Cyber Liability Cheat Sheet

This sheet is a synopsis of everything you have learned throughout our program and all the key tips we gave you. We get it, Melanie talks fast sometimes so this is for you to keep handy 😊

The Basics…..

<u>Why is the application important?</u>

Because Melanie told you it was!!! Ok fine, the real reason is because the application can really act like a risk management review. In addition to providing basic information about the organization which underwriters rely on to assess the risk, the application contains declarations relating to any circumstances that could give rise to a claim as well as any prior litigation or notice of claims that occurred.

PLUS misstatements in the application have resulted in insurers rescinding coverage ab initio. It is therefore especially important that the questions on the application are carefully considered and that the application is signed by the chairman of the board or the CEO.

<u>What is the coverage 'trigger'?</u>

The "trigger" refers to the event that will give rise to a claim under the policy, hence, trigger the coverage. The Cyber Liability policy is almost universally a "claims made" policy. This means the trigger that will give rise to a claim is the date a claim is made against the insured. The date when the wrongful act actually occurred that is the underlying cause of the allegation will not determine coverage under the policy; the claim must be made against the Insured during the policy period and not after the policy has been allowed to lapse.

What is the limit of liability?

The limit of liability under the Cyber Liability policy is an aggregate limit, meaning it is the most the underwriters will pay for all claims combined during the policy year. Some policies include defense costs and expenses within the limit while broader policies provide unlimited defense costs coverage in addition to the policy limit. This is obviously extremely important.

What is the retention?

When does it apply? Retention is the term for a deductible on the Cyber Liability policy. This retention applies to the insured organization when a claim is made. Some policies specify that the retention does not apply to defense costs and some will even contribute equally to damages along with the insured until the retention has been paid.

D&O policies typically contain a retention that the corporation needs to pay in the event that they reimburse a Director for a claim. To ensure that companies do not try and avoid paying the retention by not reimbursing the D&O, many policies contain "presumptive indemnification" language. This forces the corporation to reimburse the insured, or at least pay the deductible, unless the corporation is prevented by law from indemnifying the insured.

Do I control my own defense and appoint legal counsel?

Most Cyber policies are written on a duty to defend basis. This policy means that the insurer conducts the defense on your behalf; appointing lawyers and paying legal costs as they are incurred. The duty to defend option has a cash flow advantage as legal costs are paid directly by the insurance company. In addition, some duty to defend policies do not apply the retention to defense costs enhancing the cash flow advantage

Some policies are written on a reimbursement format. With a reimbursement policy your client would appoint legal counsel (typically the insurer still needs to agree with the legal counsel chosen) and conduct their own defense, paying legal costs. The insurer then reimburses costs when they provide documentation to support.

Organizations who are comfortable having more control in dealing with lawyers and conducting and overseeing the defense of the claim, and if the cash flow advantage of the duty to defend policy is not critical, often prefer the greater level of involvement allowed by the reimbursement policy, especially where serious allegations and personal reputations may be in question.

Make sure you pay attention to this as it could end up being a real problem with the client in the event of a claim and could turn into an E&O for you!!

What is a "Hammer Clause"

A Hammer Clause typically consists of two elements:

- The Insurer must get consent from the Insured before settling a claim.
- If the Insured does not give consent, the Insurer's liability is limited to the amount of the plaintiff-approved settlement and the defense costs to the date of the withheld consent

Be extra careful with this one. Some policies limit the hammer clause to a set percentage, which means the insured participation in any increase settlement amount is limited to that percentage.

How do I Review the Policy?

The typical policy if divided into 6 sections, and as we taught you during the program this is how we review the policy 😊

1. Declarations - This section specifies what is unique to each insured. It includes the name and address of the insured, coverage period, limits and deductibles purchased and the premium.

2. Definitions - Many terms are defined in the policy, usually in such a way to put a narrow interpretation to the term and often operate to exclude certain aspects of coverage. Remember some definitions also exclude coverage like punitive damages.

