Your Coverage Advisor

Insurance Coverage Newsletter
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"I want it noooow!"

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That famous proclamation by Veruca Salt in Willy Wonka and the Chocolate Factory epitomized a spoiled, unrealistic child when the movie was released in 1971. Flash forward nearly 50 years later and no sooner do we conceive of a desired product, it appears on our doorstep.

In an era where everything can be brought to your front door in days or even hours, delivery is king. What does this mean for your operation? How are you adapting? In the rush to stay competitive, are you considering the risks associated with delivery services and the insurance implications of adding these types of services?

Businesses looking to get into the delivery game typically have two choices: (1) in-house delivery; or (2) partnering with a third-party delivery service. There are pros and cons to both options. Below are some considerations to keep in mind while you are trying to adapt to this cultural shift to stay competitive.

In-House Delivery

Depending on your type of business, in-house delivery may range from shipping products over long distances to delivering food locally. This could involve a fleet of company-owned vehicles wrapped with your logo or company employees using their personal vehicles.

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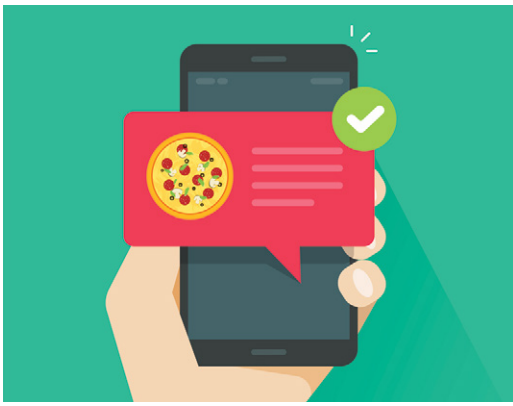

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"I want it noooow!" **(Continued from page 1)**

One benefit to in-house delivery is that you have greater control over personnel and delivery standards. There are, however, several risk mitigation factors to consider.

- **Review your insurance coverage to ensure you have adequate coverage.**
- **If employees are operating their personal vehicles on behalf of the business:**
  - **Alert your insurance agent so they can check your policy for coverage to confirm the insurance company is comfortable with this exposure.**
  - **Notify employees that they must also alert their personal auto insurance company that they will be using their vehicle for deliveries. Many policies specifically exclude food delivery, so the employee must make sure there is coverage. A business owners' policy would not cover the physical damage to the vehicle in the event of an accident, so it is important for the employee to check with their personal auto insurer for coverage.**
- **Require each delivery employee to review and sign a "driver safety agreement" that sets forth:**
  - **what is, or is not, acceptable on their motor vehicle driving record (e.g., types of moving violations that could result in termination); and**
  - **required safety precautions (e.g., no cell phone use while driving; proper seatbelt use; following traffic laws), along with a mandate that employees report any infractions to you.**
- **Develop and implement procedures to annually review each driver's motor vehicle driving record and compare it against the company's guidelines.**
- **Develop a standard vehicle inspection checklist to ensure that all vehicles, whether company-owned or employee-owned, are safe for road operation, and review quarterly.**

Third-Party Delivery

Well-known examples of third-party delivery services include UberEats, GrubHub, and DoorDash. One benefit to such services is that the business owner does not need to invest in hiring, training, or managing employees. Additionally, there is no need to invest in or maintain a fleet of vehicles. However, before entering into an agreement with a third-party delivery service, you should also consider:

- **Who bears the responsibility if, during delivery, there is an accident, a crime committed, or some other unforeseen event?**
- **What insurance coverage is in place? Similarly, whose insurance coverage applies if such an event occurs?**
- **If your business involves food delivery, what standards are in place for food handling, and what precautions are taken to ensure the food is the same quality as when it left your restaurant? What happens if the driver takes too long? What happens if they just ate peanuts on the drive and your customer has an allergy? How are you protected?**
- **Understand that you are now sharing your goodwill and brand with someone you have never met. How will they represent you?**

Entering into the business of home delivery can be a profitable venture. We also want you to be aware of the potential risks, and how to protect your business and your employees from those risks. You do not need to find the proverbial golden ticket to run a successful delivery business, but having trusted partners can help. ■

Governmental Investigations—Are You Covered?

