Negotiating and managing a commercial property and casualty insurance program are complex tasks. The fine print of highly technical insurance policy language and the plethora of legal and business exposures which are presented to commercial entities make the commercial insurance and risk management process a daunting one. This book has been prepared to assist the commercial insurance buyer with the insurance buying process by providing a “plain English” discussion of gaps that are often found in insurance programs.

The Managing Editors have represented both policyholders and insurance companies relating to the denial of claims for many of the exposures discussed in this book. Analyzing the most common problems found in commercial insurance programs, our insurance attorneys and other experts present concerns that could translate into financial loss to you and your business.
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Second Edition

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NOTE:
This book is intended to provide some basic information and suggestions to business owners on commercial insurance coverages, claims-handling and risk management techniques. It is not intended to serve as a substitute for the advice of key professionals including attorneys, CPAs, tax advisors, and insurance professionals. Specific advice about the needs of your business should be obtained from persons knowledgeable in these areas.

Copying in full or in part is expressly prohibited without the written consent of the editors.
This book is dedicated to Kathleen B. Gelardi, former President of the Cambridge Underwriters Ltd.

Personal Lines division.

She was a visionary leader, a dedicated associate, and a loyal member of the Cambridge family. The solid foundations and standards of excellence she created perpetuate and serve as a lasting tribute.

12-30-1947 to 6-15-2002
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ABOUT CAMBRIDGE

The Cambridge Group

Cambridge Underwriters Ltd. is a Cambridge Group Company. The Cambridge Group is comprised of three distinct organizations that together offer a complete source for insurance and financial services. The other two organizations are Cambridge Financial Services, Inc. and PensionTrend, Inc.

Cambridge Financial Services, Inc. is a financial services firm that offers group-based employee benefits, estate planning and wealth preservation services. Based in Troy, Michigan, its founding principals are Ralph Eagle and Al Papa.

PensionTrend, Inc. is a major provider of qualified retirement plan and administration services. Based in Okemos, Michigan, PensionTrend also has offices in Troy, Michigan.

Cambridge Underwriters Ltd.

Property and Casualty Experts

Cambridge Underwriters specializes in the design and management of property and casualty insurance programs for businesses and individuals. Property and casualty insurance is insurance that protects assets from loss due to damage to your property and from liability claims alleging legal responsibility. Such insurance is typically purchased as part of a package that combines both property and liability coverage together in one policy. There are many different types of policies available from many different insurers. These policies are not alike and each involves a great deal of fine print and technical language that is subject to judicial interpretation. As a result, it takes a seasoned expert to design a business insurance program that has the appropriate protections for your business and personal assets.

History of Cambridge Underwriters Ltd.

Cambridge Underwriters was formed in 1974 by Kenneth Hale. Ken had been an underwriter for three insurance companies — Great American Insurance Company, American Insurance
Company (now known as Fireman’s Fund) and Consolidated Mutual Insurance Company, where he was the underwriting manager.

In 1968, Ken joined Meadowbrook Insurance Agency (now known as Meadowbrook Insurance Group), a large insurance agency located in Southfield, Michigan as the Senior Vice President where he managed the Michigan operations.

Ken graduated from Detroit College of Law (now Michigan State University -DCL) in 1972. Prior to that, in 1965 Ken graduated from Wayne State University in Detroit, Michigan with a Degree in Education.

In 1974 Ken left Meadowbrook to form a law firm that specialized in property and casualty coverage issues and also did defense litigation work for a variety of insurance companies.

Subsequent to its formation in 1974, the law firm did extensive consulting work for corporate clients in the area of property and casualty insurance, acting as a risk manager and also developing specifications and placing insurance with either independent or direct writing agents.

In 1980, frustrated with not being able to find insurance agents that could competently handle the law firm’s corporate clients, Ken formed Cambridge Underwriters Ltd. with the vision of a personal touch, highly skilled independent insurance agency with the emphasis on having all accounts handled by attorneys, certified public accountants or individuals with advanced insurance designations, such as Charter Property and Casualty Underwriter (CPCU), Certified Insurance Counselor (CIC), Associate in Risk Management (ARM), or Accredited Advisor in Insurance (AAI).

Cambridge Underwriters has grown from having no business in 1980 to $70,000,000 a year in premiums serviced as of the publication of this book. Cambridge has over 600 corporate clients in its Cambridge Commercial Underwriters Division, over 1,500 personal insureds in its Cambridge Personal Insurance Division and over 4,000 clients in its association divisions.
The law firm that was the original impetus for starting Cambridge Underwriters Ltd., now known as Hale, Stein, Murphy, Hale, Cramer, Moore and Associates P.C., continues to exist, offering expert witness services for insurance related litigation as well as risk management services. Its attorneys also serve as account executives for various commercial accounts under the Cambridge Underwriters Ltd. banner. Its Cambridge Coverage Advisors, P.C. division offers insurance review and compliance services for corporations and financial institutions.

How Cambridge Underwriters Is Different

Cambridge Underwriters offers a different approach to managing insurance and risk management for businesses and personal accounts. Its differences are based on the underlying core value of Cambridge that the management of insurance programs is a sacred trust that requires highly specialized training, education and experience.

The following are some of the key points of Cambridge’s professional service standards:

Account Executive has the ultimate responsibility.

The account executive is the person that is in charge of the account. At some agencies this means that the account executive is the front line sales person who turns the account over to an inside service person once the account is written. These service representatives most often lack the experience and training to make critical decisions on insurance placement or policy analysis.

Cambridge requires each of its experienced and credentialed account executives to maintain ongoing responsibility for the commercial or personal account, including day-to-day events involving the client. This avoids the situation where the person that is least familiar with the account and the least credentialed is making important decisions and judgments.

Ultimately, this means that you will only have a limited number of persons who are involved in the handling of your account, primarily an account executive and an account manager, minimizing the chance for error.
Professional designations.

It takes only a 40 hour class and the passing of a single examination to be licensed to sell property and casualty insurance. This is a precarious situation in light of the assets that the client is protecting.

Cambridge’s professional standards require that each of its staff pursue advanced insurance degrees and professional designations. These include:

- Certified Insurance Counselor (CIC)
- Licensed Insurance Counselor (LIC)
- Chartered Property and Casualty Underwriter (CPCU)
- Accredited Advisor in Insurance (AAI)
- Associate in Risk Management (ARM)
- Certified Insurance Service Representative (CISR)

Attorneys and CPA’s available on all accounts.

In addition to the above professional insurance designations that all Cambridge account executives are required to pursue, a Cambridge licensed attorney or Certified Public Accountant (CPA) is available for reviewing lease agreements, policy language issues, employment risk management and other areas.

Plain language summaries.

Cambridge utilizes extensive summaries of insurance that it has developed that outline coverage issues and detail discussion points. This high level of communication provides the client with a greater degree of understanding of what is covered and what is not and presents options.

Negotiate broader policy language to the greatest degree possible.

Given our attorneys’ experience in representing insurance companies and policyholders in coverage disputes in litigation, we have a greater degree of understanding of how policy language can be problematic at the time of a claim. While no policy can be “bullet-proof,” careful analysis of the language by an experienced insurance professional is critical so that gaps can be minimized.
Strict criteria for insurance carrier selection:

1. Policy forms.
Policy language and forms are closely scrutinized by our team of experts and those carriers that have the broader forms are given preference in our office.

2. Claims reputation.
The reputation of an insurance company is critical in terms of claims paying and we avoid utilizing carriers that have a less than stellar history of policyholder satisfaction.

3. Pricing tools.
Some insurers offer alternatives to standard pricing protocols for insureds that are better than average in loss history, risk management and loss control. These carriers are represented by Cambridge.

4. Other services.
Loss control and prevention services are typically offered by insurers to insureds at no additional charge. However, the extent of such services varies among insurers. The availability of true loss control services is a critical consideration for Cambridge in evaluating insurers.

5. Financial rating.
The financial rating of the insurer is one of the most important considerations in evaluating the insurance company’s ability to pay claims in the long term. Since many liability insurance claims involve long term litigation over the course of years, the ability of the insurer to back the insured is critical. Cambridge monitors the financial solvency of the insurers it represents on an ongoing basis.

Purchasing insurance through an unlicensed insurer means that in the event of insolvency, the payment of claims is not guaranteed by the state of Michigan. While it is sometimes appropriate to utilize insurers that are unlicensed but are approved to write business in Michigan, particular emphasis is given to reviewing the financial solvency of such insurers.
7. Using specialty carriers and alternative sources.
Cambridge is a major writer of workers’ compensation insurance through alternative programs. Such programs offer expertise in specific trade groups, dividends, favorable claims services, and stability that is not often found with many standard carriers. Moreover, pricing can be more competitive than standard insurers for workers’ compensation.

Other unique agent-insurer arrangements also benefit Cambridge clients including association programs and other special arrangements.
ABOUT THE EDITORS

Managing Editors
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Judith Johnson has been with Cambridge Underwriters Ltd. since 1999. Prior to her work with Cambridge she worked in a variety of industries including medical marketing, travel and leisure, and education. Judith lives in Livonia, MI with her husband, Robert, and they have three children, Christa, Kelly, and Michael and three grandchildren.

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Christine Maffucci is an Account Executive at Cambridge Underwriters Ltd. She joined Cambridge with a wealth of knowledge and experience in the insurance industry. Christine holds the professional designations of Certified Insurance Counselor (CIC) and Certified Insurance Service Representative (CISR). She is currently pursuing her Bachelor of Science degree in Marketing at the University of Phoenix and plans to obtain the Certified Risk Manager (CRM) designation.

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PREFACE

Negotiating and managing a commercial property and casualty insurance program are complex tasks. The fine print of highly technical insurance policy language and the plethora of legal and business exposures which are presented to commercial entities make the commercial insurance and risk management process a daunting one. This book has been prepared to assist the commercial insurance buyer with this process by providing a “plain English” discussion of insurance coverage gaps that are often found in insurance programs.

The editors have represented both policyholders and insurance companies in court cases relating to the denial of claims for many of the exposures discussed in this booklet. Analyzing the most common problems found in commercial insurance programs, our insurance attorneys and other experts identify concerns that could translate into financial loss to you and your business.

Included in this book is a checklist of key provisions to include or exclude from your commercial insurance program. This checklist can be used as a tool by the commercial insurance buyer to evaluate the strength of the agent and insurance program.

This practical guide includes . . .

• An analysis of the insurance industry marketplace
• Checklists of key provisions to include or exclude from your commercial insurance program
• Tips on controlling your corporate insurance claims
• Self-insurance and alternative risk financing considerations
• Sample insurance requirements and indemnification language to be considered in construction agreements
• Sample waiver of subrogation language for lease agreements
• Employment practices risk management tips
• Common gaps often found in personal insurance
The Property and Casualty Insurance Market

From the year 2000 to the date this book went to press, the property and casualty insurance industry has been in what is known as a “hard market,” meaning that insurers are suffering from underwriting losses and reductions in investment income. During this time, many insurers in this market are sending marching orders to their underwriters to do the following:

- Increase premiums substantially. Produce an underwriting profit regardless of investment income.

- Cancel classes of business that have the potential to create severe losses or that have been unprofitable to the insurance company, such as habitational risks, trucking, contractors, nursing homes, and properties in hurricane prone areas.

- Cancel individual accounts that have had poor historic loss experience and/or will not cooperate with loss control.

- Remove coverages that contribute to losses, such as mold, coinsurance waivers or blanketing of multiple locations into one limit.

- Reduce internal expenses by restricting or eliminating services, computerizing the underwriting process for small accounts, and increasing the premium threshold of premiums for accounts that will be individually underwritten.
Centralize claims adjusting and utilize phone adjusters in claims centers in far-away states.

This hard market continues today and some believe that it will extend at least through 2004 and perhaps longer. Insurance buyers are seeing, and will see in the future, rate increases, reductions in coverages and, in some cases, unavailability of insurance. While this market condition makes it challenging for the end buyer to negotiate the type of insurance programs that are available in better economic times, there are things that can be done to minimize increases and improve coverages.

What Is a “Hard” Insurance Market?

Property and casualty insurance includes coverages such as property, liability, automobile and workers’ compensation insurance. The property and casualty market is quite cyclical as compared to other types of insurance, such as life insurance or employee benefits. Insurance carriers and agents describe the cycles in terms of “soft” or “hard.”

In a soft insurance market, insurance underwriters compete for business by lowering rates, loosening underwriting standards by taking accounts with more risk, and adding coverages at low or no cost in order to differentiate themselves from their competitors.
The Property and Casualty Insurance Market

During a soft market, the insurance company executives pressure the underwriters to acquire additional premium volume to meet growth objectives and to utilize the cash flow for investment purposes which, in a bull investment market, will increase profits and growth. This in turn results in increased stock prices for the insurance carriers, which are largely publicly owned companies.

An example of this soft market can be seen in the aggregate statistics of United States insurance carriers for 1997. During 1997, insurance carriers paid $15 billion more in claims than they received in premiums; yet, after investment income they actually had profits of $76 billion.

If the investment market continues to provide returns that exceed underwriting losses, the soft market continues and the insurance company executives are happy, the stockholders are happy, and the insureds are happy with low rates and broad coverages.

Unfortunately this started to come to a screeching halt beginning in 2000 when the $76 billion in profits of 1997 was reduced to $4 billion in 2000 as the stock market waned, and underwriting losses increased from $15 billion to over $31 billion because of catastrophes, increased medical and repair costs, and insurance company expenses.

This really hit home in 2001 when underwriting losses were $53 billion and, after investment income, the insurance carriers actually lost $37 billion.

What the insurance companies were left with at the end of 2001 was business on the books that was substantially under-priced with premiums too low to achieve a profit, policies with broad coverages negotiated during the years of the soft market, the threat of terrorist acts and little or no investment income to make up for the losses.

The “hard” market arrived in a big way in 2001 and continues today, resulting in massive rate increases or unavailability of insurance for some policyholders, heightened underwriting standards, and annual rate increases in the 10%-20% range for even the most profitable policyholders and much worse for less desirable accounts or classes of business.
The amount of the increase depends on numerous factors including an account's individual loss history, class of business, how long the account has been with a particular insurance company, its efforts in controlling losses, the ability of the insurance agent to negotiate effectively on its behalf, and an account's willingness to move to another insurance company if necessary.

In a hard market, historically unprofitable classes of business are no longer able to buy insurance from standard insurance carriers and will face severe rate increases. Accounts that would previously be written by standard insurance companies are written by specialty companies that understand the nature of those particular accounts, such as construction or trucking, and are able to charge what they feel are appropriate premiums.

As a result of the tightening of underwriting standards and the availability of fewer insurance companies to quote an account, there is less competition in many areas and this, again, allows the limited number of carriers that may quote an account to achieve the pricing they feel they need in order to make a profit.

An additional factor in a hard insurance market is the problem of insurance company insolvencies. This has to be examined very carefully because insurance companies that were once highly rated by insurance rating organizations are now bankrupt. The state insolvency fund applies only when an account has been placed with an admitted or licensed insurance company and, even then, insureds with a high net worth may not be able to recover their losses in the event the insurance company becomes insolvent, because the insolvency fund only applies to insureds that have a net worth below the threshold established by law.

For the year 2001, that net worth amount was about $13,000,000. In other words, insureds with net worth of above $13,000,000 would receive no protection from the insolvency fund.

Also as a result of the hard market, insurance companies are making every effort to reduce their expenses and, as a result, provide fewer services. Whereas in the past, insurance companies might be quite liberal in providing loss control services, in many cases today loss control is limited to an inspection made to
The Property and Casualty Insurance Market

determine the account’s acceptability rather than providing services that will effectively reduce losses.

This area of expense reduction is also seen in the area of claims services. Because many of the initial adjusters that look at a file may be less experienced, denial of coverage based upon an interpretation of the policy may be less well considered, making it more important for the insurance agent representing an insured to monitor coverage questions very carefully.

Also in the area of claims, aside from coverage questions, the claims themselves will be scrutinized much more carefully.

Damage to your property may result in impersonal settlements often handled over the phone and will be conservatively rather than liberally handled.

Third party claims such as liability claims made against an insured will be settled quickly in some cases in order to close the file and reduce the claims expense. This will result in a higher than appropriate amount being charged to an insured’s claims history which may result in higher renewal premiums if a renewal offer is even made.

As mentioned, although the hard market can make it more difficult for the insurance buyer to negotiate the types of insurance packages which may be available during the soft market, certain steps can be taken to minimize rate increases and improve coverages. However, insurance buyers must first understand the insurance buying process.

Buying Property and Casualty Insurance During a Hard Market

How do you buy insurance during a hard insurance market? The worst thing you can do is to behave as the typical insurance buyer. This is the buyer that makes multiple copies of his or her current insurance policies and invites multiple agents to bring in quotes from multiple insurance companies, asking that they quote “what I have right now.”

Assuming that the insurance buyer has five different agents that go to five insurance carriers, there may be 25 insurance carriers
“bidding” for an account. When these carriers receive a submission, they record the information in their computer systems and examine whether or not they looked at the same account previously.

If these carriers decide to go forward with a quote, which is less likely during the hard market if they perceive that the insurance buyer is a constant “shopper,” they will send out insurance company inspectors who will, for the most part, all ask the same questions while looking at the same facilities, consuming enormous amounts of insurance carrier’s and insurance buyer’s time. Insurance carriers then spend additional time preparing premium quotations which are relayed to the insurance agents who prepare their own proposals for presentation to the insurance buyer.

All of this, as it turns out, is usually a waste of time because the insurance buyer never intended to leave its long time agent to begin with but just wanted to keep that agent “honest.”

This type of wasteful “quote contest” will surely come back to haunt the insurance buyer during the hard market when the insurance really needs to be placed because of a cancellation or non-renewal.

There are occasions, however, when it may be appropriate to consider making a change in agents or insurance carriers. Some reasons for doing this are:

- The insurance agent is not providing effective services, for example, risk management services.
- The agent does not represent a sufficient array of insurance carriers.
- Agency service is relegated to the least experienced representative.
The Property and Casualty Insurance Market

- The current insurance company is attempting to impose rate increases that are unaffordable or they may, in fact, withdraw from writing your type of business.
- The current carrier is no longer able to provide the coverages or limits necessary.

Changing Insurance Agents or Insurance Carriers
Changing agents and/or insurance carriers needs to be done very carefully because of the many hidden risks.

Risks Involved in Changing Insurance Agents
The potential pitfalls involved in changing insurance agents are numerous. Consider the following:
- An insurance agent, due to inexperience, incompetence, or fraud may misrepresent your account, using incorrect classifications or loss information. This can result in coverage denial, rescission of the policy, or retroactive premium adjustments.
- An agent may turn your account over to an inexperienced or incompetent customer service representative in the agency.
- An agent may send your account to an insurance company controlled service center which assumes the account servicing responsibilities, using ever-changing customer service representatives who represent only one point of view — the insurance carrier that employs them.
- An agent may have financial problems and might not render proper payment to the insurance company.
- An agent may have little “clout” with an insurance carrier because of low premium volume or bad loss experience in the aggregate for accounts placed by the agent.
- An agent may be on the verge of termination of its contract with an insurance carrier, which means a non-renewal of your account in most cases.
- An agent may quote your account using computer based rating systems assuming that the underwriter will honor the quote if the agent gets the business; however, as it turns out, the insurance company’s appetite has changed and the quote is not honored.
Insurance & Risk

• An agent is selling only policies, not a coordinated program.
• An agent lacks the capital to provide additional services.

Risks Involved in Changing Insurance Carriers

There are also risks in changing insurance carriers:
• There is the risk that the insurance carrier will become insolvent and cancel mid-term. Most insurance carriers can cancel without any reason with only 10 to 30 days notice depending on the type of policy, and could fail to return pre-paid premiums or pay claims.
• There is the risk that after writing an account the carrier will have a change of appetite and will either cancel your account mid-term or non-renew at the next renewal date.
• The insurance carrier may terminate doing business with the agent.
• The insurance carrier will perform payroll audits differently, resulting in major additional premiums being retroactively applied.
• The insurance carrier may cancel your account after one claim.
• The insurance carrier may inspect after the business has been placed and then want to cancel the policies mid-term with 10 to 30 days notice.
• The insurance carrier may find that the agent misrepresented the account and cancels mid-term.
• Coverages are less than the previous carrier.
• Claims are handled by an “800” number in a service center in some far away state.
• The insurance carrier checks driving records and excludes drivers that were previously acceptable because of different underwriting standards.
• The insurance carrier obtains loss experience after the fact and finds the agent hid some of the losses and cancels mid-term or non-renews.
• The insurance carrier inspects the account after it is quoted and imposes new or additional loss control requirements, such as a mandatory renovation or installation of an automatic sprinkler system.
The Property and Casualty Insurance Market

If you have been with an insurance company for a considerable period of time and the service from a claims and audit standpoint has been good and the rate increase during the hard market is palatable, you may want to stay where you are.

If Changing Agents or Carriers Is Appropriate, Consider the Following:

If the premium or coverage forms being imposed upon you at your renewal are unpalatable and your current agent does not have a solution, it may be necessary to seek proposals from other insurance companies or from other insurance agents. Here are some suggestions as to how to do this:

• Collaborate with your agent (if you have confidence in that agent) on a shopping strategy. There is both formal and informal shopping of insurance. Formal shopping involves sending applications to insurance companies that are duly recorded in their computer system and may entail actual inspections by the insurance company and the work involved in rating up your particular premiums.

Informal shopping, however, is the preferred way to determine how to proceed. Your agent, if competent, is aware of numerous insurance companies that may have an appetite for your type of account. Often a phone call will provide an indication as to

“Don’t burn out the market by shopping every year. Look at insurance costs in the long-term and also look at these costs as a percentage of sales. Don’t ask for quotes if you are not prepared to move your account. Keeping your current carrier “honest” is not a good reason to shop your account because of the inherent risks in doing so long term. Quoting and inspections by insurance companies are expensive and insurance companies have long memories when they quote an account and don’t get the business. Avoid quote contests which will waste your time and give you the reputation at the insurance companies of being a shopper.”
whether or not the insurance company would be interested and what their pricing might be. In using the informal shopping method you do not burn out the market and you are able to sort out varying offers before you ask an insurance company to formally quote. This is the “rifle” rather than the “shot gun” approach to insurance buying.

Don’t burn out the market by shopping every year. Look at insurance costs in the long-term and also look at these costs as a percentage of sales. Don’t ask for quotes if you are not prepared to move your account. Keeping your current carrier “honest” is not a good reason to shop your account because of the inherent risks in doing so long term. Quoting and inspections by insurance companies are expensive and insurance companies have long memories when they quote an account and don’t get the business. Avoid quote contests which will waste your time and give you the reputation at the insurance companies of being a shopper.

• Pick your agent first and let the agent bring you alternatives. Never use multiple agents. If you do look for alternatives to your current insurance program, remember that the devil is in the detail. In this current hard market an underwriter looking at your account is flooded with business looking for a home. The underwriter needs a quick picture of what your business is, your loss history, your loss prevention efforts, your financial status, and other factors. Your mission is to demonstrate that your account will make a profit for the underwriter and meets underwriting standards.

"Your loss history is the most important information you can give an insurance company and it should be maintained over a long period of time, sometimes ten years or more. Gather this documentation and keep it updated at all times. This will allow you to demonstrate that you have had more profitable years than unprofitable years from a claims to premium standpoint. Never fabricate your loss information but always explain. Insurance carriers will not usually hold a major loss against you if you have a history of profitability."
The Property and Casualty Insurance Market

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• If you don’t have a safety program, get one now. This needs to be a formal program and you need to actually do it.

• Your financial information is critical. Cooperate with financial reporting agencies. Seek copies of their credit reports to be certain that yours has accurate information. Insurance companies underwrite, to a large degree, based upon your financial ability and will give the best rates to accounts with high credit scores.

• From a management standpoint, show that you have strong management and that it is experienced. Include resumes of key executives.

• In your submission you need to carefully list all entities that you currently use and that you have used in the past. If a new claim is made against an entity that you are no longer using, you will not be covered unless that entity is listed as an insured.

• Driving records are important. Check these driving records yourself on a regular basis or have your agent do it for you. Submit the driving records of your principal drivers to the insurance company with your submission. If you have an effective driver safety program, there will be no surprises in the driving records.

• Tell the underwriter about your maintenance programs. What do you do to perform preventative maintenance on your machinery and equipment, on your roofs, or on your sidewalks?

• If you seek indemnity or hold harmless agreements from others, be certain to tell your underwriter about these agreements. This will lessen that underwriter’s losses.
The Property and Casualty Insurance Market

• In submitting your account, include your sales, payroll and loss history by year. This allows the underwriter to relate payroll and sales to losses.

• Include a summary of the nature of the buildings you occupy. Are these buildings sprinklered? Is the sprinkler system adequate for your type of occupancy? Do you have a central station alarm system? Does the organization used by most insurance companies to establish the rates consider your building to be adequately sprinklered?

• Send pictures and diagrams of your property.

• If you have a safety committee, discuss its operations and its makeup.

• Do you have other written safety and risk management standards in place?

• You need to start early in the process of securing alternative proposals. 120 days prior to the expiration is not too soon.

• Minimize rate increases by considering higher deductibles. Certainly deductibles of $10,000 should be a minimum for many property accounts. You should not be turning in small claims.

• If you choose not to turn in small claims then take advantage of reducing the premium by having a higher deductible.

• You may want to consider trimming “frill” coverages. Ask your agent to break down the premium by coverage. Eliminate coverage for smaller risks such as towing losses, rental reimbursement, or mini-tort losses.
Selecting an Agent to Represent You

Insurance buyers choose an insurance agent to represent them in a variety of ways:

- Direct solicitation by an agent: an agent calls, asks to quote, has the lowest price, and gets the business.

- An insured calls an insurance agency and is assigned to an agent based upon the alphabet, or is given to the agent that is not busy, usually meaning the newest and probably the least experienced agent.

- An insured goes to an agent that a relative or friend had.

- The insured bought the insurance over the Internet and receives service from an “800” number to change autos or to make claims.

- The insured purchases insurance from an agent they liked but the agency that agent worked for reassigned them to another person within the agency. Or, the agent sent the file to an insurance company owned service center that services the account on an “800” number basis, presenting only the products of that one insurance company.

- Specifications were sent to multiple insurance agents and the lowest bidder gets the business.
The purchase of insurance, for the purpose of protecting assets from loss, is a very complicated process requiring expert guidance and advice. The same insurance policy issued by different insurance companies may contain different language and different coverages.

For example, a basic automobile policy covering one automobile in a state such as Michigan allows for a variety of choices:

• What limits of liability: $100,000 or $1,000,000?

• Should personal injury protection be excess or coordinated, and how does this affect health insurance?

• Should excess wage loss benefits be purchased under personal injury protection above the statutory amount? Personal injury protection under the Michigan no fault statute provides limited protection for up to three years and the monthly limit in 2003 was only $3,688 or $44,256 annually.

• What limits for uninsured motorist coverage: $20,000 or $1,000,000?

• What limits for underinsured motorist coverage, and is it even available? (One of the largest writers of automobile insurance in Michigan will not even provide underinsured motorist coverage.)

• What deductible for physical damage: $50 or $2,500? What are the pros and cons?

• Is it even worth buying physical damage coverage, such as comprehensive and collision, on a vehicle with minimal market value?

• For personal insurance should the automobile policy be combined with the homeowners policy with the same insurance company? What are the advantages and disadvantages of doing this?

• How should youthful drivers be handled? Should they be placed on the same insurance policy or separately? Should they be added to commercial policies where available?
Selecting an Agent to Represent You

- What is the best way to title an automobile in order to minimize the risk of losing assets of husband and wife? How should these names be scheduled on the auto policy?

The homeowners policy presents similar issues:

- If the amount of the loss exceeds the limit on the policy for fires, for example, will the insurance company pay above that amount? If so, is there a cap on that amount or is the coverage, known as guaranteed replacement cost, even available?

- How should items such as jewelry, fine arts, furs, gun collections or stamp collections be handled?

- Is mold coverage available, even where the mold is as a result of water damage resulting from a fire?

- Is ordinance or law coverage appropriate to cover differences in building codes?

- What should the limit be for personal liability insurance: $25,000 or $1,000,000?

- How should recreational vehicles be handled, such as jet skis and snowmobiles?

For the commercial account, the options are even more numerous and complicated. The same basic property and liability package policy issued from one insurance company might have 20,000 words and a policy from another company might have only 15,000 words. Which is better?

In addition, there are hundreds of endorsement and coverage options to choose from.

Selecting an agent to represent an insured is the most critical decision in structuring a commercial insurance program because virtually no insured alone is competent to make decisions on an appropriate insurance program to protect their assets.
Also, the truth is that many insurance agents are not competent in all areas. Their mission is to sell you an insurance policy based upon the lowest premium, which may or may not be the most appropriate choice for you.

The following are some of the basics regarding insurance agents, insurance agencies, and other related information.

**Licensed Agents**

Insurance agents can be licensed by preparing, either by correspondence course or by classroom setting, for 40 hours and passing a basic exam regarding property and casualty insurance.

This exam does not really prepare the insurance agent for the “real world” of personal and commercial insurance. The situation is similar to that of the medical intern. Although the intern may be licensed as a doctor, consulting with the intern is not the same as consulting with an experienced doctor. The insurance exam tests basic concepts pertaining to insurance regulations and some of the insurance coverages, but it is by no means comprehensive and does not equate to experience and long-term training.

**There are Several Types of Insurance Agents**

**Solicitor:** A solicitor is appointed by an insurance agency. The solicitor cannot bind insurance but can solicit insurance and place the insurance.

**Agent:** An insurance agent is appointed by specific insurance carriers and has the ability to bind within the parameters established by the contract with the insurance company.

**Brokers:** An insurance broker is basically the same as an insurance agent. In essence, the broker or agent is an intermediary between the insurance organization and the insured, receiving a commission for services rendered. The broker usually has no authority to bind an insurance company without its specific permission.

**Surplus Lines Agent:** A surplus lines agent is licensed to place insurance with insurance carriers that write specialty insurance, and that are not admitted to...
do business in the particular state involved. The major difference between admitted and non-admitted carriers is that the state insolvency fund will not protect an insured for the insolvency of a non-admitted insurance company.

“How do you establish the qualifications of your insurance agent? This is obviously critical because it is the insurance agent that is making recommendations as to appropriate coverages and the appropriate placement of insurance for an insured’s account.”

Establishing Qualifications

How do you establish the qualifications of your insurance agent? This is obviously critical because it is the insurance agent that is making recommendations as to appropriate coverages and the appropriate placement of insurance for an insured’s account.

Insurance agents have either commercial or personal orientations. In most cases it is probably best to separate the two if you are a business owner. In other words, your insurance agent should specialize in commercial insurance for your commercial account, and personal insurance for your personal account.

Look at the experience of your insurance agent in your field. Does your agent specialize in a particular industry or profession, or is your agent more of a generalist representing the local ice cream store as well as the local plastics manufacturing company? Generally speaking, the agent specializing in a particular area of commerce is better than a generalist.

The professional designations held by the insurance agent are important in establishing their commitment to their field and their level of knowledge. The following are the typical designations:

- LIC – Licensed Insurance Counselor
- CIC – Certified Insurance Counselor
- CPCU – Chartered Property and Casualty Underwriter
• ARM – Associate in Risk Management
• AAI – Accredited Advisor in Insurance
• CLU – Chartered Life Underwriter
• CRM – Certified Risk Manager
• JD – Juris Doctorate (attorney)
• CPA – Certified Public Accountant
• CISR – Certified Insurance Service Representative

If your insurance agent has been in the field for a number of years and has no designations, you need to question his or her competency and commitment to the insurance profession.

Negotiating skills are critical as well. This is the ability to present your account to an insurance carrier and to negotiate the coverages that are appropriate to protect the insurance buyer’s assets at the most reasonable cost.

Also look at the clients represented by your agent. Ask for a client list and see if other people in your field are represented by that agent.

Direct Writers Versus Independent Agents

Also in the insurance business there are agents known as direct writers and agents known as independent agents. A direct writer is an agent that is exclusive to one insurance company, either as an employee or independent contractor. A direct writer represents only one insurance company and independent agents typically represent multiple insurance companies.

The direct writers would be a good choice on very small main street types of accounts. They sell policies with premiums as low as $250 and these can be efficiently handled by direct writers. Direct writers in total probably write more personal insurance than independent agents. For insureds that are not particularly discriminating regarding coverages, direct writers of personal insurance may have the lowest price. Don’t look for any risk management or any significant counseling from direct writers.

The reality of the situation is that the $250 policy pays the direct writing agent commissions of between $25 and $37.50. Typically after these policies are written they are then handled directly by
Selecting an Agent to Represent You

the insurance company and renewed year after year without any further questioning as to whether or not that policy continues to be appropriate.

The independent agency system as opposed to the direct writing system is better for most insureds who have significant assets because it allows an insurance agent to select the most appropriate company for the insured and to design a complex insurance program. With this said, however, the insured needs to determine who actually handles the account within the agency. If the agency is going to take the personal or commercial account and send it to an insurance company owned service center, then that arrangement is no better than the direct writer arrangement. The insured has lost a personal relationship with the agent and that insured’s account is considered to be too small to be serviced by the agency personnel on a regular basis and, of course, “out of sight” is “out of mind.” When the file is sent to the insurance company owned service center, service will be reactive instead of proactive.