3. Insuring Agreements - This should clearly spells out the coverage grant in broad terms. The broad scope is then limited and shaped by the exclusions, definitions and conditions as well as certain endorsements that are added to the policy.

4. Exclusions - They typically fall into two categories: Coverage that is provided by other policies, such as the General Liability policy; and situations that are beyond the scope of insurance such as conduct exclusions relating to criminal acts and fraud.

5. Conditions - How the policy is managed and the rights and responsibilities of both the insurer and the insured are specified in this section of the policy. This section would explain the procedure for reporting a claim and what happens in the event of a merger or sale of the corporation amongst other things.

6. Endorsements - The endorsements of the policy can make changes to any of the sections noted above. This is the insurer's avenue for making changes to their base or standard wording.

Definitions to Review

Definition of Claim

There can be considerable difference in the scope of this important definition between various policies, as many insurers have substantially broadened the definition.

Definition of Loss

Does the definition of loss specifically exclude taxes? Are punitive damages excluded? Is the coverage broad offering ‘most favourable jurisdiction’ language or is coverage limited to Canadian suits only? So many things to look for!

Insured

What does the definition of the insured look like? Does the definition include spouses, domestic partners or heirs in the event they are named as parties to a suit solely due to their relationship to an insured person?

There are subtle differences between definitions that can have a significant coverage impact.

Coverages to Review

Business Interruption

Typically coverage for loss of income, and the extra expense incurred to restore operations, as a result of computer system disruption to the company's computer system caused by a virus or other unauthorized computer attack. Sometimes Contingent BI is covered, other times it is not.

Be very careful with the policy trigger, this changes from company to company.

Claims Expenses & Data Breach Expenses

Look to see if it is included inside Aggregate Limit or outside the limit?

Cyber Terrorism

Currently most companies specifically exclude this however there are a handful of companies that will offer via endorsement.

Fines & Penalties

This one is something to watch for. Some companies provide coverage and other companies don't, some companies will offer as an endorsement and some companies offer no available coverage.

Network & Security Liability

One important thing to remember about this coverage is Canadian Privacy law still does not require mandatory breach notification in the majority of provinces. So this coverage should cover the failure to provide notification of data breach where required by law as well as **not** required by law.

Reputation Coverage

Provides costs to restore Insured's reputation and is not covered on all policies in the marketplace today.

Security Breach Remediation

This is probably one of the most important coverages so pay attention! Watch for limitations on time frame and dollar amounts as well as what is actually covered. The trigger for this could be voluntary or required by law, look to see if the policy responds to both.

Wrongful Collection of Personal Information

This is another tricky one. Currently some companies specifically exclude it with no option to include it or the possibility of purchasing by endorsement. Other companies cover it with limitations.

Policy Conditions to Review

Cancellation

Most policies are non cancellable by the insurer, except with respect to nonpayment of premium.

Coverage Territory

This is a BIG one to pay attention to. Most policies provide coverage worldwide however the thing to watch for is where the suits can be brought. It may read as worldwide, suits can be brought anywhere OR applies to claims committed anywhere in the world provided that the suit is brought against the insured in Canada.

Discovery

If the policy is not renewed or is allowed to lapse an automatic period of time (usually 30 days) is allowed for the insured to report claims or notice of circumstances that could give rise to a claim. Most policies give the insured an option to purchase an extended reporting for one year. This allows the insured to maintain coverage for wrongful acts that took place prior to the expiry of the policy. As the insurer may fail to offer competitive renewal terms or even refuse to renew the policy this can be an important clause allowing the insured valuable time to prepare proper notice of claim or to be covered for events that subsequently come to light after the expiration date.

Extended Reporting Period

In the event that the policy is not renewed, extended discovery coverage provides for a further period of protection for claims arising within the policy period but discovered during the extended reporting period. If possible, the extended reporting period should also be available where the insured decides not to renew or terminate coverage.

Every company offers this in a different manner. The first thing to look at is the automatic extended reporting period which can be anywhere from 15-60 days. Then the optional coverage can be purchased typically for 12 months or 24 months. Some companies charge 100% of the annual premium, some companies charge something different.