By Christos Georgalis, Flannery Georgalis, LLC
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Introduction

In an increasingly complex and regulated world, scrutiny from governmental agencies and regulators continues to rise. Every day, federal and state governmental agencies issue subpoenas or other investigative demands to companies of all shapes and sizes. Many companies overlook the significant impact these types of events can have on their business operations. If they are not prepared to respond, companies can be disappointed to discover, only after it is too late, that their insurance policies may not cover what are often expensive endeavors.

Have a Plan

Some of the most significant (and stressful) challenges companies face in responding to a governmental investigation is lack of advanced planning. To be prepared when served with a subpoena or other investigative demand, companies should have considered at least the following:

- Which attorney or law firm they will contact. In many instances, investigations move very quickly, so it is critical to involve an experienced law firm immediately.
- What data backup systems are in place. Companies should ensure that they have a data backup system in place so their organization can continue operating, even in the face of a subpoena or other investigative demand. Otherwise, companies can encounter lost data, time, and profits.
- What insurance may be available. Failure to provide sufficient notice under applicable insurance policies may result in the denial of coverage, so it is important to engage coverage counsel early in the process to allow them to identify potential insurance coverage and prepare claims submissions. And, as discussed below, there are many insurance coverage issues that an organization should consider before filing a claim.

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Know What You Have

After a plan of action is in place, an organization should turn to improving its protections. An important step is to review and assess whether certain governmental actions — especially those most likely to occur in the organization's particular industry — will trigger insurance coverage under current policies. For instance, a broker-dealer firm must be prepared to receive demands from the Securities and Exchange Commission, Financial Industry Regulatory Authority, or even state regulators; while companies in the health care sector must be prepared to receive Civil Investigative Demands and HHS-OIG subpoenas, and respond to Medicaid audits.

Many governmental investigations are initiated by issuance of a regulatory subpoena, civil investigative demand, grand jury subpoena, or target letter. When an organization receives one of these investigatory demands, a determination must be made as to whether the demand amounts to a "claim" under any applicable insurance policy. The definition of a "claim" is specific to each insurance policy and must be analyzed carefully to determine whether coverage exists. Oftentimes, for a claim to be valid, it must be made: (1) during the applicable policy period; (2) against an insured person or the insured organization; and (3) for wrongful acts.

While a governmental demand may at first glance seem to present a "claim," under most policies, the demand must also target the organization for a "wrongful act": the insured must be the entity under investigation. For instance, if the company or its employees are designated as witnesses or even victims of another's malfeasance, in contrast with being designated as the perpetrator of the malfeasance, then there may be no "claim" triggering insurance coverage. Whether an entity itself is under investigation, however, is not always known. Governmental agencies may be unwilling to provide this information during the course of their investigation. Furthermore, how a governmental agency perceives a company at the beginning of an investigation may change multiple times over the course of an investigation. Coverage counsel can assist an organization in analyzing the demand and framing the insurance claim.

It is also important to be mindful of the policies' numerous exclusions, including professional services and regulatory agency exclusions. Typically, if a subpoena relates to the "professional services" of a company, then coverage would be unavailable. But determining what the phrase "professional services" entails can be difficult, as often times it is not defined in the policy.

Similarly, many insurance policies contain a regulatory agency exclusion that precludes coverage for claims brought by a regulatory agency. For example, in the banking industry, claims brought by the Federal Deposit Insurance Corporation against individual directors and officers are typically excluded under the financial organization's Director's and Officer's Liability policy. It is important for an entity to be aware of similar exclusions that may be applicable to the regulatory agency providing oversight in its field.

Companies are well advised to talk through exclusion issues with their insurance counsel and brokers to understand how these exclusions may apply.