Also, when an insured looks at the structure of an independent agency, aside from the off-premises insurer owned service center issue, an inquiry should be made as to who services the account within the insurance agency. Is it the insurance agent that originally developed the relationship, or is it now the service representative that assists the insurance agent or a pool of service representatives within the agency?

As a general rule, the typical service representative’s workload and experience are the most appropriate to effectuate changes on a policy such as change of car endorsements or to prepare invoices and certificates of insurance, but they are not usually experienced enough to provide meaningful insurance advice.

The best arrangement is to be certain that the experienced insurance agent is the one that is reviewing your account on a regular basis, understanding how your business or personal risks have changed, and making appropriate recommendations with service assistance by a commercial or personal service representative on a supplemental as opposed to primary basis.
The Agent/Carrier Connection

Another factor to look at in selecting an agent or an agency is the quality and number of insurance carriers represented. In the property and casualty insurance field it is not easy to represent an insurance company. In order to do so, an agent must commit a significant amount of insurance premium. An insurance agency that has $1,000,000 in insurance premiums might represent one or two insurance companies, whereas an insurance agency that has $10,000,000 in premium volume might represent ten insurance companies.

It is obviously better to have an agent that represents multiple insurance companies so that as the appetite for a particular risk changes, the insurance agent has options.

This also presents more of an opportunity for the insurance agent to do informal quoting rather than formal quoting. Under the formal quoting process, applications are presented to insurance companies, they are recorded in the insurance company’s computer, and could be held against the insured if that insurance company does not obtain the business. In the informal process, a discussion is held over the telephone between the insurance agent and the insurance company underwriter to see if that company might be appropriate for an account and what the premiums might be. A formal submission is made only after informal discussions with a variety of underwriters.

Another issue pertains to the availability of “surplus lines” insurance carriers within the agency. The admitted insurance company is more regulated by the state insurance authorities than the surplus lines insurance company.

The surplus lines insurance company provides specialty insurance products or even high risk insurance products and, in many cases, is an appropriate choice for an insured. Insurance agents either represent these specialty companies directly or have access to them through other organizations.
Additional Services

An insured should also look at what additional services are available from the insurance agency and insurer. For example, an insurance agency that employs attorneys might have additional expertise in dealing with insurance coverage or claims disputes, or in designing insurance programs.

Another service is loss control. The insurance premium charged by an insurance company includes a component for loss control; however, this is misleading because insurance carriers typically “inspect” accounts for acceptability and do not spend a great deal of time in minimizing losses. The larger the account, the more likely that meaningful loss control services will be provided by the insurance agency or by the insurance company.

Agency Size

An additional issue is to look at the size in deciding on an insurance agent. There are very large insurance organizations in the United States that generally focus on writing Fortune 500 companies that produce commissions in excess of $100,000 per year. This would equate to something in the area of $1,000,000 in premiums. For this size account the national brokers have significant clout with the insurance carriers and have specialty products and the expertise to handle that type of business.

Accounts that are smaller than the threshold established by these brokers may not receive any significant service because they may be relegated to small account service centers that provide service over “800” numbers on a reactive rather than proactive basis.

At the other end of the spectrum is the very small insurance agency that might have several employees and represents several insurance companies. These agencies are best for very small accounts, either small personal or small commercial accounts, but generally do not provide additional services such as legal, loss control, or even much proactive advice.

It is between these two areas that most insurance buyers should focus their efforts in purchasing insurance or obtaining risk management services that are appropriate to their needs.
Conclusion

The secret to the selection process is the personal interview with the agent to determine that person’s experience, their areas of specialty, their insurance designations, and how the account is serviced within the agency; that is, directly by that agent or by others.

You should be looking for a long-term relationship with a person that will be making recommendations regarding the protection of your assets and will be “hands on” throughout the course of the relationship.
Selecting an Insurance Company

The previous chapter discussed the importance of selecting an insurance agent, and it is typically the insurance agent that places your account with an insurance carrier; however, insureds need to have some basic information regarding insurance carriers.

Types of Insurance Carriers
There are three basic types of insurance carriers: 1) admitted; 2) non-admitted but approved; and 3) non-admitted and not approved.

Admitted Insurance Companies
The admitted insurance company is the insurance company that is used for the majority of insureds within the state of Michigan. This type of carrier receives a great deal of scrutiny from the state insurance department. The insurance department reviews their financial statements, approves their policy forms, approves the rates they charge, and also there is an insolvency fund that provides protection for insureds when the insurance company becomes insolvent.

The advantage of an admitted carrier is that insureds can have a comfort level in utilizing them, knowing that there is oversight of what they are doing by state insurance officials.
At the same time, insureds need to be aware that the state insolvency fund is not a guarantee of protection for insurance companies that become insolvent. For example, the insolvency fund has a limit on the net worth of the insureds that it will protect. Insureds with a net worth of approximately $10,000,000 or more will not have any protection from the insolvency fund. The insolvency fund also has limitations on the amount of claims it will pay and the amount of premium it will return if a policy is cancelled because of insolvency.

The disadvantages of using admitted insurance companies include the lack of flexibility in rates and forms. For example, the insurance company is required to charge premiums that are in accordance with the rate filings made by the insurance carrier with the insurance authorities. The forms that are used are also filed and cannot be changed without permission of the authority which reduces the flexibility of the insurance company.

**Non-Admitted But Approved**

When the insured looks at the use of non-admitted insurance companies, although these companies have flexibility in their policy wording and can charge whatever they feel is necessary from a premium standpoint without oversight, there is an additional tax on this charge in most states and there is usually no insolvency fund guarantee.

In Michigan, non-admitted companies are “approved” as a “surplus lines” carrier after a review of the financial and other information.

**Not Admitted Not Approved**

In very rare instances, an insured is allowed to use surplus insurance companies that are not admitted and not approved with the appropriate payment of tax and filing of specific forms as required by statute.

**Direct Writers Versus Independent Agency Carriers**

The majority of insurance companies are admitted insurance companies. There are two types of admitted insurance companies: direct writers and independent agency carriers.
Direct Writers

The direct writer insurance carrier has employees who represent it as agents or independent contractors who represent it and they typically do not offer options with any other insurance company. The advantage of a direct writer is that the cost of doing business is typically lower and, in many cases on small accounts, it can produce a policy at less premium than other types of insurance carriers.

The disadvantage of the direct writer is that it offers little by way of additional services, it typically does not provide on-going analysis of the risk management needs of an account, and may not have a great deal of expertise. Its agents are generalists, charged with putting the business on the books and that business is then serviced, for the most part, by the service center of that insurance company.

Independent Agency Carriers

The independent agency carriers select independent agents to represent them and the advantage of this type of arrangement is that the agent represents multiple insurance companies and has multiple options, therefore, in placing an account. For medium sized accounts these companies also can provide additional loss control services depending on the needs of the account.

Self-Insured Workers’ Compensation Trust

There is an additional type of insurance arrangement in Michigan and in many other states that is known as a self-insured workers’ compensation trust. In Michigan, there is a statute that allows certain insureds to become self-insured for workers’ compensation and also allows groups of insureds to join together and to pool their workers’ compensation premiums under supervision of the Department of Labor. This type of arrangement operates in many ways like a typical insurance company and is used by independent agents.

The advantage of this type of arrangement is that the cost structure of a self-insured workers’ compensation trust is far less than many insurance companies because it does not have an expensive bureaucracy. Typically it will have one administrator who
supervises the claims handling and loss prevention services which are generally provided by a third party or perhaps in house, and also secures reinsurance.

Under this arrangement the premiums are pooled together, claims are paid, the services necessary to loss control and claims handling are paid for, and after a period of time any surplus remaining is returned to the members.

This arrangement is typically the most effective way to purchase workers’ compensation coverage because the self-insured workers’ compensation trusts specialize in particular areas such as metalworking accounts, plastics accounts, construction accounts, retail, or hospitality.

These trusts are also less likely to have “knee-jerk” reactions if there is one bad loss year. They typically take a “big picture” view.

The disadvantage of a self-insured workers’ compensation trust is that every member is jointly and severally liable for the losses of all members. In the worst case scenario, if all of the premiums disappear and the reinsurance fails, every member could be assessed for claims of all the members that must be paid.

From a practical standpoint, because of the supervision of the Department of Labor and the requirements for maintenance of substantial funds to pay losses and the requirements for excess insurance, this is not any type of significant problem.

Other Factors In Determining What Is Best For You

Insurance carriers provide numerous services. They provide underwriting services which typically today are structured between small account underwriters, medium account underwriters, and large account or specialty departments.

The small accounts are generally handled by computer programs for specified classes of business with minimal underwriting. Medium sized accounts, or what is known as middle-market in the insurance industry, are handled by underwriters that have the responsibility for pricing those accounts in the commercial field,
and then of course making the decision as to whether or not they
should be written.

For small commercial accounts and for personal insurance
accounts, the insurance companies have developed service centers.
For a small fee to the insurance agency they agree to assume the
responsibility for servicing an insurance agent’s business with that
insurance company. Using an “800” number, insureds call for
service needs and the person answering will answer with the
insurance agency’s name and, therefore, provide service; however,
the service is actually provided by the insurance company and not
by the insurance agency.

Although this works well for basic policy changes and renewals,
the bottom line is that the insured does not receive the independent
advice that is necessary to maximize the protection of assets.

Reputation
A major element in determining what insurance company should
write your account is the reputation of that insurance company for
the payment of claims. Most agents are aware of insurance companies
that have a reputation for poor claims handling; however, they will
still use that insurance company where necessary to get the business
or to place the business. One of the secrets is to try to find out
from the agent the real reputation of the insurance company
being recommended.

Carrier Stability and Breadth
Another issue is carrier stability. Insurance company appetites for
particular risks change depending on profitability. For example,
the insurer may be the largest writer of construction business this
year, and withdraw from the field next year. It may be a major
player in the personal insurance but because it was too competitive
its losses require it to withdraw from the field next year. Generally
speaking, the lowest priced carrier is going to have the least
stability in the marketplace.

Carrier breadth of appetite is also important. There are some
insurance companies that will write only particular classes of
business, such as manufacturing. However, if that same manufacturer acquires another business or another property that is outside of the area of expertise of the specialty company, it will not write that additional exposure. Also, it may be good at writing property and liability insurance but not good at writing workers’ compensation.

A narrow breadth of appetite is not necessarily bad for insureds that are within that breadth of appetite; however, generally speaking there will be little flexibility in staying with that carrier if that insured has a frequency of losses or does not comply with the loss control recommendations of the insurance company.

As a general proposition, insureds with operations in multiple states should also do business with an insurance carrier licensed in those states as opposed to splitting up the program between two companies.

Conclusion

In summary, the experienced insurance agent is best able to guide an insured through the complexity of selecting an insurance carrier and whether it is best to use an admitted vs. non-admitted carrier, direct writer vs. independent agency carrier, or utilizing specialty sources such as workers’ compensation trusts.

Only the experienced agent knows about carrier appetites, reputation, and multi-product and multiple state capacity.
The Quote Process

How Often Should You Quote Your Insurance?

It is probably not best for you to quote your insurance among different agents every year. In fact, you should be cautious about having your existing agent quote the account among the same carriers every year. You should collaborate with your agent and ascertain what insurance companies will be approached for your renewal. Depending on the market conditions, it may not make sense to blanket the market with submissions and to spreadsheet the premiums to see who is lowest in cost. In a hard market, of course, your agent may not have as many options with insurance companies as during a soft market, given underwriting restrictions and generally rising prices. In that circumstance, it may make more sense to quote your account among different insurers using a different agent.

Agents typically can get a feel for what increases and coverage changes are to be expected from the current carrier. If there is stability in coverages and pricing with your current carrier, and there is satisfaction with the claims paying and loss control services of the insurer, it may be in your best interest to avoid authorizing an agent to blanket the market with applications to multiple insurers. The insurance industry is a small community of underwriters that know what accounts are shoppers. In fact, loss control representatives from the insurers typically ask how often you shop your insurance when visiting your facility. Underwriters know that the quoting process is a time consuming one. It involves the expenditure of resources in
The insurance industry is a small community of underwriters that know what accounts are shoppers. In fact, loss control representatives from the insurers typically ask how often you shop your insurance when visiting your facility. Underwriters know that the quoting process is a time consuming one.

There is a difference between shopping among insurers and shopping among insurance agents and brokers. Many agents have access to the same insurance companies, both nationally and locally. Further, the same general rule applies to agents as to insurance companies that agents know what accounts are bidders and will shy away from spending the considerable time and resources in a quoting contest. As a general rule of thumb, it may make sense to consider other agents in the following situations:

- Your agent is not proactive in developing alternatives for you to consider at renewal and instead offers the same insurer year after year without discussing possible options.

- You have had your insurance policies reviewed by an outside consultant, such as an attorney or insurance expert, and have determined that there were coverage gaps that you did not know about.

- Your agent does not spend quality time with you at renewal and throughout the year going through your insurance program and what is covered and what is not covered. Detailed summaries of insurance should be expected from your agent as well as
The Quoting Process

narrative letters explaining coverages. If you receive your policies in a window envelope without an explanatory letter or personalized summary or personal visit, it is probably time for a new agent.

- Your agent does not have access to a specialized program, such as an association program, that offers reduced costs and improved coverages. Programs can sometimes offer better coverages and pricing due to the volume of business with a particular insurer. These programs may be exclusive in nature meaning they are not accessible to all insurance agents.

- Your agent is not proactive in dealing with claims on your behalf.

“Detailed summaries of insurance should be expected from your agent as well as narrative letters explaining coverages. If you receive your policies in a window envelope without an explanatory letter or personalized summary or personal visit, it is probably time for a new agent.”

Gathering the Information

As mentioned above, there is considerable information that insurance agents and insurers must obtain and review to consider your account. This includes:

Loss History

Your loss history is critical to your ability to negotiate a favorable insurance program that includes the better coverages and pricing. Carriers typically require five year loss histories to quote your account. Loss histories are maintained in computer databases by individual insurers and can be obtained for the asking. Usually this involves a letter on your letterhead signed by an officer of the company that authorizes the release of the loss history.

Even where you are not shopping your insurance, you should request loss histories (also called “loss runs”) at least once a year.
and perhaps more frequently. The reason for this is that there may be reserves or “estimates” on your loss history that claims personnel have listed but that should be lowered or closed out. There can also be errors in the listing of claims and this should be reviewed and presented to the insurer for clarification and amendment.

If you have a poor claims history there are a few things you should do. First, be certain that a prospective insurer is not quoting your account “subject to receipt of loss history.” If this is the case and you have had some claims, the new insurer could cancel you mid-term by providing you thirty days notice and you could be in a precarious position in terms of finding a new insurer. On all applications for insurance, it is asked whether a policy has been cancelled or nonrenewed and this is something that will have to be explained. If you fail to do so you could be cancelled mid-term or in the event of a major claim the insurance company could, in fact, sue to rescind the policy on the basis of fraud.

Secondly, if you have had one or two major claims, you may be able to provide an explanation that will satisfy a prospective insurer that the loss causing event would not occur again. Carefully review your loss histories to see what needs to be changed and what needs to be explained and work with your agent on this process.

**Safety Programs**

Not surprisingly, insurers are not eager to write accounts that will have a propensity to have claims, whether property or liability in nature. While your loss history is one good indication of future claims, the existence of a safety program is something that is considered as well. Insurers know that those organizations that are proactive about safety and claims are the better insureds from a claims incurred standpoint. As a result, spend time showing the insurer that you have a safety plan and a safety committee. Perhaps you should even appoint a safety officer with accountability for compliance with safety and loss control standards. This will do you no good with the insurer unless they know about it. Therefore, you should provide information to your agent regarding your safety and corporate compliance plan and also give a copy of this to the loss control representatives when they come out to do a review of your facility.
The Quoting Process

Financials

At times, insurers will ask to see a copy of your financials. Some insureds are reluctant to release financial information. However, it is generally only the agent and the underwriter that see such financials. If necessary, require that the agent sign a confidentiality statement.

In reviewing the financials, the insurer will be looking for a few things. First, the insurer will look to see whether there is a positive net worth. Second, the insurer will be looking to see net sales which is often a basis for determining general liability premiums. Insurers generally are looking for financial stability. Spend the time to attach an explanatory memo to your financials where explanations are required.

Management

Is the management of the organization proactive in dealing with safety and claims? Is there an attitude of concern for coverages or is the insurance process more of a spreadsheet bidding war? These are questions that will be important to obtaining a favorable quote.

“Policies are not the same. There is no such thing as quoting “apples-to-apples.” Because of this, you need to understand what coverages you have in place in relation to those that are desired. You would not want to leave a program for another set of policies that do not necessarily provide coverages which are as broad. Have your agent and even prospective agents review your current policies to be sure there are no gaps that result from making a change.”

Relevance of Current Coverage

Policies are not the same. There is no such thing as quoting “apples-to-apples.” Because of this, you need to understand what coverages you have in place in relation to those that are desired. You would not want to leave a program for another set of policies
that do not necessarily provide coverages which are as broad. Have your agent and even prospective agents review your current policies to be sure there are no gaps that result from making a change.

**Driving Records**

Your insurer will ask for information on employees who drive on behalf of the company. Individuals with poor records such as suspended licenses, driving while impaired, reckless driving or excessive speeding tickets will be excluded by your insurer and you would want to know about this before you move your insurance program to a new insurer. Insurers have different standards on driving records. If you have an in-house system for obtaining and monitoring driving records, this is something that you should tell your agent and insurer about.

**Maintenance Programs**

What program is in place for maintaining the premises, its equipment, and your vehicles? A maintenance program should be reviewed with your insurer and agent.

**Showing Indemnity from Others**

Often times you will have entered leases or other contracts that are in your favor from an indemnity and hold harmless standpoint. For example, if you are a distributor of a product and the manufacturer has agreed to hold harmless and indemnify your organization for claims arising out of the product you are selling, this would be less of a risk for your own insurer. These situations should be discussed with your agent.

**Preparing Specifications**

It is generally advisable to have a game plan for the coverages that are desired before starting the quoting process. This can be accomplished by drafting a set of specifications that can be provided to the agents that show precisely what the minimum standards for quotes are.

The specifications require some expertise in terms of the available coverages and exposures that you have. As a result, you should have either your current agent assist you in preparing the specifications or an outside expert such as an attorney, business advisor or
insurance expert. These specification documents are usually by line of coverage.

Signing Applications or Specifications

Be cautious about signing any application completed by your agent or someone else. It is common practice for insurance agents to complete applications and have the applicant sign them. In some cases, these applications are attached to the policies as warranties and if any information is inaccurate, it can be grounds for the denial of a claim.

Tips for Structuring the Program

Insurance policies and programs are not interchangeable commodities. All policies have gaps and exclusions along with highly technical insurance language. As a result, it is important to keep in mind certain standards in achieving the best insurance program possible. While insurance market conditions will often times dictate the availability of certain coverage enhancements, other coverages should be minimum standards. The following are some key points to consider:

“Insurance policies and programs are not interchangeable commodities. All policies have gaps and exclusions along with highly technical insurance language. As a result, it is important to keep in mind certain standards in achieving the best insurance program possible. While insurance market conditions will often times dictate the availability of certain coverage enhancements, other coverages should be minimum standards.”

Same Date

It is best to have a common expiration date for all insurance policies. This can create premium clout that can be effective in negotiating with insurers and can also assist in minimizing
unforeseen gaps. For example, an umbrella policy typically provides excess coverage over certain scheduled underlying policies. When those policies have different dates, there is a potential for a gap to the extent the underlying scheduled policies are placed elsewhere. This general rule should not only apply to the property and liability policies but also to other policies including employment practices, directors and officers, fiduciary liability, crime, umbrella and workers’ compensation policies.

**Same Agent**

For reasons similar to those for having a common date of expiration for all of your policies, the same agent should be used for all policies as a general rule. Where there are competing agents involved in different aspects of managing your risks and insurance policies, the potential for an uncovered claim is increased.

**Same Carrier**

There can be fine lines between various different types of policies. For example, a general liability insurer may try to argue that a claim is excluded because it is a professional act whereas the professional liability insurer may, in turn, deny coverage stating that there was no professional service that caused a wrongful act. In these situations, having the same insurer can minimize the chances of competing denials which can find the policyholder in the middle. It is usually best to have the same carrier for as many lines of coverage as possible.

**Deductible Options on Property**

Particularly in hard market conditions where underwriting restrictions are imposing price increases, increased deductibles for property insurance can provide cost savings that will minimize the increase.

**Self-Insurance on Nominal Exposures**

You should look at self-insuring areas that would not be catastrophic to your business. For example, towing and rental reimbursement costs on an automobile insurance policy usually would not cause a financial hardship on a business that did not carry such coverages.
The Quoting Process

“We should look at self-insuring areas that would not be catastrophic to your business. For example, towing and rental reimbursement costs on an automobile insurance policy usually would not cause a financial hardship on a business that did not carry such coverages”

Payment Terms

Payment terms should be negotiated up front with your insurer and agent. Where the insurance is placed with a standard licensed insurer, quarterly and sometimes monthly payment plans can be negotiated for no additional premium or for a nominal service charge. For nonstandard insurers, payment plans are usually not available outside of a premium financing arrangement that would be handled by an outside premium financing company.

Fees or Commissions to the Agent

Most agents are compensated on a commission based on a percentage of the premium. This percentage varies from insurer to insurer and from policy to policy. However, most insurers pay 15% commission on property and liability insurance and 9% or lower on workers’ compensation insurance. You should ask your agent to disclose the commissions and if considerable, a zero commission arrangement can sometimes be negotiated whereas the agent charges you a flat fee. On larger accounts this can make more sense. An agent, however, needs to be fairly compensated for the services that are provided.

Allowing Others Such as Tenants to Buy Insurance on Your Assets

Be cautious about allowing other parties to purchase your insurance. For example, with triple net lease agreements it is commonplace for the tenant to be required to purchase the insurance for the landlord. This is usually not recommended. One reason is that the landlord will typically only be named as an additional insured and not a named insured on the policy purchased by the tenant. This would mean that the landlord, would have inferior liability coverage to that of the tenant.
Moreover, in allowing another party to purchase your property insurance and other lines of coverage, you are at risk to the sloppiness of the third party’s insurance agent and could have very little control over the insurance that protects your assets.

**Seeking the Broadest Coverages**

Our team of insurance experts has found over the years that insurance should not be purchased in the way janitorial supplies are purchased. All policies are different in what they cover and what they do not cover. As a result, you need an expert to compare the available policies and to make recommendations to you. Sometimes this expert can be an attorney. However, your agent should also be providing you with coverage comparisons.

It is important to set your sights on having better coverages than the average program offers. This does not necessarily mean that you will be paying more in premium dollars. Even minor enhancements in coverage can be negotiated that could save the day for you in a compromising coverage situation. See our following chapter on “Ordering and Reviewing Policies” that includes checklists of things to look for.

"It is important to set your sights on having better coverages than the average program offers. This does not necessarily mean that you will be paying more in premium dollars. Even minor enhancements in coverage can be negotiated that could save the day for you in a compromising coverage situation."

Although some insurers offer broader coverage forms than others to start with, sometimes even those coverage forms can be improved. It is an important rule to remember that insurance companies typically only offer the coverages that their agents request in an application. Oftentimes coverage enhancements can be added for a nominal additional premium, if any.
The Quoting Process

**Dividend Plans**

On workers’ compensation policies, some insurers will offer dividend plans that could return premiums to you in the form of dividends if you have a favorable claims year. Some such insurers pay dividends to insureds based on the performance of the entire book of business while others will pay dividends based on your account’s performance. In any case, most workers’ compensation policies do not start out by offering dividends programs. Such programs can sometimes be negotiated with insurers, particularly if you have the rest of your insurance with the same insurer. If your insurer will not offer a dividend plan and you are paying workers’ compensation premiums in excess of $100,000 for that coverage, you should look for one that does.

**Self-Insurance**

Self-insurance is a possibility to consider. All insurance programs contain deductibles which are, in effect, self-insurance. Other forms of self-insurance include “going bare” on property or liability insurance. Some businesses that do not have lienholders or mortgagees that require property insurance may decide they can afford to self-insure. However, self-insurance should be structured whereas dollars are earmarked for expected claims. Moreover, to the extent possible, stop-loss insurance can cap your losses at a certain point.

**Captives**

Captives involve a single large company or a group of related companies getting together and forming their own insurance company to insure their individual risks. This pooling mechanism typically involves off-shore corporations but can involve domestic corporations as well. The appropriate venue for the captive involves considering many factors and tax ramifications that you would need expertise to properly consider. By and large, a captive is not appropriate for premiums less than $3,000,000 for the reason that there are expenses that need to be managed including reinsurance and administration costs. A feasibility study can be generated to determine if a captive makes sense for a particular insured or group.
Association Programs

Association programs can offer considerable benefits to particular trade group members. The premium clout that typically accompanies such programs usually translates into broader coverages and more competitive rates. Your agent may not have access to these programs. However, if you are a member of a trade group association, you should check to see if insurance programs are available and ask for comparisons to how the coverages offered differ from your own.

Insurance Specifications

It is advisable to draft a set of insurance specifications that detail all of your locations, limits of insurance, automobiles, payrolls, and annual sales by classification type. Further, you should include a list of required coverages such as the following:

- Blanket limits of property insurance between buildings and contents and between locations.

- Agreed amount endorsement (no coinsurance) for property insurance for buildings and contents, electronic data processing and personal property of others.

- Agreed amount endorsement (no coinsurance) for business interruption coverages.

- Broad form notice of occurrence endorsement on the liability insurance that will prevent the insurer from denying a claim based on late notice of that claim unless an officer of the company knew about it and did not report it.

- Aggregate per project or location on the liability insurance.

See our checklists in the next chapter that also include other coverages to request.
One Agent or Multiple Agents?

There are a plethora of insurance agents that are licensed to sell insurance. Many of these agents represent the same insurers. There are exceptions to this rule, however. Some agents have exclusive access to specialized programs such as association programs. However, it usually does not make sense to entertain proposals from more than one agent. The reason for this is that most agents will not quote when there are multiple agents because they are under the impression that your account will be “bid” every year and that only the lowest cost wins. It is for this reason that it makes sense to talk with your current agent at least 90 days before the expiration date of your program and get a sense for what his or her direction will be. Will the agent be attempting to renew the policies with the current carrier without doing a lot of comparison shopping for you? Will the agent be offering creative ways to offset major increases? Is there an increase that is expected at all? If there is not going to be an increase or change in coverages with your expiring carrier, and your current program is determined to properly cover your organization, it may make sense not to shop the coverage at all.

“Will the agent be attempting to renew the policies with the current carrier without doing a lot of comparison shopping for you? Will the agent be offering creative ways to offset major increases? Is there an increase that is expected at all? If there is not going to be an increase or change in coverages with your expiring carrier, and your current program is determined to properly cover your organization, it may make sense not to shop the coverage at all.”

With minor exceptions, you should avoid blanketing the market each year with submissions from various agents. The reason for this is that most carriers know what accounts are shoppers and shy away from offering a quote. Instead, you should consider taking your account to market only when necessary.
One process is to hire an outside consultant to assist you in interviewing agents to determine their competence and available resources and whether it makes sense to spend the considerable time it will take to prepare specifications and in reviewing any proposals.

Two agents are not able to access the same insurer for your account. Therefore, if you will be having multiple agents work on your account, it is advisable to get a list of markets that each agent will be pursuing. Most carriers will accept an agent of record letter that will enable you to appoint a specific agent to be your agent of record for a particular carrier. This applies to existing policies that are in force and to prospective quotes. If you do not like a particular agent’s style or lack faith in the agent, the agent-of-record option is an alternative. However, some insurers will not accept mid-term agent of record letters and will only accept a change in agents at the time of renewal.

“Carriers are known for having an appetite for certain kinds of risks. For example, Carrier A may be willing to write a machine shop while Carrier B would be more competitive for a service related organization. Educate yourself on the appetite of various insurers by asking your agent what the carriers preferences are. Sometimes, insurers are impressed by a quality loss control report to the point that they are willing to overlook poor loss history with prior insurers.”

What Carriers Should Be Considered?

Depending on the type of business you are in, your designated agents will have access to multiple insurers. Agents generally have a feel for what markets are best for what exposures. Carriers are known for having an appetite for certain kinds of risks. For example, Carrier A may be willing to write a machine shop while Carrier B would be more competitive for a service related organization. Educate yourself on the appetite of various insurers by asking your agent what the carriers preferences are. Sometimes, insurers are impressed by a
quality loss control report to the point that they are willing to overlook poor loss history with prior insurers.

Time to Submit Proposals
The task of comparing insurance programs can be a daunting one. You should set deadlines of at least 30 days before your expiration date for presentations to be made (including by your existing agent) so that you can have the quality time to review each proposal, ask questions and consult outside experts. Some insurers and agents will be lax in getting renewal proposals to existing clients. You should hold your existing agent accountable to the same deadline you set for the other agents so that you can be sure you know what the renewal terms and pricing will be for the expiring program.

Comparing Proposals
There are as many proposal formats as there are agents. Proposals that are only a few pages and merely list limits should be unacceptable to you. Such proposals do not outline coverage issues or deficiencies with any degree of particularity and should be avoided. Instead, ask the competing agents to follow a standardized format that you can use to compare each proposal once you have all of the proposals.

Be certain to pay close attention to the terms and conditions listed on the proposal. For example, proposals that are contingent upon review of loss history and driving records should not be acceptable.

“A key issue often missed by agents is the proper listing of named insureds among policies. It should be noted that past LLC’s, joint ventures or partnerships are not automatically covered for liability insurance. Further, all names of existing entities should be listed. In reviewing proposals, take care to review the listing of all entity names to be sure that you are not buying a policy that would leave your assets from one of the companies uncovered.”
Instead, provide that insurer with that information to start with so that the chance for an unexpected mid-term cancellation can be avoided. Keep in mind, however, that some insurers will not inspect the premises until after the order has been given to them. Consider whether you may have inspection issues at the time loss control comes out. Is your sprinkler in good working order? Is the sprinkler density appropriate for your operations? What is the overall appearance of the building and related structure? When was the roof and electrical last updated?

A key issue often missed by agents is the proper listing of named insureds among policies. It should be noted that past joint ventures or partnerships are not automatically covered for liability insurance. Further, all names of existing entities should be listed. In reviewing proposals, take care to review the listing of all entity names to be sure that you are not buying a policy that would leave your assets from one of the companies uncovered. Consider a broad form named insured endorsement which some carriers will add that will grant automatic coverage to entities that are subsidiaries that are owned at least 51% by the principal named insured.

Understanding the Proposal “Guarantee”

Most proposals will contain a limitation of time in which the deal can be accepted. Pay close attention to this and obtain a written extension if necessary.

Proposals are important in the case that you have an uncovered claim. Although in many states the proposal will not bind the insurer unless the insurer actually issued it, where a proposal misrepresents the extent of coverage or is ambiguous, this would be important in proving an errors and omissions liability case against your agent.

Also understand that proposals are not guarantees of long-term coverage at all. Insurance companies can cancel coverage at any time for any reason with 30 days notice or even 10 days notice in the event of nonpayment of premiums.
Reviewing Payment Terms

Some proposals may not detail the payment terms that are available. As mentioned in previous pages, whether there is a payment plan will depend in large part upon the type of insurer that you are using. Standard insurers often offer monthly or quarterly payment plans.

Be aware, however, that late payments can raise red flags with your insurer and impact your renewal premiums.

It is common for insurers to offer direct bill which means that instead of the insurance agent billing you, the insurer will. Questions about coverages or changes in your insurance should still be directed to your agent for the most part. The direct bill arrangement is merely a billing conduit. Similar payment plans are available through direct bill as are typically available through agency bill.

Premium financing is usually an option and interest rates vary.

Final Negotiations

Agents that have put considerable time into quoting your account will not want to lose the opportunity to write your business if they can help it. As a result, it makes sense for you to negotiate based on other quotes you have received. Detail the coverages that must be provided as well as the pricing and sometimes you will be successful in getting the insurer to agree. Further, this can have the effect of bringing down your overall insurance costs. Keep in mind that some agents will be willing to reduce commissions to get to the desired pricing.
5

Ordering and Reviewing the Policies

Once a decision has been made as to what policies and coverages will be ordered, the insurance agent should be informed and this should be followed up in writing before the inception of the policy. This is particularly the case to the extent that any coverage changes are made that are inconsistent with those mentioned in the proposal. In the event of a claim between the time the coverage is bound and the time that the insurance policies are delivered, you want to have the appropriate documentation showing which coverages you had ordered.

Keep in mind that although insurance agents may tell you that they have the authority to bind the insurer, this authority is often limited to the exact underwriting rules of the insurer. As a result, ask your agent to confirm that the insurer has bound the coverage. If possible, get a copy of the exact quote that the insurer provided to the agent.

