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THE INSURANCE NEWSLETTER

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Disappearing Insurance

We have written in the past about conditions affecting buyers in the insurance market, and by now most everyone understands the difference between “soft” and “hard” markets. Now that we are a couple of years into a soft market part of the cycle, it might be time to reevaluate some assumptions.

When the insurance market turns hard, insurance companies raise prices, underwrite (that is, choose who they will insure) much more selectively, and become much more stingy in terms of the scope of the insurance coverage they are willing to offer.

In a soft market like we have now, you would expect to see prices coming down; they are. You would expect to see insurance companies loosening underwriting standards and going after accounts or classes of business they might have avoided just a few years earlier; they are doing that, too. You might also expect to see them offering broader coverage, removing some exclusions, and generally offering more actual insurance coverage for the premium dollar. Whoops; there’s not so much of that happening.

In fact, there has been a long term trend, going back several decades, for insurance policies to provide less and less actual insurance coverage. This persistent trend toward less coverage in standard policies has persisted through both soft and hard insurance market cycles.

The General Liability policy is the poster child for this trend. Up until 1986, it was called the “Comprehensive General Liability” policy, but in that year the name changed to the “Commercial General Liability” form; still “CGL”, but not

comprehensive anymore. There have been seven revisions to that standard policy form just since then, at roughly three year intervals; with each one, a little more actual insurance disappeared. Each revision may have made only an incremental change in coverage, and to be fair there have been some areas where coverage has improved, but added up over the years standard form insurance policies today are significantly less broad than they were four, three, or even two decades ago.

Underwriters are not just arbitrarily taking away coverage, they are generally responding to new or unanticipated risks or legal precedents that develop over time. Here’s the classic example: the 1960’s and 1970’s saw an increase in claims arising from pollution and environmental contamination, which were covered by CGL policies back then. The insurance industry responded by excluding such claims from standard general liability policies, unless they arose from “sudden and accidental” pollution. After careful analysis of this wording, lawyers soon found that a reasonable way to interpret “sudden and accidental” was for it to mean “any time at all”. In one often cited case, a court found that in the case of a tank that leaked pollutants over a period of years, each drip of the pollutant constituted a “sudden and accidental” event, and was thus covered. Underwriters who might have been willing to offer reasonably priced sudden and accidental pollution coverage found they could not write a policy in a way that could be thus limited and withstand legal challenge. Predictably, they responded with a total pollution exclusion, which we live with today.

More examples: most people have some knowledge of the massive wave of asbestos litigation that commenced in the 1980’s and 1990’s; now there are asbestos exclusions on your policies. The

same time period saw a wave of litigation for mold claims arising from water damage to properties. Your policies now have mold and fungi exclusions. Other examples abound: Year 2000 exclusions for feared computer damage due to the advent of a new millennium (some underwriters are still attaching these exclusions); terrorism exclusions after 9/11 (underwriters apparently thinking that the war and nuclear exclusions that have always been on your policies weren't enough). More recently we are seeing silica exclusions (sand?).

Coverage Still Available

There is a flip side, though. Standard policies are less broad, but new specialty policies and markets have sprung up to fill specific niches and needs. For example, look at the pollution exclusion mentioned earlier. Stand alone pollution insurance, now generally referred to as environmental impairment liability (EIL) insurance, can be found for those who need it in what has developed into a reasonably mature and stable market. Employment practices liability (EPL) went from nowhere twenty five years ago, to an essential part of any employers insurance portfolio now. New insurance products are being continually introduced to meet the needs of information technology users in our electronic age. Policy forms and coverage are currently all over the map as underwriters and policy drafters try to get a grip on how to insure new, rapidly evolving and highly complex digital information exposures, but it's reasonable to expect that within the next decade a degree of uniformity will begin to settle in even to this complex area of risk and insurance.

What's the Catch?

The catch is that you now need to buy more different policies. Thirty or forty years ago, two or three policies were all that might have been needed by almost all except the largest businesses: a package policy including all risk property, comprehensive general liability, auto, and perhaps some inland marine property floater coverages; a workers compensation policy; and perhaps an umbrella liability policy. Those three standard policies then were broad enough for most needs. These days even an average insurance buyer will most likely need at least twice as many policies to adequately cover their needs.

