

Vantage Points - Summer Edition 2007

Dear Friends,

Summertime words of welcome are some of my favorite. You know them, "Come on, let's eat outside," or "We need a fourth, come and play golf." Or my kids' current favorite, "Let's all go get ice cream." Words of welcome always have been part of my experience in Huntington. From my first days here as a transplant, this city has been welcoming, and those welcome words have been non-stop as we (this law firm and I) begin a term of leadership with the Huntington Regional Chamber of Commerce. We all are excited and looking forward to welcoming many more newcomers to our region and clients to our firm in the months ahead.

We also are excited about this edition of our newsletter. Lee Hall, with great expertise in insurance coverages, continues her article from our Spring Edition regarding Business Interruption Insurance. Protecting your business always is a timely topic, and insurance is a big element of that protection. You'll want to take a look.

Arnold Janicker, one of our litigation attorneys, addresses collection efforts when confronted with the uninsured defendant. This area of the law can be a challenge, with overlapping laws and rules from both the federal and state governments. Arnold's article should raise some questions for you and your business as past due accounts are collected. He will be happy to respond to your calls and e-mails.

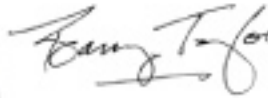
Our third article is from Steve Wellman, who serves as our lead Workers' Compensation attorney. Steve has addressed the newest law and procedure for settling claims and how the changes have increased the number of claims being settled.

Facilities and technology updates are continuing in our building, a landmark here in Huntington. Elevator replacements are complete, with our third high speed elevator operational. New telephone hardware and software also is in place, with new direct dial and voice mail capabilities. Thank you for your patience as we have invested to better serve you, the reason we are here.

Best wishes for a great summer and, as always, we welcome hearing about your own accomplishments, and ideas to improve our service to you.



Warmly,



Barry Taylor
Chief Executive Officer



Business Interruption Insurance: Protect Your Business Income From Disaster (Part II)

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In our Spring Vantage Points issue and in the wake of several disasters this winter, I talked a bit about the need for business interruption coverage and the standard and optional coverages available. Adequate business interruption coverage will go a long way toward protecting a company's assets. Simply purchasing the insurance, however, is not enough; only an efficient resolution of the claim makes the coverage worthwhile. Efficient resolution is unlikely without adequate documentation; a process that must begin long before any disaster.

Although policies do not define what documents are needed, most do include endorsements that provide the insurer with the ability to audit and inspect the insured's "books and records." Your initial meeting with the loss adjuster and their accountants should be an open dialogue where you discuss the impact that the loss has placed on your business and the items that you expect to include in your claim. The adjuster or accountant can identify the documents that they would like to review to support your claim. Since there are no exact documentation requirements in the policy, it is important to have this meeting with your insurance adjuster early in the claim process. You should note the documents requested and review them back to confirm that you have recorded the correct documents, and the correct time periods.

Documents typically requested by the insurance company in the initial meeting include:

- * Monthly Profit and Loss Statements
- * Monthly and Daily Production Reports
- * Monthly Inventory
- * Monthly Cost Accounting Reports
- * Invoices and Purchase Orders

For businesses who do not receive annual audit opinions, insurers will generally request state and federal tax information and copies of all monthly bank statements. Expect to be asked for historical production, income, expense and sales records. The claim auditor may ask to verify entries in the ledger to ensure completeness of the reports.

Each industry or business is unique. For manufacturing operations, it is important to provide the typical production days and actual production days, noting normal maintenance or downtime. For retail operations, markups and markdowns will be analyzed along with inventory turnover and inventory obsolescence. Location of the business is also significant; compare the income stream of a restaurant at the Outer Banks, a West Virginia ski resort and a local gift shop. Most insurers will request six months of historical figures. However, if the information requested does not demonstrate the full loss or omits the two to three busiest months, it is up to the insured to provide the documentation and explain why it is significant. Historical sales that are on an upward trend provide excellent support for using a growth trend in your sales calculation. The key in developing a lost sales projection model is to present an analysis that is consistent with the anticipated business environment during the loss period.