Policies take some time to be issued by the insurance company. This varies greatly among carriers. However, you should be proactive in demanding that policies are delivered within 30 days of the inception date. This is important because you would want to read your policies and raise any questions with your agent as soon as possible to avoid any miscommunications or unforeseen gaps.
“Policies take some time to be issued by the insurance company. This varies greatly among carriers. However, you should be proactive in demanding that policies are delivered within 30 days of the inception date. This is important because you would want to read your policies and raise any questions with your agent as soon as possible to avoid any miscommunications or unforeseen gaps.”

Binders, Certificates of Insurance and Summaries

While waiting for your policies, you should have at least a binder of insurance that indicates that coverage has been bound with the insurance carrier. Further, you should obtain updated certificates of insurance for your vehicles, and for loss payees, landlords, and others that you are required to list on your policies. Moreover, you should have your agent provide a summary of insurance as to what is covered and what is not. The reason for this is that the binder of insurance does not contain all the details of coverage and usually only lists the applicable insurance limits. This is not to say that your agent’s summary will bind the insurer. In many cases it will not since the agent may be the legal agent for the policyholder and not the insured. This varies among the laws of the various states.

Checking the Policies Against Expectations

It is rare for an insurance policy to be issued exactly as ordered. Insurance company processing departments often omit locations, endorsements, and there may be other errors. As a result, you should take steps to be sure your policies are reviewed to assure that they are as ordered.

It is incumbent upon the insurance agent to check the policies for accuracy. However, a detailed review of all coverage forms, policy language and endorsements may not occur in all cases. As a result, it is often advisable to have an outside consultant or attorney review your policies in relation to the proposal of the agent and the exposures that you have. Further, the insured should read the
Ordering and Reviewing the Policies

policies themselves to see if there are any glaring errors that the insured would pick up through a review of the policy.

Although policyholders may not have the technical know-how to understand all of the policy language, there are certain critical things to consider.

NOTE:
Please see Appendix M for insurance checklists to help evaluate your policies.
Additional Insureds, Certificates of Insurance and Insurance Requirements Provisions

Virtually every business entity has imposed upon another or is itself subject to an insurance requirements provision in a lease agreement, purchase agreement, land contract, or construction agreement. Such provisions are often found as part of a larger contract document and usually require that a party be listed as an insured, additional insured or loss payee. Similarly, most every business either provides or obtains certificates of insurance to confirm the existence of coverage and to demonstrate compliance with insurance requirements provisions. There is widespread confusion in these areas and this chapter provides some practical tips to consider in dealing with such insurance requirements and certificates.

Who Is an Insured?

A critical issue in understanding coverage under an insurance policy is determining who is an insured. Indeed, most policies include a “Who is an Insured” provision which lists who is covered under the policy. However, the list typically does not cover all parties and other names may need to be added such as landlords and others. The following is an analysis of the types of “insureds” under the most common property and casualty insurance policies.
“The named insured can include multiple entities. This is a common oversight of insurance agents who think that it is acceptable to list the main company being insured as a named insured and other entities related to the company as additional insureds. This is inaccurate. The named insured provision should list all entities including, for instance, a 401(k) plan entity, an LLC through which a business owner owns the building, or a partnership.”

Named Insureds

The most important insured under the policy is the named insured. This is typically defined as the “you” referred to before the insuring agreement or in the definitions section of the policy. The named insured is listed on the declarations page of the policy. For example, on a commercial property insurance policy, the named insured could be listed as “John Jones Company, LLC.”

The named insured can include multiple entities. This is a common oversight of insurance agents who think that it is acceptable to list the main company being insured as a named insured and other entities related to the company as additional insureds. This is inaccurate. The named insured provision should list all entities including, for instance, a 401(k) plan entity, an LLC through which a business owner owns the building, or a partnership.

A common issue becomes who to list first in the named insured provision. Under most policies, the first named insured listed is the captain of the insureds, meaning that that person or entity has the right to make decisions, such as increasing or decreasing coverage. Further, the first named insured is responsible for payment of the premiums. As a result, commercial entities need to be cautious as to who is listed as a named insured and who is listed as the first named insured.
Who can be included as a named insured on a commercial insurance policy? Most insurers will agree to list entities that have common ownership. For example, if a manufacturing company has a separate division that is run through an independent corporation that is owned by the same owners as the manufacturing company, both names should be listed as a named insured.

**Automatic Insureds**

Aside from named insureds, there are other “insureds” that are automatically included under certain policies. This list is usually included under the “Who is an Insured” provision of the policy. For example, under a commercial general liability insurance policy, an insured includes a real estate manager, members of a limited liability company, employees of a corporation and spouses of sole proprietors. A critical distinction exists between a named insured (often referred to as “the insured”) and other automatic insureds (often referred to as “insured” or “an insured”). The named insured typically has more rights and responsibilities under the policy than other “automatic” insureds.

**Additional Insureds**

An issue arises as to listing additional insureds under a commercial liability insurance policy. For example, many lease agreements require that the landlord be listed as an additional insured under the tenant’s commercial general liability policy. However, that coverage is limited by the policy language or by an additional insured endorsement added to the policy. This language typically limits coverage for the additional insured to liability arising out of acts of the named insured. This is widely misunderstood among attorneys and insurance agents. A problem arises where the additional insured is sued but not the named insured. In such a situation, arguments are often made by the insurer that there is no coverage for the additional insured. As a result, when adding additional insureds to liability insurance policies, the additional insured should obtain a copy of the policy or endorsement that limits such coverage. Some language is broader than others in this area.
Loss Payees

Loss payees are listed on property insurance policies. However, a loss payee is not an additional insured. In fact, a loss payee, as a matter of practice, does not have independent rights under a property insurance policy. As a result, where a mortgagee is mistakenly listed as a loss payee and not as a mortgagee, there are no independent rights to coverage and if any insured voids coverage, there is no coverage for the mortgagee.

“Certificates of insurance are a quagmire for companies yet many companies routinely obtain such certificates when dealing with suppliers, customers, tenants, or others. They are the typical instrument used to evidence insurance coverage for business entities. However, these certificates present issues.”

Lender’s Loss Payable

Where a commercial entity loans funds to a business, it is best to have such a party listed as a “lender’s loss payable.” Such a party, if listed as such, would have independent rights of coverage under the policy. Again, it is a common mistake to have such parties listed as loss payees which are subject to an insured voiding coverage for them.

Certificates of Insurance

Should I Rely Upon Them?

Certificates of insurance are a quagmire for companies yet many companies routinely obtain such certificates when dealing with suppliers, customers, tenants, or others. They are the typical instrument used to evidence insurance coverage for business entities. However, these certificates present issues.

First, the certificate is only one page in and of itself which constrains the reader from truly understanding the intricacies of coverage. Second, such certificates often list additional insureds but do not state the limitations on the additional insured status or attach a copy of the endorsement adding such coverage. Third,
certificates of insurance may not be binding upon the insurance company unless the insurance company prepared the certificate. In many cases, the independent insurance agent is preparing the certificate and under the law of some states, such agents are agents for the policyholder. ¹

As a result of the problems with certificates of insurance, businesses should take time to understand some basic tips on what to look for in reviewing certificates.

What Should I Look For?

1. Listing of additional insured or loss payee. Additional insureds should be listed clearly as such on the certificate and a copy of the endorsement applying the additional insured language should be reviewed.

2. What are the limits of insurance? Property, liability and workers’ compensation policies are listed on certificates of insurance with certain limits of liability. The sufficiency of such limits needs to be reviewed and evaluated.

3. Does coinsurance apply? Coinsurance provisions are a dangerous proposition in property insurance policies. Such provisions allow the insurance company to invoke a penalty in the claims adjustment if the insured did not insure enough. Such provisions can typically be waived by the insurance company. Where you are allowing someone else to insure your property, you should review certificates of insurance for reference to coinsurance and whether the “agreed amount” or “agreed value” endorsements apply that suspend such coinsurance.

4. Blanket limits. Property insurance can be written on a blanket basis that provides for a single limit for both building and contents and by location. Many insurers are willing to offer this and the advantage is that if blanket limits are negotiated, there is a higher limit available at any one location. Where you are allowing someone else to insure your property, certificates should list blanket as opposed to individual limits for property insurance, where available.

5. **Notice of cancellation.**
Certificates impose upon insurers and agents the obligation to advise the certificate holder of cancellation within a certain number of days before the cancellation becomes effective. Some agents will limit this to ten days. Thirty days should be requested.

6. **Insurer type and rating.**
The insurer providing coverage is listed on the Certificate of Insurance in the upper right-hand column and is referred to by line of coverage in the certificate. There may be multiple insurers listed on a certificate. One thing to inquire about is the insurer’s financial rating through A.M. Best Company which publishes an annual guide. Such ratings are usually “A,” “B,” “C,” etc. For the most part, only “A” or “B+” carriers should be used.

Insurers that are non-admitted are required in some states to add a red stamp on the front of policies and certificates showing that “In the event of insolvency, payment of claims cannot be guaranteed.” This causes consternation in many businesses who are reviewing such certificates. However, many insurers who are financially viable may not be licensed and, in fact, may not want to be licensed. The reason is that as a non-admitted insurer, the insurer has freedom of rate and form. As a result, the financial rating and history of the non-admitted insurer should be evaluated but such insurers should not be dismissed out-of-hand.

**Tips for Dealing with Additional Insureds, Loss Payees and Certificates of Insurance**

1. **Do not rely upon Certificates of Insurance.**
Although certificates are often unavoidable in closings, landlord-tenant situations, and other scenarios, certificates do not tell the whole story. Further, where such certificates are not prepared by the insurer itself, they may not be binding upon the insurer.

2. **Ask for specimen copies of the policy.**
A central reason for the use of certificates is that the policy has not been prepared yet. However, specimen policies and endorsements are often available from insurance agents and should be requested. When the policy is issued, it should be reviewed as well, particularly if a tenant is insuring your building.
3. **Raise a red flag where you see a loss payee listed.**
A loss payee has no rights under a property insurance policy and the listing of a loss payee extends no coverage under a commercial liability insurance policy. If you are listed as a loss payee on a certificate of insurance or insurance policy, ask your insurance professional about this.

4. **Evaluate the insurance company’s financial rating and history but do not necessarily dismiss “red stamp” insurers.**
A.M. Best is a common rater of the financial solvency of insurers and such ratings can be obtained from insurers or agents. Further, surplus lines insurers with “red stamps” are not necessarily bad. Again, their ratings should be reviewed.

5. **Demand that certificates of insurance reflect the waiver of coinsurance and blanket limits where someone else is insuring your property.**
Coinsurance is generally bad for insureds and should be avoided on property insurance policies. Ask that certificates be amended to include waivers of coinsurance where you are requiring someone else to insure your property. Blanket limits should be negotiated and reflected on certificates of insurance so that broader coverage applies to any one location.

“Where someone else such as a tenant or contractor is listing you as an additional insured on their liability insurance, do not assume that your coverage is as broad as theirs. Liability coverage for additional insureds is typically derivative of the named insured. Such endorsements vary and should be reviewed by requesting a copy when the certificate is obtained from the insurance agent.”

6. **Obtain copies of additional insured language/endorsements so you can see what is covered and what is not.**
Where someone else such as a tenant or contractor is listing you as an additional insured on their liability insurance, do not assume that your coverage is as broad as theirs. Liability coverage for addi—
tional insureds is typically derivative of the named insured. Such endorsements vary and should be reviewed by requesting a copy when the certificate is obtained from the insurance agent.

7. Be cautious in the listing of named insureds and especially the first named insured on commercial insurance policies. It is preferable to have insureds listed as named insureds and not additional insureds where there is common ownership. The first named insured is the “captain” of all of the named insureds and is the only party with the right to make coverage changes.

8. Where you are the owner of a building that has a triple net lease with a tenant, avoid allowing the tenant to insure the building. In such situations, the landlord is often listed as an additional insured or loss payee which could leave the landlord open to an uncovered claim for acts of the tenant. Further, when the landlord allows the tenant to insure the building, the landlord loses control over the insurance program.

9. Where you are a limited liability company (LLC), be sure members have been added as additional insureds to the commercial general liability policy and umbrella policy. Some insurers are using older policy forms that do not reflect LLC members as additional insureds. In this case, the insurer will typically add an endorsement to reflect this for no additional premium. However, this is often missed by agents.
Building and Personal Property Coverages

This coverage protects your organization for covered perils which damage buildings or contents. Coverage forms vary. At a minimum, the following considerations should be taken into account:

The “All Risk” Form

The scope of coverage should be “all risk” or “special,” which is a coverage form that is not limited only to coverage for fire and vandalism. It is also known as “basic” or “broad.” The broader scope of coverage will pick up many situations not covered under the more limited forms, such as roof collapse due to weight of ice, sleet or snow, bursting of water pipes, sprinkler leakage and theft.

Flood and Earthquake Coverage

If the property in question is in a flood zone or has an earthquake exposure, these coverages should be specifically negotiated, inasmuch as they are not included in the “all risk” or “special” forms.

Coinsurance Penalty Clause

Most property insurance policies have 80%, 90% or 100% coinsurance clauses which have been placed on the property insurance policy by the insurance company. Coinsurance is
unacceptable in most cases in that it presents the possibility of a penalty being imposed at the time of loss for underinsuring the property.

If, for example, the insured has $1,000,000 in building coverage with a 100% coinsurance clause and after the claim the insurance company establishes that the building value was $2,000,000, the insured will only collect $500,000 or 50% of a partial loss. The coinsurance percentage is usually selected by the insured in exchange for discounts up front. A 100% coinsurance clause has a higher discount than an 80% coinsurance clause but requires that you insure a higher amount. The proper procedure for handling coinsurance is to accurately establish values by way of appraisal or other methods at the time the policy is purchased, select a 100% coinsurance clause in order to maximize the discounts, and then request that the company apply an agreed amount endorsement that waives the coinsurance penalty clause. They will do this if the values insured can be substantiated at the time the policy is purchased. This way, the client has the benefit of appropriate values, maximum discounts and a waiver of the coinsurance clause so that there will be no second-guessing after a claim occurs. It is critical that the coinsurance clause is always waived.

Replacement Cost Coverage

In almost all situations the policy should be written on a replacement cost basis for building and contents, which means the insurance company will not deduct physical depreciation from the loss adjustment. For example, if a roof is 40 years old and is destroyed and the policy is written on an actual cash value basis, the insurance company may not pay anything to replace the roof because it is fully depreciated from an insurance standpoint (not the same as from a tax standpoint). If the policy was written on a replacement cost basis, the company would provide an adjustment based on a new roof. Most policies begin with actual cash value coverage and an endorsement must be added providing for replacement cost insurance. The replacement cost endorsement may not cost any money; however, you of course must insure values equal to replacement cost which may have some cost considerations. Remember also that the values to be insured do not relate to market value or book value, inasmuch as many
Property and Insurance

physical assets are fully depreciated on the books or may not even be listed for one reason or another.

Replacement cost, however, in the case of personal property does not always mean new. The insurance company is obligated to replace with comparable material and quality. If they can locate, for example, a used item equal to the item that was destroyed, they are not obligated to replace with new property. Note also that replacement cost for buildings does not mean that the insurance company is obligated to pay the cost to upgrade the building to new standards required by new ordinances regulating construction. The insurance company is only obligated to replace the building as it was without depreciation penalties.

Functional Replacement Cost

Functional replacement cost is needed for older property. Under the typical replacement cost form, you must replace with property that is comparable to the damaged or destroyed property. This may not be possible in all cases. For example, older telephone systems cannot be replaced new or used. In this situation, the insurance company will take depreciation. This can be avoided with the functional replacement cost endorsement which allows the insured to replace with property that is similar.

Blanket Limits

Blanket limits are extremely important when they are available. If more than one location exists, the value should be blanketed together so that each location is covered for the total amount. An example follows:

<table>
<thead>
<tr>
<th>Location</th>
<th>Building</th>
<th>Contents</th>
<th>Combined (Blanket) Limit for Building and Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building #1</td>
<td>$500,000</td>
<td>$200,000</td>
<td>$700,000</td>
</tr>
<tr>
<td>Building #2</td>
<td>$400,000</td>
<td>$100,000</td>
<td>$500,000</td>
</tr>
<tr>
<td>Building #3</td>
<td>$600,000</td>
<td>$400,000</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Total Limits</td>
<td>$1,500,000</td>
<td>$700,000</td>
<td>$2,200,000</td>
</tr>
<tr>
<td>Limit to Insure</td>
<td>--</td>
<td>--</td>
<td>$2,200,000</td>
</tr>
</tbody>
</table>
Example – Location Business

An insurance program which is properly written will have a single blanket limit of $2,200,000 stated on the policy instead of separate limits. This would maximize the amount of insurance available for each location. For example, if a loss occurred at building #1, the location would have up to $2,200,000 in coverage for building and contents instead of the separate limits.

Sufficient Limits

Sufficient limits are a vital consideration. In establishing values, consideration should be given to the fact that repair costs could be substantially higher than replacement cost. Even if you have an appraisal indicating that the repair cost of the building is, for example, $1,000,000, it is possible that the repair cost under emergency conditions could be $1,500,000. Where you have single location accounts, consideration should be given to insuring more than replacement cost, inasmuch as that value may not be adequate.

Never insure what you paid for a building or personal property. Typically, these amounts would be far less than repair cost.

Increased Cost of Construction Coverage

In most cities, ordinances exist that indicate that in the event a building is destroyed to the extent of more than 25% of the building value, the building must be updated to current codes. This could involve the installation of a sprinkler system, firewall, barrier-free design, elevator or other improvements in construction. The standard insurance policy pays only for like kind and quality as existed at the time of the loss and does not pay for increased cost of reconstruction. These costs, however, could be considerable with sprinkler systems costing many thousands of dollars. The increased cost of construction endorsement should be added to the policy to cover this difference.

Demolition Cost and Ordinance or Law Coverage

Demolition cost and ordinance or law coverages are usually needed. For instance, in the event one half of a building is damaged and the other half is not, but the city will not let you
Property and Insurance

“Demolition cost and ordinance or law coverages are usually needed. For instance, in the event one half of a building is damaged and the other half is not, but the city will not let you rebuild or for zoning reasons you cannot rebuild, the other half of the building that has not been substantially damaged will have to be demolished. This separate demolition cost and loss of the value of the undamaged portion of the building is not covered by the standard insurance policy and this coverage should be added by endorsement.”

rebuild or for zoning reasons you cannot rebuild, the other half of the building that has not been substantially damaged will have to be demolished. This separate demolition cost and loss of the value of the undamaged portion of the building is not covered by the standard insurance policy and this coverage should be added by endorsement.

Vacancy Clauses

Most insurance policies have vacancy clauses that limit coverage if the building is vacant for a period of time, for example 60 days. Vacancy clauses can be waived on insurance policies on a case-by-case basis. Without a vacancy endorsement issued by the insurance company, there would be no coverage for damage caused by vandalism, sprinkler leakage, glass breakage, water damage, theft or attempted theft. All other losses, such as fire or windstorm, would be paid less a 15% reduction.

Vacancy is typically defined for building owners as meaning that 70% of the square footage is not rented or is not used to conduct customary operations. When the policy is issued to a tenant, vacancy applies when the unit leased does not contain enough personal property to conduct customary operations.
Increased Hazards Endorsements

Increased hazards endorsements should be avoided. Many insurance policies contain an increased hazards provision which voids coverage if the hazard is increased beyond what the company had contemplated. For example, if a client changes its operations to include a more hazardous process, such as spray painting booths, and a loss occurs, the insurance company could deny coverage. It is always best to notify the insurance company of any change in operations.

Protective Safeguards Clauses

For risks that have an automatic sprinkler system or burglar alarms, the policy may contain a protective safeguards clause which, in essence, indicates that coverage is void in the event the insured did not use due diligence to maintain these safeguards. This clause should be waived or a carrier should be utilized that does not require this provision.

If this clause is included, the insurance company likely gave a discount for having a sprinkler system. If the sprinkler system was turned off at the time of loss or was not in “good working order,” the insurance company could void coverage. Insureds should always have procedures to maintain and to verify that these protective safeguards are working. Also, sprinkler valves should be chained open to protect against being accidentally turned off. Whenever a sprinkler system is turned off, the insurance company must be called immediately and this must be documented. However, preferably, the clause should be removed.

At least one court has determined that where a sprinkler system was nonexistent and the protective safeguards warranty existed on the policy as an endorsement, coverage for a fire loss did not apply. Cases such as this illustrate the danger of this type of endorsement.²

Fences, Light Poles and Signs

Most insurance policies do not automatically cover fences or light poles or many other items not generally considered part of a building. Further, most policies limit the coverage provided for building signs. These items can be added by endorsement.

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² Goldstein v. Fidelity & Guaranty Underwriters, Inc., 86 F3d 749 (7th Cir 1996).
Property and Insurance

Property of Others
Where the insured is responsible for property of others, such as personal property of others being worked on, or leased personal property, the insurance policy should specifically include “property of others” coverage.

Off-Premises Operations
If the insured is using facilities owned by others for off-premises processing or storage, that exposure should be covered under the insured’s property policy.

Leased Equipment
Leased equipment should be analyzed for exposure to your organization. In the event machinery or equipment or computer systems are leased, the lease agreement should be carefully examined to determine what your responsibility is. Also, even though the lease agreement has no provision requiring the insured to provide protection for that equipment, the lessor’s insurance company could subrogate or sue the insured/lessee for damage to that equipment. Either a waiver of subrogation should exist in the lease or it should be insured under the client’s contents coverage by including the words “including property of others.”

Pollution Liability
Pollution liability for higher than $10,000 should be considered for cleanup after a fire or other covered cause of loss. Property insurance policies are usually limited to $10,000 for cleanup of contaminants that may spill onto your land in the course of a fire or other covered loss. This limit is often not sufficient and needs to be negotiated to a higher limit or a supplemental specialty pollution policy should be obtained.

Furthermore, most pollution incidents on or off the premises will not be covered. Pollution is broadly defined to include smoke, fumes, etc. A separate pollution legal liability policy should also be considered.
“In most cases, however, everyone assumes that the landlord is providing the insurance for the building and, even where this is the case, the landlord’s insurance company can sue the tenant. The tenant’s policy will not, in most cases, provide for building coverage and even the liability portion of the lessee’s policy provides only a limited amount of fire legal liability coverage, usually $50,000, and then only for fire – not vandalism, water damage, etc. This problem can be solved by appropriate lease clauses that contain a waiver of subrogation or by stating the insurance responsibility of the tenant.”

**Damage to Leased Buildings Is Not Automatically Covered**

Where a building is leased from another party, damage to the building is not normally covered under the building or contents policy of the client. In most cases, however, everyone assumes that the landlord is providing the insurance for the building and, even where this is the case, the landlord’s insurance company can sue the tenant. The tenant’s policy will not, in most cases, provide for building coverage and even the liability portion of the lessee’s policy provides only a limited amount of fire legal liability coverage, usually $50,000, and then only for fire – not vandalism, water damage, etc. This problem can be solved by appropriate lease clauses that contain a waiver of subrogation or by stating the insurance responsibility of the tenant. This exposure can also be addressed by increasing the fire legal liability protection to equal the replacement cost of the premises leased. Such an endorsement should expand the scope of coverage to provide a broad spectrum of perils.

See Chapter 10 for a sample waiver of subrogation which can solve the problem of a tenant’s legal liability.

**Valuable Papers Coverage**

Many insureds, especially those involved in the legal, medical or accounting professions, have valuable papers on the premises that
will have to be restored at the time of loss. Valuable papers coverage can be purchased to cover the labor cost to accomplish this. Without valuable papers coverage, the insurance carrier will pay under personal property coverage the cost of blank paper. While many insurers automatically include some valuable papers coverage, the limit may be insufficient.

Computers

While computers are covered as part of normal contents insurance for the hardware value, a separate computer endorsement or a separate computer policy will provide broader coverage for the hardware. For example, certain breakdown coverage such as power surge would be covered under a separate computer policy. Such coverage will also provide insurance for damage or loss of media or data under certain circumstances, and will provide coverage for the extra expenses or loss of income associated with reprogramming or re-inputting data. Such coverage can also expedite the delivery of another computer system in the event the insured's system is damaged.

Manufacturer Selling Price Clause

A manufacturer selling price clause is needed for manufacturers. A replacement cost endorsement does not solve the problem of manufactured products that are completed but awaiting delivery or sale. Once the product is delivered, of course, the insured will be collecting its profit. If those same products are damaged on the premises prior to delivery, the replacement cost endorsement would not allow the insured to obtain a profit unless a manufacturer selling price clause endorsement is included on the policy. To the extent you are in a manufacturing business, such coverage should be provided.

Accounts Receivable Records

Accounts receivable records replacement coverage should be analyzed. Where an insured has substantial accounts receivable records, if a fire occurs those records could be lost. And the ability to collect on the receivables will be impaired. Accounts receivable coverage will pay for the loss of receivables; however, in lieu of purchasing the coverage or at least purchasing the full limits, the insured should maintain off-premises computer backup of these records.
Reporting Forms

Many policies are written on a reporting form basis, which means the property limits insured depend on the values reported by the insured each month. Reporting forms can be dangerous, inasmuch as insureds in most cases do not know the proper basis of the values to be reported and, in the event a report is either late or the reports are inaccurate, the insurance company can apply serious penalties. Where reporting forms are used, stringent procedures should be established to assure that they are reported in a timely manner and that the basis of the values is accurate. For example, where personal property values are being submitted, the values reported should not be book values, but should represent the cost new values of all items on the premises, even the items that the insured does not want to insure (these become part of the coinsurance unless they are excluded in advance with the agreement of the insurance company).

Boiler and Machinery Policies

Boiler and machinery policies can provide a lot of coverage for a little premium. The standard property insurance policy does not provide coverage for claims arising out of power surge, electrical arcing, mechanical breakdown, steam boiler explosion or business interruption arising from these perils. A boiler and machinery policy can be negotiated to cover these substantial exposures.

It should be noted that boiler and machinery coverage is important even if you do not have a boiler. For example, a power surge could damage electronic cash registers, inventory control equipment, restaurant equipment, and phone systems. Depending on how the boiler and machinery policy defines “object,” these items could be covered under this type of policy whereby most property insurance policies would not cover such exposures.

Transit Coverage

When the insured is delivering property on owned trucks or even using common carriers, the insured could be responsible for replacing the damaged merchandise or commodities in transit. Transportation coverage is not automatically covered under most
insurance policies and the transit exposure should be examined by looking to the maximum exposure on any one vehicle.

**Patterns, Dies and Molds Theft**

The typical property policy only covers theft of patterns, dies or molds up to $2,500. This provision should be waived if you are a manufacturer with this exposure.

**The Collapse Exclusion**

Many insurance agents are under the impression that the typical Special Cause of Loss property form used by most insurance companies (also known as “all risk”) includes full collapse coverage for damage to buildings and personal property. This is not correct. There is an exclusion which totally removes collapse coverage for buildings or personal property. The form later adds back limited collapse coverage as a separate peril.

When collapse coverage is built back into the policy, it limits coverage to apply only to collapse of buildings and not personal property. The building collapse coverage is limited to only a few perils.

Many commercial enterprises have high storage racks for personal property storage. If those racks were to collapse and damage personal property, there would be no coverage under the Special Causes of Loss form.

“There was a Michigan claim several years ago where a rack collapsed, spilling paints and painting materials onto the floor causing a significant claim. The insured sued the insurance company after coverage was denied and the trial court upheld the collapse exclusion.”

There was a Michigan claim several years ago where a rack collapsed, spilling paints and painting materials onto the floor causing a significant claim. The insured sued the insurance
company after coverage was denied and the trial court upheld the collapse exclusion.

Even building collapse coverage is limited. Only collapse caused by fire, windstorm, hidden decay, hidden insect or vermin damage, weight of people or personal property, or weight of snow, ice, sleet or rain is covered.

What's missing from this list of covered perils is roof collapse because of defective material or because of construction, remodeling or renovation. This type of claim is covered under this Special Cause of Loss form but only if the collapse occurs during the course of construction, remodeling or renovation.

For example, if a large flat roof collapses as a result of a bad design or improper materials, it is not covered unless it occurred during the course of construction, remodeling or renovation.

Roofs contract and expand during hot and cold cycles. But even though the definition of collapse includes settling, cracking, shrinkage or expansion of roofs, these situations are not covered.

Several insurers use non-standard forms and may cover personal property collapse, but only for the perils of fire, windstorm, hidden decay, hidden insect or vermin damage, weight of people or personal property, or weight of snow, ice, sleet or rain. Coverage is also limited to claims occurring during the course of construction, remodeling or renovation.

A solution to the collapse problem is to purchase a Difference in Conditions policy ("DIC") which has a broader definition of collapse, or to utilize insurance carriers that do not require collapse exclusions as additions to their property insurance policies.

**Are You Covered for Mold-Related Claims?**

Mold is a significant concern among insurers. There are about 100,000 species of mold which grow on carpeting, wood, drywall and ceiling tiles. Conditions of high humidity such as in attics present ideal conditions for growth of mold spores.
Mold claims have increased in frequency and severity in recent years with property owners having to incur remediation and demolition costs to remedy such problems. As a result, many insurers have either excluded mold altogether or added significant limitations on the coverage for such claims.

It is nothing new that standard commercial property policies have excluded causes of loss originating solely from mold growth. For example, mold growth with no proof of prior water damage that would have been covered i.e. a broken water-pipe, is a condition that would not have been covered by property policies even prior to the advent of the mold revolution. However, where a cause of loss such as water damage causes mold, the consequential clean-up costs have been covered by standard property policies. As a result, many insurers have added exclusions or limitations on such coverage. One insurer, for example, limits mold-remediation costs to $25,000, and then only if the impetus of the claim is a peril that would have been covered.

For property owners concerned with the potential for mold claims, the commercial property policy covering the properties of the client should be examined for potential coverage. Further, a separate environmental policy should be considered. Some environmental policies would cover “mold” as a pollutant on a first party clean-up basis or on a third-party basis.

**Should We Buy Terrorism Coverage?**

On November 26, 2002, President George W. Bush signed the Terrorism Risk Insurance Act of 2002 into law. This was largely in response to the crisis among commercial borrowers in obtaining financing due to the unavailability of terrorism coverage post September 11, 2001.

The Act creates a federal backstop for insured losses caused by acts of international terrorism certified by the Secretary of the Treasury. The law requires all such insurers to make terrorism coverage available as provided for in the Act and to send disclosure notices to policyholders. Further, the new law voids existing terrorism exclusions on property insurance policies to the extent those provisions would be losses insured under the Act.
Insurers are now required to offer the coverage on all property and liability policies and can invoke an appropriate charge for the coverage. Many lenders are requiring that such coverage be purchased. Where such coverage is declined by the insured, a written declination is usually required on the insurer’s form.

Whether or not the insured should buy the coverage depends on numerous factors including the geographic location, applicable premium charge, and third-party requirements. For example, a property owner that leases to a city police department arguably has a greater need for such coverage than a retail store in a suburban area.

Keep in mind that terrorism exclusions can also apply to policies other than property policies such as workers’ compensation and liability insurance. Again, such coverages are optional for an additional premium but may not be endorsable mid-term. Sometimes umbrella carriers will offer lower premiums to add back the terrorism coverage, even without evidence of such coverage in the underlying liability policies. This may be an option that should be considered where there is a terrorism liability exposure.
Business Interruption Insurance

It is one thing to have insurance coverage to replace property damaged by a covered cause of loss such as fire; however, companies have another significant exposure associated with an interruption in the business as a result of the loss. Business interruption coverage is designed to cover such risks so that the business can retain revenue which would have otherwise been lost, and to pay for extra expenses related to the loss, such as rental expenses.

Scope of Coverage

It should be noted that, where purchased, business interruption coverage is not triggered until there is a covered cause of loss which caused the interruption in the business, like a fire. The scope of coverage should be the same as was discussed under the building and contents section. For example, coverage should be written on an “all risk” or “Special” form.

Coinsurance Penalty Clauses

Similar to the previous discussion about avoiding coinsurance for building and personal property coverages, the business interruption coverage should not contain a coinsurance clause or a contribution clause, inasmuch as this requires that the insured prove that the limits insured were adequate after a claim. An agreed amount endorsement can be attached to the business interruption form which will avoid this problem. Without an agreed amount
endorsement, you must insure between 50% and 100% of your projected 12 month net profit and all operating expenses including depreciation.

Monthly Limitations

Monthly limitations should be recognized. The policy may contain a monthly limitation of 16%, 25% or 33\(\frac{1}{3}\)% of the value insured per month. If the business interruption value, for example, is $1,000,000 and there is a 16% clause, the most the insured could collect is $150,000 per month until the value is exhausted. This may not be adequate and should be examined.

Blanket Coverage

For reasons similar to property insurance, business interruption coverages should be blanketed instead of having specific limits per building or per location. Blanket coverage should be the rule rather than the exception.

Length of Coverage

The length of coverage must be analyzed in detail. The standard business interruption form provides coverage from the date of loss to the date repairs to the property are or should be made. Unfortunately, many losses will continue after repairs are made because of the necessity to rebuild the business that has been lost. An extended period of indemnity endorsement is available to extend the business interruption coverage beyond the normal period.

This coverage is available for varying periods beyond the 30 days that is typically provided, for example, 60, 90, or 120 days. Some carriers provide coverage without any time limitation.

