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Lawyer Insights

What’s in a Name? Avoiding Insurability Pitfalls with Name Changes and Other Corporate Transactions

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One of the most basic questions that policyholders consider when assessing insurance policies is “who (or what) is covered?” Some policies, such as commercial general liability policies, answer that question more directly using standard form sections with titles like “Who Is an Insured.” Other liability policies, like those for directors and officers (D&O) liability or errors and omissions (E&O) coverage, may be less straightforward and require a more nuanced analysis of the various policy forms, definitions, and endorsements. In all cases, a good place to start is the policy declarations page, which typically identifies one or more “named insureds.” Those key insureds are the persons or entities who own the policy and whose names appear at the beginning of the policy.

Although the scope and amount of coverage available to entities or individuals varies significantly based on the type of coverage, policy terms, and facts giving rise to a particular claim, attention to the kind of insureds protected under a particular insuring agreement or policy is always critical. One event that could impact—or even eliminate—coverage for insureds is a name change, acquisition, merger, asset sale, or other change in corporate form. This article discusses several common insurability issues related to the corporate form for policyholders to consider when placing or renewing coverage.

PRESERVING COVERAGE IN DEALS

Nuanced analysis of who or what is covered may be academic if a change to corporate form following a deal negates potential coverage under legacy policies altogether. These insurance pitfalls can arise in a variety of ways.

For “claims-made” policies like D&O and E&O policies, an M&A transaction, restructuring, or other change to corporate form may result in a “change in control.” This matters because those policies typically will only cover wrongful acts by insureds that were alleged to occur before the closing date. A change in control sends the policy into “runoff,” which limits coverage to pre-transaction conduct and cuts off going-forward coverage for the company and its directors, officers, or employees.

The runoff terms depend on both the language of the seller’s D&O policy, which may provide for automatic conversion to runoff upon a change in control, and the effective date of the deal. Whether those provisions are triggered—and, if so, when the change in control occurs—can impact coverage for claims for pre-transaction wrongful acts that arise after the triggering event occurs.

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To combat the risk of losing future coverage for pre-transaction acts, it is common (and encouraged) for buyers to require targets to obtain "tail" coverage for their policies for pre-transaction liabilities. Tail coverage extends the reporting period for a target's current policy for a specified period of time. The period of the tail coverage can vary, but three to six years is most common. Tail coverage can protect buyers for claims that may have occurred prior to the consummation of the M&A transaction, and a buyer will want to avoid the risk that a claim is made against the target officers and directors after the acquisition and after expiration of the target's D&O policy period. It is important to consider that many insurance companies will only provide D&O tail policies to a target company that already had D&O insurance in place before it received an offer to be bought.

Finally, careful attention must also be given to preserving insurance assets as part of any deal. In many deals, a surviving or acquiring entity does not assume all liabilities of the company it is acquiring. Many times, the successful transfer of interests under insurance policies in a particular transaction can turn on applicable state law. Limiting the transfer of liabilities or assets can have potential adverse impacts on the surviving entity's ability to access historic insurance policies or to trigger coverage for legacy liabilities related to pre-transaction conduct.

POLICY CHANGES MAY LEAD TO UNINTENDED CONSEQUENCES

There is no one-size-fits-all approach to modifying insurance policies to account for changes to corporate form. For example, there may be unintended consequences from identifying named insureds and any associated "dbas" (doing business as) or trade names in the declaration pages of liability policies. Some policyholders have found out the hard way, in litigation, that coverage may be limited depending on the specific wording of named insureds in an insurance policy. See, e.g., Masonic Temple Ass'n of Quincy, Inc. v. Patel, 185 N.E.3d 888 (Mass. 2022); see also Cent. Mut. Ins. Co. v. Davis, 576 F. Supp. 3d 493 (S.D. Tex. 2021) (stating as a matter of first impression that a designation of insured doing business as a named entity may still serve as a limiting phrase if the policy language shows that the parties intended to limit insurance coverage to one specific sole proprietorship).

In Masonic Temple Association of Quincy, Inc., for example, the Massachusetts Supreme Judicial Court held that a company was not covered under a liability policy where the company's liabilities arose from activities outside the "dba" name identified in the policy's declarations. The insured hotel business obtained several million dollars in general liability and umbrella coverage. When a dispute arose at a construction project about whether the business had adequate insurance to cover the work, the president of the company reached out to his insurance agent to modify the policies, including by listing the insured with reference to a "dba," which led to a resumption of the construction project.

Following a fire at the property, an insurer denied coverage on the ground that it insured the hotel business only for operations at the "dba" address listed in the policy. In the coverage litigation that followed, the policyholder argued that the use of a "dba" name did not create a separate legal entity, so all of the company's activities were covered under the policy, whether they related to the "dba" name or not. But the Massachusetts Supreme Judicial Court disagreed and held that the "ordinary understanding" of the phrase "doing business as" a particular entity meant that the policy only covered liability arising from activities undertaken while doing business as the listed entity. Any other interpretation, the court reasoned, would render the "dba" designation superfluous.

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The Masonic Temple decision shows that clarifications to named insured provisions, even if well-intentioned, may have adverse consequences by unintentionally limiting coverage.

TAKEAWAYS

Insurance-related considerations for changes to corporate form are not limited to modified declarations pages or tail policies. For example, even in the absence of a change in control, policies may have other requirements related to acquisitions of new subsidiaries or similar operational changes that could jeopardize coverage if violated. Policyholders may have to undergo additional underwriting, or pay additional premiums, to cover the new acquisition. Even where coverage for new subsidiaries is automatic, policies may require notice or acceptance of special terms or exclusions related to the transaction to preserve coverage beyond an initial grace period. Engaging insurance coverage counsel as part of a deal team can help monitor these insurance requirements, ensure continuity of coverage, and avoid any unexpected coverage gaps.

The above concerns require nuanced analysis based on the specific lines of coverage, policy language, and circumstances giving rise to the name change or corporate restructuring. As just one example, the potential adverse impact of modifying named insureds to reflect trade names stands in contrast to insurance requirements in some jurisdictions where state regulators may require proof of name changes in certain policies when filing for a new "dba" or assumed name.

Careful analysis of insurance considerations in conjunction with changes to corporate form is of paramount importance in order to identify and resolve any issues before they cause problems securing coverage months, or even years later, when it may be too late. Retaining insurance coverage counsel early and often in the deal process can help minimize these risks and maximize recovery in the event of a claim.

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