



In case you haven't noticed, we have established our own Facebook page. To be honest, we are not sure what will come of this electronic presence, but we felt the need to branch out into the world of Social Media. If nothing else, we hope to develop this page into another effective means of spreading the word about who we are, what we do and what we don't do....We DON'T SELL INSURANCE!

So far, we've posted periodic risk management tips, information about noteworthy product recalls, some pictures of our hometown, Buffalo, NY, as well some pictures that conjure up memories of A&C's early years. Please stop by [Facebook.com/aldrichandcox](https://www.facebook.com/aldrichandcox) and be sure to "like" our page! While you're visiting, post a note and tell us what you would like to see on our page and what would bring you back and/or be of value to you.

In this month's edition, we have included two articles that deal with the impact of recent court decisions on insurance. One article will underscore the importance of a Personal Umbrella Liability policy to overcome a relatively unknown shortcoming of most Homeowners policies, while the other addresses the first of what is likely to be several new Business Auto endorsements designed to curtail coverage for certain drivers.

The best to all of our readers for a healthy and prosperous New Year!

-- Ed.

ashton@aldrichandcox.com

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CANALYSIS & COMMENT

A NEW BUSINESS AUTO EXCLUSION TO THE RESCUE

A serious chartered bus accident that occurred in Atlanta, Georgia in 2007 and the resulting litigation caused a grant of coverage to be afforded under the standard Business Auto policy that shocked Commercial Auto and Umbrella Liability insurance underwriters and, as expected, we are starting to see the insurance industry's understandable response.

Bluffton (Ohio) University had chartered a bus from Executive Coach for its baseball team's trip to Florida. The bus was owned by a partnership and had been leased to Executive Coach. Of the 33 students and coaches on board, five players were killed along with the bus driver and his wife, resulting in many lawsuits.

In their search for insurance coverage, the plaintiffs eventually turned to the University's Auto insurer and, in the first ruling (*Federal Insurance Co. v. Executive Coach Luxury Travel, Inc.*) the trial court ruled in favor of the insurer finding that the University had not hired the bus or permitted the driver to drive it, essentially saying that the University had no control or authority over the driver.

On appeal, however, the Ohio Supreme Court reversed the lower court's decision and held that the University had hired the bus and granted the driver permission to use it, resulting in putting the University's Business Auto insurer (Hartford Fire Insurance Company), its Excess Umbrella Liability insurer (American Alternative Insurance Corporation) and its Excess Follow-Form Liability insurer (Federal Insurance Company) on the hook for the damages.

The Business Auto policy was held to apply because the "Who Is An Insured" provision included as an insured, "anyone else while using with your permission a covered auto you own, hire or borrow." None of the policy's standard exceptions to this all-inclusive language were held to apply. In addition, the Court held that there were sufficient facts to establish the required level of control and possession for the chartered bus to be considered a hired auto. The Court concluded that the University had hired the bus and that the driver had the University's permission to operate the vehicle. Thus, coverage was found under the Business Auto policy (and that coverage followed up through the two layers of excess liability as well).

Although considered by many as an unexpected grant of coverage, a strict reading of the policy language makes it pretty clear that the Supreme Court got this one right. Consequently, it was just a matter of time before Business Auto insurers started to develop and obtain regulatory approval for a new endorsement that would restrict the hired auto coverage. One such endorsement crossed our desk this past fall, though it is a non-ISO endorsement.

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A NEW BUSINESS AUTO EXCLUSION TO THE RESCUE

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“When the third party sued, the couple’s Homeowners insurer refused to indemnify them. . . .”

To evaluate the newly published endorsement, we must first go back to the standard Business Auto policy and understand that the “Who Is An Insured” provision includes the named insured, and anyone else using a covered auto the named insured owns, hires or borrows with the named insured’s permission. The policy then goes on to exclude (1) the owner or anyone else from whom the named insured hires or borrows a covered auto; (2) employees of the named insured while using a covered auto they own; (3) someone using a covered auto while working in an auto-related business, unless that business is the named insured’s; (4) anyone while moving property to or from a covered auto, other than the named insured’s employees, its partners, or members of the named insured’s limited liability company; and (5) partner(s) of a named insured’s partnership and member(s) of a named insured’s limited liability company, while using a covered auto owned by such person or a member of their household.

The new endorsement adds an Item 6 to the above list of exceptions that reads, “The employees of anyone or any entity excepted from qualifying as an insured under paragraph b(1) of this subsection.” In other words, the employees of anyone or any entity listed in item (1) in the preceding paragraph will not qualify as an insured under the policy.

Only time and potential future litigation will determine if this endorsement accomplishes what the insurer intended, but one learned insurance expert has already opined that the newly added Item 6 fails to define the word “employees,” which could open the door for further interpretation. In the meantime, entities and organizations entering into charter agreements (for buses, limousines, etc.) may be well served to have their Auto policy amended to prevent it from granting coverage to employees of the chartering company operating the chartered vehicle in order to avoid costly claims unnecessarily affecting their insurance premiums.

-- Charles H. Cox (cox@aldrichandcox.com)

PERSONAL INSURANCE CORNER

We have repeatedly emphasized the importance of a Personal Umbrella Liability policy over the years, and a recent court case that was brought to our attention has reinforced that position. The case involved a couple who supplied an unrelated minor with alcohol. The minor got behind the wheel of his car and was involved in an accident resulting in serious injury to a third party. When the third party sued, the couple’s Homeowners insurer refused to indemnify them, citing the motor vehicle liability exclusion in the policy, and the court agreed with the insurance company.

