

UNIQUE INSURANCE ISSUES EVERY BUSINESS MUST FACE – COVERAGE AVAILABLE AND POTENTIAL CLAIMS THAT MANY BUSINESSES FAIL TO CONSIDER

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I. WHAT INSURANCE DOES YOUR BUSINESS NEED?

- A. Insurance needs vary amongst businesses. What is right for one business may not necessarily be right for another. It is important to identify the types of risks you face. A retail store may face risk of bodily injury to its customers, whereas that may be less of a risk for a financial institution. A professional employer organization may face a greater risk of employment practices or civil rights liabilities than another type of business, such as a restaurant.

- B. Insurance Agent Who Understands Your Business
 - 1. The most important asset many businesses can have is a good insurance agent who understands your business. A good agent should be able to help you find the most appropriate coverages. Additionally, if an insurer denies coverage, asserting that a specific loss is outside the scope of an insurance policy as written, an agent or broker can be a significant advocate. Agents or brokers typically have agency contracts with insurers with which they place insurance. That written contract governs their relationships with those insurers. There are generally two types of agents.
 - a. Captive Agent – A captive agent usually places insurance only with a particular carrier. The applicable agency contract may allow that agent to place insurance with another insurer if the insurer does not write a particular line of business. The law typically considers them to be agents of the insurer, not the insured.

 - b. Independent Agent – An independent agent places insurance with a variety of different companies. The law generally considers independent agents to be agents of the insured, not the insurer.

 - 2. Absent a “special relationship” an agent or broker does not have a duty to advise a potential insured of the types or amounts of coverage needed.¹ The practical impact of this is that an agent will usually have a defense in cases where a loss occurs and the insured attempts to sue, alleging that the agent did not advise the purchase of a particular type of insurance or did not advise purchasing insurance with sufficient limits.

¹ Harts v. Farmers Insurance Exchange, 461 Mich 1 (1999)

- a. This relationship changes under certain circumstances, such as when a potential insured asks the agent for advice and the agent then provides it. It also arises when an agent or broker offers unsolicited advice and that advice is wrong.
- b. There will be questions regarding liability for agents providing advice about Michigan No-Fault Reform.
 - i. Previously medical caps were unlimited. Unlimited caps are still available.
 - ii. Caps of \$500,000 or \$250,000 can be purchased at a lower rate.
 - iii. \$50,000 caps can be purchased by individuals receiving Medicaid.
 - iv. Over 90% of No-Fault claims are under \$500,000. Yet if you or your employee is involved in a catastrophic accident, this amount will likely be insufficient. Agents may be liable if they advise regarding reducing damage caps in exchange for lower premiums and those caps are insufficient.
- c. Licensed Insurance Counselors
 - i. Michigan also provides for services from a licensed insurance counselor.²
 - (A) A counselor can become licensed by undergoing specific training and education regarding types and analysis of insurance needs.
 - (B) The relationship is governed by a written contract. The client will typically be charged an extra fee for the analysis performed by the counselor.

C. Types of Insurance Policies

- 1. There are generally two separate types of policies, which are often not clearly understood.
 - a. Occurrence Policies – These policies apply when a loss occurs during the policy period, regardless of when a claim is made. For example, you have a policy with a period of 1/1/2020 to 1/1/2021. A loss occurs on June 1, 2020, but no claim is made until 2021. An occurrence policy would be triggered because the loss occurred during the policy period.
 - b. Claims Made Policies – These policies apply when a claim is made, regardless of when the loss occurred. In the above scenario, you have purchased a new policy with a different carrier with a period of 1/1/2021 to 1/1/2022. The loss occurred on June 1,

² MCL 500.1236

2020, but no claim for that loss was made until February, 2021. A claims-made policy would be triggered because the claim was made during the policy period.

i. CAUTION: You will have completed an application when you switched carriers, or even if you renewed with the same carrier. You will likely be asked about any “claims or circumstances that may give rise to a claim.” If you knew about the June 1, 2020 incident and do not report it, you may have no coverage for any litigation resulting from that incident.

