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# Lawyer Insights

## Maximizing insurance coverage and managing risks for educational institutions

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Each year, colleges, universities, and other educational institutions face exposure to a range of claims, including those involving allegations of hazing, alcohol use, and sexual assault. In August, for example, four former football players from Northwestern University filed lawsuits against the university, alleging hazing and mistreatment.[1] Two of the lawsuits named the university's former athletic director, a former coach, a former university president, and the university's board of trustees as defendants.[2] Such allegations can lead to significant financial exposure for schools and are unlikely to subside in the near term. In fact, according to some reports, over half of college or university students involved in sports or other student clubs and organizations have experienced hazing.[3] The number of deaths resulting from hazing ranges from 50 to 105 since 2001.[4] Many hazing-related injuries and deaths are also alcohol-related.[5] In one recent example, Baylor University settled a lawsuit brought by 15 women who alleged they were sexually assaulted as students.[6] The details of the settlement have not been disclosed. While liability insurance coverage may be available to mitigate risks associated with these claims, not all policies are the same, and insurers often raise defenses to avoid liability and exclude coverage, leaving educational institutions and individual defendants potentially exposed without the benefit of insurance. Accordingly, compliance professionals, in-house counsel, and other decision-makers should be aware of the sources of insurance coverage for these claims, as well as the common challenges in obtaining such coverage and potential risk solutions, so they are better prepared to respond should a claim arise.

**Insurance coverage for emerging claims against educational institutions**

General liability policies are one potential source of coverage, but those policies have exclusions that could jeopardize coverage depending on the facts giving rise to the claim. Like most businesses, educational institutions purchase general liability insurance to protect themselves against lawsuits involving bodily injury and property damage. This type of policy might afford broad coverage for many claims that put educational institutions at risk of high financial exposure. But as explained more fully later, general liability policies typically include broad exclusions for risks like hazing, alcohol, and sexual assault or abuse. Adding such exclusions to general liability policies is one of many insurance market reactions to the financial exposure posed by emerging claims against education institutions.

While unlikely to step in and protect educational institutions directly from third-party litigation, homeowners policies may potentially cover allegations of hazing, and students have successfully obtained coverage for these allegations in the past. The availability of this coverage to individuals insured under a homeowners policy—such as student defendants, coaches, deans, and trustees— could indirectly benefit the educational institution by offsetting losses that otherwise may be sought from the institution.

In one South Carolina lawsuit, a student involved in hazing freshman swimmers sought coverage under his parents' homeowners policy after being named individually in a lawsuit.[7] The insurer filed a declaratory judgment action, seeking a determination of coverage under the policy. The federal court held that intentional conduct producing an unintended injury constituted an "accident" under the policy. As a result, the insurance company had to defend the student in the lawsuit.

Similarly, in a separate case in New York state court, a Pi Delta Psi fraternity pledge was an alleged victim of a hazing ceremony.[8] The fraternity members and pledges rented a house in the Pennsylvania Poconos for the weekend. As part of the initiation ceremony, fraternity members blindfolded the pledge, weighed him down with a backpack filled with sand, and then repeatedly tackled the pledge until he was knocked unconscious. The pledge's family subsequently sued several members of the fraternity for wrongful death. One of the fraternity members requested coverage for the suit under his parents' homeowners insurance policy. The insurance carrier filed suit and moved for a ruling that they had no duty to defend or indemnify the wrongful death suit. The court denied the motions ruling that the defendant was entitled to a defense under the broad duty to defend standard. The insurers appealed the court's ruling. The appeal was later withdrawn at the stipulation of both parties.

Employees of educational institutions—who may only have limited coverage under the institution's liability insurance policy because of the policy's applicable limits, high retentions, narrow coverage grants, or broad exclusions—may also benefit from coverage under traditional homeowners policies. Specifically, if the employee is named in a lawsuit alleging failure to supervise the educational institution's organizations, failing to act to prevent hazing or participation in hazing, and the educational institution's insurance coverage does not extend to the employee, the employee could seek defense coverage under a homeowners or umbrella liability policy. Unless an insurer can establish that the allegations in a complaint are entirely excluded by policy exclusions—and subject to no other interpretation—the insurer would likely have to provide a legal defense for the lawsuit if the allegations in the complaint are alleged in a way that triggers insurance coverage.

**Common challenges to insurance coverage**

In response to mounting potential financial exposure due to hazing, sexual assault, and similar claims, insurers have adapted policies to limit or exclude emerging claims against educational institutions. One common exclusion in general liability policies is the alcohol exclusion. Most relevant for educational institutions, an alcohol exclusion eliminates coverage for "bodily injury" and "property damage" arising out of, resulting from, or in connection with a violation of the named insured's applicable alcohol policy. To highlight the risk, if an alcohol exclusion is included in the policy, the insurance may not cover an institution's exposure to claims for death or injuries resulting from an upper-class student or employee supplying alcohol to a student under the legal drinking age. The exclusion may also preclude coverage for failing to render or obtain medical treatment in alcohol-related incidents.