And that makes our job more complicated. Finding different underwriters for those new types of policies,

understanding what they cover, making sure your policies all mesh; we are working a lot harder for you now than we did back then.

Avoid Claim Denials from Late Reporting

Employment Practices Liability policies are good examples of new types on insurance that have matured over the past twenty years. As widespread (and important) as this necessary insurance coverage has become, terms of the coverage offered will vary from one insurance company to another, and even between policies offered by the same insurance company. There are, however, certain terms and provisions that are commonly found in almost all EPL policies; timely claim reporting requirements are one of them.

One of the leading causes of claim denials in EPL policies is violation of these timely reporting provisions. Put simply, these provisions require that the policyholder report a claim to the insurance company as soon as the policyholder becomes aware of it.

It's important to understand what constitutes an EPL claim. The most typical problem involves charges or complaints made to the EEOC or an equivalent state agency. By definition, these charges are claims under most EPL policies, and you are obligated to report them.

Consider this not uncommon situation. An EPL policyholder receives notice of an EEOC charge filed during the term of an EPL policy. Months later, the first EPL policy that was in force at the time of the original EEOC complaint has expired and a renewal policy is in force; a lawsuit that developed from the original EEOC charges is then filed. The employer then reports the claim under the then current EPL insurance policy.

Result: denial of the claim in both current and prior policies. The EPL policy currently in force at the time of the lawsuit denies on the grounds that the claim should have been filed during the prior policy period when the employer first had knowledge of the EEOC complaint. The policy in force at the time of the original EEOC complaint will deny based on failure to report the claim timely, and possibly also the

failure to file the claim within the claims made policy period.

A Common Mistake

It's fairly easy for employees to bring EEOC charges. Costs, primarily legal costs, to respond to these charges may be relatively low and usually will fall within the deductible or retention contained within most EPL policies. Employers are often inclined to look at a complaint, conclude that it's baseless and without merit, and choose to handle it as a routine personnel matter.

Often employers are correct with their assessment of the value of a complaint. The problem comes with those complaints that develop into significant legal actions. You buy EPL insurance to cover those lawsuits; you expect to be covered when they happen.

EPL policies are almost always claims made forms, so there are actually two claim reporting time frames to keep in mind; both must be observed. First, these policies cover you for claims made within the policy period. Unless your policy contains an applicable extended reporting period provision, the policy expiration is an absolute deadline, and failure to observe it will result in denial of the claim. Policies also require you to report claims "as soon as practicable" or similar wording. These terms can be tailored by endorsement to reflect knowledge of claims by appropriate company personnel.

The fix: define within your organization the appropriate reporting structure and persons responsible so claims are noticed internally. Tell us so we can negotiate with your insurer to modify your policy to reflect your organization. Don't forget, though, claims will still need to be reported timely.

Employers Liability in the WC Policy

The standard workers compensation policy has two parts. The first, Part One, applies to the workers compensation law of the applicable states of employment. The insuring agreement is quite simple: it promises to pay the benefits required by the law of the applicable jurisdiction.

Part Two is Employers Liability. This part is necessary because of the way general liability

policies are written. Bodily injury to an employee or their significant others arising out of the employment relationship is a standard exclusion in all general liability policies.

Employees do get hurt, and the ever inventive plaintiff's bar is always seeking ways to profit from that fact. Employers face essentially four types of legal action an employee can take, outside of workers compensation. In order of their appearance in the workers compensation policy, they are:

Third-party Action Over

Here's an example: an employee is injured while operating a machine. He files a workers compensation claim, but also sues the manufacturer or seller of the machine.

The machinery manufacturer brings an "action over" against the employer. They might, for example, allege improper maintenance, unauthorized alterations to safety guarding, or inadequate training of the employee. The employers liability section of your policy responds to this claim.

