

Insurance and Risk Management

Chapter 5

Dealing with Your Insurance Company

If you are a business owner, there are some things you should know when buying insurance coverage and when dealing with claims. As an attorney, I sometimes have clients who, when disaster strikes, regret not having paid more attention to their insurance coverage. Decisions about what kind and what amount of coverage to buy are some of the most critical you will make as business owner. By law, insurance policies must be written in clear and unambiguous language. If something in the policy does not make sense to you, then you should question it. As the insured, you need to understand what you are buying—what the policy will cover and any exclusions or limitations to it.

The type of business you operate and any inherent hazards it presents to your employees or others, the number of employees you have, the amount of real and personal property involved with the business, where its operations are carried out and other factors determine what types and amounts of insurance coverage you should have. You may need *specialized* insurance due to a certain risk posed by your operations, or you may need an *occurrence* policy, which extends the length of time the coverage may be effective, rather than a *claims made* policy, which limits the coverage to being triggered only during a definite time period.

When making insurance buying decisions, choose an insurance agent who is familiar with your business's operations and the extent of the property it owns. Having a long-term relationship with a knowledgeable and trustworthy agent is important, since this relationship will be ongoing. You will need to review your coverage at least once a year and provide information about any changes in your business such as the number of employees and the property owned by the business. Talk to members of your local chamber of commerce and other business owners to get the names of insurance agents they use.

All insurance policies are not the same, either in price or in coverage. There may be different coverage language and exclusions even in the policies of insurers purporting to cover the same matters. Your agent should understand and be able to explain these differences in a detailed written package comparing alternatives. You should also consider having your attorney review the coverage you plan to buy.

After deciding what type of insurance to buy, you can hope it will never be used. But if you are like most business owners, you probably will have a claim sooner or later. The claim may take the form of a lawsuit against your company. If the claim involves a lawsuit, tell your attorney immediately. Let your attorney submit the lawsuit to your insurance carrier. This should be done immediately and by means of a letter. Your attorney will know how to demand action from the insurer under the applicable policy language.

Usually, insurance policies require the insurer to choose and pay for an attorney to defend the lawsuit, although sometimes the policy may allow you to select the attorney. Once an attorney has been selected, you may get what is called a *reservation of rights* notice from your insurance carrier. This means the insurer will pay for the defense of the lawsuit, but reserves the right to refuse to pay for any judgment, which might be entered against you. Usually reservation of rights letters arise when the lawsuit alleges some claims that may be covered by the policy and others that may not be covered.

Be aware that the interests of your company and your insurance carrier differ in this situation. Although your insurer may appoint counsel to represent you, that lawyer will probably be one

who has an ongoing relationship with, and receives lots of work from, the insurance carrier. Particularly if the stakes are high, you may wish to have separate counsel for your company, at least to monitor the legal proceedings. Your company must pay the additional costs for this, but your company's rights will be protected.

Your insurance coverage is important to your business's survival. Give it the attention and consideration it deserves.

—by W. Kelly Lundrigan, an attorney with the Cincinnati firm of Statman, Harris & Eyrich, LLC.

Know about Taxes When Using Business Life Insurance

Q: I own a business with two other equal owners. We believe that the business is worth more than \$750,000 if we were to sell it. The business owns a total of three policies of term life insurance, \$250,000 on each of us, payable to the business. Can the business deduct the premium payments as a business expense?

A: No, not if the business is either directly or indirectly a beneficiary under the policy.

Q: If the business designates one of us as an owner and beneficiary of the life insurance policy, can the business deduct the premium as an ordinary business expense?

A: Yes. The business may deduct the premium payment as compensation paid to the insured owner, and the owner must declare that as compensation on his income tax return.

Q: If I die and the business owns the policy and receives the life insurance proceeds, does the business have to pay income tax on the proceeds?

A: Probably not. Generally, life insurance proceeds are received free of income tax. However, if the business is incorporated (a C-corporation for income tax purposes) and does not meet *small corporation* status, the life insurance proceeds may be subject to *alternative minimum* income tax—a tax covering certain items (including life insurance proceeds) that would otherwise escape taxation. Although we do not know whether this business is a C-corporation, we do know that it has average annual gross receipts of \$1.5 million. Unless the average annual gross receipts are more than \$7.5 million, the corporation will be considered a small corporation and will be exempt from the alternative minimum tax.

Q: If I die and the business owns the policy and receives the life insurance proceeds, does the business owe estate tax?

A: No.