Most general liability policies also include hazing exclusions. The consequences of hazing—such as death and severe bodily injury—often lead to litigation and create significant financial exposure for educational institutions. Hazing exclusions typically are drafted broadly to exclude coverage for any "bodily injury" and "property damage" arising out of hazing committed by an insured, including claims for the alleged failure to suppress or prevent hazing by any insured or any other person. While educational institutions may take preventive, anti-hazing precautions, any alleged failure to prevent hazing may still expose the educational institution to litigation not covered by insurance. For example, many educational institutions have implemented a zero-tolerance approach to hazing. Some institutions impose severe sanctions against students and organizations that engage in hazing.

Similarly, several educational institutions will not admit a student convicted of criminal hazing for a period of time after the date of the conviction. Educational institutions have also implemented parent–family and community involvement initiatives to educate students about hazing, including how to report allegations of hazing. However, these preventive measures do not foreclose the possibility of civil liability when victims of hazing file lawsuits against the institution. Also, many fraternity or sorority events that rise to the level of hazing involve alcohol. Thus, even if a policyholder can somehow avoid application of the hazing exclusion, coverage may still be precluded under an alcohol exclusion.

Another critical insurability issue for educational institutions is the prevalence of exclusions for sexual assault, abuse, and molestation. Like the hazing exclusion, the sexual assault, abuse, and molestation exclusion applies to, among other things, the alleged failure to suppress or prevent sexual assault, abuse, and molestation. The case mentioned earlier involving a Texas university is just one example of how if the insurance carrier denies coverage, allegations of sexual assault can render an educational institution responsible for settling a large number of claims while also creating additional financial exposure because of the institution's tainted reputation. The sexual assault, abuse, and molestation exclusion leaves universities vulnerable to such financial risks without the ability to recoup losses from the insurer.

**Potential risk solutions**

In the face of these coverage challenges, colleges, universities, and other institutions should consider negotiating and purchasing special policies catered to their distinct needs or, at a minimum, carefully reviewing existing policies to understand potential coverage gaps. Some well-known insurers in the education industry, for example, offer general liability policies that provide coverage for many of the claims previously described, including claims of alcohol abuse and sexual misconduct. Those kinds of policies typically provide coverage for the educational institution as well as its trustees, directors, and officers. The policy may also cover faculty and employees, volunteers, and, in some circumstances, students and interns acting within the scope of their duties or obligations to the educational institution. Many policies are also specifically tailored to the needs of educational institutions, and the institutions—at least to a certain extent—may be able to customize policy language to address specific exposures. However, as traditional liability risks increase and new risks emerge, some insurers restrict or limit coverage under general liability policies.

**Self-insurance**

Self-insurance may be an option if traditional insurance markets are impracticable or unavailable. Self-insurance is the process of setting money aside for potential losses rather than transferring risk to a third-party insurer by buying an insurance policy. This type of insurance allows for flexibility in tailoring coverage to fit the specific needs of an educational institution. Self-insurance is best suited for an institution that faces a small number of claims because it enables it to avoid paying a premium for coverage it rarely uses. Other benefits of self-insurance include covering losses that traditional commercial insurance policies will not cover and retaining any premium funds set aside but not paid for losses. The risk with self-insurance, however, is that the educational institution could face an unexpected catastrophic loss that was not accounted for when setting aside money for self-insurance. These types of losses are difficult to predict and, as a result, can leave the educational institution exposed to a greater financial risk than the institution would have incurred if it were covered under a policy issued by an insurer.

**Captives**

Another alternative to traditional insurance markets is the formation of a captive. Unlike traditional insurance—bought from a third-party insurer—a captive is another form of self-insurance. Under this arrangement, an educational institution creates a subsidiary of itself that writes and covers its own insurance policies. The captive may be formed to insure risks that would otherwise be uninsurable because the potential losses or claims cannot be calculated and so a premium cannot be established, risks that are unreasonably priced in the commercial insurance marketplace, or to cover deductibles or self-insured retentions in the educational institution's primary and excess insurance programs. In addition, a captive may offer certain tax advantages and allow the educational institution to tailor the insurance provided in ways not available through commercial insurance markets.

