

Check Professional Liability Policies before Launching New Business Services

As the pandemic disrupts and stalls the global economy, businesses are quickly adapting their services and products to prop up stalled revenues, mitigate financial losses and help their communities. Restaurants are increasingly delivering food, as well as alcohol. Local distilleries are making hand sanitizer. Textile companies are producing face masks. Gyms are streaming workouts, and hair salons are preparing hair coloring kits for home use. While creativity and ingenuity are commendable during these difficult times, the implementation of new business activities is never without risk. Before adopting a new business model, those responsible for insurance should engage in proactive risk management to identify potential exposures and closely review relevant insurance policies for coverage gaps.

The focus of this article is on professional liability and miscellaneous errors and omissions policies (“professional liability”), which provide coverage for legal exposures arising from services provided by businesses and professional firms. However, there are other commercial liability policies that may come into play depending on the operations of the business at issue and the attendant risks.¹ These policies should also be closely reviewed. Professional liability policies provide coverage for acts, errors, omissions or misrepresentations committed solely in the conduct of “Professional Services” or “Covered Services” for others. Such services are often specifically identified or “scheduled” in the policy’s declarations or by endorsement. An examples of sample language from a large commercial insurer’s miscellaneous errors and omissions policy form is as follows:

*In accordance with the terms of the Professional Liability Insuring Agreement Endorsement, **Professional Services** means each service listed in the schedule below. Coverage is only provided for those services listed below that are selected with a check in the box.*

If the new business service isn’t scheduled or identified under the insured’s policy as a covered activity, it may not be subject to coverage should a claim arise out of such service. As a result, it’s crucial to review applicable insurance policies – and to communicate with insurance brokers or insurers (if directly written coverage) to confirm that the new business activity is subject to coverage and whether the new service implicates any exclusions. If the new activity isn’t covered, it should be scheduled to the policy. There should also be a determination whether the new services could give rise to a third party bodily injury or property damage (“BI/PD”) exposure. If so, it may be necessary to amend the policy with contingent BI/PD coverage. Additional premium may be required for the increased risk.

¹ Businesses that manufacture consumer products should check their products and completed operations coverage under their commercial general liability policies to determine if there is coverage for new products and/or operations. Other applicable policies that should be evaluated for coverage include the business owner’s policy or “BOP,” which combines commercial liability and commercial property in one form. Likewise, there may also be a commercial property insurance implication if new materials are used in the manufacturing process that increase risk.

Some policies provide automatic coverage for a certain period of time (60 – 90 days) for new business activities that are tangentially related to an insured's scheduled services. If a policy has this coverage, it is usually found in the policy conditions. Ideally, coverage for any new business activity should be confirmed or scheduled under the policy prior to launch – including any advertising of the new business activity. If the business owner jumps the gun and offers and/or promotes its new service prior to having coverage in place, it's important to talk with the insurance broker about adding coverage for prior acts (if an occurrence policy) or a retroactive date (if claims made).

New business activities also require enhanced risk management. Streaming videos, whether workout videos from the local fitness studio or worship services from a church, for example, can give rise to copyright and trademark infringement claims. An ASCAP or BMI license, which is generally required for the performance of music in the exercise studio or church, generally won't include the right to synchronize the music in a video stream. Copyright infringement can also arise from artwork, too – photographs, paintings and sculptures – that are displayed in business-related videos. Trademark infringement can arise from the prominent display of third-party commercial products, such as Gatorade, Evian water or other identifiable brands. The promotion of the new service can also give rise to a host of advertising liability exposures – especially if the advertising is produced internally without requisite knowledge of advertising risk management. Commercial general liability policies provide an anemic response to intellectual property perils, in particular, and can't be relied upon for such coverage. An existing professional liability policy may provide some coverage for advertising and media-related exposures, but the business service giving rise to the claim must be specifically scheduled. If there is no such coverage available under the professional services policy, a specialty media liability policy may be in order.

With respect to media liability policies, media companies are also exploring new services to build revenue during these difficult times because of the sharp decrease in advertising revenues. Media liability policies can be readily amended to provide coverage for services to others, but as with professional liability policies addressed above, the new service will need to be expressly added to the policy. Likewise, if a media company expands its media content offerings, such as the addition of a daily podcast, it's important to make sure that the schedule of "Covered Media" or "Scheduled Media" under its media liability policy is broad enough to capture the new media activity.

As a final matter, there are a number of businesses that have permanently closed or will fail during the pandemic. When winding down a business, it's crucial to contemplate insurance issues. Discuss with the broker how insurance will apply to any claims that could potentially arise after relevant policies are cancelled and/or nonrenewed. A claims-made liability policy will require an extended reporting period or tail coverage, which allows the insured to report claims that are made after the policy has been cancelled or nonrenewed. As a general rule, the insured has a set period of time, which is usually outlined in the policy or by endorsement, to purchase an extended reporting period. It's a good idea to involve an attorney who can advise the insured regarding legal exposures of the defunct business and the applicable statutes of limitations that may apply.

There are many traps for the unwary when a new business model is quickly employed without careful thought to attendant risk management, including insurance. Before engaging in the new activity – and its advertising, it's important to confirm that existing insurance policies cover the new business services, and there aren't any coverage gaps. Additionally, sound risk management should be implemented to mitigate potential exposure. A media or IP attorney, for example, should always be consulted when

businesses produce their own commercials, stream videos or engage in other activities with intellectual property risk.

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