



**CHICAGOLAND
RISK FORUM**
CHICAGO & MID-ILLINOIS RIMS CHAPTERS



Working in Harmony with Your Legal Department to Protect the Company's Bottom Line

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Who We Are

- **Iryna Sladkevych - Risk and Insurance Manager, Essendant**
 - Essendant is a wholesale distributor of workplace essentials
 - Responsible for coordination of risk management & insurance: placing insurance program, and managing claims, safety and loss control initiatives
- **Matt Jeweler – Counsel, Pillsbury Winthrop Shaw Pittman**
 - Pillsbury is a law firm with approximately 700 lawyers in 20 offices around the world
 - Matt’s practice focuses on representing corporate policyholders in insurance matters, from policy negotiation to resolution of claims and litigation, if necessary

Agenda

- Why it is important for RM and Legal to coordinate
 - Common examples where a lack of coordination can have serious (and costly) consequences
- Identifying and establishing a relationship with “go-to” counsel
- Key items about RM that Legal needs to know
- Key insurance issues and concepts that Legal needs to know
- The role of outside coverage counsel
- Tips for better cohesion between RM and Legal
- Q&A

How Lack of Coordination Between Legal and Risk Management Departments Can Harm the Company

- Written demand comes in to Legal and RM doesn't know about it, then six months later a lawsuit is filed after policy renews
 - ✓ Claim not "first made" during the later policy period
 - ✓ Possibly no coverage due to exclusion for claims relating to prior claims or circumstances that the insured was aware of prior to policy period
 - ✓ Late notice issue

How Lack of Coordination Between Legal and Risk Management Departments Can Harm the Company

- Field does not inform RM or Legal of an issue, then later a demand/lawsuit is made
 - ✓ Possibly no coverage due to exclusion for claims relating to prior claims or circumstances that the insured was aware of prior to policy period
 - ✓ Late notice issue

Example:

- EPA audit at the customer's location revealed violations
- Your company had recommended certain practices that customer used and for which they have been cited
- Customer sent a first note advising of violations to the field manager but it was never escalated to RM or Legal or to any senior leader, and thus notice of circumstance was never given to the E&O carrier
- Six months later, the client receives penalties from the EPA due to the audit violations in the amount of \$100K and sends a demand letter to a corporate office for reimbursement because the processes they have established were based on your company's recommendations claiming that your professional advice was incorrect and you are responsible party for the violations
- You submit the claim and the insurer denies coverage based on late notice

What do you do? Who helps you to resolve dispute with the insurer?

How Lack of Coordination Between Legal and Risk Management Departments Can Harm the Company

- Legal hires defense counsel not approved by insurer
 - ✓ Perhaps no coverage for defense costs depending on policy language, and at the very least some portion of rates may be uninsured

Example:

- Cyber event occurred over the weekend, and the Cyber Security Response plan did not list pre-approved counsel to handle the incident
- General Counsel appoints a firm with which he has connection and worked in a previous company on a similar issue
- After reporting the Cyber event to the carrier's emergency hot line, the contact person appointed for this claim is CISO who schedules a call with the insurer first thing in the morning next day. RM is not notified of an attorney appointment or of the scheduled call. The call happens and it appears that an attorney represents your company as appointed by General Counsel, but adjuster invites their panel counsel in anticipation that your company has not hired any other law firm.
- Now both attorneys are present on the call which creates confusion and unnecessary frustration of all parties involved. Later on, the adjuster approves your appointed counsel however, the rates for our appointed counsel are twice higher and adjuster does not approve the panel attorney or the higher rates.

How could this situation have been avoided? Why do you think this happened and could it have been prevented if RM was involved and fully informed by Legal?

How Lack of Coordination Between Legal and Risk Management Departments Can Harm the Company

- Legal settles a lawsuit against the company without the insurer's consent
 - ✓ Possibly no coverage per policy condition prohibiting settling without consent
 - ✓ May be saved by a prejudice requirement, depending on what state law would govern the insurance claim

Who In Legal Should RM Reach Out To

- Establish a clear process between Legal and RM departments (notification, communication, approvals)
- Identify points of contact in Legal for the RM team
- If you have multiple “in-house” attorneys, identify for which matters they should be involved
- Coordinate with Legal to identify outside law firms and for which matters they should be involved
 - Discuss whether RM can contact those firms directly or need pre-approval from Legal, and convey this protocol to RM

Key Items About RM That Legal Needs To Know

- Legal needs to know to connect with RM on the claims, insurance, or lawsuits received
- Legal should have a clear understanding of roles and responsibilities in RM and whom to reach out to on various matters
- Discuss and identify outside counsel depending on the matter and provide this information to RM to have a pre-approved list of providers accepted by the carriers
- Have your TPA/carrier hold an annual legal review of services they provide on company's behalf (e.g., workers comp) and include Legal to make sure they are in agreement with their qualifications, rates, jurisdictional expertise, etc.

