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## Small Professional Shops Face Liability Claims

Small-business owners often act as if professional liability insurance is only of concern to big companies, lawyers or doctors. Contrary to such belief, here are several key reasons why they may be wrong:

- If you offer a “professional service,” you can be sued if the service causes financial damages to a customer. This is true for a professional service of any size, including home-based businesses and those operated by the self-employed.

- You can be sued for errors that harm the client, even if the error causing the failure was a simple oversight.

- If you offer professional advice to customers that results in damages, you will likely be blamed for the damages and will be expected

to reimburse the customer.

- If one of your employees or a contractor working on your behalf is responsible for negligence, an error or an omission, your business can be held responsible.



- Customers may require you to furnish evidence of professional liability insurance in order to do business with you.

- Professional liability insurance provides dollars for defense costs and can prove to be much less expensive than retaining legal counsel out of pocket.

- Professional liability insurance may cover claims such as wrongful acts, errors, omissions, personal injury, and copyright infringement. Such claims are typically not covered by traditional general liability insurance policies.

### ‘Likes’ and Liabilities

Insurance organizations are seeing an uptick in the number of small and midsize businesses purchasing “media liability insurance.” The term is used to describe a niche insurance policy designed to cover costs resulting from a firm’s actions involving the use of social media platforms like Twitter and Facebook.

Insurance professionals were recently asked for input on the greatest concerns expressed by their customers regarding this exposure. One third responded that customers believe the biggest risk is data leakage, followed by lack of control over potentially

damaging content disseminated by employees. Around 20% said clients believe the greatest risk is from personal injury exposure, including damage from libel and slander. Copyright and/or trademark infringement was the biggest concern of 13% of respondents.

Media liability insurance represents a relatively new product designed by insurance companies to fill gaps in coverage that exist in traditional commercial liability insurance policies. If your firm participates in publishing, even informally via blogs, you should consider media liability insurance.

## Volunteers: Protected but Not Immune



The federal and many state governments have implemented laws designed to protect the actions of those offering volunteer services (e.g., The Volunteer Protection Act). Laws offering immunity from liability have done much to encourage people to volunteer. However, an unfortunate side effect is the misguided belief that all activities performed as a volunteer are immune from liability.

This incorrect view has led many volunteers and organizations to falsely believe that they are legally protected from financial losses and don't need directors and officers or other forms of professional liability insurance for their volunteers or nonprofit organization.

Volunteers and nonprofits must keep in mind that the law does not prevent a lawsuit from being filed. Nor does the law cover all volunteer roles in organizations. Even if the court rules that the volunteer does have immunity under the law, defense costs will still be incurred and could be substantial.

It is the nature of the claim or lawsuit that will determine the level of immunity—if there is any—afforded by the law. Some claims involve actions that are not protected by the law. For those and to be assured of protection in other claims, appropriate professional insurance is the best option.

## What Happened Before Matters

Victims of harassment, discrimination and other employment practices misconduct often don't bring the incident(s) to light immediately. In fact, they may keep the infractions hidden for a long time for fear of retaliation or other consequences. Sometimes something down the road will occur as the proverbial straw that breaks the camel's back. At that point, a victim may file a claim regarding the prior wrongdoing.

If the alleged violations occurred prior to the inception of certain insurance policies, they could fall outside the coverage requirements, thereby leaving you uninsured for the claim.

When determining adequate coverage

under an employment practices liability policy, review whether or not the coverage applies to prior acts. To save money, some employers purchase "inception" coverage, coverage that applies only for acts that occur after the inception of the policy. While such policies may be less expensive upfront, they may prove very costly if it is discovered at the time of a claim that acts leading to the claim occurred before the inception of the policy. By the terms of the insurance policy, they would be excluded from coverage.

Be certain your current employment practices liability policy provides the coverage you want and need. Talk to our professional liability team today.

## Foreign Corrupt Practices Act Insurance

Studies are showing that many company officers and directors are lulled into a false sense of security by faulty assumptions about their protection under D&O (directors and officers) liability coverage.

The Foreign Corrupt Practices Act, which very broadly prohibits bribery and other acts of anti-competitive behavior, is leading to increased enforcement actions against directors and officers, some of which aren't covered by some policies.