Q: If I die and the business owns the policy and receives the life insurance proceeds, will my estate have to pay Ohio and federal estate tax on the proceeds?

A: Not directly, but perhaps indirectly. Ohio exempts life insurance proceeds from estate tax unless the estate, itself, is the designated beneficiary. Federal rules are more complicated. So long as the business owns the policy and is the designated beneficiary, the life insurance proceeds will not be included in your estate. However, if the business receives the \$250,000 insurance benefit following an owner's death, its value has increased accordingly. Indirectly, an owner's one-third interest has increased by \$83,333 (one-third of \$250,000). The deceased owner's one-third interest in this case also has increased. Estate taxes are based on the value of assets owned by the deceased. As the value of those assets increase, so do the estate taxes. Values of certain assets, such as business interests, may be predetermined through the use of agreements between the owners. These agreements are commonly called *buy-sell* agreements. Appropriate use of buy-sell agreements often saves estate taxes by fixing reasonable values.

Q: If I own the life insurance policy which is payable to the business upon my death, will I save Ohio and federal estate taxes?

A: No, in either event. It will make no difference for Ohio purposes whether you own the life insurance policy on your life, or the business owns the life insurance policy on your life. However, it makes a big difference for federal estate tax purposes. If the

deceased owner owns the policy on his/her life, \$250,000 will be included in his/her estate for estate tax purposes even though the business receives the proceeds.

Q: What should I do in order to protect my family and minimize my income and estate taxes?

A: First, you and the other business owners should agree on your objectives for the business and what will happen to the business in the event of the death of one of the owners and the sale of his or her business interest. Second, you should state these objectives in a written *buy-sell* agreement. Third, you and the other owners should review the costs and benefits of using life insurance to fund the buy-sell agreement. Fourth, you and the other owners should make certain that your personal objectives match the business objectives and that you coordinate your wills and trusts, if any, accordingly.

Fortunately, Congress has increased the estate tax threshold. Coupled with the stagnant economy which has restrained valuations, a small business owner has less worry today that his family will be forced to sell the business in order to pay estate taxes.

Note: Because this area of the law is very complex, you should seek counsel from a qualified estate-or business-planning attorney.

—by Paul S. Klug, an attorney with the Cleveland firm, Ziegler, Metzger & Miller, LLP.

Business Insurance Protects Property and Covers Liability

Q: I have recently purchased a manufacturing business and its plant. What kinds of insurance should I purchase to make sure I am protected against the major risks of my business?

A: A business owner should always consider at least two general types of insurance. The first is *property insurance*, which covers damages to buildings, goods, equipment and other business assets caused by fire and lightning, or by third parties or employees. The second is *liability insurance*, which protects the business against claims by others for injuries or property damage caused by the business. Depending upon the size and nature of the manufacturing business, a business owner may also consider *inland marine* coverage, which protects products in transit. A *crime policy* may also be necessary to protect against loss from burglary, theft or robbery. If the business is a corporation or limited liability company, a business owner may also want to consider *directors' and officers' liability coverage*.

Q: When I look for property insurance, what types of assets should I expect to be covered by it when a fire occurs?

A: Any property insurance policy should cover the building where the fire occurred and any damaged contents. However, a business owner should also look for coverage for contingent losses such as the fixed expenses that had to be paid even though the plant did not operate, lost profits, the cost of paying some other company to manufacture the goods while the plant was down, and the cost of putting the plant back in operation as quickly as possible. These costs often fall under coverage for *contingent business interruption* and *contingent extra expense*.

Q: If I do not own the building, but only lease it from its owner, will that affect whether I should have a property insurance policy?

A: Yes, because the lease will most likely spell out the duties of the tenant (you) and the landlord (the owner) as to obtaining insurance coverage and restoring destroyed or damaged property. You would probably prefer to pass to the landlord the obligation of insuring the building and the cost of insurance premiums for that coverage; if, however, the lease says the landlord will do that, then the landlord will probably have control over how the destroyed or damaged building will be rebuilt. Therefore, in balancing out your needs, you might have to agree in the lease to insure the building in order to be able to decide how any repairs would be done.

In any event, you should shoulder the responsibility of insuring your own equipment and goods within the plant, and your operating expenses, lost profits, etc., incurred during the down time after a fire.

Q: What are some examples of accidents from which liability claims are made against a business?

A: Most liability claims arise from the following three scenarios: 1) an employee injures the claimant while the employee is in the course and scope of his work for the business; 2) the claimant is injured by a dangerous condition on the business premises; or 3) the claimant is injured by a product made or sold by the business.