In large claims, most insurers retain their own accountant to evaluate and adjust the claim. A company should expect someone who specializes in these types of claims and is knowledgeable in both accounting and the application of costs to the policy endorsements. You should expect a high degree of audit skepticism coming from this individual. You should also expect that they would handle your claim within the general rules that govern auditing standards.

The following tips will help the process run smoothly in the days both preceding and following a disaster:

1. Back up significant financial documentation electronically to an off site location daily.
2. Notify all insurers immediately following loss. If policies were lost in the fire or disaster, notify your agent or broker of the loss and request copies of all policies.
3. You should receive a call from an adjuster assigned to your claims within 24 hours. Request an in-person initial meeting with your adjuster if possible. In the initial meeting, give the adjuster or his accountant an overview of your operations and business so that they can better understand your company and business. Identify one key contact within your company to deal with the insurer. Your company representative should make sure that someone from your claims team is involved with any meetings that take place with the insurance company's accountants or adjuster.
4. Use your accounting system to capture extra costs. Policies usually contain coverage for extra expenses that would not otherwise have been incurred. Create accounts that are used only for extra costs relating to the tragedy. Since you will need to show that these costs are incremental to the disaster, contemporaneously record the reason that the cost was incurred, and why this was caused by the disaster. This should be done immediately because many costs incurred in the first 24 to 48 hours following the loss are never accounted for and therefore, never recovered.
5. Hire outside help. Retain your own professional and independent accountant to help you prepare the claim and anticipate questions from the insurer. Some policies will pay for the cost of documenting the claim. When losses are high, you should match the carrier's efforts with your own expertise. An experienced claim consultant will be able to:
 - * Provide a skeptical and independent view of what is reasonable
 - * Advise you as to what is allowable, and ensure that your claim is as large as permissible
 - * Avoid wasted time and effort from a claim that does not comply with policy restrictions
6. Use Multiple Approaches. Claims can be prepared based on (i) specific identification, and (ii) trend, statistical and other analyses. By looking at your claim from multiple perspectives, your business is more likely to address all claim amounts, and have a more comprehensive and convincing analysis.
7. Prepare a well-documented comprehensive claim, which includes source documents that are consistent and referenced.
8. Include insurance policy classification of the amounts claimed and provide descriptions of the expenses in the claim.
9. Ask for a written document request by the insurer's accountants to avoid confusion over what has or has not been requested.
10. Maintain a log of information provided and the date on which it was provided during the process to avoid resending information that has already been provided.
11. Set a schedule. Ask for a commitment to a time frame when certain claim analyses will be complete.
12. Get an advance. Negotiate a funding arrangement that advances cash to allow your business to start its recovery. Insurers will generally agree to such advances. However, make sure that these advances are not a final settlement of claims and understand that these advances will be deducted from the total settlement amount unless you specifically agree otherwise.

The future will likely hold a few surprises, some of which may be unwelcome, but following these guidelines can make your recovery and return to profitability quicker and smoother.



Collecting Money Judgments

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Collecting a money judgment awarded against an uninsured party in civil litigation can be difficult. Fortunately, West Virginia, like all states, provides the prevailing party a number of tools, which, if used effectively can simplify and streamline the process involved in collecting money to satisfy a judgment. Most are available for a small fee, which can be added to the amount of the judgment. It is wise to remember that not all judgments can be collected, as certain individuals have no assets and are often labeled “judgment proof.”

The Basics

In general terms, a judgment is a written court order directing one party to pay another a certain sum of money in damages. The party that obtains a judgment in their favor is called a “judgment creditor,” and the party against whom a judgment has been rendered is called the “judgment debtor.” In West Virginia, a judgment creates a judgment lien on all real property owned by the judgment debtor in the county in which the judgment was rendered. The judgment lien lasts 10 years, and is renewable under certain circumstances for additional ten year periods. In some circumstances, real property may be sold to satisfy an unpaid judgment.

Abstracting the Judgment

A judgment creditor may obtain an Abstract of Judgment from the circuit clerk of the county in which a judgment is rendered. The Abstract is essentially a summary of the judgment, which includes costs and post-judgment interest into the total judgment amount. A judgment creditor can record the abstract with any of West Virginia’s county clerks. Recording the Abstract provides notice to all parties, including bona fide purchasers, that a judgment lien has been placed on specific real property.