Extra Expense Coverage

Extra expense coverage should be included with business income. An insured, under certain circumstances, may not suffer a loss of business because of a business interruption but may have extra expenses to continue operations, or both situations may occur. For example, a law firm may still continue to operate without the physical office structure. Extra expense coverage will provide for
Business Interruption Insurance

the expenses over and above the insured’s normal expense, such as leasing another building temporarily or leasing equipment. Usually extra expense coverage is combined with the business interruption coverage on a combined business interruption/extra expense form. These extra expenses should be contemplated in developing the business interruption limit.

Some extra expense forms limit the amount that you can collect for short term disruptions. For example, under a 40% limitation, you would only be able to collect 40% of the limit that was purchased if your disruption is less than 30 days.

Consider Leasehold Interest Coverage

Most leases contain a clause that in the event the building is damaged more than 50% of its value, the landlord does not have to rebuild. In the event the lease is a particularly favorable lease, this could be very damaging to the tenant by way of moving expenses or the increased cost of rent elsewhere. Leasehold interest coverage can be purchased to cover the loss of a favorable lease.

Excluding Ordinary Payroll

Insureds have an option in developing business interruption values to either exclude ordinary payroll, that is, people other than executives, supervisors or persons under contract, or to include the payroll for these people. If ordinary payroll is excluded after a claim, most employees will have to be laid off and it may be difficult to rehire them when the business is ready to be reopened. It is recommended that ordinary payroll be included in developing business interruption values. Where it is the insured’s decision to exclude ordinary payroll because of cost considerations, the ordinary payroll coverage can be limited if necessary (to 90 days, for instance) rather than excluding it altogether.

Contingent Business Interruption Coverage

Contingent business interruption coverage can cover you for loss to another’s business that affects your company. Where the client depends on someone else's business for supplies, processing, or for purchases and that business burns down, your client may be damaged.
Contingent business interruption coverage will cover this difference.

**Contractual Penalties Coverage**

If the client is doing business with customers that utilize a “just-in-time” delivery process, penalties could be imposed if delays occur as a result of casualty claims such as fire. Policies should include coverage for these penalties. One automobile manufacturer imposes penalties at $500 per minute for late delivery.

**Off-Premises Services**

**Business Interruption Coverage**

To the extent an off-premises utility such as water or electrical becomes unavailable, this could cause an interruption in the business of the insured. Coverage is not automatically provided for this exposure under most forms. Instead, a separate endorsement is needed.
Crime Insurance

Crime coverages are a critical part of commercial insurance programs. Coverages vary among policies. Some commercial package policies automatically give certain crime coverages for theft of money and securities, employee dishonesty, forgery of checks by nonemployees, computer fraud, and other areas. Other policies require that separate crime insurance be purchased as an add-on.

Employee Dishonesty Is a Serious Problem

Employee theft is the frequent subject of newspaper headlines:

“Starbucks accuses employee, husband of embezzling $3.7 million from firm”
In this case, the employee and her husband set up a phony company and charged Starbucks for information technology work that was never performed.

“Entech temporary employee implicated in scam on GM executives”
A temporary employee took lists containing the personal information of 7,500 employees and used the information to obtain credit cards, making more than $500,000 in charges.

“Honored employee, embezzler – former controller now in prison”
This long time controller of an automotive supplier was thought to be a good family man and capable individual; however, using a signature stamp of the owner, he stole $3.33 million dollars.
He was the sole person in control of accounts payable, receivables, payroll, and check writing.

“Embezzlement arrest – drugstore employee skims $14,000 from deposit money over six months”
In this case, a chain drugstore employee in Livonia, Michigan failed to make deposits over a six month period.

“Employee investigated in embezzlement of $1,200,000”
This employee of a major software company voided more than 100 checks to vendors that had never been cashed and then reissued the checks to persons or businesses who were not owed and forwarded the checks to his own bank account.

“College controller accused of embezzlement”
This controller stole more than $50,000 by transferring money from the college bank account into one that he controlled. He used a signature stamp to set up another account where only one signature was required for check issuance.

“Businessman charged with embezzlement”
This business owner stole $247,110 which was the entire balance of the employee pension money. He filed false bank returns to cover up the theft.

According to the Association of Certified Fraud Examiners, fraud and abuse costs U.S. organizations more than $400,000,000,000 a year. The average organization loses more than $9 a day per employee to fraud. The average organization loses about 6% of its total annual revenues to fraud and abuse committed by its own employees.

The purpose of this chapter is to cause you to analyze the exposure to employee theft in your organization and to provide suggestions about internal controls and insurance coverage to protect your company.

The Perpetrators
In the Association of Certified Fraud Examiners’ Report to the Nation (“Report”), which examined over $15,000,000,000 in actual employee theft cases occurring over the past 10 years and involving 12 different major industry groups including the
government, interesting information was disclosed regarding the perpetrators of fraud within organizations:

- Losses from fraud caused by managers and executives were 16 times greater than those caused by non-managerial employees.

- Losses caused by men were four times those caused by women.

- Losses caused by perpetrators 60 and older were 28 times those caused by perpetrators 25 or younger.

- Losses caused by perpetrators with post-graduate degrees were more than four times greater than those caused by high school graduates.

“In the Report, the fraud examiners indicated that 58% of the reported fraud and abuse cases were committed by non-managerial employees, 30% by managers and 12% by owners/executives; however, the median losses caused by non-managerial employees were significantly lower than those caused by managers and executives.”

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Median losses caused by non-managerial employees were $60,000, by managers $250,000, and by owners/executives $1,000,000.

As respects losses by gender, the Report indicated that the median loss per case committed by males was $185,000, which was nearly four times that caused by females, which was $48,000.

As respects the median loss by age, the Report indicated that perpetrators younger than 25 caused median losses of about $12,000; those caused by employees 60 and older were 28 times greater, or
about $346,000.

Relative to the median loss by marital status, the Report disclosed that married employees commit the greatest number of fraud and abuse cases and cause the highest median losses, with the median loss being $150,000 for married employees, $80,000 for divorced employees, $54,000 for single employees, and $50,000 for separated employees.

The Report also examined the median loss by education. It indicated that there is a linear relationship between education and median losses due to fraud and abuse. Generally those with more education occupy higher positions in their organizations and, therefore, have more access to company funds and assets. In the Report, it was disclosed that high school graduates were responsible for $50,000 in median losses, college graduates $200,000, and post-graduate individuals $275,000.

The Victims

The Report examined losses by industry, indicating that real estate and manufacturing lead the pack, with real estate and financing causing median losses of $475,000 and manufacturing $274,000. This is to be compared to the field of education, which is lowest on the list at $32,000.

The Report also examined the median loss per number of employees and found that the median loss for organizations with 100 or fewer employees was $120,000 and this was about the same as losses for organizations with more than 10,000 employees which was $126,000. On a per-capita basis, however, the Report indicated that smaller organizations suffered the largest losses.

The Methods

In the Report, the Association of Certified Fraud Examiners found that:

• Asset misappropriation accounted for more than four out of five offenses.
• Bribery and corruption constituted about 10% of the offenses.
• Fraudulent statements were the smallest category of offense.
In the Report, asset misappropriation was by far the most common form of occupational fraud constituting more than four out of five reported offenses. Assets are misappropriated either directly or indirectly for the employee’s benefit. Certain assets are more susceptible than others. Transactions involving the organization’s cash and checking accounts were far more common than all other asset misappropriations combined such as inventory, supply, equipment, and information theft.

The next category was corruption. Corruption in the sense of an occupational fraud, according to the Report, usually involves an executive manager or employee of the organization in collusion with an outsider. There are four principal types of corruption: bribery, illegal gratuities, conflicts of interest, and economic extortion.

Fraudulent statements is the third broad category of occupational fraud according to the Report. These statements, in order to meet the definition of occupational fraud, must bring direct or indirect financial benefit to the employee. This category is limited to two subcategories: fraudulent financial statements and all others. Fraudulent statements accounted for about 5% of all occupational fraud cases.

The Report also discussed the median loss per cited financial category.

Fraud in the cash account resulted in median losses of $100,000. Fraud in accounts receivable and services resulted in the highest median losses of about $300,000 in each category.

Types of Employee Fraud

The following outlines the most common types of employee fraud:

• Corruption
  Purchasing Schemes
  Sales Schemes
  Bid Raking
  Illegal Gratuities
  Economic Extortion

• Asset Misappropriation
  Larceny of cash on hand
Larceny from the deposit
Skimming from sales either unrecorded or understated
Receivable write-off schemes
Illegal refunds

• Fraudulent Disbursements
  Shell company
  Non-accompliced vendor
  Personal purchases
  Ghost employees
  Commission schemes
  Falsified wages
  Mis-characterized expenses
  Overstated expenses
  Fictitious expenses
  Multiple reimbursements
  Forged check maker
  Forged endorsement
  Altered payee
  False voids
  False refunds

• Fraudulent Statements
  Asset revenue overstatements because of timing differences
  or fictitious revenues
  Concealed liabilities and expenses
  Improper disclosures
  Improper asset valuations
  Falsified employment credentials
  Falsified internal documents
  Falsified external documents

• Inventory and Other Assets
  Misuse of inventory and other assets
  Larceny by asset requisition and transfers
  Larceny by false sales and shipping
  Larceny by purchasing and receiving
The Report’s Conclusions

1. Certified fraud examiners consider the problem of occupational fraud and abuse to be a serious one, involving direct costs as a result of the behavior, and also indirect costs such as loss of productivity, pilferage, and related expenses.

2. There was a direct correlation between the employee’s age, sex, position, and the median loss due to fraud and abuse, with the most predictive variable concerning the amount lost being the perpetrator’s position in the organization.

3. Smaller organizations are the most vulnerable to occupational fraud and abuse. Organizations with 100 or fewer employees suffered the largest median loss per employee. The Report indicated this is generally because sophisticated internal controls designed to deter occupational fraud are less prevalent in smaller organizations.

4. Lack of understanding of the nature of occupational fraud and abuse adds to its costs. Executives are often reluctant to believe fraud and abuse occurs within their organizations. Because of their clandestine nature, many of these offenses go undetected until significant losses are incurred.

5. Relatively few occupational fraud and abuse offenses are discovered through routine audits. Most fraud is uncovered as a result of tips and complaints from other employees. To deter and detect fraud and abuse, many experts believe an employee hotline is the single most cost effective measure. Some organizations install their own hotlines while others use a subscription service such as the Ethics Line maintained by the Association of Certified Fraud Examiners.

6. The expansion of computers in organizations likely will increase losses due to occupational fraud and abuse. The use of computers in business has drastically changed the speed with which financial transactions can be accomplished. In addition, computers often do not create the documents necessary to easily detect fraud and abuse. Many experts see increasing reliance on computers as a likely cause of additional offenses.
7. The rate of occupational fraud and abuse likely will rise. The Report indicated that it is caused by many complex sociological factors. Individual and corporate morality are difficult to quantify. Among other things, increasing demands on the criminal justice system by violent criminals may make fraud and abuse prosecutions more difficult.

The Perils and Pitfalls of Employee Dishonesty (Also Known As Fidelity Insurance)

Insurance is commonly available to provide coverage for many types of employee theft. An understanding, however, of the insurance that is available suggests a number of gaps that are hidden in the fine print of these insurance policies. All of these provisions should be understood carefully when purchasing employee dishonesty coverage or in submitting a claim.

Employee theft covers loss of or damage to money, securities and other property resulting directly from theft committed by an employee, whether identified or not, acting alone or in collusion with others.

It is important in evaluating employee theft coverage to understand the definitions of “employee” and “theft” found in many policies:

**Employee**

“Employee” means:

1. Any natural person:
   (a) while in your service or for 30 days after termination of service;
   (b) who you compensate directly by salary, wages or commissions; and
   (c) who you have the right to direct and control while performing services for you; or

2. Any natural person who is furnished temporarily to you:
   (a) to substitute for a permanent “employee” as defined in Paragraph (1) above, who is on leave; or
   (b) to meet seasonal or short-term work load conditions while
Crime Insurance

that person is subject to your direction and control and per-
forming services for you, excluding, however, any such per-
son while having care and custody of property outside the
“premises”; or

3. Any natural person who is:
   (a) a trustee, officer, employee, administrator or manager,
      except an administrator or manager who is an independent
      contractor, of any “employee benefit plan(s)” insured under
      this insurance; and
   (b) your director or trustee while that person is handling
      “funds” or “other property” of any “employee benefit
      plan(s)” insured under this insurance.

“Employee” does not mean:
1. Any agent, broker, person leased to you by a labor leasing firm,
   factor, commission merchant, consignee, independent contrac-
   tor or representative of the same general character; or

2. Any “manager,” director or trustee except while performing
   acts coming within the scope of the usual duties of an
   “employee.”

Please note carefully that the definition of “employee” in the
standard form does not include any person leased to you by a labor
leasing firm. Also, it should be noted that the related coverage
that is provided for non-employee theft does not include leased
employees, leaving a significant coverage gap if a leased employee
is involved with the theft of money or property.

Also, the provision regarding temporary employees indicates that
they are covered; however, coverage only applies while on your
premises. If you allow a temporary employee to take a bank
deposit to the bank and that money is stolen, coverage would not
be provided.

Similarly, employees of others working on your premises, such as
security guards, cleaning people, or parking lot attendants, may
not be covered under their employee dishonesty coverage if your
property is stolen by them even though they could be in an
excellent position to steal your property.
There is a form that is available which covers property for which an insured is legally liable while the property is on the premises of a client of the insured. If your employees, for example, are working at someone else's location, those employees could steal that property. To the extent you are legally liable, coverage could be provided under this form if added to your employee dishonesty coverage. Specific endorsements are also available to amend the definition of ‘employee’ to include partners, volunteer workers, and non-compensated officers.

Also, note that “employee” does not mean any “manager,” director or trustee except while performing acts coming within the scope of the usual duties of an “employee.” “Manager” is defined in the policy as meaning a person serving in a directorial capacity for a limited liability company. An endorsement is available which includes members of a limited liability company as employees.

Note that the definition of “theft” above requires the unlawful taking of money, securities, or other property to the deprivation of the insured. The word “deprivation” can create coverage problems.

Exclusions

Although coverage forms vary among insurers, standard employee dishonesty policies exclude:

3 Form CR0401.
4 Endorsement CR2504.
Crime Insurance

- Acts committed by the insured, the insured’s partners, or the insured’s members if it is an LLC.

- Governmental actions, such as seizure or destruction of property by order of governmental authority.

- Loss that is an indirect result of any act or occurrence covered by the employee dishonesty coverage, such as your inability to realize income that you would have realized had there been no loss, or the payment of damages of any type for which you are legally liable, or payment of costs, fees, or other expenses you incur in establishing the amount of loss.

- Loss caused by an employee for whom similar prior insurance has been cancelled is not covered.

- Loss or that part of any loss the proof of which as to its existence or amount is dependent on an inventory computation or a profit and loss computation (inventory shortages).

- Loss resulting directly or indirectly from trading whether in the insured’s name or in a genuine or fictitious account.

- Loss resulting from fraudulent or dishonest signing, issuing, cancelling or failing to cancel a warehouse receipt or any papers connected with it.

- Automatic cancellation as to any employee if prior dishonesty. A particularly onerous provision is that the employee dishonesty insurance is cancelled as to any employee immediately upon discovery by the insured or any of the insured’s partners, members, managers, officers, directors or employees of any theft or any other dishonest act committed by the employee whether it is before or after becoming employed by you. Please note that any dishonesty even if it involves as little as $1 would immediately exclude, without notice, any further employee dishonesty. In tight labor markets many companies now hire individuals who they know have prior criminal records. Any subsequent theft by these employees could be excluded.

Duties in the Event of a Loss

After the insured discovers a loss or a situation that may result in a loss, the insured must notify the insurance company as soon as possible. If you have reason to believe that any loss involves a
violation of law, you must also notify the local law enforcement authorities. An important requirement in the policy is that you provide a detailed, sworn proof of loss within 120 days.

Other Crime Coverages

Crime insurance forms can vary widely and you must examine the specific provisions of your employee dishonesty coverage in conjunction with your insurance counselor or risk manager. Many insurance companies are willing to modify their provisions to suit your particular needs.

As to the limits you should select, bear in mind that the Report to the Nation by the Association of Certified Fraud Examiners indicates that these losses can be substantial and healthy limits, for example in the $1,000,000 area for many companies, would not be inappropriate. Carefully examine your exposure and the ability of a significant loss to destroy your organization. Consider the following:

Coverage for Holdup or Theft

Where a cash exposure exists, holdup or theft of money coverage is also recommended. Coverage for holdup or theft should be matched with the cash which is kept on hand.

Third Party Dishonesty Coverage

Third party dishonesty coverage is usually overlooked by agents but is important to protect your business. Where your employees have access to property or money owned by others, you should negotiate “third party dishonesty.” For example, if an employee of a janitorial company steals property from a customer, that situation would not be covered under the standard employee dishonesty policy. Rather, third party employee dishonesty coverage would be necessary.

 Forgery Coverage

 Forgery of checks can be by employees or outsiders. For employee forgery coverage is needed under employee dishonesty insurance. For forgery by outsiders a separate coverage called depositor's forgery is needed. This type of coverage may be more important than you think. Computer technology has enabled some thieves to take properly issued checks and to change the amounts for which the check was issued.
Many employers think that any forgery of checks is the responsibility of the drawee bank. This is not always the case. In fact, the Uniform Commercial Code (UCC) and bank documents substantially limit a depository institution’s liability in the event of forgery.

One bank-customer contract reads as follows:

“You are responsible for monitoring and reviewing the activity of your Account and, if applicable, the work of your employees, agents, and accountants. Toward that end, Business Account Owners should have at least two (2) individuals inspect statements on a regular basis to look for improper and unauthorized signatures, alterations, forged endorsements, overpayments or any other irregularities and to insure that the accounts are being handled in a proper manner.”

“The customer has thirty (3) days from the time of [the Bank’s] mailing of the statement to you, to notify the Bank of any discrepancies.”

The Uniform Commercial Code also provides significant protections to banks including the following:

“A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.” *UCC 3-406*
"If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts." UCC 4-406(c)

"If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank: [...] (2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank." UCC 4-406(d)

Banks are not hesitant to rely upon the provisions of their contracts and the Uniform Commercial Code to deny liability to their customers arising out of forgery. The following is an excerpt from a letter that a bank sent to its customer after the customer asked the bank to reimburse it for not catching an employee's embezzlement of funds through forgery:

“Based on the above-referenced facts as [we] understand them, and on the above-referenced sections of the UCC and the Contract governing the Account, [company’s] failure to notify [us] within thirty (30) days of receiving its May 2002 statement (the statement which revealed the beginning series of alleged multiple forgeries by [employee]) precludes [company] from asserting the claim against [us] for any of the subsequent forgeries by [employee].”
Moreover, regardless of the 30-day test of UCC 4-406, [company’s] failure to sufficiently investigate [employee’s] background which would have disclosed a prior conviction of embezzlement in Michigan for the same nature of activities as alleged in the instant case, together with its failure to review its monthly statements in accordance with the Contract and in accordance with the UCC, constitutes sufficient negligence by [company] to preclude any recovery for a claim against [us] for such alleged forgeries under UCC 4-406 and Section 2.24.02 of the Contract.

As stated above, although [we] can genuinely sympathize with [your] loss, based on the foregoing, [we] must respectfully decline any claim for reimbursement by [you] arising from the facts as set forth above. Please also be advised that, taking into consideration that each forgery claim against [us] must be analyzed based on its own facts and circumstances, claims similar to this one by [company] are normally declined by [bank] on the same basis as described herein.” (emphasis added).

The above presents a sobering application of the law to facts which face most businesses – the exposure of forged checks. This can relate to employee forgeries, as in the above cited case, or can relate to forgeries by nonemployees such as your customers or others.

These exposures can be addressed through the design of an appropriate crime insurance program including employee dishonesty, depositor’s forgery, and computer fraud coverages.

As a result of the Uniform Commercial Code and the contracts that virtually every company has with its financial institution(s), the analysis of the adequacy of your commercial crime coverages is critical.

Occupational Fraud and Abuse Risk Management

Aside from negotiating appropriate crime insurance coverages, there are other things organizations should consider in their overall risk management plan to avoid crime losses.
In the Report to the Nation, the Association of Certified Fraud Examiners makes a number of suggestions:

- Consult a certified fraud examiner. These certified fraud examiners have special knowledge concerning fraud detection and deterrents. Regular audits are not designed specifically for fraud and abuse. A fraud examiner can assess your organization’s unique fraud risks and design programs to cost effectively reduce exposures and to help resolve suspected fraud and abuse matters.

- Set the tone at the top. Employees who view their leaders as honest people are more inclined to emulate that behavior. The opposite is also true. Don’t give employees an excuse to be dishonest.

- Have a written code of ethics. A written code of ethics sets forth what the organization expects from its employees.

- Check employee references. Some occupational offenders chronically abuse their position and are simply discharged. These persons usually go on to other organizations where they continue their patterns of fraud and abuse. They often purposefully select organizations where they know prescreening is nonexistent.

- Examine the bank statements. The organization’s unopened bank statement should be reviewed at the highest possible level. Since most occupational fraud involves skimming cash and false disbursements, a responsible person unconnected to the bank reconciliations should look for unusual patterns, dual endorsements, unfamiliar vendors, and unfamiliar financial trends.

- Utilize a hot line. In this study, a majority of occupational fraud and abuse cases were discovered through tips and complaints by fellow employees. Employees are often in a position to observe improper conduct but frequently have no way to report it without fear of retribution. Some companies use a subscriber service while others maintain an internal hotline.

- Create a positive work environment. Employees frequently commit occupational fraud and abuse as a way of “getting back”
at the organization for perceived workplace injustices. By creating a positive and open work environment, the employing organization can often reduce the motivation for its employees to commit fraud and abuse.

NOTE:

For a complete copy of the Report to the Nation by the Association of Certified Fraud Examiners you can call 800-245-3321 or 512-478-9070 or you can download this from the Internet at: www.cfe.net.com.
Liability insurance coverage is a term loosely bantered around the insurance industry as coverage for liability an insured may have to some other person or business. Such policies also include the costs of retaining an attorney, although the insurance company almost always has the right to select the attorney to be used. The most basic examples of this include a customer slip-and-fall on your premises, or an injury as a result of a defective product. However, many more complicated liability exposures exist including employment practices, liquor liability, employee benefits liability exposures, and others. The majority of coverage disputes filed in this country center around liability insurance, given the severity of the loss presented and the complexity of the policies and endorsements.

$1,000,000 Is Not a High Enough Limit of Liability Insurance In Most Cases

Attorneys and insurance agents are routinely asked what limits of liability insurance should be purchased for a business under a commercial liability insurance program. This a difficult question which does not have a hard and fast answer inasmuch as the liability potential for each business varies. For example, apartment buildings have a far greater catastrophic exposure than a simple office building; similarly, manufacturing situations with hazardous products exposures have a far greater liability exposure than a paper manufacturer. As a general rule of thumb, no business should have less than $1,000,000 in liability insurance and most
medium sized businesses should have at least $5,000,000. Major enterprises with a large net worth may require $100,000,000 or more in liability insurance. These liability limits should apply not only to the general liability policy but to the automobile liability policy as well.

**Umbrella Liability Is an Integral Part of Your Liability Insurance**

Usually, $1,000,000 in liability insurance is written on a primary general liability policy and an umbrella policy is issued to provide increased limits. The increased limits would apply over the general liability, automobile liability, employer’s liability, and other coverages. An umbrella policy, however, does more than provide excess liability insurance. In many cases it provides coverages that are broader than what can be purchased in the underlying policy. For example, mental anguish, certain discrimination coverages, and humiliation can be covered under an umbrella policy, whereas those situations may not generally be available on a primary general liability policy.

Do not assume that the umbrella policy is always as broad as the primary policies. Many umbrellas are actually less broad in terms when compared to the primary policies and cannot be relied upon to provide even excess coverage, much less the broader terms found in many umbrella forms.

**Products/Completed Operations Coverage Should Not Be Excluded**

With some exceptions, products/completed operations coverage should not be excluded from the business liability insurance policy, even if your business is not manufacturing or selling products. This insurance covers products that are completed and sold and operations that are completed. General liability policies usually automatically cover products/completed operations; however, the carrier could exclude this exposure which should not be acceptable in most cases.
Personal and Advertising Injury Coverage
Provides Key Insurance for Non-bodily Injury

The term “personal injury” is a term that has a unique meaning in the insurance industry and is to be distinguished from “personal injury lawsuits” which has an altogether different meaning. The standard general liability policy provides coverage for claims involving bodily injury and property damage. Personal injury coverage, either by way of a specific personal injury coverage endorsement or as part of a broad form liability endorsement, should be included. Personal injury and advertising injury insurance provides coverage for injury arising out of one or more of the following offenses:

1. False arrest, detention or imprisonment;
2. Malicious prosecution;
3. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
4. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
5. Oral or written publication of material that violates a person’s right of privacy;
6. The use of another’s advertising idea in your “advertisement,” or
7. Infringing upon another’s copyright, trade dress or slogan in your “advertisement.”

This coverage part will often normally exclude these claims if made by employees, however, which creates a serious exposure for
employment practices lawsuits that should be separately addressed. This employment practices issue is addressed subsequently in this section.

Note the language at #3 above relating to wrongful eviction. Some businesses, such as restaurants, have a wrongful eviction exposure. These claims would not be covered under most primary liability policies because the policy language limits coverage to rooms or premises that a person occupies. This issue can be addressed by obtaining a policy that does not contain such a limitation.

Non-Owned Watercraft Is Often an Overlooked Catastrophe Waiting to Happen

Where key employees or corporate officers have a personal boat, or if the business owner charters or borrows watercraft and have occasion to entertain clients, the general liability policy should provide for non-owned watercraft coverage. Normally, the policies will include this coverage only for boats fewer than 26 feet in length. This can be changed, however, by endorsement. Further, a broad umbrella policy may cover large watercraft.

Assumed or Contractual Liability Coverage Is Not as Broad as You Might Think

Most clients assume liability from others by way of hold harmless agreements or indemnity agreements that are contained in purchase agreements, leases or in other contracts. Even in the simplest of businesses with a garbage dumpster, the agreement with the dumpster company typically requires that the client hold harmless the dumpster company from any claims arising out of the dumpster. In order to cover this, contractual liability insurance is required and it should be a standard part of any insurance program. Remember that without contractual liability coverage, liability assumed under contract is excluded.

Many businesses enter into such agreements and leases believing that they have coverage for all the liability they are assuming; however, the agreement in which the liability is assumed is often broader than the coverage. The typical commercial liability policy covers the assumption or claims made against third parties for bodily injury or property damage only and not the personal injury
Liability Insurance

“Many businesses enter into such agreements and leases believing that they have coverage for all the liability they are assuming; however, the agreement in which the liability is assumed is often broader than the coverage. The typical commercial liability policy covers the assumption or claims made against third parties for bodily injury or property damage only and not the personal injury situations discussed above. For this reason, contractually assumed personal injury coverage should be added to the primary liability or umbrella insurance policy.”

...
Employment Practices Legal Liability Coverage Should Be Considered a Staple to Most Liability Insurance Programs

Employment practices legal liability coverage protects against employee claims such as discrimination, sexual harassment, and violations of the Americans with Disabilities Act, among others. Most liability policies exclude these claims and a special policy needs to be obtained. The importance of this coverage cannot be overstated.

Today, organizations employing anyone are at risk for lawsuits, claims or government investigations for wrongful termination, discrimination, harassment, violation of handicapper rights, and other claims. Plaintiffs’ attorneys who have been limited by broad sweeping tort reform measures in recent years are turning to employment lawsuits to supplement their practices.

Private Causes of Action Against Employers

There are a number of different types of claims that can be filed against an employer alleging improper employment practices. The following are some types of legal action which can be taken against employers arising out of the employment relationship:

First, an employee can claim that an employer has condoned or failed to prevent sexual harassment in the workplace. Such suits can be based on “quid pro quo” (sexual acts as a condition for employment) or “hostile work environment” (environment of sexual nature such as posting of comics, telling of dirty jokes, etc.). Implementing effective policies and procedures prohibiting sexual harassment can minimize these claims.

The second type of suit is for wrongful discharge or breach of contract. In this claim, the employee asserts that he or she had a reasonable expectation of future employment or employment benefits which he or she was denied. These types of claims can be minimized through having a consistently applied “at-will” employment policy that denies the existence of a contractual relationship with the employee.
Liability Insurance

The third type of private employment claim is violation of state or federal law prohibiting discrimination.

**Governmental Actions**

Aside from private lawsuits, governmental authorities also have the right to investigate certain employment complaints.

The Equal Opportunity Employment Commission (EEOC) of the federal government has the right to undertake similar investigative activities on behalf of employees or at its own initiative.

Both federal and state agencies have broad sweeping powers to sanction employers and to take other remedial action to prevent illegal policies and practices of an employer.

The defense costs alone for the defense of an employment lawsuit can easily reach the area of $10,000 - $50,000 and sometimes more. This is something probably not budgeted by your organization. Such coverages are readily available in the industry and are not cost prohibitive. There are essentially two ways to obtain such coverage.

First, an employment practices policy could be purchased. Forms vary greatly and should be analyzed in detail to be certain that the broadest coverage is being purchased to cover more than statutory discrimination.

Second, a directors' and officers' liability insurance policy can be negotiated to include employment practices liability coverage in addition to coverage for lawsuits against the organization's directors and officers for management mistakes.

Even if employment practices coverage is not purchased, you should be certain to attempt to have removed the "consequential injury" provision of the typical exclusion which excludes coverage for consequential injury arising out of an employment practice. For example, if a claim was made that an employee injured a customer because that employee was discriminated against at work, this would arguably not be covered.
Host Liquor Law Liability Coverage Can Be Tricky

Where clients have occasion to entertain their clients, such as at a holiday party for instance, host liquor law liability insurance will protect the company for claims arising out of this type of entertainment. Of course, where a business is licensed to sell or distribute liquor, full liquor law liability insurance is required. Several carriers exclude this host exposure and this should be avoided. It should also be noted that employees should be named as additional insureds on such policies, which is usually not automatically the case.

Several insurance companies are issuing liability policies that exclude coverage if any charge is made for liquor, beer or wine even if you are not in the business of selling, distributing or serving liquor. This could occur if employees contribute to the cost of liquor related products for a company-sponsored picnic or party.

Fire Legal Liability Coverage Is Not Sufficient in Most Cases

As indicated under the property insurance chapter, the insured may be liable for damage to the portion of the building the client is leasing. In the event of a fire or other peril such as units damaging the building, the landlord’s insurance company can subrogate against or sue the tenant. Coverage for this is excluded under the general liability policy because the property is leased to the insured or otherwise in the care, custody and control of the insured. This coverage can be provided under a fire legal liability endorsement with limits equal to the replacement cost of the portion of the building leased by the insured. Where this coverage is automatically provided in some cases by insurance companies, the limit is only $50,000 and the limit should be increased. Also, fire legal liability coverage is limited only to fire. The legal liability exposure, however, may also be for water damage, vandalism, etc. These particular coverages must be negotiated. The need for this coverage can be greatly minimized, however, by utilizing a waiver of subrogation such as the following:
 Liability Insurance

**WAIVER OF SUBROGATION**

In the event of fire or other loss or damage to the premises, the Landlord and Tenant mutually waive their rights of subrogation and recovery against each other, their agents, employees or sublessees to the extent that they are insured or are required to carry insurance for said loss.

The Landlord agrees to maintain insurance against loss or damage to the building and personal property owned by the Landlord including loss of rental income. The coverage shall be equivalent or better than the Special Cause of Loss form (CP1030) as published by the Insurance Services Office and shall be on a replacement cost, no coinsurance basis.

The Tenant shall maintain insurance on personal property owned by the Tenant and property of others in its possession on a replacement cost, no coinsurance basis and also will carry business interruption insurance with coverage to be on the same Special Cause of Loss form required by Landlord or better. Both Landlord and Tenant will maintain said coverage with limits equal to the full replacement cost of building and/or personal property as the case may be and the full twelve (12) month loss exposure for loss of rental income and business interruption.

Named Insureds Should Be Carefully Listed

The policy should be carefully reviewed to be certain that all legal entities are included. This is an often neglected area on policies. For example, some machinery may be owned by an individual officer and leased to the company or the building may be owned by a partnership and controlled by the client and then leased to the corporation. All of these names should be carefully listed and all policies should be consistent.

Also past partnerships should continue to be listed on current policies to cover new injuries arising out of past operations.
Dealing with Independent Contractors Can Be Pandora’s Box

When dealing with independent contractors, always obtain certificates indicating that they have liability insurance with limits equal to the client’s liability limits and that they have workers’ compensation. Auditors for insurance companies have a right to audit both the workers’ compensation and liability policies to be certain that independent contractors are insured elsewhere. If they are not insured, the independent contractor will be treated as if they were employees and substantial additional premiums may result. Furthermore, have independent contractors hold you harmless from any liability arising out of their operations. This will protect you against claims by an independent contractor or employees who are injured on your premises.5

Lessors As Additional Insureds

Where a building is leased from a third party, the lease agreement commonly provides that the lessor must be listed as an additional insured under the tenant’s liability policy. This is commonly neglected and should be reviewed. If such coverage is not included, the tenant is considered to be in breach of the lease agreement and can be sued directly by the landlord. Some additional insured forms exclude construction operations.