The first scenario often occurs when an employee causes an automobile accident while on the job. Another motorist injured in the accident will often make a claim against both the employee and the employer.

The second scenario may arise when a customer slips and falls on a wet floor. However, it may also arise if a customer is injured by a criminal attack by a third party. These claims sometimes occur when a customer is physically attacked in a parking garage or during a convenience store robbery. The business may be held liable if it had reason to know of a significant risk of criminal attack and failed to take steps to either protect its customers or warn them of the risk. Claims arising from dangerous conditions on business premises are called *premises liability* claims.

The third scenario arises most often in manufacturing or retail businesses when a consumer is injured by the product produced or sold. These claims are called *product liability* claims. A familiar example is the customer who is burned by a hot cup of coffee. It may also arise when a food product is found to be contaminated or a household product is found to be unreasonably dangerous.

Q: What kind of insurance is available to protect a business against liability claims?

A: The most common liability insurance coverage is found in a *comprehensive general liability policy* or *CGL policy*. These insurance policies typically provide for a legal defense for the business—known as a *duty to defend*—as well as coverage for any legal judgment or settlement the business is required to pay (*indemnification*). CGL policies generally cover claims for injuries caused by employees, premises liability claims and products liability claims.

Also, Ohio’s statutory law requires most employers to participate in the workers’ compensation program, which provides a type of insurance protection for employees who are injured while working for their employers.

Q: Can I take the risk of doing business without adequate insurance?

A: To take such a risk would not be wise. Despite any savings resulting from not paying insurance premiums, the risk of loss through fire or through liability claims is too great. The insurance market provides a number of alternatives at competitive prices to make business insurance affordable, beneficial, and almost indispensable.

—by Jack L. Neuenschwander, retired partner of the Piqua firm of McCulloch, Felger, Fite & Gutmann Co., LPA. Updated by Monica L. Waller of Lane, Alton & Horst, LLC in Columbus.

Ask Questions When Selecting Health Insurance for Your Small Business

Q: Who can I talk to about selecting health insurance coverage for my business?

A: Small business owners can obtain an overall view of different health insurance options from an independent insurance agent or broker. Information can also be obtained from the Ohio Department of Insurance and local small employer alliances.

Q: What is a small employer alliance?

A: Through small group alliances, small employers can pool their resources to negotiate lower insurance rates and expanded benefits. Alliances are often formed by local chambers of commerce or trade associations. In Ohio, small employers that access small group alliances must have fewer than 500 full-time employees, with a majority of the employees working in Ohio. You can get a list of registered alliances in your area by calling the Ohio Department of Insurance at (800)686-1526.

Q: What are the differences between traditional health insurance and managed care?

A: With traditional health insurance, employees can use any doctor or hospital. If the policy pays less than the full bill, the employee is responsible for paying the remainder. For example, some policies are “80/20,” meaning that after the employee has paid any applicable deductible amounts, the insurance company will pay 80 percent of the bill, and the employee is responsible for 20 percent of the bill. With a managed care plan, employees typically select primary care physicians to manage their care and refer them to specialists. Except in emergencies, an employee generally must receive care from a provider on the insurer’s panel. However, many managed care companies also offer plans that cover services provided by out-of-network providers or without a primary care referral, but at a lower benefit level. As long as employees follow the managed care plan’s rules for obtaining care, they are only responsible for any applicable deductible and co-payment amounts for covered services.

Q: How can I distinguish between different health insurers?

A: Several companies, such as Moody’s Investor Service, A.M. Best Company, Fitch Investors’ Service, Weiss Research or Standard & Poor’s, specialize in evaluating the finances and services of insurance companies. Each company has its own grading system, and their ratings are generally available online or at local libraries. The Ohio Department of Insurance does not rate or recommend insurance companies, but does collect and publish information regarding complaints against insurance companies.

Q: Can an insurance company refuse to sell health insurance to my business?

A: Subject to a few exceptions, insurance companies cannot refuse to sell health insurance to small employers. If you employ at least two but no more than 50 individuals eligible for health benefits, health insurance companies must sell you any small group health plan they sell to other small employers. However, the insurance company can require that a minimum percentage of your employees participate in the plan. If you employ 51 or more employees you can be turned down for coverage.

Q: Can my insurance be cancelled if an enrollee becomes seriously ill?