Years ago, that exclusion was limited to liability arising out of (among other things) the operation or use of a motor vehicle by an insured. Because of the “severability of insurance” provision of the policy, only the insured who was using or operating the vehicle would have been subject to the exclusion. Motor vehicle use by someone not insured under the Homeowners policy would not be excluded at all.

Over a decade ago, the “standard” Homeowners policy was amended to exclude liability arising out of the use of *any motor vehicle*. There are still Homeowners policies that use the old language, but they are becoming fewer and fewer.

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The good news is that Personal Umbrella policies still provide coverage for this Host Liquor Liability exposure involving motor vehicles. Such Umbrella policies are by no means standardized, so care should be taken in selecting the best one to fit your needs. But the ability to fill in this coverage gap is yet another reason why everyone should consider purchasing an Umbrella.

WHO SHOULD READ YOUR INSURANCE POLICY?

Do policyholders read (and understand) their own insurance policies? Perhaps a better question is, do agents and brokers read (and understand) your insurance policies before they are delivered to you? The fact is that many insurance agents and brokers are trying to avoid Errors & Omissions claims by dutifully telling their insureds to read their own insurance policies, thereby hoping to avoid responsibility for any mistakes or gaps in coverage.

It certainly is always a good idea for policyholders to read their insurance policies and to have at least a general understanding of the coverage they provide. Let's face it, however, most policyholders don't. Nevertheless, at a time when insurance agents and brokers are striving to be perceived as professionals (not just sales people), shouldn't a policyholder reasonably expect their insurance agent/broker to read their insurance policies before delivering them? Shouldn't a policyholder expect their insurance agent/broker to advise them on their insurance needs and the extent to which the policies they are purchasing meet those needs?

Unfortunately, it has become a standard practice for many insurance producers, when sending insurance policies to their clients, to include language in their cover letters that is clearly intended to shift their own duties and responsibilities to their clients. For example, one producer says, "Please examine [your insurance policies] carefully to make sure the limits of coverage meet your needs and that no items have been omitted." Another says, "It is important that you review the policy and advise us at your earliest opportunity of anything which you believe is not in accordance with the negotiated coverage and terms." Still others say, "Please read your policy. If there are any errors or if you have any questions or need to make any changes, please contact our office immediately."

The truth is that most policyholders not only do not read their policies, they probably don't even read the transmittal letter from their producer, so they are not aware of the subtle (or not so subtle) attempt to shift responsibility. The next time you receive your insurance policies, look to see if your insurance agent or broker is telling you to carefully review your policies or to advise them if you find any problems in the policy. If that happens to you, consider sending a letter or e-mail to your agent or broker along the following lines:

"Thank you for sending me my insurance policy. As you suggested, I have read through my policy but, to be honest with you, I don't really understand much of what I read. It is a little confusing. Nevertheless, I know when I selected you as my agent/broker I did so knowing you were a professional. Consequently, I am confident that you have thoroughly reviewed my insurance policy as well as my insurance needs, that you have taken any corrective actions necessary and/or communicated to me any steps I may need to take to ensure that my insurance protection will reasonably meet my needs."

We'd love to see the agent/broker's reaction!

-- Charles H. Cox (cox@aldrichandcox.com)

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***"[S]houldn't a
policyholder
reasonably expect
their . . .
agent/broker to read
their insurance
policies . . .?"***

MUNICIPAL UMBRELLA LIMITS

As long as we are talking about Umbrella policies, a couple of recent court cases may cause municipalities to reconsider what Umbrella limits they carry. Typically, municipalities carry relatively modest Umbrella limits to keep their annual premiums down, figuring this will cover the usual claims and the municipality can use its bonding authority to deal with any really unusual awards. Most of the larger awards against municipalities arise from either traffic accidents or road maintenance.

A couple of local Western New York awards, however, should make municipalities pause to reconsider their insurance limits. First, we read of a town that had to pay out \$23.4 million to a roofing contractor's employee that fell off a ladder while inspecting a roof. The employee fell, broke his neck and the municipality was held responsible under New York's so-called Scaffold Law (Labor Law §240). The town's Umbrella insurer paid \$10 million and the town issued bonds to cover the remaining \$13.4 million, fully expecting to recover from the roofer's insurer before any interest accrued on the bonds. Despite judgments in the town's favor that the roofing company was responsible for its employee's injury, the roofer's insurer is refusing to pay, and interest is coming due on the bonds.

The other case involved a \$7 million settlement arising out of a swimming pool accident that left a woman brain damaged. Two county life guards failed to notice that she was in distress and didn't even help the victim's son pull his mother out of the water when he tried to rescue her. In this instance, the county had no Excess Liability coverage at all, instead relying on a risk retention fund. Unfortunately, that fund is inadequate and the county may have to resort to borrowing to pay much of the settlement.

The size of damages in general is increasing but judgments like this are cause enough for municipalities to re-examine not only their liability limits but also how they handle the risk of large losses in general.

-- James B. Hood, Jr. (hood@aldrichandcox.com)



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ALDRICH & COX, INC.

3075 Southwestern Blvd, Suite 202, Orchard Park, NY 14127-1287
(716) 675-6300 • www.aldrichandcox.com

HOLFOTH RISK MANAGEMENT

A division of Aldrich & Cox, Inc.
(716) 675-0505