Automatic Additional Insured Endorsements

Business owners are often required to add others as additional insureds to their liability policies. Examples would be equipment lessors, customers and others.

These additional insured requirements are often neglected because of the failure to notify the insurance agent or insurance company that a particular additional insured needs to be added.

The liability policy should have an endorsement that automatically adds an entity as additional insured if required by a written agreement. However, care should be given to reviewing the exact coverage provided.

5see sample language at Appendix A
Leased Employee Exclusions Should Be Avoided
The standard general liability policy excludes injury to any leased employee. Have this exclusion waived when an employee leasing exposure exists.

Non-Owned Automobiles Present Liability Exposures
Where employees have occasion to use their own personal automobiles on behalf of the corporation, non-owned automobile coverage should be provided on the basic general liability policy. While this coverage can also be provided under the automobile policy, the automobile policy may not include all of the names that are included under the basic general liability policy, and the preferred way is to have such names listed on both policies.

Employee Benefit Legal Liability Coverage Is Often Missed But Is Critical and Inexpensive
Where a client administers employee benefit plans, such as hospitalization, group life, and group disability, if a mistake is made and an employee is not added to the plan, the company could be liable for the coverage that would have been paid by the insurance company. This coverage is available at a nominal cost from most carriers and should be a standard part of every insurance program. This presents a particular concern in the case of employee leasing arrangements where an organization could be held liable for a mistake in the health insurance.

Some forms exclude COBRA letters, which is also a serious issue.

Employee benefit E & O forms should be reviewed in detail to be certain that the broadest coverage is being provided.

Broad Form Notice of Occurrence Can Be Negotiated for No Additional Premium in Most Cases
The standard general liability policy requires that notice be given immediately of all situations that can result in a claim. If notice is not given, even though the incident is known to an employee of the insured, the insurer could try to deny the coverage. A broad

Form notice of occurrence endorsement allows the company to decline coverage only where a corporate officer was aware of the event and did not report it. This endorsement should be added to the liability policy.

Aircraft Liability Exposures Need Separate Analysis

Where a corporate officer or other employee has an airplane owned personally and used in the business of the employer, non-owned aircraft coverage should be provided.
Automobile Insurance

Owned, leased, non-owned or rented motor vehicles present large scale exposures to companies. Some of the largest verdicts are those arising out of motor vehicle accidents. The following are common issues in commercial automobile insurance.

List Named Insured to Include Titleholder
Be certain that the names on the commercial auto policy are consistent with the titleholder of the vehicles. Usually insurance agents are sloppy in this area, inasmuch as an automobile may be owned by the owner of a corporation and listed on the automobile policy for the purposes of convenience, or lower rates; however, the policy will not reflect the titleholder of the automobile and the titleholder may not be protected.

Lessor Should Be Added as Additional Insureds
Be certain that where automobiles are leased that the lessor is listed as a named insured, which is required under the lease agreement.

Uninsured and Underinsured Motorists Coverage Is Vital
Uninsured or underinsured motorists coverage is very important for business owners. In certain cases involving motor vehicle accidents the business owner could sue the other driver for pain and suffering and for excess wage loss benefits; however, if the
other driver does not have insurance or has insufficient limits, this will be a futile effort. Uninsured or underinsured motorists coverage is normally provided under automobile policies with limits of $20,000 which is inadequate. Limits of $1,000,000 are preferred.

Rented Car Physical Damage Coverage
Is Not Automatic

Where automobiles are rented or borrowed, an exposure exists for damaging that vehicle and the renter being sued by the rental company or automobile owner. Hired car physical damage coverage can be provided to address this situation and some insurance carriers will provide for consequential loss of use coverage for claims by the rental company that it lost profits during the period that the vehicle was being repaired.

Employees as Additional Insureds Is Often Missed

Employees should be additional insureds on the employer’s auto policy for using personal autos on behalf of the employer.

There are two important reasons for this. First, in the event the employee has an accident while on company business and the employer is sued, the employer’s insurance carrier could try to sue the employee to recover the funds it expends because of the employee’s negligence. Adding the employee as an additional insured will block this from happening.

Second, adding the employee as an additional insured to the employer’s automobile policy would provide additional limits to protect the employee’s assets as a result of claims by other parties arising out of the accident.

“Drive Other Car” Coverage Is Needed Where No Personal Coverage Is Maintained for a Driver of a Company Car

Where an employee drives a company car and does not have a vehicle of his or her own, broad form “drive other car” coverage should be purchased as an add-on to the business automobile
policy to obtain liability coverage for that named driver. It should be noted, however, that spouses and young drivers may not be automatically included.

Broadened Personal Injury Protection Is Needed for Workers and their Families Who Have No Separate Personal Automobile Insurance

Similar to drive other car coverage, where there is no personal automobile policy in the household of a person, they should be named on the business automobile policy to be covered for personal injury protection benefits. In fact, all family members should be listed including small children.
Workers’ compensation coverages are standard in Michigan with a few optional endorsements relating to business done in other states and employee leasing exclusions or endorsements. Despite the standard nature of the coverage, there are key issues which need to be addressed.

When is Workers’ Compensation Required?

Any business with one full-time or three part-time people in Michigan must have workers’ compensation coverage as required by the Michigan Workers’ Disability Compensation Act. The Michigan Attorney General’s office routinely enforces this in cases where coverage is not maintained. Even where there is only one part-time employee, the coverage should still be maintained so that the employer is protected by the workers’ compensation act. Otherwise, no such protection would exist. Commercial liability policies exclude injury to employees even if workers’ compensation coverage is not required.

There are serious issues associated with an employer not purchasing a workers’ compensation policy where required to do so by law. This is a misdemeanor punishable by possible jail time. The law also provides that there is personal liability of directors and officers of the corporation for unsatisfied amounts.

\[ \text{MCL 418.641 (1)} \]
\[ \text{MCL 418.641 (3)} \]
Add States to Your Policy Where Your Employees Are Working

If you have employees that work in other states, be sure to list these states on your workers’ compensation policy. Some states have their own monopolistic funds and coverage must be purchased through the state, such as in the state of Ohio. These coverages are not generally available through insurance agents.

Retention or Dividend Plans Can Be Cost-Savings Devices

Consider a retention or dividend plan that would return premiums in the event of favorable losses. This is available on large premium accounts usually if your premium is above $25,000 per year.

Certificates Should Be Obtained From All Contractors

Obtain certificates of insurance from all independent contractors indicating that they have workers’ compensation coverage in order to avoid unnecessary charges at the time of audit.

Partners and Officers Should Not Be Excluded in Most Cases

Under Michigan law it is possible to exclude partners and officers from the workers’ compensation coverage. Of course, this has the effect of reducing the premium because the payroll of these people will not be included. This should be done in only limited circumstances. In Michigan the most payroll that can be picked up for a corporate officer is approximately $68,000. If the corporate officer has management functions primarily, the rate is usually in the area of $.30 per $100. On the other hand, if the officer is involved in a very hazardous field operation that has, for example, a $10 rate, the consideration is far different inasmuch as at a $68,000 payroll the premium would be $6,800 a year. Where officers and partners
Workers’ Compensation

elect to be excluded they should, of course, check with their
disability and health insurance carrier to be certain that job-related
claims are covered. This may not be the case.

Foreign Operations Requires
Special Endorsements.
If you have employees working in other countries, add internation-
al voluntary workers’ compensation to your workers’ compensation
or international foreign insurance policies. Also, negotiate repatri-
ation coverage to provide funds for the transportation expense for
injured employees to return home.

Domestic Employees Should
Be Treated Differently
Domestic employers wishing to bring themselves within the
protections of the Michigan Workers’ Disability Compensation Act
must include a voluntary compensation endorsement on their
workers’ compensation insurance policy. The Act states:

“... domestic employees may be voluntarily included by
specific endorsement (sic) to a workmen’s compensation policy
in those cases where such coverage is not required.”
MCL 418.121.

As a result, domestic employers are not required to purchase a
workers’ compensation insurance policy but if they desire to be
protected by the Act, they should be certain to have the voluntary
compensation endorsement added to the policy.
Pollution and Environmental Liability
Are Exposures for Many Businesses

In the United States, pollution accidents occur about once an hour causing loss of life, damage to property and the environment and creating millions of dollars in claims.

Many businesses expose themselves to serious risk from financial claims because they think:

• They have taken adequate precautions to prevent such accidents;

• The small risk of loss from pollution related claims doesn’t warrant the expense of additional insurance; and

• That their existing general liability and property policies provide pollution coverage.

Environmental Exposures
Consider the following environmental exposures:

• On-site cleanup of unknown pre-existing conditions.

• On-site cleanup of new conditions.
• Bodily injury or property damage to third parties caused by on-site pollution conditions.

• Third party claims for cleanup costs or property damage beyond the boundaries of the insured’s site resulting from pollution conditions.

• Off-site bodily injury, property damage or cleanup costs beyond the boundaries of a non-owned location resulting from pollution conditions originating from a non-owned location.

• Bodily injury, property damage or cleanup costs resulting from a pollution release from transported cargo carried by owned or hired automobiles.

• Third party claims from transportation of the business owner’s product or waste by third party vendors that result in bodily injury, property damage or cleanup costs caused by a pollution condition.

• Loss of income sustained by the business owner resulting from the interruption of the injured business due to on-site pollution conditions.

Examples of Environmental Claims

• While transporting a large metal coil, a forklift operator hit a hydrofluoric aboveground storage tank releasing dangerous fumes into the neighboring community. Area residents and businesses were evacuated and several people were treated at a local hospital for fume inhalation. Claims for bodily injury and business interruption approximated $94,000.

• A manufacturer operated a machine, which was used to punch holes in sheet metal. A portion of the machine was located beneath the floor. For more than 20 years, lubricating oil from the machine was released into the surrounding soils. When a nearby homeowner’s drinking water well was tested, it contained petroleum hydrocarbons. They were determined to be from the leaking equipment. The homeowner was forced to hook up to municipal water. The homeowner submitted a claim totaling more than $40,000 for the hook-up cost, as well as a bodily injury claim for contaminant ingestion.
Pollution Legal Liability

- A manufacturer had aboveground storage tanks that contained fuels with connections to below ground piping. Fuel contamination to soils on and off-site was discovered. The source of the pollutants was identified as emanating from the below ground piping which had been leaking for an unknown period of time. Coverage was granted for cleanup costs and defense expenses. The extent of the damage included three contaminated plumes emanating off-site, groundwater contamination and damage to a neighboring petroleum site. $3.4 million in indemnity was paid for remediation costs and attorney fees.

- A manufacturer began expansion of a production line area. During excavation, oily soils with a petroleum odor were discovered. Further investigation uncovered an old, undocumented sludge-drying pit that the previous owner used back in the 1940s. The manufacturer had to remove and remEDIATE the soils at his expense. Cleanup costs exceeded $400,000.

- A manufacturer stored a drum of caustic chemicals next to a drum of highly reactive acid. When a forklift disturbed the drums, their contents were released causing a violent reaction. Fumes spread over neighboring properties and damaged plants at the nursery next door. The nursery owner submitted a claim totaling more than $35,000 for business interruption and loss of goods.

- The concrete secondary containment of a 10,000-gallon diesel above ground storage tank was cracked and crumbling. A release from the tank spewed 8,000 gallons into the containment area. The diesel seeped into the underground soil and required costly excavation and removal. The total cost for investigation, removal and disposal exceeded $320,000.

- Since 1965, a metal toy manufacturer had been using trichloroethylene (TCE), a common solvent, to remove oil and grease from toys prior to painting them. This process generated a liquid waste mixture of TCE and oil. In 1994, an engineering study revealed that the groundwater surrounding the plant contained significant concentrations of TCE and other solvents. The cleanup of the site was estimated to exceed $900,000.
An aerosol packaging plant located on a 17-acre site manufactured hair spray, spot remover and oven cleaner. The facility is near a river that runs through a neighboring town. The town discovered contamination in its municipal water supplies and was forced to close its wells. The town sued the packaging plant and settled for $780,000.

During Midwest floods, manufacturers paid to cleanup contamination caused when chemical tanks floated down river.

A truck owned by a manufacturer struck a utility pole causing a transformer explosion that released carcinogens and smoke into homes in the area.

A cloud of chlorine was released during a fire.

Tenants of a manufacturing building complained of headaches, nausea and fatigue. Twenty individuals had to be hospitalized.

Carbon monoxide from a defective hi-lo caused injury to employees and third parties.

An employee mistakenly opened a valve controlling the hot water flow to an ammonia vaporizer causing 3,800 pounds of ammonia to escape causing hundreds of nearby residents to be hospitalized.

Securing the Appropriate Coverage for Pollution/Environmental Liability

The following policies and coverage parts are typically available to address the pollution liability exposure:

**Property Insurance Policies**

Property insurance policies will cover cleanup of some types of pollution conditions that occur but only if as a result of specified causes of loss. This means if the pollution event is caused by fire, lightning, explosion, windstorm or hail, smoke, aircraft, self-propelled missiles or vehicles, riot or civil commotion, vandalism, leakage from fire protective equipment, sinkhole collapse or
volcanic action that results in damage to the building or personal property would be covered up to the respective limits on many property insurance policies. If, however, as a result of those events your land or water at the described premises is affected because of the dispersal, seepage, migration, release or escape of pollutants, you would typically only have $10,000 in cleanup coverage under a standard insurance policy.

Any other event on the premises that causes pollution damage would not be covered. For example, there is no coverage for pollution or contamination arising out of falling objects; collapse; weight of snow, ice, sleet or water; hidden decay; insect or vermin damage; accidents such as accidental spills or mechanical equipment damaging pollution containers or accidental spills from existing equipment. Nor is there coverage for any other cause other than indicated above.

Property policies are very limited as respects pollutant discharges on your premises affecting your building or affecting your land or water.

**General Liability Insurance**

General liability policies also have pollution exclusions that exclude claims by third parties for injury or property damage.

Pollution is very broadly defined as including any solid, liquid, gaseous or thermal irritant or contaminate including smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes. Coverage is excluded whether or not the pollution event is gradual or sudden and accidental.

The standard commercial general liability policy does make certain exceptions. Typically, pollution arising from your products would be covered. Also, pollution from a hostile fire, and pollution such as fumes from heating systems within a building are covered under many policies. All other events would not be covered. For example, there is no coverage in most cases for fumes from cooling systems, mechanical equipment, mobile equipment or any other event that causes injury to third parties.
Umbrella Policies

Umbrella policies that typically provide broader liability insurance do not provide protection for pollution events other than those covered in the primary policy, and in some instances the umbrella policy is not even as broad as the primary policy.

“Supplemental pollution policies are available to cover a variety of pollution incidents. These policies are generally inexpensive for commercial enterprises that do not have an obvious pollution exposure.”

Supplemental pollution policies are available to cover a variety of pollution incidents. These policies are generally inexpensive for commercial enterprises that do not have an obvious pollution exposure. The following is a summary of many available insurance policies covering environmental type claims:

Pollution Legal Liability

Site-specific, third-party liability insurance for claims (and defense costs) resulting from gradual or sudden releases of pollutants from an insured site. These policies can include coverage for releases from underground storage tanks, thereby satisfying financial responsibility requirements of the Resource Conservation and Recovery Act (RCRA) and for cleanup of the insured site.

Contractors Pollution Liability

Third-party liability insurance written for environmental remediation, general or trade contractors covering claims, including cleanup expenses, arising from a release caused by their work. This type of policy is intended to fill the gap in the CGL policy created by the Absolute Pollution Exclusion. The contractor must still purchase a CGL policy to insure non-environmental risks. While contractors’ pollution liability policies have been available only on a claims-made basis, occurrence coverage may now be available.

* Since 1986, ISO Commercial General Liability policies have included an absolute pollution exclusion that removes most coverage for claims arising from gradual and sudden releases of contaminants. Insureds with significant environmental exposures have had to purchase separate pollution liability coverage to fill the gap created by these exclusions.
Pollution Legal Liability

**Engineers and Consultants Errors & Omissions (including pollution)**

Third-party bodily injury and property damage and cleanup cost insurance for claims arising from negligence, errors or omissions in risk assessment, remedial action plan design, lab testing or other aspects of professional work that results in a release of contamination. This type of policy is written in place of other professional liability insurance, covering both environmental and non-environmental risks of the consultant or engineer.

**Environmental Contractors and Consultants Liability**

Third-party liability coverage for bodily injury and property damage claims arising from environmental contracting and/or professional environmental services against insureds that work in both areas, or for environmental engineering firms that subcontract the remediation work.

**First-Party Environmental Remediation**

Coverage to reimburse the property owner for the cost of cleanup and remediation of the insured’s property when required to do so by order of a governmental agency with jurisdiction over environmental regulations.

**Property Transfer Insurance**

First-party cleanup coverage for contamination that is discovered subsequent to the sale of property when the cleanup is ordered by a governmental authority. Policies also can be written for financial institutions to cover the loss in asset value of the property or the outstanding balance of the real-estate loan. Third party bodily injury, property damage and cleanup claims may also be covered.

**Asbestos and Lead Paint Abatement Liability**

Third-party liability protection for bodily injury, property damage and cleanup cost claims arising out of or following asbestos or lead paint abatement activities. Insurance can be written for property owners and/or the contractors working on their behalf, and may cover the removal or encapsulation of asbestos.
Underground and Aboveground Storage Tank Insurance

Third-party liability coverage for bodily injury, property damage and cleanup expense claims arising from the release of hazardous materials from underground or aboveground tanks (meets financial responsibility requirements of the EPA). On-site cleanup also may be insured by these policies.

Automobile Coverage for Hazardous Materials Transporters

Third-party liability coverage for bodily injury, property damage and cleanup cost claims arising from a release of hazardous materials resulting from transportation activities including loading and unloading of vehicles.

Remediation Cost Overrun Coverage

Coverage for property owners against cost overruns for onsite remediation expenses. Coverage is often written in conjunction with pollution legal liability insurance and may require a self-insured retention or co-payment feature. This coverage has been useful to firms involved in Brownfield\(^{10}\) remediation projects since they can “cap” the costs of remediation.

Remediation Warranty Coverage

Insurance providing property owner’s coverage for pollution conditions discovered after environmental remediation has been completed. This insurance is often written in conjunction with real estate transfer liability and/or remediation cost overrun coverage for sites that are sold to third parties before or after cleanup (including Brownfield projects).

Third-Party-Owned Disposal Site Coverage

Insurance providing third-party bodily injury, property damage and offsite cleanup coverage for sudden and gradual pollution emanating from a disposal site or landfill used by the insured. These policies can also be endorsed to provide coverage for onsite cleanup costs for disposal site remediation.

\(^{10}\) Brownfield properties are typically abandoned or underutilized inner-city industrial sites contaminated (or thought to be) due to historic operations using hazardous materials and/or onsite disposal of hazardous wastes.
Pollution Legal Liability

**Environmental Product Liability Insurance**

Third-party bodily injury, property damage and cleanup coverage for pollution conditions caused by the failure of the insured's product. Typical products include tanks, pipes, hoses, valves and other flow-control devices.

**Environmental Directors & Officers Liability**

Coverage for the officers, directors and employees of a corporation for D&O claims that result from a pollution incident. Coverage is typically available only to clients that purchase either pollution legal liability insurance or contractors’ pollution liability insurance. A stand-alone policy is available in two forms: one for publicly traded companies, and the other for closely-held corporations. Some underwriters are also providing pollution liability protection to other insureds by modifying the Pollution Exclusion in the standard directors and officers liability policy form.

**Hybrid or Combination Insurance Forms**

Some insurers are now willing to combine several of the forms of insurance discussed above into a single policy with a single aggregate limit. One form of this type is AIG Environmental’s PLL Select, which offers a menu of more than 20 coverage parts that can be combined into a custom policy that fits the specific environmental insurance needs of the client. Other underwriters are offering similar combined forms with third-party liability, onsite cleanup and cost overrun insurance.

Research shows that manufacturing processes combined with human error and unforeseen circumstances may result in accidents despite the implementation of safety programs.

The risk of losses from pollution related claims may warrant the expense of additional insurance. The truth is that air-borne or water-borne pollutants can ultimately cover a wide area, endangering thousands of people and millions of dollars worth of property.
“The Occupational Safety and Health Administration (OSHA) estimates that 20% - 30% of American office buildings are "sick." More than 21,000,000 people fall prey to indoor pollution because the offices in which they work are poorly built or poorly maintained. Indoor pollution is a catch-all phrase that describes a range of factors that cause people inside commercial and residential structures to become ill. Symptoms range from a runny nose to death from Asbestosis, Legionnaire's Disease, and environmental tobacco smoke.”

**Limiting Risk for Indoor Pollution**

The Occupational Safety and Health Administration (OSHA) estimates that 20% - 30% of American office buildings are “sick.” More than 21,000,000 people fall prey to indoor pollution because the offices in which they work are poorly built or poorly maintained. Indoor pollution is a catch-all phrase that describes a range of factors that cause people inside commercial and residential structures to become ill. Symptoms range from a runny nose to death from Asbestosis, Legionnaire's Disease, and environmental tobacco smoke.

Legionnaire’s Disease, which can be caused by improper maintenance of cooling towers and heating, ventilating and air conditioning systems, strikes 25,000 and kills more than 4,000 a year according to the Center for Disease Control.

More typical symptoms of indoor pollution include pulmonary and respiratory problems, dizziness, fatigue, inability to concentrate, impaired memory, headaches, itching, sneezing, dry eyes, coughing, aches and pains. Many people who think they are suffering a recurring cold are, in fact, suffering from indoor pollution. Their illness is an allergic reaction to something inside their building.

In most cases indoor pollution is not life threatening; however, it can affect a lot of people in a building who suffer for a long period of time, because it usually takes a long time for those responsible to get rid of the problem.
Of course, the indoor pollution exposure is ultimately a liability exposure for the landlord or business owner and general liability policies will not typically cover this type of claim. Separate coverage should be considered.
Management Practices Liability

A staple to virtually every insurance program is management practices insurance to cover three primary exposures: employment practices liability such as wrongful discharge, harassment and discrimination, directors and officers liability, such as breach of duty owed to the corporation and fiduciary liability relating to retirement plans. Each of these areas can be addressed through the purchase of a separate policy or through a combined policy designed to offer all of them.

Aside from the three basic tenets of management practices liability discussed above, some carriers offer optional coverage for losses associated with workplace violence. For example, an incident of workplace violence can cause a plant to close down or could cause a restaurant or hotel to lose business for an extended period of time. These exposures for business interruption are often insurable as are the additional costs, such as hiring of security guards or other similar expenses.

Employment Practices Liability

There are countless statutes that govern the employment relationship, both on the federal and state level. The Family and Medical Leave Act and the Americans with Disabilities Act alone create significant responsibilities for many employers. The risks of employment practices can be minimized through the purchase of a policy which offers coverage for defined employment wrongful
Like all policies, however, these policies differ and should be reviewed by an expert that understands the available coverages.

**Directors and Officers Liability**

Federal and state authorities as well as individual shareholders and other affected parties are increasingly bringing lawsuits against corporate directors and officers, personally, to pay for losses allegedly incurred because of negligent acts, misconduct, or wrongdoing by the directors and officers. This recent surge in civil and criminal lawsuits against directors and officers of corporations in businesses has created renewed interest in accessing insurance specifically designed to cover directors and officers liability.

Directors and officers liability insurance, like other types of errors and omissions coverage, provides insurance for claims by third parties that an insured under the policy breached certain duties and obligations, usually the duty of loyalty and the duty of care.

Some people have referred to directors and officers liability insurance as the “malpractice” insurance for officers and directors.

General liability and umbrella policies do not cover claims against officers and directors for perils other than bodily injury, property damage and certain personal injury exposures, and even then only against the officers and directors in their capacity as such.

Many other claims can be brought against officers and directors. The following is a list of some examples of potential claims:

- Acquiescence in conduct of fellow directors engaged in improper self-dealing.
- Acts beyond corporate powers.
- Allowance of covenant violations in long-term loan agreements.
- Antitrust violations, especially Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act.
Management Practice Liability

- Approval of corporate acquisition with resulting loss of corporate assets.
- Attendance at directors’ meetings and committee meetings.
- Causing the corporation to incur unnecessary tax liabilities.
- Civil liabilities in connection with prospectuses and communications.
- Civil liabilities on account of registration statement.
- Compensation arrangements.
- Competition with corporation.
- Conflicts of interest.
- Continual absence from meetings.
- Corporate debts and delinquencies.
- Corporate funds improperly expended in proxy contests.
- Corporate gifts or contributions.
- Declaration of dividends.
- Disclosure of material facts.
- Failure to purchase insurance.
- Foreign currency violations.
- Fraudulent interstate transactions.
- Fraudulent methods, misstatements or omissions involving material facts or engaging in fraudulent course of conduct in connection with purchase or sale of any security in violation of Securities and Exchange Commission Rule 10b-5.
- Fraudulent reports, financial statements, or certificates.
• Ignorance of corporate books and records.
• Improper repurchase of stock.
• Inadequate dividend payments.
• Inadequate investigation of facts included in public filings.
• Inducing corporation to commit breach of contract.
• Inducing or abetting corporation in commission of torts.
• Inducing or abetting willful wrongdoing by corporation.
• Inefficient administration resulting in losses.
• Informal dissolution or liquidation of corporation.
• Insider tipping.
• Insider trading.
• Interstate use of the mails in connection with sale of unregistered securities.
• Liability of controlling persons.
• Loans by corporations.
• Loans from officers, directors, or stockholders.
• Loans to officers, directors, or stockholders.
• Misuse of insider information.
• Neglect of proper management with respect to corporate debts and delinquencies.
• Patent, copyright or trademark infringement.
Management Practice Liability

- Periodical and other reports under securities act and corporation laws.
- Timely disclosure of material facts.
- Transactions between corporations having common directors.
- Transactions with other companies in which officers or directors are personally interested.
- Treble damage liabilities under antitrust laws.
- Unauthorized acts in connection with liquidation of corporation.
- Unfair competition.
- Unreasonable accumulations.
- Use of corporate funds in proxy contests.
- Violations of specific provisions of articles or by-laws.
- Violations of state statutes.
- Wasting of corporate assets.
- Willful wrongdoing.

“A study done by Wyatt & Co. examined the total number of claims against officers and directors and found that 52% of the claims were brought by shareholders, 22% by employees, 16% by customers, 2% by competitors, 3% by the government, and 5% by others.”

A study done by Wyatt & Co. examined the total number of claims against officers and directors and found that 52% of the claims were brought by shareholders, 22% by employees, 16% by customers, 2% by competitors, 3% by the government, and 5% by others.
A variety of inexpensive policies are available to both profit and nonprofit corporations and even partnerships and LLCs for these types of exposures. One of the better policies today is the Chubb Forefront policy which combines together officers and directors liability, employment practices, fiduciary liability, and outside directorship liability.

Officers and directors liability policies do have exclusions, however. One of the most important exclusions pertains to pollution liability. In recent years, management has been increasingly held accountable for the strategic decision-making on environmental matters within the corporation. This means that the shareholders and employees expect that certain components of an environmental management program will be in place for all corporations.

In addition to the basic elements of environmental management programs, which is the legal responsibility of directors and officers, it is also expected that the officers and directors will properly represent and protect the shareholders during such extraordinary events as mergers and acquisitions in which environment liabilities might be acquired along with assets.

“A common misconception is that employers do not need to be protected against claims arising out of a breach of fiduciary duties because they only have self-directed 401(k) plans or are relying on outside companies for the administration of the employee benefit plan. This is not the case given that a “fiduciary” and an “employee benefit plan” are defined rather broadly under the federal Employee Retirement Income Security Act of 1974 (“ERISA”). Moreover, fiduciaries can face personal liability for a wrongful act such as engaging in prohibited transactions. There are many fiduciary liability exposures facing businesses today; however, insurance protection is available to cover such exposures.”
Management Practice Liability

Inasmuch as officers and directors liability policies typically exclude pollution liability claims, a separate environment legal liability policy should be secured.

Fiduciary Liability

A common misconception is that employers do not need to be protected against claims arising out of a breach of fiduciary duties because they only have self-directed 401(k) plans or are relying on outside companies for the administration of the employee benefit plan. This is not the case given that a “fiduciary” and an “employee benefit plan” are defined rather broadly under the federal Employee Retirement Income Security Act of 1974 (“ERISA”). Moreover, fiduciaries can face personal liability for a wrongful act such as engaging in prohibited transactions. There are many fiduciary liability exposures facing businesses today; however, insurance protection is available to cover such exposures.

Fiduciary Liability Is Created By ERISA

Fiduciary liability exposures are created by ERISA. This Act governs most, but not all, employee benefit programs maintained by private employers and is designed to protect retirement and other types of employee benefit promises to employees.

Responsibilities are imposed on employers that sponsor or maintain these ERISA plans and are enforceable by employees in federal court. Responsibility under these plans does not apply only to large employers but applies to any employer providing employee benefit plans.

The Definition of a “Benefit Plan” Is Very Broad

An employee benefit plan under ERISA includes any plan, fund, or program that provides, through insurance or otherwise, medical, hospitalization, sickness, accident, disability, death, vacation, and unemployment benefits and includes such health plans as dental, vision, life, and short and long term disability plans.

It also includes apprenticeship training programs, day care centers available to employees, scholarship funds, and legal services funds.
In addition, it includes any plan, fund or program that by its express terms or as a result of surrounding circumstances provides retirement income to employees or results in deferral of income by employees or provides severance pay or salary continuation programs.

ERISA plans also include defined contribution plans such as money purchased pension plans, profit sharing plans, 401(k) plans, stock bonus plans, employee stock ownership plans (ESOPs), and target benefit plans. Furthermore, defined benefit plans such as fixed benefit, flat benefits, and unit benefit plans come under the ERISA rule.

**Individual Retirement Accounts/Individual Retirement Annuities**

Individual Retirement Accounts and Annuities (IRAs) are typically set up by individuals outside of the employment arena. There are, however, some IRA programs that are established within the employment environment. Although an IRA usually will not be an employee pension plan under ERISA, the level of an employer’s or employee organization’s involvement in a program may trigger coverage. Under the ERISA regulations, an IRA program will not be considered an employee pension plan if the employer does not make any contributions, participation is completely voluntary, the employer does not endorse the program, and the employer receives no compensation from the sponsor except for reimbursement of expenses.

Under certain circumstances, however, recommending an IRA program and employee materials may sufficiently involve the employer to trigger ERISA coverage.

**SIMPLE Plans**

Beginning in 1997, a new type of retirement arrangement was available for small businesses. The Small Business Job Protection Act of 1996 amended the Internal Revenue code to permit eligible employers to establish a simplified retirement plan called a Savings Incentive Match Plan For Employees (SIMPLE).

The SIMPLE plan is also covered by ERISA. It allows employers to contribute directly to separate individual retirement accounts or individual retirement annuities established for each eligible employee.
An employer may establish a SIMPLE plan by using an IRA as the funding vehicle or by adding the SIMPLE plan features to a 401(k) plan.

The SIMPLE plan may be established by an employer with no more than 100 employees who received at least $5,000 in compensation from the employer for the preceding year. Under the SIMPLE IRA, participation must be available to all employees who received at least $5,000 in compensation during any of the two preceding years and are reasonably expected to receive at least $5,000 in compensation during the current year. A SIMPLE plan is covered under the ERISA requirements.

**TOP HAT Plans**

A TOP HAT plan is an unfunded plan maintained by an employer primarily to provide deferred compensation for a select group of management or highly compensated employees. If a plan meets these requirements, it is excluded from the ERISA participation and vesting rules, and funding requirements and fiduciary responsibility rules remain subject to ERISA reporting, disclosure, and enforcement requirements.

**Severance Pay Plans**

ERISA plans exclude most types of severance pay plans from the definition of employee pension benefit plans; however, severance pay plans that are not employee pension benefit plans are employee welfare plans and come under the ERISA requirements.

**Cafeteria Plans**

Flexible benefit plans, also known as Cafeteria Plans, whereby each participant may choose or decline various benefits according to his or her needs, come under the ERISA rules.

**Naming Fiduciaries**

The ERISA plans described above must meet specific statutory requirements. Formalities under these requirements mandate that the plan designate at least one named fiduciary. A named fiduciary is the individual or individuals who have the authority to control and manage the operation and administration of the plan. Often the plan designates the employer as the named fiduciary.
Liability of Fiduciaries

Plan fiduciaries are bound by the fiduciary rules found in the ERISA statute and may be liable for breach of those rules. In addition, plan administrators must comply with ERISA reporting and disclosure rules.

Under the ERISA rules, a person is a fiduciary of a plan to the extent that the person: exercises any discretionary authority or discretion over management of a plan or the disposition of plan assets; has any discretionary authority or responsibility in the administration of the plan; renders any investment advice, or has any responsibility or authority to do so, as to the compensation, direct or indirect, with respect to plan assets.

Generally, a person's status as a fiduciary is determined by function not necessarily by title, and a person is considered a fiduciary only to the extent that he or she has responsibility for or actually exercises any of the above named powers; however, a person may be deemed a fiduciary solely because of a formal appointment. For instance, plan trustees and plan administrators are generally considered fiduciaries by virtue of their title.

