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Is Your Company Sitting on Buried Treasure?

Finding Resources in Insurance Policies

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Many companies are sitting on buried treasure and do not even know about it. Buried treasure is often found in insurance policies the company purchased, including policies purchased many years ago. In other cases, substantial resources are unlocked in policies the company inherited through a merger or acquisition. This buried treasure can often be worth millions or even tens of millions of dollars that go directly to a company's bottom line. This may sound too good to be true, but it happens more often than you might think. The key is to know where to look for buried treasure in your insurance resources and what to do if you find it.

In order to find buried treasure in your company's insurance policies, it is first important to understand how it was lost in the first place. There are many ways in which companies overlook or fail to pursue available insurance resources. Here are some of the more common.

A claim was submitted, but the insurance company denied coverage and the denial was not challenged.

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When this happens, companies often simply engage counsel at their own expense and deal with the claim, often by paying a settlement or judgment. As the matter proceeds, often at a cost of hundreds of thousands or millions of dollars, the claim under the policy is forgotten.

However, all may not be lost. So long as the matter is within the state's statute of limitations, the company can probably still challenge the denial (in litigation if necessary) and potentially recoup defense costs as well as settlement and judgment expenses. Of course, there still has to be a basis for coverage under the policy, but many times insurers "win" simply by denying the claim and the insured not pursuing coverage.

In most states, the bar for requiring an insurance company to provide a defense (pay for lawyers to defend a claim) is lower than the bar for paying for a settlement or judgment. Further, in most states, if part of a claim is covered, the insurer is obligated to provide a defense for the entire claim. Getting back some or all of the legal fees spent in defending a case can be a substantial recovery in itself.

The company may not understand the nature of occurrence based policies.

Many policies, especially commercial general liability ("CGL") policies, are written on so-called "occurrence" based forms. In broad terms, these policies cover bodily injury or property damage caused by an occurrence during the policy period.

Under an occurrence based policy, *if a claim asserted is based on events that happened years ago, the policies in force at that time may still cover the claim.* Environmental and asbestos claims are examples of this type of situation. In some instances, policies written in the 1950s and even earlier are providing coverage today for these types of claims. Pursuing coverage under older policies can be important and beneficial, because they contain fewer exclusions (such as the partial and absolute pollution exclusion) found in more modern policies.

The company may not understand the breadth of claims potentially covered.

Even sophisticated policyholders typically assume that only bodily injury and tangible property damage are covered by insurance. Although this is often true, under some policies (and depending on the jurisdiction), it may be possible to obtain coverage for claims such as trade secret violations, breach of contract and loss of data. The key point here is to base decisions on what the policies and law provide, and not what you assume may or may not be covered.

The company may be unaware of what its modern policies cover.

Policies are now available that specifically provide coverage for environmental issues (referred to as "environmental impairment liability" coverage or simply "pollution coverage"), breach of trade secrets and breach of contract (such as under "media tech" policies often

marketed to the software industry), and other types of risks. For example, other insurance products are being marketed to provide coverage for data breaches and cyber liability issues.

In some instances, a company may have policies providing coverage, but does not realize it has coverage available. Although this may seem unlikely, it does happen. For example, a company may separate its risk management and legal functions. If one department is responsible for procuring insurance and another for giving notice of claims, it is possible that all available coverage will not be pursued. This type of situation happens more often than you might think. Further, in this day of frequent turnover due to mergers and acquisitions, layoffs, and general movement of personnel from one company to another, those now responsible for managing insurance issues may simply be lacking a thorough institutional knowledge of the scope of coverage previously purchased.

LOOKING FOR TREASURE

Now that you understand how buried treasure can be lost, here is a map to start looking for your company's insurance resources.

Make sure you are getting copies of insurance policies from your insurance company or broker or agent when they are issued.

This may seem obvious, but we often have to work to get copies of the relevant policies. It is very common to ask for the policy and to get a copy of an insurance certificate or a declarations page. An entire business policy is usually many pages long, and an insurance certificate or "dec page" is only the tip of the iceberg. If you do not have a set of policies, contact your agent or broker (or your carrier) and ask for copies.

Gather and keep all policies in a central repository.

As you can gather from the discussion above, old policies can be valuable, so do not throw them

away. Policies can (and should) be scanned and stored (or backed up) electronically off-site. That way, they will always be available.

Never blindly accept your insurer's statement that a claim is not covered.

The same is true for assessments by agents and brokers. Although such assessments may be correct, our experience is that they are often wrong.

Review files for prior denials of claims.

As noted above, it may well be possible to pursue coverage if an insurance company has denied a claim and your company has been forced to incur the expense of hiring counsel and paying a settlement or judgment. Statutes of limitation (which vary from state to state) may come into play here, so it is very important to review claim files for denials as quickly as possible and to analyze whether coverage should be pursued.

If you consult with an attorney regarding coverage issues, make sure that the attorney has substantial experience in handling coverage claims.

Although an insurance policy is a contract, it is a particular type of contract. Insurance coverage issues are often not intuitive. Experienced coverage counsel can usually tell you pretty quickly whether coverage exists or at least whether there is a reasonable basis for pursuing coverage. An experienced coverage lawyer will also have greater credibility in dealing with an insurance company than a generalist.

Going forward, give notice of claims early and often.

Always assume that a claim may be covered. Insurance companies often raise late notice as a defense, and, depending on the circumstances and the jurisdiction, they may be able to avoid coverage on this basis.

Note that special rules exist for "claims made" policies.

Claims made policies, as a general rule, only cover claims that are made during the policy period. These

policies are designed to eliminate the "long tail" risk discussed above regarding occurrence policies. "Claims made" policies are typically written for professional liability and D&O coverage, although they may be used in other circumstances. Under claims made policies, giving notice within the policy period or extended reporting period is typically a pre-requisite to coverage, which makes giving notice an even more important issue.

Many claims made policies have "notice of circumstances" provisions. These provisions are designed to ameliorate the sometimes harsh application of claims made policies and allow the policyholder to report events during the policy period that may give rise to a claim later, even though a claim has not yet been made. If a "notice of circumstances" provision exists, and such a notice is properly made during the policy period, the policy should cover claims made after the policy period. It is thus a good idea to make a careful internal review of circumstances that may give rise to a claim before the expiration of a policy period.

CONCLUSION

Companies buy insurance policies to protect themselves from claims, but, in many instances, do not pursue or take advantage of the coverage they have purchased. However, with a little bit of digging and review, it is often possible to find coverage in those policies. We hope we have provided a map to start finding the buried treasure at your company.