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An Introduction to Insurance for Small and Medium Entities, Part One: Third-Party Liability Insurance

By Craig R. Blackman and Mischa S. Wheat

In order to give our clients and friends some perspective on how insurance is intended to work, we are issuing two client alerts, this first one dealing with third-party liability coverages, and the second one soon following addressing first-party coverages. Third-party liability coverage is insurance purchased to cover what the insured party allegedly owes to others, in contrast to first-party liability coverage that pays the insured for its own covered losses. These two client alerts will then be followed with an interactive webinar to be scheduled in November, for a more comprehensive conversation on how to best make use of your entity's insurance assets. So, make a note of any questions you may have as you read these client alerts and email them to us so that we can try to address those specific concerns in our webinar to follow.

Small and medium businesses or organizations, both for-profit and nonprofit, rarely have a dedicated risk management officer, let alone a dedicated department skilled at addressing insurance needs. In this ever more complicated world, how can you know what insurances are available, what they do, and what you need, and what questions to ask your insurance broker when placing your own insurance? After all, insurance is like any other asset and needs to be properly managed in order to maximize its benefit to your organization or business.

As COVID-19 continues to reshape businesses and organizations of all sizes, new sources of liability are emerging. In the interim, businesses and organizations are looking to their existing insurance policies to determine the extent of their coverage for losses attributable to COVID-19. As entities begin to look toward a post-COVID world, a review of their insurance coverage should be a high priority.

Generally, third-party liability policies fall into one of the following categories:

- Comprehensive General Liability Insurance
- Workers Compensation/Employment Practices Liability Insurance
- Directors and Officers Liability Insurance
- Errors and Omissions Liability Insurance

Comprehensive General Liability Insurance

Comprehensive General Liability (CGL) insurance provides coverage for personal injuries or property damage resulting from an accident. Typically, this is the entity's core insurance coverage. Most CGL policies provide a wide range of coverage for negligent acts that result in bodily injury, property damage, personal injury, or advertising injury to a third party. For example, something as basic as a slip and fall on the entity's premises may be covered under a CGL policy. The scope to which such an insurance policy would cover injuries stemming from an on-going pandemic is less clear. But, to the extent the third party's alleged pandemic-related injury is a result of the covered entity's negligence (e.g. improper warning, failing to

take reasonable precautions, etc.), a CGL policy may provide coverage, absent a specific exclusion in the policy.

Comprehensive General Liability insurance is typically an “occurrence”-based policy, meaning that coverage is triggered when an accident occurs, as opposed to a “claims-made” policy, where coverage is triggered when a claim is first made. Usually, this policy does not cover damages resulting from a breach of contract; however it is always worth reviewing the policy for coverage even in contract claims, for example, if too many employees were sickened by a pandemic and could not work, making compliance with contractual obligations not possible. This type of coverage usually tied specifically to the insureds usual operations and location(s) and would generally not protect against a canceled special event.

Workers Compensation Insurance/Employment Practices Liability Insurance

Workers Compensation insurance provides an employer with coverage for claims filed by its employees. The most common coverage is for an employee’s personal injuries suffered on the job. However, Workers Compensation insurance may also cover “employment practices liability”, which typically stems from workplace discrimination or harassment and may provide protection for related employee lawsuits.

A business or nonprofit’s Workers Compensation insurance might also provide protection against an employee seeking recovery on claims that it did not have adequate measures in place to secure the safety of its employees. For example, an employer failing to confirm that its building meets code requirements that is liable for injuries if the building collapses. As another hypothetical example, the employer failing to have an appropriate evacuation plan may be responsible for injuries and losses resulting from an emergency evacuation.

Generally speaking, Workers Compensation insurance will not provide coverage for common community-spread illnesses, such as a cold or the flu. A global pandemic presents a unique circumstance because many jobs that are not typically hazardous have suddenly become more dangerous. Accordingly, it is unclear if those existing policies would provide cover for the expanding group of workers with pandemic-related injuries on the job. This lack of clarity is, in part, because the actual source from which the employee contracted the virus, whether in the workplace or from some other activity, likely will not be discernable.

Directors and Officers Liability Insurance

Directors and Officers liability insurance generally covers claims against the entity’s directors and officers for any wrongful act or omission, unless the wrongdoing is specifically excluded from coverage. This coverage includes suits by shareholders who are complaining that actions by the directors



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and officers were improper and not in the company’s best interests. Where there are no shareholders, as with a nonprofit and many small to medium-sized businesses, this coverage may also protect the directors and officers from employment-related actions, including wrongful termination, harassment, discrimination, and failure-to-hire claims.

In a natural or economic disaster, including a pandemic situation, this insurance might provide coverage for claims that the directors and officers failed to have in place an adequate business recovery plan. Unlike other types of insurance, such as CGL insurance policies, which specifically enumerate the risks covered, Directors and Officers insurance provides coverage for “all risks,” except those specifically excluded. For example, many Directors and Officers policies have “bodily injury” exclusions, which may preclude coverage for pandemic-related safety policies or risks resulting in bodily injury.

Directors and Officers liability insurance policies are often “claims-made” policies, triggered when a claim is first made (i.e., when a claim for damages is first asserted or when a lawsuit is filed) as opposed to an occurrence-based policy triggered by when the harm took place.

Errors and Omissions Liability Insurance

This coverage is like a general Professional Liability policy for errors or omissions by the business or nonprofit. For some kinds of entities, this kind of coverage is specialized by the type of profession and is then commonly known as “malpractice insurance” (such as for doctors, lawyers, architects, and pharmacists).

This insurance might provide coverage for a customer lawsuit claiming an injury as a result of inadequate safety and security measures or claims of injury or losses due to the business’s failure to have in place an adequate containment plan (for example, that an oil company should have had better measures to make sure damage to the oil lines or tanks would be contained on-site, or a medical or biotech company should have

had better measures to prevent damage from a release of viral or bacterial agents). This coverage could also respond to volunteer claims or disputes about customer or client services. These claims would usually not be covered by the entity's CGL policy, which normally contains a professional services exclusion.

To bring this summary full circle vis a vis COVID-19, the extent to which an entity's Errors and Omissions liability insurance provides coverage for pandemic-related claims depends largely on the nature and scope of the goods or services that the covered entity provides. Claims that are directly related to the business's services, or failure to provide services, may be covered by an Errors and Omissions policy.

Conclusion

It is important for businesses and organizations to examine their third-party liability coverages in consultation with insurance industry professionals to ensure that these coverages are better adapted to their post-COVID 19 business models. Our next alert will examine common types of *first*-party liability coverages. Following that second alert, we will be providing a comprehensive webinar about insurance in the post-COVID 19 world to assist nonprofits and business organizations with assessing their coverage. In the meantime, if you have any questions about the above third-party coverages, email them to us so we can try to address them in our upcoming webinar.