A: Guaranteed renewability is required and it applies to group plans of all sizes and prohibits an insurance company from canceling an employer's coverage merely because an enrollee becomes seriously ill. You can, however, be required to maintain minimum participation and contribution rates in order to renew your coverage. Your employer plan may be cancelled for nonpayment of premiums or if you commit fraud, or if the insurance company is discontinuing the offering of a certain insurance product.

Q: Can you be charged more—or less—because of your group's health status?

A: Yes, but only within a certain margin. Premiums for small group health plans can vary based on the health status, age, gender, industry, and other characteristics of the employees and other individuals within your group, subject to certain limits.

Q: Do I have to offer health insurance to my employees?

A: Employers are not required to offer health benefits to their employees; rather, health insurance is voluntary benefit offered by many employers to maintain and attract qualified employees. Employers can also choose to offer health insurance benefits only to certain classes of employees (*e.g.*, full-time employees) subject to certain limitations. All though you are not required to offer health insurance to your employees initially, once such coverage is provided, a variety of state and federal laws regulate the level of benefits that must to provided and the continuation of coverage.

Q: In comparing health insurance policies, what questions should I consider?

A: The following is a list of questions to ask:

- 1) What services are covered by the plan (*e.g.*, routine check-ups, well-baby care, substance abuse care, vision care, dental care, prescription drugs)?
- 2) What services are explicitly not covered?
- 3) How often and under what conditions will the insurer change my premium rates?
- 4) How much are the deductibles and co-payments?
- 5) How much is the out-of-pocket maximum?
- 6) Are there dollar limits for certain benefits?
- 7) What are the plan's grievance/appeal procedures?
- 8) If the plan is a managed care plan:
 - a) Does the plan require employees to use the plan's panel of physicians and hospitals?
 - 1) If so, how many of my employees' physicians are in the plan?
 - 2) Are the network providers conveniently located?
 - 3) When are the services of non-network providers covered?
 - b) Is a primary care physician referral required for specialist services?
 - c) What services require prior approval (*i.e.*, pre-certification) from the insurer?

—by attorneys Nancy A. Brigner and Melissa C. Lloyd, formerly of Schottenstein, Zox & Dunn Co., LPA. Updated by Chad W. Helmick, an attorney for OhioHealth Corporation.

Protecting You and Your Employees' Income with Disability Insurance

Purchasing disability insurance to protect your income and that of your employees is a smart way to prevent a financial disaster in the event you or one of your employees is unable to work due to sickness or injury. However, disability insurance policies have a number of variables and are not standard. It is important that you understand the options available and that you tailor your purchase of disability insurance to your own business situation.

1) Basic policy provisions

Definition of disability

While many people will focus on the cost and the benefit they and their employees will receive in return, the real place to start in looking at a disability insurance policy is the definition of disability. Make sure you and your employees (hereinafter the "insured") are considered disabled within the terms of the policy and therefore provided coverage in the event the insured is a) unable to perform *all* (not just some) of the material and substantial duties of b) their *specialty* within their *occupation*. Under the definition of disability in some policies, an insured who is able to perform *some* of the material duties of his/her occupation is not considered to be disabled. For example, a trial lawyer who suffers an injury may be unable to try cases, but may still be able to conduct legal research. Under those circumstances in many cases, the insured may not be considered disabled and entitled to coverage, although his/her income would surely be substantially less as a legal researcher than as a trial lawyer.

Partial disability option

Look for a provision that provides coverage in the event the insured is able to work, but only part time or on a sporadic basis. Just as with the prior example, in the event the insured is able to work a few hours a week after an injury or illness, the insured still wants disability protection as his/her income again would be substantially lower than before the injury or sickness.

Benefits

In addition to the obvious importance of the amount of the monthly benefit, determine what is the maximum amount of the total benefit provided for in the policy. Also find out how long the benefits will continue and at what age will they stop regardless of the length of the insured's disability.

Premiums

Disability insurance policies are annual policies that are renewed on the anniversary date each year. Check to see whether the premiums are guaranteed to stay level throughout the life of the policy. Instead, are they scheduled to increase every year or at certain attained ages? Is the schedule just an estimate or are the premiums guaranteed?

Renewability

Since the policy must be renewed annually, does the business have a right to continue to renew the policy regardless of any change in any employee's health? If the policy is purchased as a member of a group such as a bar association, do employees have to continue to be a member of that group every year at renewal time? What is the age limit of the insured after which the business cannot continue to purchase the policy?

Waiting period

The waiting period is the amount of time the insured must be disabled before benefits are paid. Insurance companies will not insure to protect income the first day the insured is disabled. Waiting periods often vary from 30 days to one year with a consequent decrease in premium as the waiting period is increased.

