010, the Wisconsin court of appeals expressly granted insureds the right to "vertically" exhaust coverage, if the insured so chooses. *See Westport Ins. Corp. v. Appleton Papers Inc.*, 2010 WI App 86.

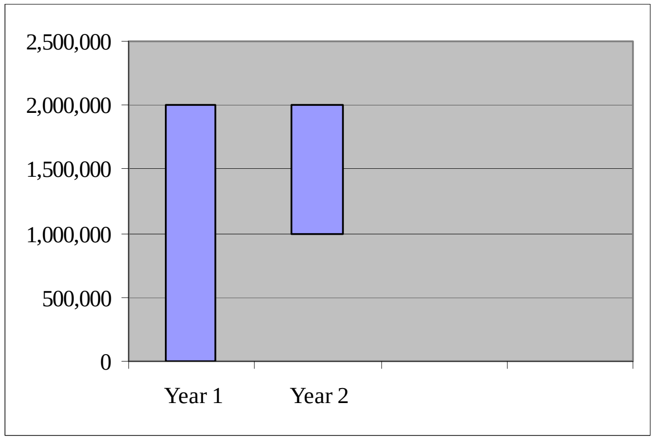
Maximizing the Benefits



Maximizing the Benefits

1. Select policy years with lower or no SIRs / deductibles..
2. Selecting one policy can avoid multiple self-insured retentions ("SIRs") and deductibles.
3. When multiple policies could be triggered, you may want to spare any policy that is close to exhaustion to reserve coverage under it for another day.
4. For high dollar claims, select a year in which you purchased excess coverage.
5. If you do not have excess coverage available and you have a high dollar claim, spread loss (reduce the chance of excess verdict) by triggering multiple policies.
6. If coverage is available to you as an "additional insured" under another entity's policy, tapping that policy instead of your own will help to keep your insurance renewal costs lower.
7. Use two policies in combination: one to satisfy the SIR under another. *See Brown County v. OHIC Ins. Co.*, 300 Wis. 2d 547 (2007).

Maximizing the Benefits



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Maximizing the Benefits

After you have analyzed coverage options, put selected insurer(s) on notice immediately. Wisconsin courts will not allow coverage for pre-tender defense costs. *See Towne Realty, Inc. v. Zurich Ins. Co.*, 201 Wis. 2d 260 (1996).

Maximizing the Benefits

When an insurer reserves its rights, several Wisconsin courts have held that the insured gets to control the defense, including the selection of defense counsel; the insurer must pay the reasonable cost of defending the case.

Maximizing the Benefits

When you are suing a defendant, evaluate whether you would want them to have access to insurance coverage. Draft your complaint with an eye towards accomplishing that goal.

Maximizing the Benefits

Ask the insurer to pay the costs of coordinating counsel in product liability cases.

An Insurance Lesson Learned in the Marinelli Kitchen

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