2. Consider the type of coverage necessary to cover the risks posed by your business and industry.

II. UNDERSTAND YOUR BUSINESS RISKS AND WHAT THE UNDERWRITER WILL CONSIDER

A. Think Like an Underwriter

1. The underwriting department of an insurance company is the arm that determines the premiums to charge. It analyzes the aspects of your business that present a unique risk of loss. It also analyzes loss runs, which is documentation of your history of claims. Based on the risk of your business operations and the way you handle them, the underwriter determines how much you should be charged for the company to issue a policy of insurance.

a. Risk Control v. Risk Financing. These are the two primary methods of handling business risk.

i. Risk Control – A loss control measure intended to prevent losses from occurring or reduce the severity of losses that actually occur.

ii. Risk Financing – Ways of paying for the losses that do occur. Risk financing techniques include insurance, non-insurance transfers (such as hold harmless agreements), retention and various combinations of insurance and retention.³

B. Businesses face a number of different types of loss exposures for which insurance may be available. These include:

1. Cybersecurity/ransomware
2. General liability/property liability
3. Employment Practices Liability/Workers’ Compensation
4. Contractor's liability

³ Malecki and Flitner, Commercial Liability Insurance and Risk Management, American Institute for CPCU, 4th Edition (1998)

5. Automobile liability
 6. Aircraft liability
 7. Professional liability
 8. Employee Benefits Liability
 9. Environmental liability
 10. Primary/umbrella policies
- C. Not all these exposures are applicable to all businesses. We will now take a closer look at some of these exposures.

1. Cybersecurity/Ransomware – Cybersecurity insurance used to be sold as an endorsement to other types of policies, such as general liability. The threat of cybersecurity has increased greatly through the years and this is now typically a stand-alone policy.

a. A typical policy may contain the following definitions:

- i. "Cyber Security Incident" is the loss or unauthorized destruction, alteration, disclosure of, access to, or control of a Digital Environment.
- ii. "Cyber Security" is technologies, processes, procedures and controls that are designed to protect Digital Environments from Cyber Security Incidents.
- iii. "Digital Environment" is information technology systems, operational technology systems, networks, internet-enabled applications devices and the data contained within such systems.

b. Ransomware – A type of malicious software designed to block access to a computer system until a sum of money is paid.

i. Ransomware is most commonly transmitted through phishing or spam emails containing attachments. It is critical that individuals within the organization understand not to click on these attachments and recognize their threat. A loss control mechanism might include appropriate employee training. It might also include running “test emails” to see if employees click on attachments.

ii. Prominent incidents:

- (A) Jones Day: Data was recently stolen from a Jones Day vendor servicing the law firm, including information relative to representation of the Trump administration in challenging the 2020 presidential election.

- (B) Mass Retailers: This often involves the theft of credit card and other personal information from customers purchasing items from these retailers.
 - c. COVID-19 Trends: Generally, cyberattacks have increased in both number and severity since the onset of COVID-19. Some estimates show the number of these attacks to have increased nearly 50%. This includes ransomware attacks, funds transfer loss and business email compromised incidents.
 - i. Source of COVID-19 cyberattacks:
 - (A) Remote work
 - (B) Exploitation of remote access
 - (C) Email intrusion
 - (D) Invoice manipulation
 - d. Make sure to review your insurance policies to obtain maximum potential recovery in such an incident.
 - e. Formulate an internal response team and strategy. Once an attack occurs, you will have very little time to respond and virtually none to formulate a strategy if you have not already done so.
- 2. Employment Practices Liability Insurance/Workers' Compensation
 - a. Employment Practices Liability Insurance ("EPL") typically covers wrongful acts arising from employment practices. Most commonly, these include wrongful termination, discrimination, sexual harassment, and retaliation. These types of claims usually involve federal or state civil rights statutes.
 - i. EEOC Mission Statement – The EEOC states the following as its Mission Statement:
 - (A) The U.S. Equal Opportunity Commission ("EEOC") is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

- ii. Protections against employment discrimination have been extended to transgender employees.⁴
 - iii. In Michigan, weight is a protected class.⁵ There is, however, an exception for weight requirements that are “bonified occupational qualifications reasonably necessary to the normal operation of the business or enterprise.”⁶ Where a party directly proves discharge from employment with weight as a determinative factor, then the party has established a claim of weight discrimination.⁷ Michigan is the only state with a weight discrimination statute.
 - iv. Tax treatment of sexual harassment settlements – Section 162(Q) of the Internal Revenue Code eliminated the deductibility of amounts paid in connection with sexual harassment claims if the agreement requires nondisclosure.
 - v. Notices in employment claims – An ADEA claimant has 21 days to review a severance or settlement agreement. That timeframe is waivable by the EMPLOYEE. A settlement agreement should clearly state that period is being waived, if applicable. Further the employee has 7 days to revoke the agreement.
- b. Workers’ Compensation Insurance – A statutory plan for compensation of workers injured on the job with few exceptions. Workers Compensation insurance is typically the exclusive remedy for employees, although not necessarily independent contractors injured in the course of employment. Payments to injured workers are calculated using a statutory formulation.
3. General Liability/Property Liability
- a. Most businesses should carry both general liability and property liability insurance coverage.
 - i. These policies protect businesses from claims involving bodily injury and property damage in the course of business operations.
 - ii. Like other policies, these contain exclusions that can create gaps in coverage. For example, there will typically be pollution exclusions, subject to exceptions.

