

Words With Friends, Part 1: Insurance Requirements and Contracts, With Vince Morgan and Suzanne Day

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In the first of a two-part episode of Bracewell Covered, [Vince Morgan](#) discusses insurance requirements and contracts with Bracewell colleague [Suzanne Day](#), who recently joined the firm from The Lubrizol Corporation where she worked for more than 20 years in their legal division, eventually serving as chief legal and ethics officer.

One of the things that I always look at when reading a contract with a bunch of coverages is the commercial general liability coverage part. At least 20 to 30 percent of the time we still see comprehensive general liability, which hasn't been sold in the United States since 1986. You have somebody who spent a lot of time working on a form many years ago and the company might say this is our wording and they just don't ever update it to keep abreast of changes in the insurance marketplace. Any thoughts on that?

I think that's just a good reminder to lawyers everywhere that you have to refresh your forms. And then you spent a lot of time, trying as hard as you can, deploying all sorts of different negotiation tactics to get the counterparty to use your form. That takes a lot of time and a lot of energy. The final step is, you've got to refresh the form.

But it is important, at least annually, to look at the requirements of your forms, or in your form contracts to make sure that they still make sense both for the market, as you're mentioning, but also for your business and what you're trying to accomplish with these contracts. Oftentimes your client's business may change dramatically in a year, and it's going to require a different kind of risk tolerance or a different kind of coverage that you might want your

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counterparties to buy or that you're going to be buying. But it really is something that you must do regularly.

You want to have a template that works, that gets you what you need but is also functional. And that's the tricky thing here, because if it becomes so burdensome and complex, then the first thing that's going to happen is people are going to stop using it.

There are plenty of vendors out there who have products that are designed to try and help lawyers work through that, so that you can work on the basis that your template should change for the specific business that you're drafting for, the kind of business, the kind of risks. You can look at the frequency that the counterparty is going to be on your premises. For example, if you're trying to put together a contract that is going to protect you against harm that your contractors might cause when they're on your premises, you can match the kind of form you use to the number of visits anticipated per year, or the kind of activities, or the dollar value, that kind of thing and have a form set up that makes the contract drafting a lot easier.

One of the other things that we've seen clients struggle with is certificates of insurance, and the thing that's important to remember is that certificates of insurance are handy. They're very good on a business level of communicating key information in a form that people are used to seeing. But courts have said you've got to be careful about relying on them because they all have that sentence that says this doesn't change the actual terms and conditions of the policy. What is the best way to approach that?

That come down to doing sort of a risk adjusted analysis for your most important contracts where you're going to be paying the counterparty quite a lot of money, the counterparty is going to be on your premises really frequently or some relationship that you think is significant. That's really something that each client has to define themselves. For those contracts, I would require, or I would recommend, at least, being able to review, if not the entire policy, which is the first ask the deck sheets for the policies so that you as the person receiving the benefits of the other parties required insurance can see for yourself the limits, you can see particularly when you have excess towers. You talked earlier about commercial general liability. Often that's a primary policy which maybe a \$2 million limit, a \$5 million limit. But then if you're requiring excess up to the hundred million or something, you would want to make sure that the excess has the primary correctly listed.

There's a lot of mischief that can be caused. Unfortunately, there are a lot of people's hands that touch policies when they get put together, and sometimes folks are cutting and pasting and are not paying as good of attention as you would when it's your biggest customer or your biggest vendor. You want to make sure and see for yourself, have someone on your team see for themselves that in fact, yes, the tower does stack up with all the right policies

underlying it. You want to be able to see, if you can't see the endorsements, you can see the list of endorsements. And those are often standard policy forms.

So that can be a good middle ground if your counterparty is both important and also has the leverage to tell you absolutely not, you're not going to see the policy, if you can negotiate yourself down to the deck pages of the policies that can give you some sense of comfort that would be missing just from a certificate of insurance.

Have questions about this podcast? Contact [Vince Morgan](#) or [Suzanne Day](#).

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