2) Optional provisions

There are a number of policy provisions, which are not necessarily standard, but may be very important to you or your employees, based upon either your current or expected future circumstances.

Underwriting

When someone purchases a disability policy individually, the policy will be underwritten, meaning the insurance company will want to review the results of a physical examination and medical history before agreeing to issue the policy to the prospective insured. However, if your employee group is large enough or if you are a member of a group, such as a trade association, the association due to its greater bargaining power, may have been able to negotiate with an insurance carrier to have the company write policies without the requirement of a physical exam, etc.

Pre-existing condition limitations

Many insurance policies contain provisions that will not cover the insured for disabilities for which they have received treatment from a physician within, for example, the last 12 months. If an insured has a back problem and regularly sees a health care provider, for example, make sure that if the insured becomes disabled due to this problem, he/she will still be covered.

Conversion to an individual policy

If the policy is purchased by the employer, can the insured convert the policy to an individual policy if he/she leaves your employment?

Rehabilitation benefit

Check to see whether the policy will pay for physical therapy and other assistance in order for the insured to return to work. Similarly, does the policy pay for retraining if necessary?

3) Additional items to consider

Stability of insurance company

Is the insurance company issuing the policy financially stable? Check to see whether it has a secure rating from A.M. Best or another recognized insurance rating agency.

Earnings definition

Does the definition of earnings include any bonuses received? If you are self-employed, how does the policy define your income since there may be some substantial peaks and valleys throughout the year?

Offsets

Determine if the benefit will be paid regardless of any other sources that might help replace at least part of the insured's income, such as workers' compensation benefits or Social Security benefits.

Exclusions

Look for any pertinent exclusions that might be particularly relevant to your situation. Examples include age limitations, minimum hours of work per week and limitations on payments caused by certain conditions such as mental disorders.

Cost of living riders

Will the benefits increase if the insured is disabled for an extended period of time as the cost of living increases? This option is usually available for an additional surcharge.

4) Consult with experts

Because of the many variables and individual circumstances, purchasing a disability insurance policy should be undertaken with a thorough consideration of all the issues. Consult with experts, including your insurance agent. Talk to your lawyer to see that your employment policies dovetail with your disability insurance program. In addition, contact your tax adviser to understand the tax treatment of benefits the insured might receive in the event of disability.

—by Alan Berliner, a partner in Thompson Hine, LLP's Governmental Affairs and Regulation Group in Columbus.

Long-Term Care Insurance: Overlooked Healthcare and Tax Planning

Introduction

In the event of an illness or injury that requires a substantial recovery period or duration of care, private health insurance, Medicaid or Medicare will cover most major medical expenses, such as treatment by skilled professionals, hospitalizations or physical therapy, as well as some medications. However, in such circumstances, patients also need assistance with daily living needs, such as dressing, eating and moving around the room or house, otherwise known as *activities of daily living* or ADLs. Home health agencies, nursing homes and hospice personnel are available to assist with these tasks. The services of home health agencies, nursing homes or hospice personnel are either minimally covered or excluded from coverage by private insurance, and both Medicare and Medicaid offer coverage for only a limited period of time. As a result, many families exhaust savings and benefits to pay for such daily living services out of pocket. Long-term care (LTC) insurance can be used to control the costs of daily living services in the event of accident, injury or long-term illness.

Q: What Is LTC Insurance?

A: LTC insurance will cover daily expenses incurred during an extended period of time for services associated with ADLs, as provided in nursing homes, hospices, assisted living facilities and through home health agencies. Coverage varies, and triggers to coverage include a serious medical condition combined with the inability to do two or more ADLs. Further, LTC insurance can be a benefit under certain life insurance policies, annuities, or through stand-alone policies. Many plans waive payment of future premiums after LTC services begin and extend coverage for a set amount of time (*e.g.*, 90 days).

Q: What planning issues are associated with LTC insurance?

A: Starting in 1997, certain LTC premium payments became deductible from taxable income as medical expenses, so long as the insurance plan was a *qualified plan*. Also, many states, including Ohio, allow for deduction of LTC insurance premiums. In order for a plan to be “qualified,” it must include specific benefit triggers such as certification that the policyholder cannot perform at least two ADLs for at least 90 days, or needs “substantial supervision” due to a severe cognitive impairment. Plans sold before 1997 are automatically qualified, so long as the product was approved by a state insurance commissioner.