Leave It to the Pros

Coverage counsel is not only beneficial from the inception of an investigation, but also throughout the investigation process. From assessing and submitting the company's potential claim, to advocating on the company's behalf in the event of insurance company pushback, coverage counsel adds tremendous value. Having coverage counsel involved early can also help the company avoid common mistakes made by organizations, as well as assist in navigating complex insurance policies. ■

Three Things Policyholders Should Know About Coverage for Settlements

By Jodi Spencer Johnson
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All too often policyholders find themselves in a difficult predicament when it comes to resolving a lawsuit. Although their insurer may have been defending the case, it has now drawn the purse strings tight when it comes to settlement. It will point to that long reservation of rights letter sent to the policyholder months or even years ago and explain why it will not contribute with respect to certain portions of any judgment or settlement. Or perhaps the insurer has valued the claim less than what the plaintiff is willing to accept, thus forcing the policyholder to trial. These are some of the murkiest waters we negotiate as coverage attorneys. There are three things policyholders should know about coverage rights and obligations regarding settlements.

1. Recognize the distinction between the duty to defend and duty to indemnify.
First, the duty to defend and the duty to indemnify are different. The duty to defend is broad, and under many policies, if the insurer is obliged to defend *any part* of the allegations asserted against the policyholder, it must defend the *entire case* – even claims for which there is no potential for coverage. The duty to indemnify, on the other hand, is narrower.

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Generally, an insurer may not have to indemnify uncovered loss. Thus, while an insurer may have been defending the case, where the damages are allocable to particular claims, it may not agree to fund the portions allocated to uncovered claims. The facts of each case and the language in the policy at issue can greatly affect the outcome in these cases. Therefore, when negotiating a settlement, care should be taken, and consulting a coverage attorney may be beneficial.

2. Insurers may not place their own interests above the policyholder's.

Second, insurers typically have the right to settle a claim against their policyholder, but must consider the policyholder's interests at least equal to their own interests when making settlement decisions. *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App.2d 65 (2nd Dist. Mont. Cty. 1971). Moreover, if an insurer has the opportunity to settle within policy limits, failure to do so could constitute a breach of its duty of good faith and fair dealing and render the insurer liable for any excess judgments to which the policyholder is exposed.

3. Insurers that breach their duty to defend and/or denied coverage may not control settlement.

Third, if the insurer has breached its duty to defend and/or denied coverage, the policyholder is free to enter into a reasonable settlement and still pursue coverage afterwards. The insurer cannot, on the one hand, deny coverage or breach its obligations and then assert coverage defenses based on policy conditions such as the consent to settle or voluntary payment conditions. *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 587 (1994) ("Neither the insured nor the injured party is required to perform conditions in a policy made vain and useless by reason of the insurer's prior breach."); *Ward v. Custom Glass & Frame, Inc.*, 105 Ohio App.3d 131, 663 N.E.2d 734 (8th Dist.1995). Additionally, even an insurer that has not breached its duty to defend, but that has indicated it will not indemnify the policyholder against a judgment, may be precluded from controlling settlement under the right set of facts. See *Ward, supra* (holding that "[w]hen an insurance company refuses to provide coverage and at the same time seeks to maintain control of the same litigation, it . . . creates a frustration of purpose. Such conduct would compel a person of reasonable faculties to cut his/her costs and settle a lawsuit to avoid the possibility of a higher judgment."). ■

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Anastasia J. Wade
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Attorney Highlights

Kerri L. Keller was appointed to the City of Hudson's Economic Growth Board.

Alexandra V. Dattilo became a Fellow of the Foundation for the Federal Bar Association.

Jodi Spencer Johnson attended the American Bar Association's Fall Leadership Meeting in Arizona, October 3-5, 2019. She also spoke at the Women in Litigation CLE hosted by the American Bar Association, November 13-15, 2019.

Amanda M. Leffler, **Andrew W. Miller**, and **Joseph P. Thacker** presented on Effectively Managing Your Claims at the Dana In-House Seminar CLE on October 1, 2019.

Joseph K. Cole spoke alongside **Craig S. Horbus** on Ethical Issues Surrounding Technology at the Dana In-House Seminar CLE on October 1, 2019.

Congratulations to **Anastasia J. Wade** on the birth of her son Trevor Harrison Yee on July 21, 2019!

Thank you to those who could attend our Annual Insurance Coverage Conference this year! Please save the date for next year on October 22nd at Embassy Suites, Cleveland Rockside.

Check out our podcast series, **Insurance Coverage Insights** on Apple Podcasts, Google Play, and Spotify, or by visiting: https://www.brouse.com/podcast-insurance-coverage-insights