



Covering all the Bases in Representing CAAs in Insurance Defense Matters

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Representing clients in litigation covered by liability insurance can present some challenging issues. Representing Community Action Agencies is no exception, and, the often misunderstood or somewhat ambiguous rules concerning use of government grant funds for legal fees and settlements makes the challenge even more rigorous.

The first issue that often needs to be addressed is whether the claim is covered at all. Due to the frequently inscrutable language of policies, CAAs may turn to their attorneys to determine whether a claim is covered, or if a carrier has denied coverage or covered under a reservation of rights, whether that determination by the carrier can be successfully challenged. Familiarity with both the specifics of the entire scope and time period of insurance coverage of the CAA, as well as a careful reading of each potentially relevant policy, is therefore essential. Review of the package as a whole, making sure that all riders, endorsements, etc., are included in the materials, is critical. An understanding of the interpretations of the various provisions, including legal research on how particular clauses have been interpreted by the courts may also be necessary. Some states have also given their own glosses on coverage issues, for example, in Massachusetts; courts will not read an exclusion to a policy to take back what the coverage gave so as to in effect create a hollow policy.

Once coverage is determined, another issue that comes up is who decides on the attorney. Does the policy permit the insured to select counsel freely? Is the insured required to select from an identified panel of carrier-approved attorneys? Or does the carrier retain total control over the appointment of an attorney? Again, a careful reading of the policy is needed to determine the level of attorney choice permitted to the insured. If an attorney has a long-standing relationship with a client, and the attorney is not on the pre-approved panel, the client may wish to consider negotiating to add a rider to the policy permitting use of that attorney or firm. The attorney may also want to investigate how to be included in the carrier's general panel of approved attorneys.

The carrier is likely to set a cap on hourly fees that is lower than the firm's standard rates. The client should be aware of this fact and the attorney and the client should discuss ahead of time whether the client will be responsible for paying the difference.

Settlements of lawsuits are another hot issue. Again, read the policy carefully as to who has the final say on settlements of lawsuits. Some policies will give the insured the authority to veto a settlement, other won't. If the insured does have that right, and the case goes to trial, often the carrier will only be obligated up to the settlement amount.

The potential use of federal grant funds to pay either legal fees, such as the deductible or any judgment to the extent it is not covered by the policy, raise additional issues. Federal grant rules

do not generally prohibit use of grant funds to pay a deductible on policies covering defense costs, as long as such cost is reasonable and otherwise follows the general allowability requirements and the specific criteria for professional services costs.¹ Caution should be used in charging judgments to federal funds without prior funding source approval. If it is considered a loss that could have been reasonably covered wholly by insurance, charging it to grants may run afoul of the federal grant rules.²

Finally, don't forget to remind clients how important it is to obtain professional advice in selecting the appropriate types and amount of insurance coverage and to review the coverage every few years. Clients should also be advised to review the coverage during the policy period to determine if the CAA has taken on additional risks, or for example has occupied new properties, that need to be insured.

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¹ Federal Cost Principles for Nonprofit Grantees, .2 CFR Part 230, App. B (Professional Services Costs, pgh 37).
http://edocket.access.gpo.gov/cfr_2010/janqtr/2cfr230AppB.htm

² *Id.*, pgh. 22..