Benefits paid under an LTC insurance plan, including annuity plans, are not taxable as income. When employers provide LTC coverage to employees, the premiums paid by employers are not treated as income for tax purposes. Also, the employer payments are 100 percent deductible as a business expense. Starting in 2003, self-employed and S-corporation shareholders are now able to deduct 100 percent of the individual deduction limit.

Additional timing and benefits issues should be considered when using LTC insurance for personal planning. The LTC policy should cover home care, plus benefits to cover the daily cost of nursing home care in the area where the insured is living or is planning to live, allowing for inflation either in the limit or via policy terms. The duration of LTC

coverage should coincide with the anticipated time period needed to bridge any gap in Medicaid coverage that may result if personal wealth planning would require a transfer of assets after the policy-holder moves to a nursing home.

Ohio has added a new tool in long-term care planning. Effective September 10, 2007, insurers licensed in the state can certify for and obtain approval from the Department of Insurance of *partnership-qualified* LTC insurance policies or riders that meet certain federal and state requirements. These policies or riders can be issued via groups or to individuals.

An LTC partnership policy helps policyholders preserve personal assets while planning for their medical needs later in life. An LTC partnership policy also helps policyholders leverage their private coverage with Medicaid services, such as nursing home stays. Under a partnership-qualified LTC insurance policy, the policyholder is eligible under Ohio law for a “dollar-for-dollar” disregard in the asset portion of a Medicaid eligibility determination that is equal to the face value of the LTC policy. As a result, if the policyholder’s LTC insurance partnership policy either does not pay quite enough to cover all LTC expenses or has been exhausted, the policyholder’s Medicaid “spend-down” requirement would exempt personal assets equal to the amount of benefits actually spent under his or her LTC insurance partnership policy. These protected assets are also protected from Medicaid estate recovery after the policyholder has died, and therefore, the assets can be passed on to the policyholder’s heirs. The partnership policy thus encourages more personal responsibility and creates an individual safety net, while also preserving the Medicaid eligibility of policyholders with longer claim needs.

Conclusion

Many state insurance departments, including Ohio’s, publish detailed information on LTC insurance offered in their states. Shop and compare coverages before purchasing LTC insurance. For employers, consider LTC benefits that will allow employees peace of mind when an unexpected illness or injury occurs.

—by Mary Jo Hudson, superintendent of insurance, and Katherine J. Melton, staff counsel, Ohio Department of Insurance.

Shoplifting and Loss-Prevention Programs

Shoplifting can cost a storeowner a bundle considering merchandise loss, apprehension costs and litigation. There are several Ohio statutes regarding theft and shoplifting offenses. Knowing the general elements of the laws (and their practical application) is essential to an efficient loss-prevention program.

Ohio's Shoplifter Detention Law permits merchants and/or their employees to detain shoplifting suspects. If a merchant, or employee or agent, has probable cause to believe that store property has been shoplifted, he or she can detain the suspected thief in a reasonable manner for a reasonable length of time in the store or in its immediate vicinity for the following reasons: 1) to recover the stolen property; 2) to facilitate an arrest by a peace officer and/or; 3) to obtain an arrest warrant. The statute does not permit the merchant or its employee to search the suspect or seize any property belonging to the suspect without the suspect's consent, or to use undue restraint.

The Ohio Shoplifter Detention Law is a reasonable response to a real need, but it does not provide absolute immunity to a merchant and/or its employees for a wrongful detention or alleged harm to a suspect. In 1991, a Franklin County jury awarded a shoplifting suspect more than \$12 million in damages for permanently disabling injuries sustained during a shoplifting arrest. The suspect was accused of stealing four "AA" batteries.

Merchants clearly have a legitimate interest in maintaining a loss-prevention program and training employees to aggressively reduce shoplifting losses. However, the use of physical force or unreasonable detention of shoplifting suspects can be expensive for the merchant—whether the suspect committed the offense or not. A merchant can be sued and, regardless of the ultimate court decision, may incur considerable costs.

As part of a comprehensive loss-prevention program, a merchant should consult with an attorney and other merchants to determine the most efficient, cost-effective loss-prevention program to meet the store's needs. Civil and criminal litigation can require many employee hours, store resources and potential legal fees. Additionally, damages may be awarded to a shoplifting suspect should a court or jury find that an arrest was unwarranted and/or unreasonable. All such costs should be factored into the loss-prevention plan.

—by Hon. Richard M. Wallar of the Hocking County Probate and Juvenile Court.

