

INSIGHTS

Words With Friends, Part 2: Insurance Requirements and Contracts, With Vince Morgan and Suzanne Day

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By: [Vince E. Morgan](#) and [Suzanne F. Day](#)

In the second of a two-part episode of Bracewell Covered, [Vince Morgan](#) discusses insurance requirements and contracts with [Suzanne Day](#), who recently joined the firm from The Lubrizol Corporation, where she worked for more than 20 years in their legal division, eventually serving as chief legal and ethics officer.

One of the things that we always ask our clients, who's your broker? Let's get them into this conversation. I know in your role at Lubrizol, where you were the general counsel, chief legal officer, you were also the risk manager. Going back to your prior role there, any thoughts on straddling those two worlds with law and risk management?

It's true that at the end of the day when you are requiring your counterparty to purchase specific forms of insurance, that is part of their fixed cost, which in some form or fashion is going to be passed along to you. So, getting broker input about whether what you're asking for is something that the counterparty likely already has and therefore is likely already priced into what they're selling you or whether what you're asking for is something that they would, if they want to do business with you, they have to incur additional expense to procure and therefore probably your price is going to go up.

That can really give you very good practical advice about what kinds of things you want to ask for. It doesn't necessarily mean you don't ask for something that you think you need. Even if the counterparty doesn't already have it or isn't likely to already have it. But you should always keep in mind that when you are requiring somebody else to do something, they're often going to come back with an additional charge to you. That is really part of the equation that brokers can be quite helpful with.

One of the questions that we see from clients is, should we make the insurance connected to the indemnity or should we make them separate? That's a good question, and there's no one-size-fits-all answer here. What are your thoughts on that?

I think you have two options there. You can either decide that you have an acceptable risk tolerance of, I don't know, \$50,000, \$100,000 and specify in your contract that the deductibles for the policies that your counterparty is going to buy will not exceed that. Again, that gets you back to, is that a commercially reasonable requirement? Are you going to have to pay more for that requirement? The alternative is to say that, you counterparty, you're going to provide this

insurance and, you counterparty, are going to be responsible for any retentions or deductibles that are necessary for the insured to pay prior to the insurance companies obligations to indemnify, defend, kicking in.

That can be dealt with in the contract. Along those lines, you also want to think about, I haven't seen too many contracts that actually get into these weeds, but whether the, for example, in a CGL policy, if you're talking about your rights as an additional insured, if somebody sues you for an injury that the other party has arguably caused, you want to think about whether your costs that the insurance company is incurring to defend you are going to erode your limits or not, particularly if you have a low limit of a million and the defense costs erode that limit, you may not end up with much insurance at the end of the day to pay a claimant. That's another thing that you could consider when you're talking about who pays what on the defense costs, whether the policy is going to cover those and who's going to be reimbursed.

So it almost entirely depends on what kind of coverage you're dealing with. The GL policies almost certainly are not eroding unless there's some wonky endorsement, but it's rare. And then the professional lines, professional liability, those kinds of things almost certainly are eroding. So you've got to be aware of which one you're dealing with and that might warrant different limits and a different approach to deductibles from tension in another. Those are some things to keep in mind, right?

Yes, it really goes back to what you said, I think in part one of this, which is that the start of any good insurance section in a contract is for the party to sit down and think about what they want to accomplish. I would like to be defended up to this amount of money and have this much indemnity available to me. And then you can draft your insurance requirements either by making deductibles required, or making certain defense arrangements required, or making other sort of things in your contract that is designed to get you what you have in mind as the end game. Starting from a blank slate saying is \$5 million a good number or doesn't really get you what you need at all in too many situations.

Have questions about this podcast? Contact [Vince Morgan](#) or [Suzanne Day](#).

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