Examples:

- If resolved workers comp claim may require injured worker to go through ADA process if there is a dispute on full recovery or in certain jurisdictions it can potentially become an issue and benefits would need to be continued regardless of the release and for as long as the matter is not resolved in court
 - Also, potentially becoming an employment matter
- Special coverage that may be required with certain types of business (especially important when working with M&A or strategy group on acquiring new companies)

Key Insurance Items About Which Legal Needs To Be Informed

- What coverage the Company has
 - Amount of policy limits
 - Identify occurrence vs. claims-made
- Brief overview of coverages provided under each policy and what types of losses are potentially covered
- RM can provide examples of possible losses that company may likely face based on the unique knowledge and experience of the RM, and explain how insurance fits in (or doesn't)

Important Coverage Conditions/Requirements For Legal To Know

- ✓ Prompt notice
 - ✓ Understanding of claims made coverage and reporting period
 - ✓ Exclusions for knowledge/claims/suits that existed prior to policy period (prior acts)
 - ✓ Other strict deadlines for giving notice
- ✓ Have clear understanding as to who and when should give a notice of circumstance, incident or a claim to the carrier under particular coverage
- ✓ Before giving a notice to the carrier, appoint a contact to deal with an adjuster(whether from Legal or RM departments) to make sure the information that comes from the company is synchronized and all parties internally agree on what is being communicated to the carrier

Important Coverage Conditions/Requirements For Legal To Know

- ✓ Insurer may have the right to appoint, or approve/deny, defense counsel or their rates
 - ✓ In-house counsel need to realize they may be constrained in who they hire
 - ✓ Ideally, have your law firms and attorneys' rates pre-approved with the insurance carrier before the claim occurs
 - ✓ Ask your carrier if they have appointment with your attorney already and possible negotiated rate that would apply to you as their policyholder
- ✓ Incurring costs without consent
- ✓ Consent to settle
- ✓ Not impairing subrogation rights
- ✓ Contractual limitations period
- ✓ Arbitration or other alternative dispute resolution provisions
- ✓ Choice of forum/law provisions

The Role of Outside Coverage Counsel

- Importance of involving outside coverage counsel before any issues with the claim arise
- Identify and appoint coverage counsel and have them engaged in policy reviews in order to better negotiate terms and conditions with the carriers
 - Also, you will have the benefit of an already-established relationship with trusted counsel to whom you can turn when you need help with a claim
- Attend webinars and workshops that your coverage law firm provides to be abreast of the latest developments in coverage litigation

Tips for Better Cohesion Between Risk Management and Legal

- Consider involving in-house counsel on the front end – when you’re buying/renewing coverage – to ensure that RM is sensitive to the current risks the Company faces and can purchase types of coverage/limits, and negotiate policy language, appropriately
 - An added benefit is that counsel will be more familiar with the coverage
- RM can proactively provide a high level outline/cheat sheet re what policies the Company has and what types of things they cover.
 - Make sure Legal has a full schedule of insurance, and do this annually after renewal – this will help account for new coverages, material changes in coverages, etc.
- Give periodic training to Legal regarding important insurance coverage principles so they are sensitive to those issues
- Set up internal distribution channel for new third-party claims/lawsuits to ensure that RM learns of the claims/lawsuits immediately

Tips for Better Cohesion Between Risk Management and Legal

- Set-up internal folders/drives to keep all claims-related communications in one place
- Create a template that you want to use when communicating with internal personnel related to the claim
 - The template should include an “Attorney/Client Privileged” header, and in-house counsel should be included on all communications internally in an effort to preserve privilege
- Involve RM in pre-close due diligence process with M&A team for any strategic planning to make sure all transactions are properly reviewed for potential liabilities, especially on “stock” deals
 - Important to note that asset-only deals should be reviewed by RM post-close to make sure appropriate coverages are in place to cover possible new exposures
 - Transactions should be reviewed to determine whether policies, or certain rights under policies, were transferred in the deal
- Consider having a dedicated in-house counsel for any insurance-related matters
 - Time-permitting, perhaps counsel could monitor insurance legal developments in the state(s) most relevant to your company

Tips for Better Cohesion Between Risk Management and Legal

- RM can and should ask Legal questions geared toward ensuring that all potentially applicable policies are noticed and pursued
 - E.g., in a long-tail claim, be sure to ask when the plaintiff worked at or lived near the plant, or in a construction defect claim ask whether there are any allegations of professional liability
 - If you have a cyber event that you have been asked to notice, make sure you know the nature of the incident from the beginning
 - E.g., whether the event should be noticed under a crime or special crime policy in addition to cyber coverage
- Things RM generally should avoid doing before discussing with Legal, if possible:
 - Communicating about a new claim/liability with other non-lawyers – best practice would be to work through Legal so you can get the benefit of privilege
 - Communicating with insurers about a new claim/liability
 - May say or characterize things in a way to the insurer that's harmful to the company in the underlying case because not fully sensitive to the issues in the underlying case



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Questions?