Insurance for E-Commerce Risks

Moving your business online brings new and dramatically different risks. Evolving technology, while beneficial, provides new possibilities for business damage. Whether done intentionally or unintentionally, damage may not be covered unless your policies have been specifically updated to cover these risks. As technology changes the way business is transacted, few consider the effects on their insurance. Even if you only have a Web site or your employees send Internet e-mail, you need to review your coverage.

Assess your risks

What if your system goes down or data is corrupted? Consider, for example, the effect on your order entry system, including damages ranging from the costs of repairing your equipment to damage to your reputation.

While business interruption insurance may cover some losses, the language in these policies was written before hackers and denial-of-service attacks were concerns. Reviewing policies with an independent insurance professional may help you discover coverage gaps or claims not previously considered. Specific items to consider would be:

- **Liability to others.** Your business damage is only one concern. The courtesy and convenience of supplying links to other sites on your Web site increases exponentially the potential for third-party liability. Links raise potential liability issues including possible patent or trademark infringement. Make sure your errors and omissions coverage covers everything you do now and may do in the future.
- **Carefully review** your general liability policies, property damage coverages (first party), business interruption insurance and errors and omissions policies. Electronic data processing policy endorsements may not be enough since the standard form has not been updated.
- **Damage to your property.** Business interruption policies should be updated to cover partial shutdowns of your business, such as when your online system is incapacitated, but your brick-and-mortar business remains open. Requirements of *physical harm to tangible property* are outdated given the intangible nature of your data stored electronically. In many cases, electronic data processing endorsements will not overcome this gap in coverage.
- **Security exposure.** Insurance is available for many of the damages that can be caused by hackers and viruses, etc. You should consider extending directors' and officers' liability insurance coverage to include claims for failure to provide adequate security.

Next steps

- **Talk with your agent.** Ask about recent updates and specific cyber-liability products. Be wary of exclusions. Make sure all coverages are coordinated, including intellectual property and media coverages, fidelity and surety bonds, and excess and umbrella policies.
- **Revisit your computer security policy.** How vulnerable is your company? Determine where insurance is appropriate.
- **Check your privacy policies and procedures.** Consumers and other businesses expect confidentiality. Make sure you are taking proper steps to protect others' confidential information.

- **Think globally.** Determine not only your back-up plan, but also the back-up plans of those upon whom you rely.
- **Stay current.** Changes will continue as risks develop and litigation ensues.

–by Alan Berliner, a partner in Thompson Hine, LLP’s Governmental Affairs and Regulation Group in Columbus.

Ohio Provides Continuing COBRA Coverage Information for Former Small Business Employees

The federal stimulus bill provides COBRA premium assistance to former employees covered under federal COBRA law and to former employees covered under state continuation coverage law. State continuation coverage is sometimes referred to as *mini-COBRA*. If an employer has fewer than 20 employees, those employees receive continuation coverage under the state continuation law rather than the federal law. The provisions of the federal stimulus bill are not identical for both groups. This fact sheet discusses the changes that the federal stimulus bill makes to state continuation coverage.

In addition, insurance policies issued, delivered or renewed after April 1, 2009, must include the following changes to state continuation law:

- Coverage has been extended from six months to 12 months.
- Entitlement to unemployment compensation is no longer required.
- Employees must be involuntarily terminated, other than for gross misconduct.
- Continuation coverage must include prescription drug coverage if it is included in the group coverage.

Q: Will small employers with fewer than 20 employees have to pay the 65 percent of the state continuation coverage premium not paid by the former employee?

A: No. Small employers will not be obligated to pay any portion of the premium. The former employee will pay 35 percent of the premium and the insurance company will claim the credit from the IRS for the 65 percent of the premium not paid by the former employee.

Q: How long does the subsidy last under state continuation law?

A: With the 2009 change in the length of state continuation coverage from six months to 12 months, Ohioans may be eligible for the entire nine months of federal subsidy. Under federal law, the subsidy ends when a person is no longer eligible for state continuation coverage or when the individual becomes eligible for other group insurance or Medicare (whichever comes first).

Q: Who is eligible for coverage under the state continuation law?

A: In order to be eligible under the newly revised state continuation law, an employee must have been:

- 1) continuously insured under a group policy during the three-month period preceding the termination of employment;
- 2) involuntarily terminated for reasons other than gross misconduct;
- 3) not covered or eligible for coverage under Medicare, or under other group coverage.
- 4) An employee should check the terms of the employer's group insurance coverage to determine what continuation benefits the employee is entitled to.

Q: If an employee elects state continuation coverage and the employer then renews the policy after April 1, 2009, is the employee entitled to the benefits in the new policy?

