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New Economy Businesses Need New Insurance

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We are in an era where technology is fueling rapid growth and changes in the economy on a regular basis. From businesses in the "shared economy" to "disruptive innovations" and new technological advances, these innovative businesses face new risks and liabilities outside of traditional business models. These new economy businesses cannot rely on traditional "off the shelf" insurance coverage to insure against liabilities and losses that even plaintiffs' lawyers have yet to discover.

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In this environment, companies need to take extra care to review and to investigate their potential liabilities as they navigate the insurance market in the new economy.

Sharing Economy Businesses

With the help of mobile technology and innovative entrepreneurs, the number of businesses in the shared economy is growing each year. FromAirbnb, which allows individuals to share their homes, to Lyft, which transforms private cars into shared resources, to Liquid, which allows people to share their bicycles, these services are impacting the traditional models for hospitality, transportation and much more.

In the case of Lyft, the popular ride sharing site is "disrupting" the traditional taxi service industry. As a regulated industry, traditional taxi services are required to maintain specific types of insurance before they are allowed to operate in most jurisdictions. There exists a particular type of commercial "taxi insurance," which is designed to protect the company, its drivers and its assets by providing coverage against liability while transporting riders. Because the traditional taxi service model has been in service for a long time, the insurance carrier underwriters presumably have had sufficient claims and loss history data to understand the risks and costs of providing "taxi insurance" to this industry.

But what type of insurance would cover losses for companies in the ride sharing economy? Unlike traditional taxis, which are designated exclusively for commercial purposes, ride sharing operates by transforming private cars into shared resources. One liability issue that has arisen recently for ride sharing companies is when does a vehicle transform from a private automobile to a commercial vehicle? More specifically for insurance coverage purposes, will insurance that the automobile owner secures for the vehicle provide sufficient coverage while the driver is operating the vehicle on their own time as well as when they are transporting passengers as a paid driver? Similar questions have come up for home sharing and other shared economy businesses. These questions are not easily answered in the relatively new shared economy.

Certain states have passed legislation to clarify the insurance requirements for ride sharing or "transportation network companies" (TNCs), to prevent potential gaps in insurance coverage. For example, in California, the state legislatures passed Assembly Bill 2293 (effective July 1, 2015), which clarifies potential gray areas regarding insurance coverage during the various phases that a ride share driver goes through during a day of driving. A driver's personal auto insurance would continue to provide coverage when the driver's ride sharing app is turned off and the driver is operating the vehicle as they normally do for personal reasons. Under the new legislation, once the app is turned on, even if there has not yet been a match to a potential passenger, the TNC's insurance policy would be required to kick in. Without this clarification, there were questions as to whether the personal automobile coverage should provide coverage until the app was turned on or when a potential customer was located or when a customer actually entered the vehicle to secure a ride. In response to the legislation, some insurance companies are now starting to offer specific ride sharing insurance offered to the TNCs. The law goes a long way to answer who is responsible at what time and is an example of how the new economy is affecting the traditional business and insurance models.

New Technology And Associated Risks

Technological advancements create numerous benefits for the economy but they also present unknown risks and liabilities.

Take, for example, the proliferation of 3-D printing. 3-D printers have been used to "print" endless consumer items from simple hair combs to lamps, and other household products, to breakthrough products in the medical and manufacturing fields. 3-D printers have also been used to print a fully operational handgun.

As the potential uses for 3-D printing are infinite, so are the potential legal implications and associated insurance risks. From product liability risks to potential intellectual property disputes, the liability issues can be overwhelming. Who is at fault if a 3-D printed product is involved in a personal injury claim? Should the liability fall on the retailer who sold a 3-D printed item, or is it the fault of the original digital designer of the product? Should the manufacturer of the 3-D printer or related software be held responsible? These are some of the many questions that will have to be answered on a case-by-case basis as these claims arise in the future.

Similar unknown legal implications exist with new technologies involving virtual reality. For example, several major technology companies are getting ready to release virtual reality headsets, which will visually replicate an environment that simulates physical presence in places in the real world or imagined worlds and lets the user interact in that world. Virtual reality has been referred to as "immersive multimedia" and can create sensory experiences, including sight, hearing, touch and smell. This new technology will have a major impact on the economy, specifically the consumer market; but at the same time, this new technology raises many potential legal implications for product liability, privacy, as well as a multitude of trademark, advertising and other intellectual property claims.

The expected proliferation of autonomous cars or self-driving vehicles will also change the traditional economic models of insurance and risk management. From the time the possibility of a self-driving vehicle was first announced, there have been endless discussions about the legal implications of who would be at fault in the event a self-driving car is involved in an accident.

Although autonomous cars have the potential to reduce the amount of traffic accidents as sensors and software give a car faster and better reflexes to prevent a collision, the greater automation potentially increases the need for sophisticated software and greater design integrity for these vehicles.

As a result, the autonomous car technology is changing the risk shifting calculation between car manufacturer and the consumer/driver of these vehicles. Whereas the traditional liability assessment for automobiles merely involved an analysis of the potential property damage and bodily injury claims that might occur when a driver is involved in an automobile accident, the use of autonomous vehicles will now require a more comprehensive assessment of new risks such as privacy, cybersecurity, and enhanced product liability related claims.

With autonomous vehicles, who should be held responsible for causing traffic accidents? Should it continue to be the driver who is in the vehicle and maintains some level of “control” over the operation of the vehicle, or should the driver be shielded from liability as the vehicle was being “self-driven?”

Worried that these legal uncertainties could delay early adoption of autonomous vehicles, one automaker, Volvo, is taking the initiative to provide an answer. Volvo recently announced that it will “accept full liability whenever one if its cars is in autonomous mode,” making it the first major automaker to claim such a position. This development could have a dramatic impact on the insurance market for motor vehicles as the focus would shift from negligence liability concerns of motor vehicle drivers to increased scrutiny of product liability risks of the vehicle manufacturers.

Insurance Industry Response

Insurance as a whole is based on risk modeling and actuarial science and the sharing economy and new technology innovations have disrupted the traditional underwriting and risk assessment models. Carriers have taken a very slow and cautious approach to developing risk models to address the potential legal implications surrounding these new innovations. The knee-jerk reaction has been to try to fit the proverbial “square peg into a round hole” by placing traditional lines of insurance onto these new disruptive innovations.

This approach has not fared well in the marketplace. The current insurance options available for this new economy often feature high rates and are cost prohibitive for new startups. These rates will likely decrease as more risk modeling information is available and with more claims and loss history to draw from in the future.

In practice, a general liability insurance policy should protect most businesses whether it’s operating in a traditional or new economy business. After all, these “general liability” policies are supposed to cover all claims involving loss to property, bodily injury and personal liability/advertising liability, unless expressly excluded by the policy. In response, carriers have added more exclusions to these “general liability” policies — most recently, a broad “data breach” exclusion to try to exclude the recent wave of data breach claims — and, therefore, the scope of coverage may be limited.

With the rapid pace of technological advancements, now more than ever, insurance practitioners face many challenges to try to keep up with all of the potential liabilities and risks that come with these new innovations and business models. Businesses should tailor individualized company risks with the appropriate insurance coverages in the marketplace and if necessary, craft new coverages to protect against unknown risks.

In the interim, the best “advice” may have come from a plaintiffs’ attorney who suggests that businesses should “buy plenty of liability insurance” as the true liability risk will not become evident for 10-15 years down the line.

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