One major advantage of forming a captive is that the educational institution has more control. Because the educational institution would "own" its captive insurance plan, it may choose its terms of coverage, tailoring its benefits to match its business risks and needs. In that case, the institution is no longer at the whim of an insurance company that may change policies or limits, add endorsements that change or eliminate coverage, or raise rates. The institution can analyze claims and use its unique knowledge and perspective about the potential claims it faces to better manage risk. Perhaps the best advantage of forming a captive is reduced overhead. While start-up costs—including capital to fund the captive—can be more expensive at the onset, the educational institution can potentially lower its insurance premiums once the plan is in place. And if claims are low, the educational institution gets to keep the profits instead of the insurance company. The educational institution will also purchase insurance in the wholesale market rather than the retail market, eliminating the go-between and reducing the price.

While there are several advantages to forming a captive, there are some pitfalls. Starting a captive can be expensive. The educational institution may initially incur costs, including formation, capital requirements, and legal fees. Depending on the size of the educational institution, it may also need to hire employees to manage the plan or outsource operations to a third-party captive manager. The institution will also be responsible for the day-to-day management of the plan. Traditional insurers have experience creating and servicing insurance products. If the educational institution does not have someone tasked with handling claims, the quality of the educational institution's claims administration and attendant benefits may suffer. This means the institution may need to be more careful with its overall cost or risk management plan. Another potential pitfall is that the institution will need to respond to claims and take on its own risk, which means having enough money to fund potential losses. If the frequency or severity of claims in a given year fluctuates unexpectedly, the institution will need money to cover those costs, which puts the educational institution's capital at risk.

**Risk-retention groups**

Another alternative insurance mechanism is a risk retention group. A risk retention group is owned by its insured parties, all of whom face similar liability exposures (e.g., working in the same business, profession, or industry). As a result, this type of coverage is popular in professions that face extremely large risks, such as higher education institutions. Since the owners of a risk retention group are the ones seeking insurance, they need to provide all the finances to cover losses. It is common for risk retention groups to be licensed under states' captives' insurance company laws. However, not all captives are risk-retention groups. Risk retention groups can benefit owners in several ways: while owners must put up the finances to cover claims, they also retain all profits, rather than insurance companies; renewals will not result in unexpected premium increases or decreases; and built-in flexibility typically means the policy can more closely meet the parties' needs. Some disadvantages of risk retention groups are that if one owner suffers a huge loss, it may raise premiums throughout the rest of the group; if a risk retention group fails, the owners may lose their funds whether they are involved in a given claim.

**Conclusion**

Although nearly all educational institutions take precautions to prevent incidents of hazing, alcohol misuse, and sexual assault from occurring, lawsuits alleging injury or death from these common institution-related incidents have recently gained more media attention. Generally, educational institutions are covered under their insurance policies if they are named in lawsuits for failure to take appropriate preventive action; however, due to the increased awareness and exposure to these issues, coverage for such incidents is becoming more difficult to obtain. As explained earlier, high retentions can effectively limit coverage, if a claim is not excluded altogether by an exclusion. Considering these coverage hurdles, educational institutions should consider alternative risk solutions, such as setting aside self-insurance, forming a captive, or creating a risk retention group. These alternatives may allow educational institutions to obtain and maximize coverage otherwise excluded or limited under traditional retail market insurance policies.

**Takeaways**

- Understanding whether the educational institution's insurance program covers increasing traditional liability risks and new emerging risks is critical.

- Simply complying with the institution's policies and procedures may not eliminate exposure to allegations of hazing, alcohol use, and sexual assault and abuse because even the best-followed practices are not assured to completely prevent claims or eliminate risks.

- Insurance claims may be covered under liability, and even traditional homeowners' policies, but insurers may raise exclusions to attempt to limit or bar recovery.

- Pay careful attention to common exclusions for intentional acts: alcohol, hazing, sexual assault, abuse, and molestation.

- Educational institutions should carefully review existing insurance programs on an ongoing basis and, if appropriate, consider alternatives to traditional insurance that allow tailored coverage to include common institution-related claims that are often uninsurable.

## Notes

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2. Rittenberg, "Ex-Northwestern AD Mark Murphy named in new hazing lawsuits."

3. Chloe Appleby, "What Is Hazing in College? Facts, Statistics, and Prevention Efforts," Best Colleges, updated August 17, 2023, https://www.bestcolleges.com/research/college-hazing-statistics/#:~:text=Over%20half%20of%20college%20students,push%20for%20a%20federal%20law.

4. Appleby, "What Is Hazing in College?"

5. Appleby, "What Is Hazing in College?"

6. ESPN News Services, "Baylor settles 2016 sexual assault lawsuit with 15 survivors," ESPN, September 18, 2023, https://www.espn.com/college-sports/story/_/id/38434684/baylor-settles-2016-sexual-assault-lawsuit-15-survivors.

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8. Adirondack Ins. Exchange v. Hewu, No. 155658/2016, 2017 WL 6539276, at *4 (N.Y. Sup. Ct. Dec. 21, 2017).

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