⁴ RG & GR Harris Funeral Homes v. Equal Employment Opportunity Commission, 590 U.S. ____ (2020)

⁵ MCL 37.2202

⁶ MCL 37.2201

⁷ Lamoria v Healthcare and Retirement Services, 230 Mich App 801 (1998)

There will also be exclusions for “Professional Services”. These exclusions may not be relevant to your business operations, but you should carefully consider them. If there is an element of your business that provides specialized professional services, you may need to purchase a professional liability policy, as well as general liability.

- iii. Engage in a careful conversation with your insurance agent as to the amount of such coverage. Typically, larger companies will need larger amounts of this type of insurance because their potential exposures are greater.

4. Business Automobile Liability Insurance

- a. This insurance covers financial risk to a business where an employee is involved in an accident using a company owned car in the course of employment.
- b. You should consult with your insurance agent to determine the appropriate amount of coverage. Most states have a minimum insurance requirement. In many cases, this will not be sufficient to cover a potential loss.
- c. Issues may arise when an employee is driving his or her own vehicle in the course of employment. The business auto insurer will likely assert that the employee’s own personal auto policy applies in the event there is an accident. An employer having employees drive their own vehicles in the course of employment needs to assess whether those employees have sufficient policy limits.
- d. In litigation, there may also be a dispute as to whether an accident occurs while the employee is in the course of employment.

5. Business Owner Policies ("BOP")

- a. These policies typically apply to smaller or medium sized businesses.
- b. They typically cover commercial and general liability, commercial property, equipment, inventory, and business income.
- c. These policies combine both property and liability into one package. They are often useful for businesses such as restaurants, small retail stores and contractors.

III. IDENTIFY GAPS THAT NEED TO BE CLOSED AND LITIGATING INSURED EXPOSURES

A. Provide Notice to Carrier

- 1. You do not need to wait for a lawsuit to be filed in order to notify your carrier of a potential claim. Policy language differs, but if you believe a claim may be made, you should evaluate whether to notify the carrier even if there is no pending litigation.

- B. Maintaining the Privilege of Attorney-Client Communications
1. Generally, your insurer will assign counsel. That counsel will represent you during discovery, depositions, and trial. Any communications with that attorney are subject to attorney/client privilege. To the extent possible, you should avoid discussing the litigation between company employees unless that attorney is involved. Otherwise, opposing counsel can ask about those communications in a deposition. Even if there are emails exchanged among key employees, copy the attorney on them in order to protect that litigation privilege.
- C. Preserve Evidence
1. You should immediately strive to preserve any evidence that may be used in litigation. This is particularly true of electronic communications, including emails and other information stored on hard drives. If this information is destroyed, the opposing party may be entitled to a jury instruction on spoliation of evidence. This typically gives rise to a rebuttable presumption that you destroyed that evidence because it was damaging.
- D. Consider Alternate Forums
1. Many contracts, particularly employment contracts, contain arbitration clauses. This allows you to arbitrate the matter privately, rather than proceed in a public forum, such as a trial court. It is also often less expensive, although not always.
- E. Prepare for Litigation
1. Key company representatives will likely be deposed and/or testify at trial. This means time away from their real jobs. It also means time preparing, which is essential. A good deposition can help strengthen a case. A bad one can be extremely damaging.
- F. Engage Proper Parties and Include Necessary Terms in Settlement
1. Your policy may or may not contain a “consent to settle” clause. The insurer may have the right to resolve litigation, even if you disagree. Even if you have such a right, you should carefully consider whether to exercise it. Your loss runs will include not only the amount paid to resolve a claim, but also the cost to litigate it. The larger this overall number is, the more it may cost you in further insurance premiums.
 2. If you do resolve a claim, carefully consider any nonmonetary terms that are important to you. Confidentiality is often key among these. You do not want the claimant talking about the money he or she obtained by suing you. In particular, you do not want this on social media.