Also, in the case of plan asset management, the named fiduciary is responsible for naming the trustee if the plan document does not already identify the trustee, directing the trustee with respect to plan assets and appointing an investment manager.

An employer frequently acts as the plan manager. When acting in its capacity as plan administrator, an employer will generally be considered a plan fiduciary. For example, when the employer provides information to plan participants about plan benefits, it may be acting as a fiduciary.

Fiduciaries must discharge their duties solely in the interest of plan participants and beneficiaries. They are charged with the exclusive purpose of providing plan benefits to the participants and their beneficiaries and defraying reasonable administrative expenses. A plan sponsor, therefore, must make decisions with respect to the plan that are in the interest of the plan participants and beneficiaries even if it
Management Practice Liability

means, for example, higher costs to the plan and, therefore, the plan sponsor.

A fiduciary’s actions must be performed with the care, skill, prudence, and diligence that a prudent person who is familiar with such matters would use under the same circumstances. Whether a fiduciary has fulfilled this duty will be determined based upon the facts and circumstances of a case. Where there is no conflict of interest to impair a fiduciary’s independent judgment and where the fiduciary has considered all relevant factors and filed all appropriate procedures, the prudence requirement likely will have been met.

A fiduciary must diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is prudent not to do so.

A fiduciary must also act in accordance with the plan document provisions. Thus, if the plan requires that the plan sponsor pay certain expenses, the fiduciary will breach his or her duty by making such payments from the plan.

ERISA permits a fiduciary to delegate certain administrative duties; however, fiduciary duties with respect to the management or control of plan assets may not be delegated except through an effective investment manager appointment. The plan trustee holds the plan assets and has the exclusive authority and responsibility for managing and controlling them. The trustees are either designated by the plan or appointed by the named fiduciary. The named fiduciary or an investment manager may, if the plan permits, direct the trustee but the trustee may not delegate investment responsibility.

If an investment manager is appointed to direct the investments, the trustee will not be liable for the investment manager’s acts or omissions. An investment manager is defined as a registered investment advisor, a bank or trust company, or an insurance company that is appointed by the named fiduciary pursuant to the plan document. An appointment is effective only if the investment manager acknowledges in writing that it is an ERISA
fiduciary with respect to the plan. Unlike in the case of a trustee, an investment manager has exclusive authority and is not permitted to follow the directions of the named fiduciary or trustee.

The obvious benefit of appointing an investment manager to manage plan assets is that, assuming the investment manager has prudently selected and monitored the named fiduciaries and trustees, if applicable, a fiduciary will not incur liability with respect to the investments the investment manager makes. The fiduciary, however, must exercise appropriate care in appointing the investment manager and properly monitoring the investment manager’s activities.

The ERISA rules as well as the Internal Revenue Code prohibits certain transactions between the plan and parties in interest, known as disqualified persons. The plan sponsor and its owners, as well as other plan fiduciaries, are all parties in interest and, therefore, are disqualified persons. Transactions that are prohibited include the sale, exchange, or lease of property to or from the plan, the lending of money or other extensions of credit to or from the plan, the furnishing of goods, services, or facilities to or from the plan, and the transfer of plan assets to or use by or for the benefit of a party in interest.

**Fiduciaries Can Have Personal Liability**

There are significant penalties for engaging in a prohibited transaction. In addition, a fiduciary may be personally liable for breaching his or her fiduciary duty by engaging in a prohibited transaction.

Furthermore, a fiduciary may be held personally liable for any losses to the plan that result from his or her breach of ERISA’s fiduciary requirements.

Any profits obtained through the use of plan assets must be restored to the plan and a court may impose additional relief including removal of the fiduciary. Also, the Department of Labor may impose a 20% penalty on the recovery assessed to the fiduciary.

Misleading communications to plan participants regarding plan administration will support a claim for breach of fiduciary duty.
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Inducing employees to transfer to a newly established organization by misrepresenting to them that their welfare benefits will remain secure despite such a transfer would give rise to a breach of fiduciary duty.

A fiduciary also can incur liability by reason of a breach committed by another fiduciary if the fiduciary participates in or conceals the co-fiduciary’s breach, enables the co-fiduciary to commit the breach, or has knowledge of the breach and fails to make reasonable efforts to correct it.

**Bond Is Required**

ERISA requires that the plan carry insurance on fiduciaries and other persons who handle plan funds to protect the plan against losses that might result from fiduciary dishonesty. This insurance, called bonding, does not protect the fiduciary personally for actions against the fiduciary for breach of fiduciary duty. It is similar to employee dishonesty insurance.

**The Fiduciary Can Be Indemnified by the Plan Sponsor**

A fiduciary may be indemnified by the plan sponsor but the plan itself is prohibited from indemnifying fiduciaries. The indemnification would not relieve the fiduciary of the breach but would immunize the fiduciary from financial loss resulting from the breach.

**Civil Penalties Can Be Imposed**

The Department of Labor has established administrative procedures governing civil penalties. Civil penalties may be assessed for engaging in prohibited transactions and for failure to file annual reports. The penalties are imposed against parties and interests who engage in such activities. The Department of Labor may also bring a civil action to collect any assessed civil penalty regarding annual reporting, prohibited transactions and fiduciary breaches.

Enforcement actions can also be levied by the Internal Revenue Service against plan participants and disqualified persons. This typically involves the qualification of the plan, the requirement to file registration statements or returns, and the imposition of taxes.
Private civil actions may also be brought for ERISA violations. A participant or beneficiary may bring a civil action for a plan administrator’s failure to produce certain information on request; to recover benefits due the participant or beneficiary under the plan terms; to enforce the participant’s rights under the plan terms; or to clarify the participant’s or beneficiary’s right to future benefits under the plan terms.

In addition, a civil action may be brought by a participant, beneficiary, or fiduciary for a breach of fiduciary duty; by a participant, beneficiary, or fiduciary to enjoin any action or practice that violates the terms of the plan; or by a participant, beneficiary, or fiduciary to enjoin acts that violate ERISA.

“Because of the personal liability of fiduciaries under the ERISA rules as indicated above, and the fact that a fiduciary would generally include an organization’s director of human resources, chief financial officer, president, and other officers, the sponsor of a plan should secure fiduciary liability insurance in order to protect the personal assets of fiduciaries.”

Fiduciary Liability Insurance Should Be Secured

Because of the personal liability of fiduciaries under the ERISA rules as indicated above, and the fact that a fiduciary would generally include an organization’s director of human resources, chief financial officer, president, and other officers, the sponsor of a plan should secure fiduciary liability insurance in order to protect the personal assets of fiduciaries.

Fiduciary liability insurance addresses the discretionary decision making process which can be the source of litigation.

The frequency and severity of fiduciary liability claims has increased dramatically during the past years according to a survey published by the Wyatt Company. Payments and closed claims averaged $876,689.
Examples of fiduciary liability claims include the following:

- A trustee of the pension plan purchased common stock of a bank. When the bank failed, the trustee was accused of purchasing the stock without adequately investigating the merits of the purchase. This was a $50,000 loss.

- Trustees of six plans were accused of improperly investing plan assets in a residential development loan which defaulted. The trustees allegedly failed to evaluate the borrower’s credit worthiness and to determine the economic feasibility of the project. This was a $550,000 loss.

- Trustees of a welfare plan allegedly paid improper, excessive and unreasonable compensation to a dental service provider. This was a $140,000 loss.

- A trustee of a pension plan was sued for improperly using plan money to purchase nearly $300,000 of company stock at a price in excess of its fair market value. This was a $50,000 loss.

- The administrator of a savings and profit sharing plan allegedly failed to notify participants who reached age 60 that they had an option to transfer any or all of their regular balances to a participant contribution account. This was a $99,702 loss.

- A controller and plan administrator allegedly transferred all profit sharing assets to a general operating account of a company which subsequently filed bankruptcy and was unable to restore the plan assets. This was a $226,300 loss.

- Trustees of a welfare plan were forced to pay actual costs plus damages to a participant after a court ruled the trustees wrongfully denied coverage for the participant’s surgery. This was a $56,340 loss.

Standard Insurance Policies Do Not Provide Fiduciary Liability Insurance

Standard general liability and umbrella policies do not cover fiduciary liability exposures. Coverage may be provided for mistakes in employee benefit plans under an endorsement to the
general liability policy maintained by most businesses. This does not cover violation of fiduciary responsibilities, however, and instead covers administrative type errors such as the failure to send COBRA letters.

On the other hand, if fiduciary liability coverage is purchased, typically employee benefit legal liability coverage need not be purchased because that type of exposure may be covered under the fiduciary liability policy. The fiduciary liability policy, however, must be examined carefully for exclusions that relate to liability arising out of COBRA.

Some coverage considerations in evaluating fiduciary liability policies are as follows:

• Is coverage on a “duty to defend” or a “no duty to defend” basis?
• Are defense costs inside or outside of the limits?
• Is the duration of the discovery clause or the extended reporting period at least one year?
• Is the discovery period available upon termination of coverage by either the insured or the insurer?
• Is the additional premium to be charged for the extended reporting period stipulated in the policy?
• Does the plan cover all employee benefit plans, not just plans covered under ERISA?
• Does the policy have a COBRA exclusion and, if so, can it be deleted?
• Does the policy have a managed care liability exclusion and, if so, can it be deleted if an exposure exists?
• Is the policy non-cancelable by the insurer?
• Does the policy require 90 days notice of non-renewal?
• Does the policy cover punitive damages?
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- What limit and deductible options are available?

- Is automatic coverage provided for new or acquired plans?

- Can the insured choose its own coverage counsel with the insurance company's consent?

- Are fiduciaries, their estates, heirs, and legal representatives covered as insureds along with the plan, the plan sponsor, and the parent company?

- Does the policy waive the insurer’s right to have recourse or to subrogate against the individual fiduciary? Most insurers waive all rights to recourse but some still include a recourse provision if there is a proven breach of fiduciary liability. Insureds should avoid such language because it weakens the protection afforded to the individual fiduciaries.

Cost of Fiduciary Liability Insurance

The cost of fiduciary liability insurance is nominal. For example, a plan with assets of less than $2,000,000 could cost about $2,300 for most companies on a stand-alone fiduciary liability policy with a $1,000,000 limit; $3,220 with a $2,000,000 limit; and $3,910 for a $3,000,000 limit. These are annual premiums.

Fiduciary Liability Insurance Can Be Combined With Other Policies

Fiduciary liability policies can also be purchased as part of a combination policy covering employment practices, directors and officers liability, and fiduciary liability.

The liability imposed on fiduciaries is substantial and far reaching and is in many situations personal to the fiduciary.

A fiduciary cannot think only in terms of liability under 401(k) plans because of the inclusion under ERISA of most other benefit plans.

Because of the stringent ERISA requirements, internal risk management programs are important to be certain that all benefit
programs are handled in accordance with the ERISA rules.

One recommendation, for example, is to use an investment manager as defined by ERISA using appropriate care in the selection process as well as subsequent monitoring of the investment manager’s activities.
Risk Management

Losses are an inevitable part of any organization; however, insurance is only one mechanism to consider in the overall risk management process. Obviously, the better the claims experience the more marketable the insurance account is to insurance companies, creating the opportunity to improve coverages. The following points of reference come from the experiences of Cambridge attorneys and risk managers in preventing or limiting losses.

Controlling Losses Is Your Tool for Negotiation of Better Coverages and Premiums

As insurance premiums begin to increase because of increasing losses in the property and casualty insurance industry, business owners need to understand how to control their insurance premiums both in the short term and in the long term.

Loss control is a critical part of any property and casualty insurance program. As a general rule, insurance companies look for accounts that have a track record of low losses. This means that, in general, the accounts that have historic loss records of less than 50% of the premium paid are viewed more favorably than those with higher loss ratios.

Losses can be controlled in many ways. For example, you can reduce slip and fall claims through effective snow and ice management programs. Slip and fall claims can convert to large losses, making your insurance program unprofitable and increasing your rates.
“If the insurance company makes loss control recommendations, follow up with them in writing with what you have accomplished. If they have not made recommendations, ask for an inspection. Not only will compliance with insurance company loss control recommendations assist you in having a more favorable loss record, your compliance with these recommendations will indicate your willingness to cooperate with the insurance company, giving you another tool to negotiate lower premiums.”

If the insurance company makes loss control recommendations, follow up with them in writing with what you have accomplished. If they have not made recommendations, ask for an inspection. Not only will compliance with insurance company loss control recommendations assist you in having a more favorable loss record, your compliance with these recommendations will indicate your willingness to cooperate with the insurance company, giving you another tool to negotiate lower premiums.

Another part of loss control is maximizing the protection that is available for your property. For example, if you have a choice of leasing a building that has an automatic sprinkler system versus one that does not, you would want to (all things being equal) secure the building that has the automatic sprinkler protection in order to reduce the risk of catastrophic loss, and to take advantage of the substantial premium reductions for buildings that have automatic sprinkler protection.

Similarly, buildings that have alarm systems for burglary and for smoke and fire will tend to have fewer losses and, by virtue of having these protective devices, you will be in a better position to reduce your insurance premiums.

Loss control can also involve carefully checking the driving records of all of the drivers of your owned or leased vehicles and the employees that utilize their own personal vehicles on your behalf.
Your insurance agent should be able to secure the driving records overnight, which will allow you to identify the poor drivers that may already be on your payroll and to avoid hiring bad drivers.

Adequate employee manuals, particularly those that have anti-harassment clauses and at-will provisions, will allow you to reduce employee claims for improper employment practices.

Be proactive in controlling your exposures to loss. For example, if your business has a high cash exposure, you will want to make more frequent deposits. If you have critical computer records, you will want to have them backed-up off of the premises.

Regarding business interruption, loss control involves having emergency plans so that you can remain in business in the event a fire or other casualty loss shuts you down.

One of the most effective risk management techniques that does not involve purchasing insurance relates to transferring potential liability to others by way of a contract, agreement or lease. This is often seen in the contractor field where such indemnity agreements are commonplace. Leases also typically contain such provisions. Such language should be examined closely to be certain that the contractual transfer of liability would hold up in court, and is broad enough. For example, boiler-plate lease agreements often state that the tenant agrees to indemnify and hold the landlord harmless from liability associated with the premises. For example:

"The Tenant agrees to indemnify and hold the Landlord harmless from any liability for damages to any person or property, in, on or about said leased premises from any cause whatsoever, and Tenant will procure and keep in effect during the term hereof public liability and property damage insurance for the benefit of the Landlord in the sum of $1,000,000."

Such language does not refer to the defense obligation which presents, at a minimum, an ambiguity as to whether the tenant would owe a defense. Previous litigation has involved this exact issue. Closing this gap by inserting the word “defense” would have the effect of transferring liability (including defense costs) to the tenant from the landlord and would reduce the landlord’s loss experience.
Control losses by having independent contractors that work for you provide you with evidence of their insurance coverage and have them hold you harmless from any claims arising out of their activities.

The following discussion provides some considerations for risk management by coverage part:

**Employment Risk Management**

1. *Utilize arbitration agreements signed by the employee to reduce the risk of high jury awards.* Recent Michigan and federal law benefits employers by stating that where consistently applied, arbitration agreements can be enforced. Such agreements must be treated like any other contract and the appropriate consideration must be paid to the employee. Utilizing such agreements can significantly reduce the employers’ exposure to large jury verdicts in employment lawsuits, although arbitration is final and binding.

2. *Implement updated and consistent employment policies.* One of the first exhibits to be marked in employment litigation is the employer’s personnel policy manual. Attorneys specializing in employment law should regularly update such a manual. These policies should usually confirm the existence of an “at-will” employment arrangement so as to guard against suits alleging wrongful discharge and breach of contract.

3. *Be cognizant of pre-employment inquiries.* In Michigan, like in most states, employers are limited in what they can ask at the time of considering a prospective employee. For example, the age or race of an applicant cannot be asked. There are other less obvious requirements. If you would like a list of prohibited questions, please call or write the Cambridge Group.

4. *Ensure that your company is complying with wage and hour regulations.* Employers are routinely faced with highly technical regulations on what they can and cannot do on the payment of overtime for nonexempt employees. If you would like additional information on what standards should be applied, please contact the Cambridge Group.
5. Obtain legal counsel if a lawyer calls you or if you question whether termination or disciplinary action is appropriate. There is no substitute for obtaining legal advice if presented with an employment situation that could give rise to a claim. Employers should avoid attempting to handle such matters on their own given the highly specialized regulations and laws which apply. Moreover, any statements made might be used against the employer at a later time.

6. Be cognizant of the fact that personnel files of other employees may be the subject of review in litigation. Many plaintiff’s lawyers attempt to obtain documents from an employer before filing suit. If an employer is asked for documents, the request should be forwarded to legal counsel given the issues of confidentiality. In fact, this policy should be applied to all documents whether related to personnel files or not.

7. E-mail is the plaintiffs’ attorney’s new best friend. Crafty plaintiffs’ lawyers have wised up to the technological age where e-mail is in almost universal use. Specialized computer companies can obtain such e-mail and computer messages from an employer’s computer system, even if such messages have previously been “deleted.” Employers should adopt a communication policy prohibiting non-business use of computers and phones.

“Documents can be an employer’s best friend in employment litigation. One of the most effective tools in defending companies in litigation are documents, particularly those signed by the former employee plaintiff.”

8. Documents can be an employer’s best friend in employment litigation. One of the most effective tools in defending companies in litigation are documents, particularly those signed by the former employee plaintiff. Employers should use error-proof systems for obtaining signatures on acknowledgment forms and at-will policies, as well as other important documents.
9. Implement an "iron-clad" anti-harassment/sexual harassment policy that includes a "notice to employer" provision. All personnel manuals should include anti-sexual harassment policies which are carefully drafted by legal counsel.

10. At-will policies should be the rule rather than the exception unless employment contracts are used. Although in Michigan the general rule is that an at-will employment arrangement is presumed, employers should take active steps to clearly solidify such policies for the sake of consistency.

11. Avoid giving negative feedback to potential employers. Acknowledging employment dates should generally be the limit of what information is provided to potential employers regarding terminated employees.

12. Save all documents and notes, regardless of how trivial. At the time of a claim or suit, much emphasis will be placed on documentary evidence to show the scope of the employment relationship and what was expected of the employee claimant. This underscores the need to maintain such documentation. One of the most powerful documents is one signed by an employee, such as an at-will policy or a sexual harassment policy.

13. Utilize employee benefit plan systems and procedures to avoid COBRA and ERISA claims. Insurance coverage can be purchased for mistakes in administering employee benefit programs, and such coverage should be included in virtually every commercial insurance program. The additional cost for such coverage, if any, is nominal.

14. Purchase employment practices liability insurance which is less expensive than you might think. Employment practices liability coverages are widely available today. Such coverages may be as inexpensive as $1,500 and can be purchased to cover defense costs and judgments for a host of employment claims. Such coverage should be included or at least considered as a staple to virtually every commercial insurance program.
Automobile Risk Management

1. Examine if private passenger autos should be company owned or if employees should be paid a car allowance.

2. Establish driving record standards and a procedure for reviewing driving records prior to hiring and periodically thereafter.

3. Review contracts with contract trucking carriers.
   a. Examine responsibility for transportation exposure, both incoming and outgoing.
   b. Examine corporate liability for use of hired trucks.

Issues to Consider with Real or Personal Property Leases

1. Inventory all property leases.

2. Determine the impact of real property lease provisions relative to:
   a. Rebuilding
   b. Lease cancellation
   c. Rent abatement
   d. Leasehold improvements
   e. Assumption of liability
   f. Liability for building damage
   g. Insurance obligations
   h. Waiver of subrogation

3. Review personal property leases relative to:
   a. Hold harmless and indemnity provisions (include “defend” language)
   b. Insurance obligations
   c. Cancellation provisions
   d. Time to supply replacement
Owned Personal Property Risk Management

1. Has an inventory system been developed to establish the basis for proving a loss?

2. Is there any personal property that could not be replaced new or used?

3. Review appraisals to determine valuation basis.

4. Review existing insurance limits and perils covered.

5. To what extent can the corporation self-insure?

6. Review off-premises operations and storage exposure.

7. Review transit exposure.

Non-Owned Personal Property Risk Management

1. Is there an inventory system to track location of non-owned personal property?

2. Determine responsibility for replacement if lost or damaged.

3. Has a waiver of subrogation been executed?

4. Does a die, mold or form limitation exist on the present insurance?

Environmental Risk Management

1. Are there any existing environmental exposures?

2. Would a fire cause environmental damage to owned land or to third parties, property or people?

3. Can or should insurance be provided to protect the corporation for environmental claims?

4. Would environmental damage delay rebuilding?
Risk Management

Business Interruption Risk Management

1. What procedures have been established to assure the continuation of income flow in the event of an interruption of business?

2. Would your cash flow be impacted if any other company, such as a supplier or customer, has a business interruption?

3. To what extent would insurance protect the corporation?

4. Would reconstruction be delayed because of zoning or building and use limitations?

Real Property Risk Management

1. Would existing buildings be rebuilt in the event of substantial damage? Could they be rebuilt?

2. If buildings aren’t rebuilt, how would demolition and cleanup be handled? Would insurance cover demolition and cleanup?

3. Does an uninsured collapse exposure exist?

4. If rebuilding takes place, would the city require a better building?

5. Is there any flood exposure?

Employee Dishonesty Control

1. What procedures have been established to minimize this exposure?

2. To what extent does insurance cover this?

3. Any third party employee dishonesty exposure?

Liability Risk Management

1. Examine any assumption of liability.

2. Does insurance fully cover these assumptions?
3. Are limits adequate?

4. Are there any non-owned watercraft and aircraft exposures?

5. What foreign liability exposure exists?

6. Review primary liability and umbrella liability exclusions.

7. Is there an ERISA bond or liability policy required by IRS for pension/profit sharing plans?

**Directors and Officers Liability Risk Management**

1. Check indemnification provisions of all by-laws.

2. Review need for directors and officers insurance.

3. Is there a subsidiary sign-off on directors and officers application providing a warranty?

**Fiduciary Liability Risk Management**

1. Review all employee benefit plans for a fiduciary liability exposure.

2. Where beneficiary funds are invested, what controls are provided?

3. Does corporation have fiduciary liability coverage?

**Other Loss Control Risk Management**

1. Review outstanding loss control recommendations including feasibility and appropriateness of same.

2. Institute a structured loss control inspection program.

3. Utilize insurance carrier loss control personnel.

4. Review existing disaster plan. Utilize experts that may be available from the insurance companies.
Dealing with Claims

Invariably, businesses are faced with the situation where insurance claims arise. It is important to properly follow the right procedures to assure that coverage is not compromised. Also, relative to liability insurance, proper handling of claims from the outset can assist greatly in the subsequent defense of a lawsuit. This chapter is intended to provide some practical advice on what to do in the event of a claim.

Property Insurance Claims

1. Take measures to protect property. Use specialized contractors to board up damaged facilities and to protect damaged property. Most likely, the insurer will reimburse you for most of these costs.

2. Report the claim as soon as possible to the agent or the insurer.

3. Cooperate with adjusters but obtain legal counsel if necessary.

4. Submit to examinations under oath if requested, but be represented by legal counsel.

5. If your claim is not paid within 60 days of submitting a signed proof of loss, a 12% penalty interest may apply against the insurer. You would be advised to seek legal counsel if this

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1 MCL 500.2006 (4).
situation arises. 12% penalty interest may also apply under Michigan’s prejudgment interest statute if suit is filed.¹²

6. Do not waive any rights to recover against anyone else. The standard property insurance policy provides that after a loss, the insured not agree to any settlement with someone who damaged the property. The reason for this is that the insurer would have your rights to proceed against that person. As a result, if someone’s negligence damaged your property, do not settle with that person, but instead submit a claim to the property insurer. Otherwise, you may be waiving your right to coverage.

7. If your claim is uncovered or only partially covered, you may have a legal right to pursue the party responsible for damaging the property. You should check with the insurance company to see if you can be joined as a plaintiff in the subrogation action to recover your deductible.

8. It is the insured’s obligation to prove a property insurance claim. You must have sufficient records to prove the loss, such as an asset schedule. Always keep copies of these records away from your premises.

**Liability Insurance Claims**

1. Report “occurrences” to the insurer. Most liability insurance policies require that the insured inform the insurer of an “occurrence” as soon as practicable, even if a lawsuit has not been commenced. This is so that the insurer can investigate the matter while the facts are still fresh.

2. Fax lawsuit papers to your agent and follow-up. In Michigan, notice to an insurance agent of a lawsuit may not be sufficient notice to an insurance company. As a defendant, you would typically have 21 days (28 if served by mail) to respond to the complaint. If you have not heard anything from the insurer within ten days of submitting the suit papers, follow-up to avoid a default.

¹² MCL 600.6013 (6).
Dealing with Claims

3. If you have specialized legal counsel that you would like to retain and the insurer agrees, you will most likely have to pay an amount over and above the hourly rate charged by the insurer’s lawyers.

4. Retain all evidence, even if it is bad. In Michigan, if a defendant is in control of evidence which subsequently becomes damaged or lost, a presumption arises that the evidence would have been negative to the case of the defendant. It is, therefore, advisable to retain evidence associated with an incident.

5. Do not be concerned with appearing to admit fault by taking remedial measures after an injury. For example, if there was a defective gate which injured a customer, by fixing the gate after the incident, the organization is not admitting fault because this would be inadmissible as evidence in a subsequent lawsuit.

6. Report the claim to all agents and insurers as soon as possible to avoid a claim of prejudice by any insurer at a later date.
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Mergers and Acquisitions

In this business climate, mergers and acquisitions are common. There are a plethora of insurance and risk management issues associated with such transactions and the purpose of this chapter is to discuss some of those issues. There are also a number of insurers that are offering mergers and acquisitions insurance that will either protect the buyer and/or the seller from representations and warranties made in the sales agreement.

Complete insurance due diligence on the insurance program before the deal is made. Before executing a merger or acquisition of a business, be sure to look at the insurance program of the company being acquired or merged into your company for many of the issues mentioned in this book. Many times insurance programs are kept in place for the acquired entity and you should have your insurance professional and attorney review each of those policies for adequacy. Assumptions are often made about the integrity of insurance programs, and the insurance program can be unnecessarily low on the list of priorities in the due diligence process.

Aside from the actual policies themselves, there are underwriting issues that need to be considered yet are often overlooked. For example:

- Is there a sprinkler system and, if so, does it comply with National Fire Insurance Protection (NFIP) standards? Particularly if you are involved in a manufacturing business, insurance companies closely evaluate sprinkler systems. Just
“Is there a sprinkler system and, if so, does it comply with National Fire Insurance Protection (NFIP) standards? Particularly if you are involved in a manufacturing business, insurance companies closely evaluate sprinkler systems. Just because there is a sprinkler system in place does not mean that it will be acceptable to insurers. Most insurers are now reviewing sprinkler systems for adequacy under the National Fire Insurance Protection standards for appropriate densities.”

because there is a sprinkler system in place does not mean that it will be acceptable to insurers. Most insurers are now reviewing sprinkler systems for adequacy under the National Fire Insurance Protection standards for appropriate densities. Where there is stacking of plastics, for example, there is a certain water density that is needed to put out a fire and loss control representatives from the insurer considering the account will evaluate this.

• What is the nature of the buildings and will they inspect well from a loss control standpoint? Most insurers will want to review the site, some before even offering a quote. Part of the negotiating power of the policyholder is to have a favorable loss control survey. This usually involves having presentable buildings and a professional approach to informing the loss control representative of the nature of the company and its exposures.

• What is the loss history of the new entity? Insurers look closely at the loss history experience of the insureds in the business. Is there a frequency of claims? Is there one or two severe claims that might indicate to the insurer that there is a trend of potential problems? Ask for the loss history of the new entity from that company’s agent so that these issues can be evaluated before the deal is finalized.

• Will your current insurer add the new exposures to your insurance program? Never assume that there is automatic coverage for new property and liability exposures that come about during the policy term. If your existing insurance
program is for a different class of business than the new entity, the insurer may not be willing to add the new exposures. You would want to know this ahead of time.

After the deal is made, be sure the insurance continues and that the insurer knows of the exposures. There are named insured exposures that arise upon acquisition or merger. Are there new names that need to be added? Are there names that need to be deleted? Check the policies to make sure that there are no issues concerning new ownership. For example, some directors and officers and professional liability insurance policies contain provisions that bar coverage if there are major changes in ownership.
APPENDIX A

SAMPLE INSURANCE REQUIREMENTS FOR CONTRACTORS

An employee of an independent contractor performing services on your premises can sue you for injuries sustained. This claim should be the obligation of the workers’ employer. This, however, is not automatically the case and there are often issues which arise in litigation related to who bears the legal liability for the injury. Properly drafted construction documents should be used to clarify this responsibility. The following sample language should be modified to fit your particular situation.

Certificates of Insurance

The Contractor, before the commencement of any work on the construction project which is the subject of this agreement, shall provide certificates of insurance to the Owner (or Construction Manager) on behalf of itself and all of retained subcontractors. The certificates of insurance shall provide evidence that the insurance requirements contained herein are satisfied in their entirety.

The certificate shall also provide that at least 30 days prior notice of cancellation or material change shall be provided to the Owner (or Construction Manager).

In the event the Contractor fails to provide said certificates or a certificate is not valid in whole or in part, the Contractor shall have the contractual obligation to pay any additional premiums, whenever incurred, imposed upon the Owner/Construction Manager because of such failure. However, the obtaining of replacement coverage shall not be an obligation of Owner or Construction Manager.

In addition, the Contractor upon a request of the Owner/Construction Manager shall provide a complete and true copy of any of the insurance policies required by this Exhibit.
Minimum insurance requirements which shall apply to the Contractor and all Subcontractors

1. Workers’ Compensation and Employers Liability coverage covering the statutory requirements of the state where the work is being done and insuring the Contractors (or subcontractors as the case may be).

2. Commercial General Liability insurance to cover liability arising out of the construction project or the operations of the Contractor and subcontractors.
   a. The limit of liability shall be $1,000,000 combined single limit per occurrence, a general aggregate limit of at least $2,000,000 and a products/completed operations aggregate of at least $2,000,000
   b. The policy shall have an endorsement applying the aggregate limits by location or project.
   c. The policy shall not exclude products and completed operations insurance.
   d. Products and completed operations insurance shall be maintained for at least three years after final payment to the Contractor.
   e. Insurance shall cover the contractual liability assumed by the Contractor in the Agreement to Defend, Indemnify and Hold Harmless which is a part of this construction agreement.
   f. The Owner of the property shall be included as additional insured. Such an additional insured endorsement shall not limit coverage for any additional insured to the ongoing operations of the named insured. Such policy shall be endorsed to include the Owner, its officers and employees as additional insureds and shall stipulate that the insurance afforded for the Owner, its officers and employees shall be primary insurance and that any insurance carried by the Owner or Construction Manager or their officers or employees shall be excess and not contributing. The Contractor shall also require that each of its subcontractors name the Owner and Construction Manager as an additional insured on their policies as required in this Exhibit.
3. Automobile liability insurance shall be maintained by the Contractor for all owned, non-owned and hired vehicles with a limit of at least $1,000,000 combined single limit for bodily injury or property damage. The Owner, its officers and employees shall be named as additional insureds on such a policy.

**Contractor agrees to the Indemnification language indicated below and shall also require that all subcontractors retained on its behalf execute this same agreement as part of the subcontract agreement**

**Agreement to Defend, Indemnify and Hold Harmless**

The Contractor hereby covenants and agrees to defend, indemnify and hold harmless the Owner, its agents, officers and employees of and from all liability, claims, actions, causes of action, lawsuits and demands including attorneys fees and costs, fines and/or penalties arising out of or in any way related to the construction project. The foregoing covenant and agreement shall apply to all such liabilities, claims, actions, causes of action, lawsuits and demands where it is charged, alleged or proven that the Contractor (or its agents or employees) was/were in any way at fault in causing or contributing to such injury, death or property damage (including but not limited to personal injury or death of the Contractor’s own employees). The Contractor’s liability insurance policies shall contain contractual liability insurance coverage for the covenants and obligations of this section.

Agreed to this ________ day of __________, 20_________ by and between

_________________________
Owner/CM

_________________________
Contractor
APPENDIX B

LIST OF OTHER CAMBRIDGE PUBLICATIONS

If you interested in any of the following publications on insurance or business issues, please call or write to us at:

Cambridge Underwriters Ltd.
Jeania Herrmann, Director of Marketing
15415 Middlebelt Road
Livonia, MI 48154
(734) 525-2442

CAMBRIDGE INSURANCE & RISK MANAGEMENT REPORTS

• Workplace Violence

• Coordinated Benefits Under the Michigan No-Fault Law

• “...But We Are a Private Corporation and Don’t Need Officers and Directors Liability Insurance”

• Considering a Merger, Acquisition, or Sale Of Your Company? If So, You Need Representations and Warranties Coverage

• Recent Verdicts/Settlements in Excess of $1,000,000 for 1998, 1999 and 2000

• 40 Statutes Which Regulate the Employment Relationship: Would Your Company Be in Compliance If You Were Audited or Sued?

