

NLC NATIONAL LEAGUE OF CITIES

RISC RISK INFORMATION SHARING CONSORTIUM

EMERING RISKS & PROBLEM COVERAGE LANGUAGE FOR PUBLIC ENTITIES

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Emerging Risks and Problem Coverage Language for Public Entities



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Overview

- Helpful Resources
- Guiding Principles
- Problem Areas
- Emerging Risks

Helpful Resources

- NLC Mutual and NLC-RISC
- SERFF
- IRMI
- Underwriting and claims personnel
- Coverage and defense counsel
- AI tools

A Few Guiding Principles

- Clarity
- Favor standard language
- Consistency
- Say it once
- Definitions versus coverage grants, exclusions and conditions
- Statutes and case law
- Alignment with excess and reinsurance coverage

Problem Areas

Coverage Triggers—Occurrence Based Coverage

- Occurrence – can raise causation issues
- Bodily injury or property damage
- Offense
- Accident

Coverage Triggers—Claims Made and Reported

- Wrongful act – commenced after retro date but before end of coverage period
- Claim first made – during coverage period or any applicable ERP
- "Claim first made"
  - Claim received by covered person and reported to pool in writing
  - Claim made directly to pool
  - Pool given written notice of wrongful act reasonably expected to result in a claim

Coverage Triggers—Claims Made Integration Language

All Claims for damages because of a Wrongful Act committed against the same person, including damages claimed by any person for care, loss of services or death resulting at any time from the Wrongful Act, will be deemed to have been made at the time the first of such Claims is made, regardless of the number of Claims subsequently made.

Limits

- Declarations alone is not enough
- Conform language in declarations to the body of the form
- Clearly state whether defense costs erode limits
- State clearly that limits apply regardless of number insureds, claims or persons bringing claims

Continuous or Related Occurrences or Wrongful Acts

All Wrongful Acts that are related, connected, continuous, repeated, or causally or logically connected, or that arise out of a common fact, circumstance, situation, event, transaction, course of conduct, or series of related facts, circumstances, situations, events, transactions, or courses of conduct, will constitute a single Wrongful Act and will be deemed to occur when the first such Wrongful Act commenced.

Stacking

- State clearly that if more than one coverage part applies, limits may not be stacked and the applicable limit is the single highest limit that could apply
- State clearly that if more than one coverage agreement applies, limits may not be stacked and the applicable limit is the single highest limit that could apply

Exclusions

- Lack of standard exclusions – e.g., land use
- Failure to state exclusions sufficiently broadly
- Use care when drafting carve-out from exclusion – e.g., liability assumed under “covered contract” is covered, but only for BI or PD occurring after execution of contract

Wrongful Conviction

- When is occurrence coverage triggered?
  - Majority rule: When prosecution begins
- Coverage language matters
- Injury during course of incarceration can trigger coverage

Multi-Jurisdiction Task Forces

- The problem
  - Potential exposure to joint and several liability
  - Multiple coverage agreements – multiple limits
  - “Drug war” approach to enforcement
- Potential approaches
  - Exclude entirely and rely on coverage obtained for MJTF
  - Exclude but endorse after underwriting
    - Appropriate governance
    - Indemnity provisions in governing agreement

Emerging Risks

Approaches to Emerging Risks

- Establish risk management guidelines
- Price and underwrite it
- Sublimit
- Exclude entirely
- Exclude with carve-outs for specific activities or risks
- Reinsurance

Does New Exclusion Imply Coverage Under the Previous Form?

- Change in form could be accepted as evidence risk was not excluded, but not conclusive
- New exclusion may be a clarification of existing scope of coverage
- Rules of evidence may preclude introduction of new form as evidence old form provided coverage

Communicable Disease

- COVID-19 Liability Shield Laws
- Business Interruption
- Broad exclusions seem to be the norm

PFAS

- US EPA reporting requirements could lead to new litigation
- Pollution exclusion in liability forms may not be sufficient to exclude liability for bodily injury or property damage
  - Direct exposure – products liability
  - Indirect exposure – environmental contamination
- PFAS-specific exclusions increasingly common

Artificial Intelligence

- Incoming: Pressure on cyber coverage
  - the “hackpocalypse”
  - Check wording on social engineering
  - Check exclusions for bodily injury and property damage
- Outgoing: Liability arising from use of AI
  - Will permeate operations if it does not already
  - Could exclude or sublimit certain type of AI or uses but difficult to define

Difficult to Define AI

"Artificial Intelligence" means any machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments, including, without limitation, any system that can emulate the structure and characteristics of input data in order to generate derived synthetic content, including images, videos, audio, text, and other digital content.

Automated License Plate Readers (ALPR) – Risks

- Civil rights violations
- Invasion of privacy
- Statutory violations for collection and sharing of information
- Wrongful arrest/detention
- Abuse by law enforcement officers

Automated License Plate Readers (ALPR) – Response

- Risk management guidelines
- Existing exclusions
  - Criminal or malicious acts
  - Knowing violation of law
  - Cyber exclusion
- New exclusions
  - Revised cyber exclusion
  - Specific exclusion

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