A: Yes. Any changes made to the terms of the coverage that apply to similarly situated, active employees and their families will also apply to qualified beneficiaries receiving state continuation coverage.

Q: What is the effective date of the federal premium assistance law?

A: The law became effective on February 17, 2009. However, under a transition rule, the former employee may have continued to pay the regular premium amount for up to two months-after this effective date. Thus, a former employee who has already paid the entire premium amount for these two transition months is entitled to be reimbursed or credited for the amount of the overpayment by the insurance company.

Q: Will eligible individuals who were previously terminated or who declined to elect group continuation coverage have another opportunity to elect group continuation coverage and receive the subsidy?

A: No. For individuals receiving state continuation coverage, there is no state equivalent to the federal COBRA's extended eligibility period. Only employees who have already elected continuation coverage, or who still have the opportunity to elect state continuation and were or will be involuntarily terminated through December 31, 2009, are eligible for the subsidy.

Q: Must small employers in Ohio (those with fewer than 20 employees) notify employees of the federal premium subsidy at the time they are involuntarily terminated?

A: Ohio law requires small employers to notify the employee of the right to state continuation coverage at the time the employee is notified of the termination of employment. Employers can use a Department of Labor (DOL) model Continuation Coverage Election Notice to notify employees terminated on or after February 17, 2009 that they can elect state continuation coverage and take advantage of the federal premium subsidy. The Ohio Department of Insurance (ODI) has used the model notice provided by the DOL and modified it to comply with Ohio law. The notice can be found on the ODI Web site through: www.insurance.ohio.gov; click on "COBRA Information" and then "Continuation Coverage Election Notice."

Q: How will people who are currently receiving state continuation coverage receive notice of the premium subsidy provided by the federal government?

A: The insurer* must send the continuation coverage notice to former employees (and their dependents) who were terminated after September 1, 2008, and who are currently receiving state continuation coverage. If the former employee qualifies for the subsidy, it applies retroactively to the first premium payment period that began on or after February 17, 2009. If the former employee qualifies for the subsidy, it applies retroactively to the first premium payment period that began on or after February 17, 2009. This notice was required to be provided by April 18, 2009. The ODI has modified the DOL's model notice to be appropriate for individuals currently receiving state continuation coverage by removing the election form. This notice can be found on the ODI Web site and can be obtained through this link: www.insurance.ohio.gov; click on "COBRA information" and then "Current Recipient Continuation Coverage Alternative Notice."

*Please note that the federal law allows the insurer "or other entity" to issue the notice.

Q: *Must the insurer accept the employee's 35 percent premium payment as payment in full?*

A: Yes. The insurer must accept the 35 percent payment as payment in full for continuation of the group coverage for the former employee. The insurer will claim the unpaid 65 percent of the premium as a credit against payroll tax owed on IRS Form 941.

Q: *What other information is the insurer likely to request from the small employer?*

A: Small employers may be asked to provide the insurance company with information to verify the former employees' eligibility under the statute. Such documentation may include:

- attestation of involuntary termination, including the date of the involuntary termination for each covered employee whose involuntary termination is the basis for eligibility for the subsidy;
- proof of each former employee's eligibility for state continuation coverage and election of state continuation coverage; and
- request for treatment as an assistance eligible individual.

Q: *What if there is a disagreement as to whether a former employee is eligible for group continuation coverage?*

A: Former employees may contact the ODI at (800)686-1526 if they believe the insurance company is not complying with state group continuation coverage rules.

Q: *What other agencies will provide information about the COBRA subsidy?*

A: The DOL and the Department of Health and Human Services will provide information about the COBRA subsidy. These organizations, along with the IRS, share responsibility for the COBRA requirements.

Visit the DOL Web site at www.dol.gov/ebsa/cobra.html for information related to COBRA eligibility and the subsidy. Benefits advisors are also available to assist you at (866)444-3272.

Visit the IRS Web site at www.irs.gov/newsroom/article/0,,id=204505,00.html for information about the COBRA health insurance continuation premium subsidy and information related to tax provisions in the American Recovery and Reinvestment Act of 2009.

View the House Committee on Education and Labor fact sheet at <http://edlabor.house.gov/blog/2009/02/health-coverage-for-the-unempl.shtml>.

Contact the Ohio Department of Insurance for questions regarding the state continuation law by calling (800)686-1526 or through www.insurance.ohio.gov.

—by Mary Jo Hudson, director of the Ohio Department of Insurance.