• “We Don’t Need Employment Theft Coverage, We Have Stringent Financial Controls”

• Sorry Employer – Your Company Vehicle’s License Plate Has Been Confiscated and Your Vehicle Immobilized Under the Michigan Repeat Offender Laws. P.S. You Are Being Sued for Millions

• Managing the Risk of Independent Contractors Working in Your Building
Appendix

- “Yes … But I Do Not Need Fiduciary Liability Insurance Because I Only Have a Self Directed 401(k) Plan”

- Use Caution When Disposing of Obsolete Inventory or Equipment

- If You Are a “Just-in-Time Supplier” Contract Penalties Could Spell Disaster for Your Business

- Understanding Coverages for Punitive/Exemplary Damages

- Vacant Buildings Could Mean No Coverage

- Coinsurance Could Ruin You

- “…But I Don't Need Boiler and Machinery Coverage Because I Do Not Have a Steam Boiler”

- Why Is Forgery or Alteration Needed As Part of Your Crime Insurance?

- The Pollution Exclusion – It Applies to You

- A Survival Guide to Buying Property and Casualty Insurance During the Hard Insurance Market

- Failure to Comply with MIOSHA Posting Requirements Could Result in a Civil Penalty of up to $7,000 Per Violation

- Special Report – Youth Employment

- Employee Leasing – Proceed Cautiously Before You Embark on This Potentially Dangerous Arrangement

- Is Your Anti-Harassment Policy Up to Date?

- Utilizing Arbitration Agreements in the Employment Setting

- Are You in Compliance with Wage and Hour Regulations?

- Personnel Records May Be the Landmine Your Company Never Expected
• Insurance Issues Related to the Short-Term Rental of Cars or Trucks

• Disputing Claims for Unemployment Benefits

• Can Your Insureds Afford to be Without Employee Benefits E&O Coverage?
APPENDIX C

LIMITED LIABILITY COMPANIES
HOW DID WE EVER GET BY WITHOUT THEM?

By: Guest Author, James R. Cambridge, J.D.
Kerr, Russell and Weber, PLC

James Cambridge is a Member of the Detroit law firm of Kerr, Russell and Weber, PLC specializing in the areas of business law, real estate and finance. Mr. Cambridge was the chairperson of the Committee of business and tax lawyers who wrote the Michigan Limited Liability Company Act as well as the amendments to the LLCA. Mr. Cambridge is the past Chairperson of the Business Law Section of the State Bar of Michigan and is a frequent lecturer and author. He is the co-author of the book “Michigan Limited Liability Companies published by the Institute of Continuing Legal Education at the University of Michigan. Mr. Cambridge is listed among “The Best Lawyers in America” and in “Who’s Who in American Law.” Founded in 1874, Kerr, Russell and Weber, PLC is one of Michigan’s oldest and most respected law firms.

Michigan’s newest business form—the limited liability company—is fast becoming the preferred way of doing business. Last year, 25,367 limited liability companies were formed as compared to 21,323 new corporations. And, this trend is continuing. Will limited liability companies replace corporations just as laptops with remote internet access have replaced manual typewriters and rotary telephones? No. However, given the many advantages of the limited liability company form and the widespread use of the LLC in today’s more competitive business environment, it makes you wonder “How did we ever got by without them?”

THE PRINCIPAL ADVANTAGES OF THE LLC OVER OTHER BUSINESS FORMS

With very few statutory requirements, the owners of an LLC (called “members”) can set up the LLC and operated it in virtually any way the owners choose. The LLC is completely flexible. Also, with very few public reporting requirements, the ownership and
management of the LLC can be kept private. By using an LLC, a business can avoid what might potentially be the double taxation of profits. Most important, however, is the LLC’s “limited liability” feature. In an LLC, the owners and operators of the company are not liable for the debts, obligations and liabilities of the company.

THE LLC IS A PURE PASS-THROUGH ENTITY FOR FEDERAL INCOME TAX PURPOSES

For federal income tax purposes, an LLC is taxed as a partnership. This means that all of the income, losses, credits and deductions of the business automatically “pass-through” the entity and are allocated among the owners in generally any manner the owners choose. This tax treatment is more preferred than the treatment afforded C corporations where the profits of the business are taxed twice—once on the earnings of the corporation and then again when these earnings are distributed to the corporation’s shareholders. In a C corporation, the same money is taxed twice. However, in an LLC, the profits are only taxed once. The LLC is also thought to be a slightly better choice than even an S corporation which generally enjoys the pass-through tax treatment as well. However, there are some important instances when a corporation electing S status will not be given pass-through tax treatment. That is never the case with the LLC. Also, in order to be taxed as an S corporation, the company must meet certain strict eligibility requirements concerning the number and type of shareholders and the class of stock that will be issued in the company. Also, a written election to be taxed as an S corporation must be made by specific times and on a specific IRS form. That is not the case with an LLC. The LLC is automatically given complete pass-through tax treatment without any exceptions or requirements.

USES OF AN LLC

An LLC can be formed and operated for any business purpose. For example, an LLC can be used for either a manufacturing, retail or service business. An LLC is also the preferred method of holding real estate. For example, plants and offices are often held in a separate LLC and leased to a commonly owned operating company. By separating the ownership of the plant and office from the operations of the business, the owner is provided with greater
Insurance & Risk

asset protection and financial flexibility. Finally, the LLC is the perfect vehicle for joint ventures and minority business enterprises. There is no limitation on what type of businesses LLCs can be formed for, and there are no limitations on the type or number of owners. An LLC can be owned and operated by a sole proprietor or an endless number of owners.

CONVERSIONS INTO LLCs

Although many of the LLCs that are being formed are for new businesses, existing corporations and partnerships are able to convert into LLCs as well. No one should be using general partnerships or, for that matter, even limited partnerships in Michigan any longer. In partnerships, the general partners are personally liable for all of the debts and obligations of the partnership. That is not the case with an LLC where neither the owners nor managers are personally liable for any of the debts or obligations of the company. Converting from a partnership to an LLC is relatively simple and is not a taxable event. Although the conversion by a corporation into an LLC is more complicated, it can still be done. Even though the conversion of a corporation into an LLC is a taxable event, some steps can be taken in advance of the conversion which can minimize the tax effect of this change in status.

“LIMITED” LIABILITY DOES NOT MEAN “NO LIABILITY”

As a general rule, the shareholders, officers and directors of a corporation are not personally liable for the debts, obligations, and liabilities of the corporation. The same is true for LLCs. Generally, the owners and managers of an LLC are not liable for the debts, obligations and liabilities of the LLC. However, there are exceptions to this general rule. In certain circumstances, creditors can pierce the veil of the corporation and now, an LLC, and try to tag the individual owners and managers with personal liability. In order to manage this risk, every LLC (just like every other business) must have adequate insurance in place to cover this risk. If you choose to use an LLC, you must talk to your insurance professionals and make sure that you have the appropriate general liability, D&O, and employment practices liability coverage in place. For example, some insurance companies still use old policy
Appendix

forms which do not list LLC owners as additional insureds. This is a huge gap in your risk management program that only you and your insurance professionals can solve. In cases such as these, a specific endorsement must be issued so that the owners of the LLC are covered. Without the endorsement, the owners might not be.
APPENDIX D

COINSURANCE COULD RUIN YOU

By: Guest Author Todd Denenberg, J.D.
Attorney at law
Grotefeld & Denenberg, LLC

WHAT IS COINSURANCE?

Commercial property insurance policies routinely contain coinsurance penalty provisions in the conditions section of the policy. This means that at the time of a claim, the insurance carrier will test to see whether the policy condition had been lived up to such that the policyholder had insured a certain percentage to value. For example, if there is a 90% coinsurance provision on the policy, the adjuster, at the time of a loss, will determine whether the policyholder insured at least 90% of the replacement value of the building, contents, property of others, computer equipment or other damaged property. If not, the policyholder will be penalized and will only recover a percentage of the actual loss.

Adjusters have an obligation to enforce the provisions of the policy and will do so. Some adjusters will subjectively determine what they feel the replacement cost of the property in question should have been and whether the coinsurance provision had been lived up to in that regard. This is a serious concern. If your agent has provided a coinsurance penalty provision on your policy, you should rethink whether this is the correct agent for you. Except for problematic risks where coverage can only be obtained through surplus lines carriers such as Lloyds of London, standard insurance companies will typically agree to remove or “waive” the coinsurance provision. This can be accomplished by way of the addition of an “agreed amount” or “agreed value” endorsement or through negotiation with the carriers such that the policy provision involving coinsurance is deleted or waived. There typically is a nominal additional premium, if any, to accomplish this.

If you have not looked at your policy lately to ascertain whether there is coinsurance, now is the time to do so.
APPENDIX E

DON'T PANIC – HOW TO HANDLE AN INVESTIGATION UNDER MIOSHA

By: Guest Author, James F. Hermon, J.D.
Attorney at Law, Dykema Gossett, PLLC

“James Herman is an attorney with Dykema Gossett, PLLC, one of Michigan's largest law firms. He specializes in employment law with a particular emphasis on representing companies in MIOSHA matters and investigations.” He can be reached at (313) 568-5640.

Investigations under Michigan’s Occupational Safety and Health Act (MIOSHA) can have significant financial and practical consequences for the unwary employer. Michigan’s Department of Consumer and Industry Services (DCIS) has been empowered to investigate potential violations of MIOSHA by spot checks, conducted without advance warning, and even without any complaint being filed with the state. Addressing these investigations effectively can spell the difference for an employer between huge administrative fines and surviving (relatively) unscathed.

I. WHAT PROMPTS AN INVESTIGATION

There are three circumstances in which an administrative search of the employer's premises will be conducted: investigation of an employee complaint, investigation of a workplace death or major workplace accident and investigation in the course of the state's administrative enforcement plan.

The first type of investigation occurs when an employee makes a complaint to the state about a workplace condition that he or she believes constitutes a violation of the Act (whether a regulation and/or MIOSHA's general duty clause). If the DCIS believes that reasonable grounds exist for an investigation, it will conduct an immediate investigation of the employer’s grounds to determine whether a violation actually does exist.

The second type of investigation occurs when an employer makes a report of an employee death on the job, or the serious injury of three or more employees on the job within eight hours of the
incident in question. Again, DCIS investigates such reports immediately to determine whether a violation of applicable workplace standards occurred.

Finally, investigations can occur as part of the DCIS’ random inspection program. These random inspections are basically a “pop quiz” to determine whether an employer is complying with its obligations under MIOSHA. These investigations occur without warning and are “wall to wall” inspections that cover the entirety of the employer’s operation.

An investigation is typically commenced simply by the inspector presenting his or her credentials, announcing who he or she is and the purpose for the visit, and requesting that he or she be given access. An employer has the legal right to demand that the state present a warrant before beginning the inspection. The question that has to be answered, however, is whether the employer wishes to exercise that right.

The standard for issuance of an administrative search warrant differs substantially from the standard for issuance of a criminal search warrant. Criminal search warrants require establishment of “probable cause” for a search. Administrative search warrants require only that the state present specific evidence of an existing violation or a showing that a business has been chosen for inspection on the basis of a general administrative plan. Given this lowered standard, it is unlikely that requiring an inspector to get a warrant before being allowed to inspect will prevent the inspection from taking place. Instead, it is more likely that demanding a warrant will simply frustrate the inspector and provoke a more thorough inspection.

Some exceptions exist, of course. If an employer has been subjected to repeated inspections over a short period of time, it may be worth making the challenge to the alleged general administrative plan and having a judge decide whether an inspection should take place. Typically, however, demanding a warrant is a fruitless exercise.
II. BEFORE AN INSPECTION OCCURS

Even before an inspection takes place, there are a number of things that an employer can do to both avoid liability as a result of a DCIS inspection and protect the employees in the workplace. Specifically:

- Designate a specific person to be responsible for safety programs.
- Establish written safety training on a regular basis for all employees.
- Schedule safety meetings with employees to solicit input on safety issues in the plant.
- Establish and consistently enforce safety rules.
- Conduct your own periodic safety inspections.
- Tag out equipment in need of repair and remove it from operation.
- Get copies of standards applicable to your business.
- Make sure you are complying with lockout/tagout and stored energy regulations.
- Inform supervisors that safety is a priority and hold them accountable for enforcement of safety standards.

While following these suggestions will not guarantee protection from MIOSHA finding that an employer has failed to comply with applicable regulations, it will reduce the chance of any serious violations being found.

III. DURING THE INSPECTION

Once a safety officer presents his credentials and is given access to the employer’s property, the next step is to call a pre-inspection conference. The safety officer, the employer, and a designated
employee representative all gather to discuss the purpose of the visit and reason for the inspection. This inspection is important for two reasons. First, it is an opportunity for the employer to “take the temperature” of the safety officer and determine the breath of the inspection. The employer’s attitude towards the inspection is important during this conference, since it will affect the safety officer’s willingness to accept explanations offered by the employer, as well as the safety officer’s willingness to overlook easily addressed housekeeping violations. Second, the pre-inspection hearing allows the employer to determine what the scope of the inspection is likely to be, so that the safety officer is not provided with unnecessary information that can result in additional citations being issued.

After the pre-inspection conference, the actual inspection will begin. The safety officer has complete control over where he or she goes in the employer’s facility. He or she is not limited to inspecting only certain areas, or to inspecting only for a limited period of time. Furthermore, the safety officer can interview employees regarding their exposure to conditions considered violations of applicable OSHA standards. Employers do not have the right to be present for those interviews and must allow them to go forward without interfering.

The employer’s role during the actual inspection is very limited. However, the employer participates in a meaningful way simply by shadowing the inspector. The representative of the employer should follow the inspector, taking notes about conditions the inspector believes are violative of OSHA standards. Those notes will be valuable in defending any citations that are ultimately issued by the state. Furthermore, it is important to “keep tabs” on the inspector, so that the employer knows where he or she is at all times. By knowing where the inspector is, the employer can take steps to be sure that all regulations are being complied with, including standards governing personal protective equipment, lockout/tagout, housekeeping, and fire exits. Finally, to the extent the inspection is taking place because of an employee complaint or as part of an accident investigation, the employer should try to keep the safety officer focused on the area of the workplace at issue. Take the safety officer to the area in question by the most
direct route possible, with the least opportunity to see other potential violations.

At the end of the inspection, the safety officer must hold a closing conference. At that conference, the safety officer will describe the violations he or she found and give the employer a rough idea of the citations that he or she intends to issue in writing within the next 90 days. The employer should ask at that closing conference the nature of all citations that he or she believes were found, including references to all standards alleged to have been violated. The employer should also ask the severity of each violation he or she intends to impose, and what abatement dates he or she intends to impose. By collecting this information, the employer gets a jump on any potential appeal, has additional time to abate citations that will be imposed and, in some cases, it may even be possible to convince the safety officer that the citation should be lessened in severity or not imposed at all. It is important, however, that the employer offers to abate an alleged violation by a particular date and that the offered date is met — it is virtually impossible to argue that an abatement date is unreasonable if the employer offered that date on its own.

IV. AFTER INSPECTION - THE CITATIONS

After the safety officer conducts his or her inspection, DCIS has 90 days before being required to issue written citations to the employer. It is virtually certain that any employer inspected will be found to be in violation of MIOSHA in some way. Those citations come in a variety of levels of severity.

Every citation has two components: the fine and the abatement. The fine is simple to explain — it is a monetary penalty imposed by DCIS for the violation in question. Abatement is fixing the problem for which the citation was issued. To satisfy a citation issued by DCIS, both the fine and the abatement must be addressed.

The first level of severity is “other than serious.” This is a technical violation of a regulation promulgated by DCIS, but which is not a serious threat to health and safety of employees. Usually, these citations do not result in any monetary fine (or, if they do, only a
very minor fine). However, the citations still must be abated, even if they are not serious in nature. Abatement can, in some circumstances be much more costly than any fine issued by the state.

The next level of severity is the “serious” violation. Serious violations can result in a citation between $0 and $7,000 per violation. Furthermore, like all violations cited by DCIS, serious violations must be abated. Abatement can be a costly process, requiring modification of the workplace, work processes, or extensive training of the workforce. Serious violations exist where violation of a standard results in a substantial probability that an employee could be killed or seriously harmed.

This does not mean that it is likely that an employee will be killed or seriously harmed; rather, it means that if an employee were injured as a result of the violation, it is likely that the injury would be serious or fatal. Thus, the sheer improbability that an injury will result is not an excuse for not complying with a MIOSHA standard. Many employers, when confronted with MIOSHA citations, respond by simply stating that it would be impossible for an injury to occur because of that violation. Yet, that is not a defense; if there is a possibility that injury will occur, the violation will stand.

After the “serious” violation, the next level of severity is “willful” or “repeat serious.” Both willful and repeat serious violations can result in fines of up to $70,000 per violation, and they are both similar in that they both result from an employer violating a regulation about which it had knowledge. However, a willful violation is issued where the state can show that the employer had knowledge of the regulation in some way and intentionally refused to follow the duties imposed by that regulation. A “repeat serious” citation, by contrast, can be found where an employer has previously been cited for a violation of a regulation, and is found to have violated the same standard a second time with regard to a different area or machine in the workplace. Willful violations also differ in that a willful violation that actually results in death or serious injury can be prosecuted by the state by imposition of a fine of up to $70,000 and up to one year in prison. Finally, employers that have previously been inspected and found to be in
violation of a standard and that fail to abate that violation can be held liable for a “failure to abate” citation. A failure to abate citation can result in a fine of up to $70,000, even if the underlying condition is “other than serious.”

V. APPEAL OF CITATIONS

Once a MIOSHA citation is issued, it is not immediately final. The employer has 15 working days from the date the citation is received to file an initial appeal. That initial appeal is simply a letter to DCIS. DCIS must respond to that initial appeal letter within 15 business days. Typically, the initial appeal is simply a means of getting to the second, more substantive phase of the appeal process. Only the most egregious errors (such as failure to describe the citation in any way, or failure to identify a standard that has allegedly been violated) will be cured through the initial appeal.

After denial of the initial appeal, the employer then has 15 business days to file a second appeal, this time for a formal appeal to be heard by an administrative law judge. A month or two after filing a formal appeal, a notice of prehearing conference is issued. At the prehearing conference (which usually occurs three to four months after the notice is issued) DCIS will attempt to resolve the citations through negotiation of citations, abatement dates, fines, or any combination of the three. If the prehearing conference does not resolve the allegations, the next step is an actual hearing before an administrative law judge. That hearing typically is set six to eight months after the conference. At the hearing, the employer has the ability to present evidence that supports its claim that it is in compliance with the regulation in question, that the severity of the citation was improper, that the fine is improperly high, or that the abatement date is incorrect. The administrative law judge, after hearing the employer’s case as well as the state’s, renders a written decision upholding, overruling, or modifying the citations set by DCIS.

Should the appeal to the administrative law judge fail, there are a number of discretionary appeals that the employer can take to the Ingham County Circuit Court, the Michigan Court of Appeals, or the Michigan Supreme Court. However, those discretionary
appeals are a last resort, and cannot be relied upon to reverse an adverse decision of the administrative law judge.

VI. CONCLUSION
MIOSHA inspections can result in significant liability to an unwary employer. However, by carefully complying with MIOSHA regulations, as well as handling inspections appropriately, an employer can effectively limit that liability.
APPENDIX F

CAN YOUR INSUREDS AFFORD TO BE WITHOUT EMPLOYEE BENEFITS E&O COVERAGE?

By Michael Hale, J.D.

Have you included employee benefits errors and omissions liability coverage as part of the liability insurance program of your insureds? If you have not, you might consider doing so given the wide array of coverage provided for this significant exposure. Courts have interpreted the now almost universally used “employment practices exclusion” of a CGL or umbrella to preclude all coverage for employee related lawsuits. The Employee Benefits Liability Coverage Form may significantly add some coverage for your insureds.

The Employee Benefits E&O Exposure

A human relations department forgets to send a COBRA letter to a terminated employee; a new employee gets accidentally left off of the company’s health insurance program; an employee accuses her employer of failing to properly provide an explanation of what employee benefits were available. These are all examples of exposures created by the employer/employee relationship, yet the standard commercial general liability insurance policy will not cover these risks. This means that your commercial insured will have to hire his own attorney to defend a claim or suit and pay any settlement or judgment. However, there is a way around this: the Employee Benefits Liability Coverage Form. The benefits to your insureds cannot be oversold.

Litigation Examples

As an insurance coverage attorney, this author has seen the use of the employee benefits E&O form as the difference between a defense and no defense being provided by an insurer. Even where the Employment Practices Exclusion is added to the CGL, it only applies to the bodily injury, property damage and personal injury coverage parts. It would usually not limit the coverage provided under the Employee Benefits Liability Coverage Form.
When a contentious former employee files suit against his or her ex-employer, the former employee will usually include all possible counts such as wrongful discharge, discrimination, harassment, breach of contract, and intentional infliction of emotional distress, among others. If the accusations relate in any way to the administration of an employee benefit program, the insurer, under Michigan law, may have a duty to defend the entire suit if the Employee Benefits Liability Coverage Form had been added. There are, of course, exclusions to such coverage such as discrimination and intentional injury. However, under the broad duty to defend law in Michigan, coverage could be triggered. Further, most employee benefits E&O forms do not limit coverage to paying for the benefits the insured would have received under the employee benefit program. Rather, most such forms cover “damages” which, in theory, could include noneconomic loss such as emotional distress.

Lawsuits involving the administration of employee benefits have seen their way into the employee leasing industry in Michigan. In a 1994 published opinion, the United States District Court for the Eastern District of Michigan held that an injured employee who discovered he had no health insurance could sue the client company/former employer for the mistake. The importance of assuring the existence of employee benefits E&O coverage for all parties to the employee leasing arrangement cannot be overstated given the enhanced possibility for mistakes.

Claims-Made Issues

As is typical with professional liability coverage, the employee benefits E&O form is usually provided on a claims-made basis. Agents should closely examine the reporting requirements under such endorsements. Some policies require that a claim not only be reported to the insured during the policy period, but also that that same claim be report to the insurer within the policy period or the automatic basic extended reporting period. The Michigan Supreme Court has upheld that type of limitation. The preferable endorsement is one where that limitation is not present. Regardless, agents should advise their insureds to report all possibilities of claim immediately given the restrictive nature of this claims made E&O coverage. Agents should, in turn, immediately report such claims to the insurer given that notice to the agent may not be sufficient to notify the insurer.
Appendix

The employee benefits liability exposure is significant to all of your insureds but is not always adequately addressed in commercial insurance programs despite the nominal cost which typically applies. Where such coverage is used, agents should take care to examine the specific forms to verify that the broadest possible coverage is being provided and that the claims-made provisions are clearly understood and communicated.

APPENDIX G

COORDINATED BENEFITS UNDER THE MICHIGAN AUTOMOBILE NO-FAULT LAW

In Michigan, under the no-fault automobile law, your automobile insurance carrier will pay benefits to you and certain other people injured in an automobile accident without regard to fault. Those benefits are:

• Medical expenses with no maximum dollar amount

• Funeral expense – $1,750 per person

• Work loss – up to a certain maximum

• Replacement services to a maximum of $20 per day

• Survivor loss – $4,027 in any 30 day period

These benefits are collectively referred to as Personal Injury Protection (PIP). This coverage is provided without deductibles on a per-accident basis.

Advantages and Disadvantages of Coordinated PIP Coverage

It is possible to reduce your automobile premium by securing this coverage on a “coordinated basis” which means that if you have health or disability insurance that pays for automobile-related medical bills or loss of wages, that specific policy pays first and the auto policy pays on an excess basis subject to a $300 deductible.

Typically, this coordinated benefit can result in a premium decrease of about only $16 per year per auto.

The advantage of coordinated benefits is that it reduces your premium slightly. There are, however, a number of disadvantages to purchasing this coverage on a coordinated or nonprimary basis. One disadvantage of coordinated benefits is that there would be a
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$300 deductible if your health insurance does not pay. In Michigan today, many health insurance companies are endorsing their health insurance policies to exclude automobile-related expenses. Also, Medicaid and Medicare do not coordinate with automobile PIP. In addition, when you make a claim you also have to prove to the automobile insurance company that the health insurance excludes auto medical claims, which could be a hassle. Another disadvantage to having coordinated benefits is that to the extent that your health insurance does pay auto related medical bills, you will be depleting the lifetime maximum benefit allowed under many health plans. For example, a Blue Cross PPO has a $5,000,000 maximum lifetime benefit for all health claims, and some others only have $1,000,000.

Work Loss PIP Benefits Under PIP

The basic personal injury protection coverage in Michigan also includes work loss benefits. It is possible to reduce your premium by totally excluding work loss benefits for individuals who are age 60 or older and who have no expectation of actual income loss. The premium savings, however, is in the area of only $4 per year.

A major issue regarding work loss benefits is whether the 2002 statutory maximum in any 30 day period is adequate and whether or not you should buy supplemental disability coverage either through the automobile policy or elsewhere.

It is possible to purchase more than the statutory work loss benefits in both limits and period of coverage under your automobile policy. The amount that you purchase is a maximum amount. The actual payment in most cases will be no more than 85% of a disabled person’s actual loss of gross income from work up to that amount or up to a higher amount if that is purchased. Also, the loss of income benefit is payable only for three years after the automobile accident date unless a longer period is chosen.

Under the Michigan no-fault law, if you have other work loss benefits, there is no coverage under the auto policy to the extent that similar benefits are paid, payable, or required to be paid under any individual, blanket or group disability policy. Most employers
provide short and long term disability and, in any event, we recommend that individuals have stand-alone disability coverage, apart from the auto coverage, that will pay for longer than 36 months.

**Recommendations**

Our recommendations regarding PIP coverage are as follows:

1. Avoid buying coverage on a coordinated basis because a $300 deductible applies if your health coverage does not pay auto medical claims, and you will have to submit information regarding your health insurance to establish that coverage is not provided elsewhere in the event of an injury and, furthermore, the savings on the auto policy is minimal. In addition, if your health insurance pays, it will deplete your lifetime maximum health benefits. It is probably better to use the auto policy for auto-related medical bills rather than the health insurance policy.

2. Do not rely on the wage loss benefit under the auto policy. The limited maximum per month for up to 36 months ($48,324 annual in 2002) is only payable to the extent that you do not have other coverage and most employers provide short-term or long term disability coverage. In addition, carefully examine your disability insurance coverage without relying on the automobile insurance coverage.
WORKPLACE VIOLENCE

Business owners must be aware of the threat of workplace violence and its possible ramifications and do what is possible to both limit that exposure as well as to include coverage for these areas in the commercial insurance program of the organization. The purpose of this Special Report is to identify some of the general issues associated with workplace violence, discuss some methods of protecting your organization from it, and to provide you with some information regarding the insurance coverage available to address these exposures. This Special Report is not intended to serve as specific legal advice. Legal consultation should be sought prior to development and/or implementation of risk management techniques.

Workplace violence, which may be committed by employees, clients, customers or others, is a very serious health and safety issue in today’s society. Consider these disturbing statistics from the U.S. Department of Labor’s workplace violence summary, released in February, 2002:

- Between 1993 and 1999, an average of 1.7 million violent victimizations per year were committed against persons who were at work in the U.S.

- Overall, 18 of non-fatal violent crimes committed in this country between 1993 and 1999 happened while the victim was working; this includes aggravated assault, simple assault, robbery, rape and sexual assault.

- In 1999 alone, there were 16,664 workplace non-fatal assaults and violent acts with lost work-days.

- In 2000, there were 674 workplace homicides in the U.S., making homicide the third leading cause of work-related death in this country.

- An average of nearly 1,000 workers are murdered and 1.5 million assaulted in the workplace every year.
Homicide is the leading cause of work-related death in Michigan.3

According to a recent survey of the top security threats and management issues facing corporate America, workplace violence was ranked as almost every company’s top security concern.4

Workplace violence is a serious issue for many businesses not only because of the danger of injury and risk to human life, but also because the significant financial costs associated with these incidents can threaten a company’s future. The financial ramifications which may arise from incidents of workplace violence can be devastating. For instance, employees who are injured or traumatized may need medical or psychiatric services, in addition to time off for rest and rehabilitation. The threat of workplace violence creates a need for additional security, including guard services and implementation of other security systems which limit access to the workplace. Operations or productions may be disrupted or shut down, which may result in significant financial loss. Morale and productivity may decline. Public relations efforts must be made and the media must be appropriately dealt with, both involving time and money. Investigations and inquiries can also be extremely costly from both a financial perspective and from the standpoint of time and effort, as can litigation which may arise. Opportunities for litigation appear to be expanding, and businesses can face potential legal liability under several theories, including negligent hiring, negligent retention, or negligent supervision, in addition to fines or penalties for violating OSHA.

Risk Management Techniques

A. What are a Company’s Obligations?

The Occupational Safety and Health Administration does not currently have a specific standard for workplace violence4. However, the OSHA has stated that, under the Occupational Safety and Health Act of 1970, the extent of an employer’s obligation to address workplace violence is governed by the “general duty” clause, which provides:

“Each employer shall furnish to each of his employees a place of employment which free from recognized hazards that are
causing or are likely to cause death or serious physical harm to his employees.”

Therefore, OSHA encourages employers to develop workplace violence prevention programs.

Following are some issues which your business may wish to address when developing a risk management program designed to reduce the likelihood and/or severity of occurrences.

B. Review Security In Your Office Area/Workplace
Perhaps one of the most basic and obvious first steps is to review basic security in your actual work space. Is access limited to employees only? Can non-employees enter the workplace unnoticed? Improved security could include receptionist screening, coded doors/entranceways, additional security guards, cameras, employee badges, escorts for visitors, metal detectors, emergency lock down procedures, etc.

C. Screening Employees
Following personal interviewing and prior to making an offer of employment, employment history, criminal history and references of every prospective employee should be diligently checked. Prospective employees should sign a release permitting the employer to perform this investigation, and employers should seek specific legal consultation to be certain that the investigations comply with all other applicable state laws in addition to the federal Fair Credit Reporting Act.

Drug tests and personality tests, testing may be appropriate. With regard to this type of testing, specific legal consultation should be sought to ensure that practices do not violate the Americans with Disabilities Act or other laws.

It is generally recommended that companies steer clear of psychiatric tests as a screening device because of the strong possibility that such testing may be in violation of the ADA.
D. Develop and Communicate a Zero Tolerance Policy

All companies should develop and communicate to its staff a “zero tolerance policy” stating that no threats or acts of violence will be tolerated, that all threats are taken seriously and may be grounds for termination, and directing employees how to report threats or acts of violence.

E. Train Staff How to Recognize and Respond

Your staff must be trained to recognize potentially violent behavior and to identify potential problems.

Companies should encourage employees to speak openly with management about workplace difficulties, without having to fear that they will be retaliated against. An open door policy may help create an environment which is less prone to violent behavior.

It may be wise to consider implementing an Employee Assistance Program designed to assist employees to cope with and overcome problems such as stress, emotional problems, drug or alcohol addiction, etc.

F. Crisis Planning

Every business must be prepared to effectively respond to an incident of workplace violence. Therefore, many experts recommend that, in addition to training employees how to specifically respond to separate incidents of workplace violence, the company should establish a crisis plan and team which can put it into action. The crisis team should be specially trained as to appropriate methods of handling an emergency of this nature, evacuation procedures, etc.

Insurance Coverage is Available

The risks presented by incidents of workplace violence are typically not covered by standard property, liability or workers compensation policies. However, a number of different insurance companies offer products to address the exposure of workplace violence coverage. Coverage features vary by insurance carrier.
Appendix

For instance, Chubb Insurance Group offers a package designed to help a business offset the crippling costs which may arise from incidents of workplace violence.

Some highlights of Chubb's policy include coverage for expenses following a covered incident:

• Security consultants to respond to a crisis
• Public relations efforts
• Security guard services
• Loss of business income due to an incident
• Death benefits to a victim's heirs
• Medical, dental, cosmetic or psychiatric services for victims
• Rest and rehabilitation services for victims
• Salaries of employee victims
• Salaries of temporary victims
• Rewards to informants

Conclusion

Most companies cannot afford to be without a company policy that addresses incidents of workplace violence. Because workplace violence seems to have become “commonplace” and has been recognized by some experts as a bona fide occupational, health and safety hazard, OSHA recommends that most businesses implement prevention programs. Insurance protection is also recommended as a means of protecting the business from a financial standpoint so that it can survive. The development of appropriate risk management techniques depends on the specific needs of your organization and should be addressed through consultation with legal counsel.
Contact Cambridge Underwriters Ltd. for a specific proposal or for more information.

1 The first four statistics listed come from the Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Workplace Violence Summary Sheet, February 2002.

2 Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Workplace Violence Summary, 1999.


5 Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Workplace Violence Summary Sheet, February 2002.


7 Occupational Safety and Health Administration, U.S. Department of Labor, OSHA Workplace Violence Summary Sheet, February 2002.

8 The coverage afforded is subject to the terms and conditions of the policy.


APPENDIX I

DISPUTING CLAIMS FOR UNEMPLOYMENT BENEFITS

Cambridge employment attorneys receive frequent inquiries as to how to handle unemployment compensation claims. Although the employer is not responsible for directly paying unemployment benefits, it should be noted that the employer pays unemployment taxes based on the number of claims made against the employer’s “account.” As a result, employers should take time to understand unemployment compensation issues and the process of how to dispute such claims. The purpose of this Special Report is to outline the key defenses to an unemployment claim and to make other recommendations for employers to follow in the process of disputing such claims.

