

Top 10 Insurance Tips for Year End Transactions

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The end is near. 2018 is fast coming to a close, and it is that time of year when corporate lawyers are counting—not the number of shopping days left until Christmas, but the number weeks, days and hours left before the end of the fiscal year. Admittedly, in the scramble to close deals, insurance requirements and indemnity provisions may not be at the top of the list of critical deal points for clients and counsel. But, in the larger scheme of things, law libraries and LEXIS are littered with the sad stories of parties, who paid too little attention to such details. Money is the mother's milk of litigation, and ensuring the availability of adequate insurance and indemnity coverage cannot be overemphasized.

For those working on corporate transactions, here are some practical reminders and best practices for drafting indemnity provisions and insurance requirements. As always, individual circumstances may vary. What is good advice for an indemnitor may be terrible advice for the indemnitee, and vice versa. The following top ten tips are framed from the perspective of the indemnitor and buyer in a transaction, but can be adapted to circumstance.

Indemnity Provisions

1. An indemnity clause should include a “release” and “hold harmless” language. The indemnity should run in favor of not only the party named in the contract, but parents, subsidiaries and affiliated companies, employees, officers, directors and representatives. In order to ensure that, where possible, the counterparty/indemnitor's insurance is triggered by a demand for indemnification, the indemnity should expressly extend to “tort liability to pay for bodily injury or property damage to a third person or organization.” If appropriate, the indemnity should embrace special, economic, consequential or indirect damages, as well as damages arising not only from conduct by the counterparty indemnitor, but by agents, subcontractors or others for whom the indemnitor is responsible.
2. In case of underlying claims against the indemnitee by an employee of the counterparty/indemnitor, the indemnity clause should include a specific waiver of any defense or immunity to indemnification the party may have under any applicable workers' compensation law or statute, or any judicial decision in a relevant jurisdiction disallowing or limiting such indemnification.
3. Where possible, the indemnification provision should include terms addressing notice of claims, selection of counsel and consent to settlement of indemnified claims. Ideally, the indemnitees should have the right to select counsel to defend their interests, and the indemnitor should not have the right to settle an indemnified claim without the indemnitees' consent, particularly where the settlement implicates amounts owed by an indemnitee and not subject to the indemnity obligation.
4. Indemnity provisions should be subject to a “survival” provision and include language separating the indemnity obligation from the existence or scope of insurance coverage

available to the indemnitor.

Insurance Requirements

1. With regard to the types of insurance a counterparty is required to maintain, it is increasingly common for parties to be required to maintain some kind of network security/privacy liability coverage, particularly to the extent that such parties may have access to the counterparty's network infrastructure or data.
2. Insurance requirements should address the use of retentions, deductibles and captives to ensure that the limits required of the counterparty provide meaningful coverage, particularly when there is an additional insured obligation.
3. Insurance requirements should include some standard of regulatory approval and financial rating for the insurers in the counterparty's program. But state licensure may not be required, particularly for surplus lines insurers, who may be "eligible" under state statutes, but not licensed.
4. With respect to additional insured status, where appropriate, additional insured status should be applied to all entities and individuals qualifying for indemnification—not just the specific counterparty. The additional insured requirement should specify what forms should be obtained for GL coverage to ensure that coverage is extended for the named insured's completed and ongoing operations. The additional insured provisions should specify in detail which required policies are subject to this obligation, including whether the duty to provide additional insured coverage extends to excess as well as primary policies. By comparison, the requisite waiver of subrogation should extend to all required policies, both first-party and third-party, and should embrace all entities and individuals qualifying as indemnitees. It is common for insurance requirements to specify that the additional insured coverage afforded by the agreement is intended to be "primary and non-contributory" to the owner's coverage.
5. Insurance requirements should specify that the policies the party is obligated to place should have terms guaranteeing that such policies will not be cancelled or modified without notice to the additional insured.
6. Most contractual insurance provisions include some requirement to maintain and provide certificates of insurance to the additional insured owner. These provisions should also allow for access to the policies themselves upon reasonable request. In the event of a claim, the contractual insurance requirements should require cooperation between the named insured and the additional insured in the giving of notice and handling of the claim.

Though often treated as boilerplate, insurance requirements and indemnity provisions have been the salvation and undoing of countless companies and their counsel. For corporate and in-house lawyers alike—whether working to close before December 31 or toiling into 2019—these top ten insurance tips can help to anchor transactions and free parties to focus on the broader deal points in a negotiation.

If you have any questions about insurance requirements and indemnity provisions in transactions, or about insurance coverage in general, please contact one of Haynes Boone's [Insurance Recovery Practice Group](#) partners listed below.