Care and Loss of Services

Family members of an injured employee may suffer loss of use of the services of an injured employee. Spouses are entitled to the right of enjoyment of the company, affection and services (consortium) of their spouse. Family members might also claim emotional damages.

Consequential Bodily Injury

Family members of an injured employee may also sustain damages as a result of the employee's injury. A worker might be exposed to infection or disease and transmit that to their family; an employee exposed to toxic material might bring residue home on their clothing.

If a claimed consequential bodily injury can be shown to be a direct consequence of an employee's injury, it's employers liability.

Dual Capacity

Workers compensation statutes generally provide that workers compensation is the exclusive remedy for injured employees seeking to pursue a claim against

their employer for a workplace injury. However, using the first example again, if the employer is also the manufacturer of the machine on which an employee is injured, the third-party action over becomes a dual capacity claim. By virtue of the fact that the employer acted in a dual capacity (both employer and manufacturer of the machine) an injured employee may be able to defeat the exclusive remedy provisions of the workers compensation statutes.

Coverage and Limits

Workers compensation (Part One) does not have a limit of liability; limits are statutory, damages are paid as required by law, with no limit in the policy. Employers Liability (Part Two) does have a dollar limit, like any other liability policy, and insurance buyers must concern themselves with the adequacy of those limits.

The standard unendorsed workers compensation policy specifically defines three limits of employers liability.

Bodily Injury by Accident – Each Accident: has a standard limit of \$100,000. This is the most the

policy will pay for all claims arising out of one accident, regardless of how many employees may have been injured.

Bodily Injury by Disease – Policy Limit: has a standard \$500,000 limit. This is the aggregate limit for all disease claims in any one policy period.

Bodily Injury by Disease – Each Employee: is \$100,000 in the standard policy. It's the limit for disease claims from any one employee.

Limits provided in a standard unendorsed workers compensation policy are clearly not adequate today. Increased employers liability limits are readily available in the standard workers compensation policy. Pricing is also standardized, and it's not expensive to buy higher limits. In most states a surcharge to standard premium of 1.7% will buy \$500,000/\$500,000/\$500,000 limits, and 2.8% will buy \$1,000,000/\$1,000,000/\$1,000,000.

Umbrella or excess liability policies will generally go over underlying employers liability limits without difficulty. Employers liability limits in the workers compensation policy should be set to the lowest level the umbrella underwriter will accept for his policy to attach.

Kapnick Risk Services Center

We recently introduced **Kapnick Risk Services Center**, a comprehensive web-based risk management platform. This exclusive tool is only available to Kapnick clients. Those who have already signed up are quickly discovering this to be a valuable risk management resource. Current users appreciate how quickly and easily they can print reports and pull up training material. They also value the convenience of receiving email reminders for items that need review or renewal, which saves them the difficulty of setting up numerous tasks.

We encourage Kapnick clients to register today and begin to take advantage of the valuable services offered through the **Kapnick Risk Services Center** including:

- A comprehensive Safety Library and Resource Center
- Email based Certificate of Insurance tracking
- Unique Incident Tracking software
- A simple tool to organize vast amounts of information relevant to risk management

We've made registering easy! Simply log-on to www.kapnick.com, click on "Client Online Tools" (or Kapnick eTools) and then on the "Kapnick Risk Services Center" button on the next screen, or go directly to www.kapnickriskservicescenter.com and click on Register Now! Once registered you can sign up for free webinar training, or view introductory videos to help you begin using your new risk management tools in no-time.

As a registered user you can also learn about additional services available with this platform which include:

- Training Track: which automates the managing and scheduling of employee safety training and provides comprehensive reports
- JSA Track: Job Safety Analysis (JSA's) made simple! Defines job positions and the safety issues involved in an automated format
- MSDS Track: automates Material Safety Data Sheet management

Our new **Kapnick Risk Services Center** provides the capability of creating a culture of safety for your entire organization with a platform that is comprehensive, seamless, and easily accessible over the web. It is designed to be a user-friendly, time saving tool whose use will become a valuable part of your daily routine. Find out more by contacting Amy DeKeyser at 888.263.4656 x1150 or amy.dekeyser@kapnick.com.