UNEMPLOYMENT AGENCY

Claims for unemployment benefits in Michigan are now processed through the Michigan Bureau of Workers and Unemployment Compensation, a division of the Department of Consumer & Industry Services. The Bureau determines whether unemployed workers are entitled to benefits under the Michigan Employment Security Act (“MESA”).

MESA was enacted for the benefit of persons involuntarily unemployed. The purpose of the Act was to ease the burden of economic insecurity on those who become unemployed through no fault of their own. Michigan courts have stated that MESA is to be liberally construed in favor of awarding benefits. As a result, obtaining a decision disqualifying a former employee from receiving benefits can be difficult. It is not, however, impossible. With planning and preparation, employers can improve the chances of a disqualification for appropriate situations.

STANDARDS FOR DISQUALIFICATION

To be eligible for unemployment benefits, a claimant must: i) be unemployed as defined in MESA; ii) have engaged in the minimum level of qualifying employment; iii) apply for benefits;
and iv) be able to, available for and seeking employment. Once an employee meets these threshold requirements, he or she is eligible for unemployment benefits unless a disqualification applies. There are essentially two grounds for benefit disqualification: i) voluntary termination of employment and ii) misconduct.

A. Voluntary Termination.

Ordinarily, an employee who voluntarily terminates his or her employment is disqualified for unemployment benefits. An employee is not disqualified for benefits, however, if the employee's termination was not voluntary or if it was prompted by good cause attributable to the employer. Michigan courts have held that voluntary termination claims require a two-part inquiry. The first consideration is whether the employee's termination was in fact voluntarily. If the termination is found to be involuntary, the employee is entitled to benefits.

Whether an employee voluntarily left their position for purposes of entitlement to unemployment benefits depends on the particular facts and circumstances of each case. It is important to note that even though an employee leaves a job through his or her own choice, the leaving is not necessarily “voluntary” under MESA. Rather, the courts have held that “voluntary” “…must connote a decision based upon a choice between alternatives which ordinary men would find reasonable, not mere acquiescence to a result imposed by physical and economic facts utterly beyond the individual's control.” Some examples of cases where an employee who quit their job and was found to have done so involuntary are:

- A pregnant woman who left her employment on the advice of her doctor and who was willing to return to work after giving birth to her child, but was refused permission to return by her employer.

- A worker who took a job 272 miles from his home and was forced to travel home only on weekends and found that his job was contributing to problems with his family life and subsequently quit.

If the termination is found to be voluntary, a second inquiry is made to determine whether the employee's termination was made
without good cause attributable to the employer. The standard applied is whether the employer’s actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment. Generally, to be eligible for unemployment benefits, the employee must bring the unacceptable condition to the employer’s attention and give the employer the opportunity to correct the situation. Some examples of cases where an employee quit their job and was found to have done so based on good cause attributable to the employer are:

- An employee who quit his position when his employer reneged on a promise to give the employee a raise in salary for developing a specialized art glass department.

- An employee who quit his position following a dispute with his employer regarding pay during an administrative leave.

In a voluntary termination case, the burden of proof is initially on the employer to demonstrate that the employee quit his or her position. The burden then shifts to the employee to show either that the action was involuntary or that the resignation was prompted by good cause attributable to the employer.

B. Misconduct

Misconduct is a very broad term commonly used to describe virtually any undesirable employee behavior, from poor performance to active insubordination. For purposes of disqualifying a former employee for unemployment benefits, the definition is much more narrow. The Michigan Supreme Court has defined misconduct under MESA as a willful and wanton disregard of the employer’s interest or the employer’s reasonable standards of behavior. An employee may also be disqualified for acts of gross negligence. In contrast, inefficiency, poor performance resulting from inability or incapacity, isolated ordinary negligence or good faith errors in judgment are not misconduct under MESA. Additionally, the act or acts for which the employee was terminated must have occurred in connection with their work.

Application of the MESA misconduct standard can be frustrating for employers. Acts which justify termination and are, in the
employer’s eyes, clearly misconduct are often held to be insufficient to disqualify an employee for unemployment benefits. In a recent case decided in Kent County Circuit Court, the insubordination of an employee who was fired after he swore at his supervisor and ignored a direct order was held not to disqualify him for benefits. The court reasoned that the employee’s behavior was not a substantial disregard of the employer’s interest as the employer could not demonstrate that the employee’s acts impaired the employer’s operations. Some examples of other cases where the wrongful acts of an employee were found not to disqualify the employee for benefits are:

• An employee who in nine months of employment received five warnings regarding lateness or absenteeism, including three “final” warnings, but alleged that her absences and tardiness were beyond control.

• An employee with three violations of shop rules of wasting time and loitering on company property and failing to wear safety glasses, even though the violations justified his discharge under a collective bargaining agreement.

On the positive side, a series of incidents, even if no one of them by itself would rise to the level of misconduct, can form the basis for a finding of misconduct to disqualify an employee for unemployment benefits. The final incident need not be related to the previous incidents. The “last straw doctrine” states that the final violation by an employee may be an unrelated act that conclusively demonstrates the employee’s utter disregard for the employer’s interests. MESA also specifically provides that certain types of employee misconduct will disqualify an employee for benefits: i) incarceration; ii) theft or destruction of property; iii) assault and battery; and iv) use of drugs or alcohol.

In a misconduct case, the burden of proof is entirely on the employer. The employer must provide substantial evidence that the employee engaged in misconduct in connection with their work. In most cases, a documented history of disciplinary action is advisory. In the most serious situations, however, the employer need not discipline or warn the employee prior to termination.
DISPUTE PROCESS

A. Initial Administrative Determination and Re-Determination

The first two steps in the unemployment benefit determination process are processed by the administrative staff of the Bureau of Worker’s and Unemployment Compensation. On a former employee’s application for benefits, the Bureau will send the employer a notice requesting a response.

The employer’s response should identify the basis for disqualification, identify the relevant fact, and be supported by appropriate documentary evidence, when available. The initial administrative determination will be based upon the employee’s application and the employer’s response. The initial determination may be submitted to the administrative staff for reconsideration within 30 days. A request for reconsideration should be based upon either new evidence or the misapplication of the law in the original determination. On receipt of a timely request, the Bureau will review the evidence and issue a re-determination which will either affirm or reverse the initial determination.

B. Hearing Before Administrative Law Judge

On issuance of a re-determination, either party may request a hearing before an administrative law judge within 30 days. On receipt of a request for hearing, the Bureau will schedule a hearing and send a Notice of Hearing to the employer and employee. The hearing may be held in person at a Bureau office or it may be held via a telephone conference.

At the hearing, the administrative law judge will review evidence presented by the employer and the employee. Evidence may be in the form of testimony or documents. It is important to note that any documents presented as evidence must be supported by testimony of a person with knowledge of the document. The administrative law judge has the discretion to limit the number of witnesses testifying on an issue and to decide how much importance to attach to any evidence presented.
Although the burden of proof at an administrative hearing is initially on the appealing party, the employer has the final burden of proof on all benefit disqualification issues. Further, in general, the administrative hearing will be the last opportunity for the parties to present evidence supporting their position. For these reasons, it is very important for an employer to carefully prepare and present its case.
APPENDIX J

MICHIGAN SALES REPRESENTATIVE ACT AND YOUR COMMISSION AGREEMENTS

Many organizations enter into commission agreements with sales representatives in the ordinary course of business. However, many are unaware that commission agreements have the potential for serious problems if they are not drafted and executed in a manner that is consistent with Michigan law.

The Michigan Sales Representative Act, codified as Michigan Compiled Laws 600.2961, sets forth very specific requirements pertaining to the payment of sales commissions falling due upon or after termination of a sales contract.

Organizations utilizing sales representatives as defined by the Act need to be aware that heavy penalties, including treble damages, may be recovered for failure to pay commissions due upon termination of the agreement as provided for by the Act.

The purpose of this Special Report is to identify some of the issues associated with the proper payment of sales commissions upon termination of a sales contract, and to discuss some methods of protecting your organization from being held liable for failure to comply with the Act.

The Michigan Sales Representative Act

The Michigan Sales Representative Act applies to individuals and legal entities (called “principals” under the Act) that:

a) Manufacture, produce, import, sell or distribute a product in the State of Michigan;

b) Contract with a sales representative to solicit orders for, or sell, a product in the state.
Under the Act, a “sales representative” means a person who contracts with or is employed by a principal and is paid, in whole or in part, by commission.

The statute, in short, provides that all commissions that are due at the time of termination of the contract, or which fall due after the date of termination, must be paid within 45 days of the date they become due.

A principal who fails to pay commissions owed in the manner specified by the Act is liable to the sales representative for actual damages caused by the failure to pay the commissions when due.

If the principal is found to have intentionally failed to pay the commission when due, the Act provides that the principal is liable for actual damages plus two times the commissions owed up to $100,000.00, plus attorney fees and court costs.

Risk Management Techniques

If your organization falls under the Michigan Sales Representative Act, you need to develop appropriate risk management techniques to help protect you from claims for damages under the Act.

Review your commissions agreement with legal counsel or risk management professional.

Your agreement with the sales representative should be very specific as to when a commission is earned. One of the most important things to do is to try to cover all the contingencies with regard to commission payments upon or after separation.

For instance, if a salesperson is only partially involved, does that person receive full commission?

If the job is not fully paid for and a bad debt is created, is that deductible from the commission? How would such a situation affect the commission owed?
Appendix

If the salesperson proposes the job and then quits or is fired and you get the job six months later with the involvement of other people, is the full commission still paid?

These are only a few examples of possibilities which should be considered.

Conclusion

Most organizations cannot afford to be non-compliant with the requirements of the Michigan Sales Representatives Act, as penalties for non-compliance are steep.

Any claims made under this statute for damages are not covered by insurance.

The development of appropriate risk management techniques depends on the specific needs of your organization and should be addressed through consultation with legal counsel.
APPENDIX K

SPECIAL REPORT - YOUTH EMPLOYMENT

The Michigan Workers’ Compensation Act provides severe uninsurable penalties for employers who knowingly or unknowingly violate the Michigan Department of Labor Youth Employment Standards (Public Act 90) by illegally employing a minor who is subsequently injured.

THE PENALTY

Double compensation (indemnity/lost time payments, not medical/benefits) is mandated for the illegal employment of minors. The insurance carrier is required to pay the double benefit but then is entitled to reimbursement from its insured. If the insured does not make repayment, then the carrier is entitled to cancellation and to sue the employer for the penalty portion of the payment to the minor.

WHO IS A “MINOR”?

According to the Michigan Department of Labor’s Youth Employment Standards a minor “... is any person under 18 except:

1) Someone 16 or older having completed requirements for high school [not necessarily graduated];

2) Someone 17 or older having passed a GED test;

3) An emancipated individual [Act 280, 1975, “…married; armed forces; or court order/16 years or older...”]

EXEMPTIONS:

1) A student 14 or older with “working papers”;

2) A minor:
   a) Working in a parent’s/guardian’s business;
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b) Working in a school where enrolled;

c) Working as a domestic in a private residence;

d) Selling/distributing newspapers, magazines, political/advertising matter;

e) Shining shoes;

f) Involved in citizenship/character building activities which do not displace hired employees.

HOW DOES A “MINOR” QUALIFY TO WORK?
He or she must obtain “working papers” prior to employment.

WHAT OCCUPATIONS ARE PROHIBITED TO A MINOR?
In general:

• any/all construction, contracting, demolition;

• metal working/forming;

• wood working/forming;

• bakery machinery operation;

• meat packing/slaughtering/tanning including retail;

• logging/sawmill;

• mining/quarry;

• vehicles (either inside/outside a cab);

• ladder/scaffolding use;

• power hoisting exposure;

• respiratory equipment use (no “contained spaces”);
hazardous substance exposures (contaminants);

toxins, corrosives exposures (flammables);

silica/clay product exposures;

radioactivity exposures;

occupations listing in 1500/1600/1700 SIC codes.

The Michigan Workers’ Compensation Act provides severe uninsurable penalties for employers who knowingly or unknowingly violate the Michigan Department of Labor Youth Employment Standards (Public Act 90) by illegally employing a minor who is subsequently injured.

EXCEPTIONS?

An employer must apply to the Michigan Department of Labor for a “deviation.” Under no circumstances should a “minor” be allowed to begin work, or, if already employed, continue to work unless he/she qualifies with “working papers” (unless exempt) or if his/her occupation is prohibited (unless a “deviation” is approved by the Department of Labor). An employer’s failure to abide by the Youth Employment Standards and injury/illness to an illegally employed minor invites a “double compensation” workers’ compensation penalty. The penalty portion of this penalty is not covered by insurance.
APPENDIX L

INSURANCE ISSUES RELATED TO THE SHORT-TERM RENTAL OF CARS OR TRUCKS

Individuals or commercial enterprises that rent vehicles on a short-term basis face four types of possible claims arising out of an accident with those vehicles:

1. Bodily injury to other people;
2. Property damage to other vehicles or property;
3. Property damage to or theft of the rental vehicle itself;
4. Loss of the use of the rental vehicle to the rental company while it is being repaired or replaced.

Coverage for these claims may be available from the following sources:

1. The personal auto policy of the individual renter subject to the limits of liability for injury claims and subject to the physical damage deductibles on that policy. Coverage is provided for physical damage claims on an actual cash value basis and this is usually less than the replacement cost demanded by the rental company. No loss of use coverage is provided for loss of profits claimed by the rental company.

2. The business auto policy of the commercial enterprise as long as hired car liability and physical damage coverage is provided and coverage is subject to the deductible on that policy; however, the commercial insurance coverage is also on an actual cash value basis, not the replacement cost required by the rental company. Loss of profits to the rental company is provided by a few, but not all, insurance companies.

3. Certain American Express or Gold or Platinum Visa or Master Card credit cards provide coverage for damage to rental cars in excess of other available insurance, not including loss of use.
4. The rental car company will also provide a low liability limit for injury claims. Usually the limit is the lowest required by state law. Sometimes a higher limit may be purchased for an extra charge.

5. The rental car company will provide coverage for damage to the vehicle and for loss of use if the collision damage waiver is purchased.

**Common Questions and Answers Regarding Rental Cars**

**Question:**

Does my personal automobile policy cover claims made by rental car companies for damages arising out of an accident that I may have with a rental car?

**Answer:** Yes and No

1. Yes, if you are in an accident and another person or company other than the rental company sues you for injuries, your personal automobile policy usually will cover this up to the limit of liability that you have on that policy.

2. No. if the rental company wants you to pay for retail value damages to their car because your personal automobile policy will cover only the actual cash value which is very similar to market value or depreciated value of the damage and the rental car company typically wants retail value. Furthermore, your insurance company will insist on inspecting the damage before repairs are made by the rental company and the rental company may not cooperate.

3. No, if the rental car company charges you for the loss of use of the rental car while it is being repaired and after repairs until it is re-rented. These damages can be substantial and they are not covered by your personal automobile policy.
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Question:
If I purchase the collision damage waiver, does this relieve me of any obligation to the rental company for damages to the automobile?

Answer: Yes and No

1. Yes, if you have complied 100% with their terms of the rental agreement. Typically, the rental agreements indicate that you are in violation of the agreement and there is no coverage under the collision damage waiver if you violate any of the following:

   a. If you provide false or misleading information
   b. If you operate the vehicle using any alcohol (even if you are not impaired), legal or illegal drugs or while drowsy
   c. For any driver training activity
   d. To push or tow a vehicle
   e. Driving in an abusive or reckless manner
   f. Driving on other than regularly maintained roadways (parking lots? gravel roads?)
   g. In Mexico, without written permission. In addition, only the authorized driver on the rental agreement is allowed to drive in most cases. These are the drivers listed on the rental agreement. You would be in violation of the agreement if anyone else drives, such as an unscheduled fellow employee on a business trip with you, a parking lot valet driver, or family member.

The effect of these limitations is to create many gray areas that would allow the rental company to exclude coverage; again, even if the collision damage waiver is purchased. You would then be responsible for the full retail value of the auto and loss of use. Your personal auto policy would only cover the depreciated value and then only if they could inspect before repairs are made. Furthermore, loss of use would not be covered.
Question:
What if I use my credit card which promises to provide collision damage coverage? Will this provide sufficient protection?

Answer: Yes and No

Some credit cards provide exactly the same physical damage coverage as the collision damage waiver would provide. In other words, the same limitations apply as if you paid for the collision damage waiver. For your credit card coverage to apply, you must decline the collision damage waiver on the rental agreement. The credit card coverage only pays if you have no other coverage and have complied with all of the provisions of the rental contract (i.e. permitted driver only, no alcohol, drugs or drowsiness). Credit card insurance is not provided for loss of profits or loss of use.

Question:
Aside from collision, am I also responsible for fire, theft or other damage to the vehicle?

Answer: Yes and No

You are generally not responsible for these perils if you have complied fully with all conditions with the rental agreement and have not breached any one of the prohibitions. You cannot allow an unauthorized driver to operate the vehicle and you must report vehicle theft or damage to the renting location and local police authority within 24 hours.

Question:
Should I rent cars in the business name in order to resolve these problems?

Answer: Yes and No

You may not be able to rent a car in a business name; however, if you do have a choice, generally, it is better to rent a car in the business name in order to allow the business automobile policy to
Appendix

provide broad coverages and the given higher limits that are typically provided under business policies. Your business automobile policy may not, but should, provide damage to rented vehicles when hired car physical damage coverage is provided, and you still have the same problems of the rental company charging your charge card with the full amount of damages at retail while your insurance company would only pay, at best, the actual cash value or market value of the vehicle or the damaged parts. Also, your commercial insurance may pay loss of profits or use of the vehicle up to the limit indicated on the policy.

You should, if you control your commercial automobile insurance, consider purchasing hired car liability and hired car physical damage coverage and loss of use coverage, if available.

**Question:**
Does my homeowners policy provide any protection?

**Answer:** No

The homeowners policy will provide no protection whatsoever for claims by rental companies since automobile coverage is excluded.

**Question:**
Will the business automobile insurance carrier protect an employee who has rented a car or truck in his or her personal name?

**Answer:** Yes and No

No unless an endorsement titled “Employees as Insureds for Rental Vehicle Coverage (Liability and Physical Damage)” has been added to the business auto policy. Without this endorsement, the employee will be unprotected because the auto lease agreement is usually written in the employees personal name, not in the business name.

**Question:**
What is your overall recommendation as to how I should handle the rental car issue?
Answer:

Our recommendation is that you:

1. Pay the rental company collision damage waiver charge. This will provide replacement cost and loss of profits or use coverage in most situations. Declining the collision damage waiver and depending on a credit card could leave you open for loss of use claims.

2. Verify that your personal automobile carrier will provide coverage for high limits for liability claims (at least $1,000,000) and will cover physical damage claims to rental vehicles. (You will probably not be able to secure loss of profits or use coverage).

3. If the use of the rental car is business related, be sure that the business policy includes hired car liability and physical damage coverage and loss of use, and the policy has been endorsed to provide coverage for employees as insureds for rental vehicles rented in their names for business use.

4. Read the rental agreement and comply with its provisions. It is important that you understand all of the limitations and prohibited uses under the rental car agreement and that you studiously avoid violating them.
APPENDIX M

CHECKLIST OF KEY COMMERCIAL PROPERTY
AND CASUALTY AND PERSONAL INSURANCE
COVERAGES

These checklists are provided as tools to use in checking your policies for important coverages. They also serve as a frame of reference from which to judge the competence of an existing or prospective insurance agent. There will, of course, be particular issues related to the type of business or personal risk in question. Moreover, some of these enhancements may not be available in a “hard” market. However, the following represents some of the common issues that arise in reviewing commercial or personal insurance programs.

COMMERCIAL INSURANCE CHECKLISTS

Property Insurance

☐ 1. Is there a coinsurance clause on property policies that has not been waived? The insurance carrier, after a loss, could allege that you did not insure up to the coinsurance percentage and would penalize you in proportion to the deficiency.

☐ 2. Does replacement cost coverage apply on buildings and contents instead of actual cash value, market value or repair value?

☐ 3. Have all locations been listed accurately? Suite numbers?

☐ 4. Have blanket limits been negotiated for all location limits? For example, if you have three locations with a replacement value of $1,000,000 each, avoid three separate limits. Instead, have one blanket limit of $3,000,000 that applies to any one location.
5. Is the building/contents insured for only market value? Replacement cost will almost always be higher than market value. Think in terms of $70 per square foot as the replacement cost of a building, or higher.

6. Always factor in the cost of debris removal expense in the building valuation. The value you insure for buildings will include the expense of debris removal and, therefore, this must be factored into the limit.

7. Is there a protective safeguards endorsement on the policy? Under this endorsement, the insurance company could refuse to pay a fire loss if the sprinkler system or the alarm system did not function properly.

8. Have you insured the value of property of others within your possession? Property of others is not always included on property insurance policies and must be specifically requested and blanketed.

9. Always include leasehold improvements in the contents values. Leasehold improvement expense is a personal property item insured as such under property insurance policies.

10. Does your policy contain the Special Causes of Loss form?

11. Does a reporting form apply for personal property? Seldom do insureds report exactly what is required by the reporting form in the time frame that is required, subjecting themselves to major penalties.

12. What is the pollution contamination cleanup limit on the property insurance policy? In the event of a fire, the land could be easily contaminated. Most policies build in only $5,000 or $10,000 for this cleanup after a fire. You can sometimes negotiate limits in the $250,000 to $1,000,000 range.
13. If you are renting a building, does your lease contain a waiver of subrogation? This would assist in derailing the efforts of your landlord’s insurance company to pursue you for reimbursement after a fire. Even though you may not be required to insure the building, in the event the building is damaged, the insurance company for the building owner could sue you for losses that it sustains. If you do not have a waiver of subrogation in your lease, what is the limit of insurance that applies for this loss under your policy?

14. Do you have off-premises backup of computer media? Even when off-premises backup exists, you should insure the full expense to recreate data that may be lost either in a fire or by theft in the event the backup procedure fails.

15. Does a 1,000 foot limitation on power surge coverage for damage to your computers apply? Power surges can often occur outside of that distance.

16. Does your policy pay selling price valuation for manufactured property that has not been sold but is damaged in a fire or other covered cause of loss?

17. Consider carrying boiler and machinery coverage even though you may not have a boiler. This will cover mechanical breakdown of major pieces of equipment including air conditioning compressors or manufacturers’ equipment and it also covers electrical arcing in the electrical panels or conduits that would otherwise be excluded.

18. Attempt to have the glass breakage sublimit waived on policies. Malicious acts could easily destroy multiple panes of building glass by vandalism and the typical policy only covers a maximum of $250 for this type of claim.

19. Does your policy have a $2,500 limitation for theft of patterns, dies and molds on a property insurance policy? Is this adequate?
20. What is your limit for business interruption coverage? Is it for more than 12 months? How long does coverage continue after you are rebuilt and back in business? You would likely continue to lose revenue after you are reopened following a fire. Most policies only pay for 30 days after that time. Broader periods can be negotiated with some insurers.

21. If you have a valuable low-cost lease, do you have to cover the loss of the favorable lease after a fire? Most leases contain clauses that allow the lessor to cancel the lease in the event of a fire destroying more than 50% of a building. When this happens, the lease you negotiated during a poor real estate market will have to be replaced with a lease at much higher rates. Coverage is generally available for this.

22. Do you have an ordinary payroll exclusion on your business interruption policy? It is difficult in an economy of full time employment to lay off employees because of a fire, for example, and expect that they will be available to return to work when reconstruction is complete.

23. Do you have coverage for business interruption for losses to someone else’s location, such as a supplier or a customer on which you depend? In the event that their locations are destroyed, your business could be impacted.

24. Have you insured contractual penalties for just-in-time delivery situations. One automaker, for example, imposes a $500 per minute penalty for failure to comply with its contract terms if the failure is within the control of the supplier. Under that requirement, a one day delay because of a fire arising out of your negligence would impose a penalty of $720,000, a 30 day delay is $21,600,000 and a 90 day delay is $64,800,000. The only excuse under that program is acts of God and areas outside of the control of the insured. Contractual penalties coverage is not provided by some insurance policies and has to be negotiated with insurance companies that are willing to cover this.
Appendix

25. Consider your employee dishonesty coverage. The standard policy does not provide any employee dishonesty and the suggested limit is at least $500,000.

26. Attempt to negotiate the inclusion of coverage for employee dishonesty that results in losses to third parties. This type of loss is not covered on most employee dishonesty coverage forms.

27. Never assume that the actual loss sustained coverage on a business owners policy is adequate, especially when recovery is limited to 12 months.

28. Do you have a maximum period of indemnity clause on a business interruption policy? Negotiate an unlimited period of indemnity if possible.

29. Have you considered the additional costs to rebuild a building because of changes in ordinances or laws that require that a building be rebuilt differently such as with barrier free designs? Coverage does not automatically apply for this but can be purchased separately.

30. Do you have demolition cost coverage on older buildings that may be located on property that is no longer properly zoned or may not have proper setbacks from lot lines? The municipality may require that the undamaged portion of the building be demolished if more than a specified percentage is destroyed by fire.

Liability Insurance

1. Is there a waiver of subrogation in your lease agreements? If this is not possible in existing leases, what is your policy's coverage for liability for damage to the landlord’s building? The typical liability policy only provides $50,000 in coverage and only insures for fires. Water damage, vehicle damage and many other perils can damage a building and subject the lessee to liability.
2. Is there an absolute pollution exclusion in a liability policy? At a minimum, require that the liability policy cover fumes from smoke from a fire, fumes from cracked heat exchangers, and fumes from mobile equipment.

3. Have you insured employment practices such as wrongful discharge, sexual harassment, failure to promote, failure to hire, etc.? These types of claims are not covered under standard liability policies and a special employment practices legal liability policy is available.

4. Have you insured officers and directors liability to cover lawsuits against directors and officers personally?

5. Does your policy contain an employment practices exclusion which bars coverage for consequential damages?

6. Does your policy include a liquor liability exclusion that bars coverage where any charge is made?

7. Do you have coverage for employee benefits legal liability for mistakes in the administration of employee benefit programs?

8. Is there a 26 foot limitation for non-owned watercraft? Salespeople and officers often entertain on personal watercraft or can charter them for business-related events imposing liability upon the business. Such liability is not usually covered if a watercraft is 26 feet or longer.

9. Does your policy contain a contractual liability exclusion? This would be dangerous because of the indemnity agreements that are entered into by almost all insureds in which they agree to hold other entities harmless from many types of claims.

10. Has the contractual liability coverage been expanded to include personal injury, not only just bodily injury and property damage? Contractual liability on most policies is limited to bodily injury or property damage.
Appendix

11. Does your policy have a leased employee exclusion on the policy? A leased employee may be able to file a tort claim against the former employer.

12. Don't assume that a certificate from a subcontractor means anything. Always require that subcontractors enter into agreements requiring that they hold you harmless from any claims arising out of their workers on your premises. This will require that they assume the defense and any liability arising out of such injuries.

13. Avoid policies that have pollution exclusions that do not make an exception for hostile fires and fumes from heating equipment.

14. Always consider pollution legal liability coverage to cover injury to others, including their land, arising out of pollution events on your premises. The pollution event could involve midnight dumping, that is, the illicit dumping of pollutants on your land, or accidents that may cause injury to persons or property on land or elsewhere.

15. Obtain the broad form notice of occurrence endorsement, if available.

16. Avoid punitive/exemplary damages exclusions where possible.

Automobile Insurance

1. Is non-owned and hired automobile coverage provided to protect the corporation for acts of employees or subcontractors while driving an automobile on behalf of the corporation?

2. Avoid low uninsured or underinsured motorists limits.

3. Has broad form drive-other-car coverage on a driver who does not have a personal auto policy been added? In addition, under these circumstances, always include an endorsement extending no-fault benefits to these individuals.
4. Do you have broadened PIP coverage for persons who have no personal auto policy? In some cases, even infants must be named.

5. Are you covered for physical damage to rental vehicles?

6. Are employees additional insureds on automobile policies? This will prevent your insurance company from suing your employees in the event they are involved in an automobile accident that imposes liability upon the employer.

Umbrella

1. What is your umbrella policy limit and should a higher limit be considered?

2. Is your umbrella as broad as your primary liability policy? Some umbrella policies will have pollution exclusions that are not present on the underlying policy.

Workers’ Compensation

1. Are all states in which you do business listed on their workers’ compensation policy?

2. Consider having the agent quote a retention plan that would return premiums in the event of favorable losses if the premium is above $100,000 per year.

3. Does your workers’ compensation policy exclude officers or partners from coverage? If so, have you obtained the premium to add them which could be nominal?
PERSONAL INSURANCE CHECKLISTS

Homeowners

1. Does guaranteed replacement cost coverage on the dwelling apply? This waives the limit in the event the replacement cost is higher than the limit that was purchased. Many insurance companies will have limitations on the guaranteed replacement cost form and you will want to avoid these limitations whenever possible. They may cap the coverage at 20%, 25% or 50%. Also, be careful to review the requirements of this important coverage form. Most forms require notice to the company or agent when you improve the replacement value of the home by $5,000 or more. Otherwise, guaranteed replacement cost coverage no longer applies.

2. Do you have building ordinance coverage? Insurance policies cover the value of the home that was destroyed, not the home that has to be rebuilt. Older homes cannot be rebuilt without complying with current building codes which could increase construction costs significantly. Building ordinance coverage will provide protection for this increased cost for the damaged portion of the dwelling.

3. Does your homeowners policy have coverage for personal injury protection which can include libel, slander, or defamation of character, invasion of privacy, etc?

4. What are your liability insurance limits? Avoid low liability limits such as $100,000. The cost to increase the limits will likely be nominal in many cases.

5. Do you have specialized coverage for valuable items such as jewelry, furs, paintings, silver, coins, stamps, collectibles, and gun collections? Homeowners policies have a sublimit, usually $500 or $1,000 for theft of these items unless they are scheduled.
6. Does a homeowners policy apply on a house that has been rented to others? If so, there may be no coverage given certain occupancy provisions.

7. Do you have “open perils” personal property coverage? Most homeowners policies are written with specified perils which significantly limits the scope of coverage.

8. Have you secured mold remediation coverage?

9. Have adequate personal property limits been negotiated? It is surprising how the value of clothing and other personal property can easily exceed the estimate of the replacement value of personal property.

10. Does your homeowners policy cover sump pump or sewer backup coverage? You could be exposed to water losses on a lower level.

Condominiums

1. Are building additions and alterations covered in the event you have improved the unit beyond the unit that was originally constructed? The condominium association’s policy may not protect you for those improvements. Also, be sure to read the by-laws to determine the extent of responsibility, because the occupant may be required to insure flooring, wall coverings, kitchen cabinets, countertops, light fixtures, sinks, bathtub, showers, etc.

2. Do you have loss assessment coverage? It is possible for the association’s board of directors to assess each unit owner for rebuilding costs that may be in excess of the insurance obtained by the association. Loss assessment coverage can be purchased to provide this protection. Major lawsuits that exceed the amount of liability insurance carried by the association may or may not be covered under loss assessment coverage even though the
board of directors can assess the member. Ask the agent if liability coverage is included or try to find a company that includes both types of coverage.

3. Is the condominium contents coverage written on a replacement cost basis?

4. Is the condominium rented to others? If so, a condominium homeowners policy may not be the correct policy.

5. Have valuable articles been scheduled?

Automobile Policies

1. Is there a least a $1,000,000 limit of liability as a combined single limit?

2. Is there uninsured motorists coverage with limits of at least $1,000,000? Does the uninsured motorists coverage include underinsured motorists coverage? Avoid carriers that provide a maximum of $100,000 for uninsured motorists and that do not provide underinsured motorists coverage at all.

3. Evaluate whether or not your medical and wage benefits under the automobile policy should be written on a coordinated basis at a lower premium. Some medical and work loss policies preclude collection from multiple policies. Also, it may be in your best interest to “not” coordinate medical expenses, because your medical policy may have a “lifetime cap” of $5,000,000. A serious auto accident could exhaust the medical coverage.

4. Is increased wage loss benefits necessary? The typical automobile policy under Michigan’s No-Fault Law will provide a maximum of less than $4,000 per month for 36 months in the event of a disabling automobile accident. It is possible to increase the monthly limit.
5. Check carefully that all titleholders of automobile are listed as additional insureds.

Recreational Vehicle or Boat Policies

1. What are the liability limits? A $1,000,000 limit should be the basic limit.

2. Does replacement cost coverage apply rather than depreciated value or repair costs? Agreed value coverage is preferred, if available.

3. Be certain that the owners of boats and recreational vehicles have been properly scheduled as additional insureds.

4. Is coverage necessary for dinghies, davits, boat hoists, etc?

5. Is there coverage for uninsured boaters in the event you are injured by another boater that does not have liability insurance?

6. Is pollution coverage needed for boat policies?

Personal Umbrella Policy

1. Is there a personal umbrella policy? What are the limits? Are higher limits necessary?
Appendix

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