Most D&O policies specifically state they don't cover claims arising out of fraudulent, dishonest or criminal acts. Policyholders who are concerned that those excluded actions include FCPA violations can negotiate changes to their policy to try to remove the exclusions. An alternative is to try to get "final adjudication" concessions that allow for defense costs to be paid until such time as a court finds that a fraud or crime was committed. That at least allows insureds to defend against claims.

D&O insurance also typically excludes fines and penalties. Since FCPA enforcement actions usually carry some monetary penalty, it might be wise to try to have those exclusions removed. It's also a good idea to make sure your policy covers investigative expenses in its coverage since many FCPA probes are settled without a lawsuit.

There are other important considerations for your directors and officers liability insurance as it pertains to the FCPA, including timing of violations and claims.



## Speaking Their Language

It's not just languages from foreign lands that pose communication challenges and lead to claims of misrepresentation.

Your own professional jargon can be so alien to clients that it causes misunderstandings and allegations of wrongdoing.

Your forms, documents, client letters and conversations may be riddled with confusing phrases, some of which are incomprehensible to clients and some of which may have alternative meanings. Both can land you in hot water if they lead to financial losses for a client.

One example common to lenders, computer programmers, and insurance professionals is the simple term "app." If used in conversation among insurance practitioners, there would be little doubt, given the context, the term was being used as shorthand for "application," meaning the documents that must be filled out and submitted to an insurance carrier to procure coverage. Yet to many outside the insurance industry, the term "app" (ironically enough, still shorthand for "application") would clearly be a



reference to a program downloadable to their favorite electronic device. Same term; totally different messages received.

Have you considered a "jargon audit" for your business? Ask someone untrained in your line of work to listen to a common conversation among your fellow professionals or to read your customer communication documents. Then have them tell you what they believe you

were saying. You may be amazed at the potential misunderstandings.

In professional business, miscommunication can lead to costly liability claims against your firm or professionals. By improving your ability to communicate with others, you not only lessen your chance of generating professional liability claims, you greatly expand your professional services in both scope and value.

## When You and Your Insurer Disagree

A typical provision of many professional liability policies is the "consent to settle" clause. It stipulates that your insurance carrier cannot settle a liability claim against you without your consent.

Insureds sometimes prefer to contest claims, even in court, out of concern for a loss of prestige and reputation or a strong belief that they are innocent. Even in such cases, an insurer may have experience with similar cases and deem this particular one unwinnable. How many times have we read of significant sums being paid to settle a suit, even though the defen-

dant still admits to no wrongdoing?

Withholding consent to settle may feel good, but it can be costly. Your policy most likely has a clause in

**Withholding consent to settle may feel good, but it can be costly.**

it dealing with your responsibilities should you refuse to settle a claim in the manner your insurer advises. That provision protects the insurer from a policyholder's poor judgment,

which could lead to a larger payout and higher legal fees than would have occurred had the claim been settled as suggested by the insurer.

The same provisions apply in reverse. You may strongly want to settle the claim, but the carrier may feel such an offer would be premature and may prefer to continue negotiating with the plaintiff. Your policy will address that situation as well.

Never make any agreements with a plaintiff without legal and insurance advice. You could put yourself in an expensive and compromised situation.

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**Thank you for  
your referral.**

If you're pleased with us, spread the word! We'll be happy to give the same great service to all of your friends and business associates

## **Dodd-Frank Act Raises Professional Risk**

The Dodd-Frank Wall Street Reform and Consumer Protection Act is expected to have a major impact on professional liability claims over the next 12 to 18 months. Although the legislation is not new, its components concerning corporate governance and financial disclosure make it a top concern. The law extends regulatory oversight to private and public companies and goes much further than Sarbanes-Oxley.

Most respondents to an insurance survey believe that the impact of Dodd-Frank will be far-reaching and will result in increased compliance costs. They also say the legislation creates new avenues of liability and resulting litigation for both public and private companies. Further concerns are exhibited by whistleblower provisions that could create costs associated with investigations.

Now is the time to review your firm's professional liability insurance portfolio. One of our commercial insurance professionals can help you understand the coverage you have as well as identify any gaps or limits in coverage.