Writ of Execution

A judgment creditor may obtain a Writ of Execution from the circuit clerk of the county in which a judgment is rendered. The Writ is a lien on all of the judgment debtor’s personal property located in the county where the Writ is issued, and can be abstracted and recorded.

The Writ directs the sheriff of a particular county where the judgment debtor is believed to have personal property to seize the judgment debtor’s personal property in an amount to satisfy the judgment, plus costs and interest. The seized property is subsequently sold by the sheriff at public auction, and the proceeds, minus the sheriff’s costs, are turned over to the judgment creditor. If after the sale, an outstanding balance on the judgment remains, the sheriff can seize and sell at auction additional items of personal property until the entire judgment amount is satisfied.

In the event the sheriff cannot locate the judgment debtor’s personal property, the Writ is returned to the judgment creditor as unsatisfied. An unsatisfied Writ is a prerequisite to the judicial sale of a judgment debtor’s real property. The unsatisfied Writ also extends the 10 year period of a judgment lien up to an additional 10 years.

Suggestion

A Suggestion is served upon companies or individuals whom the judgment creditor believes owes the judgment debtor money; for example, rent payments or payments for goods. The Suggestion also can be directed at banks where the judgment creditor believes the judgment debtor may have money or other assets on deposit. Essentially, the Suggestion directs the party receiving it to pay all sums it owes the judgment debtor directly to the judgment creditor up to the full amount of the judgment.

Suggestee Execution

A Suggestee Execution is directed to the judgment debtor's employer, and directs that party to pay the judgment debtor's wages directly to the judgment creditor every 90 days until the judgment has been satisfied. Federal law exempts from a Suggestee Execution a portion of the judgment debtor's wages equal to 30 times the federal minimum wage.

Deposition in Aid of Execution

Under certain circumstances, a judgment creditor can ask the court issuing the judgment to order the judgment debtor to appear in court where the judgment debtor is questioned under oath about financial assets. This may assist the judgment creditor in determining what, if any assets the judgment debtor has that can be used to satisfy a judgment.

Conclusion

A judgment creditor should seek the advice of counsel as to how to proceed in a particular situation. Certain counties have different administrative procedures that can impact collection procedures. Knowing how and when to proceed can minimize a judgment creditor's incurred costs and maximize the amount and speed in which a judgment is collected.



Settlement of Workers' Compensation Claims Becoming More Common

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Over the years, it has become increasingly beneficial, at least in some circumstances, for employers to settle contentious Workers' Compensation claims. Just a few short years ago, settlement of Workers' Compensation claims was extremely rare because the parties could not settle the claimant's right to receive further medical treatment. Medical costs are often more significant and have more impact upon the employer's insurance premium than the indemnity benefits that the claimant may receive. Thus, without being able to settle the claimant's right to medical benefits, the parties to a Workers' Compensation claim in West Virginia rarely even attempted to negotiate settlements.

Over time, this has changed. In 2003, the Legislature enacted sweeping Workers' Compensation reforms, one of which was to permit full and final settlement of claims, including medical benefits. [1] This made settlement considerably more attractive to employers, since they could avoid the costs of litigation and could add a degree of predictability and control over the costs of a given claim or claims.

Even at that time, however, settlements, once reached, had to be reviewed and approved by an administrative law judge. This process was time consuming, required an expenditure of legal fees, and was somewhat unpredictable, as judges were charged with ensuring that the agreement was fair to the claimant...a subjective endeavor to say the least.

Under our newest law and procedure, settlements are no longer reviewed or approved by the Office of Judges. The parties are free to negotiate and enter into any settlement, so long as it is not fundamentally unfair to a claimant who is not represented by counsel. This gives the parties great flexibility in establishing a mutually acceptable compromise of any claim or claims.

Furthermore, at least in the context of litigated claims, wherein the settlement will be negotiated and the agreement prepared by the counsel retained by BrickStreet to represent your business in the claim, you will not incur any legal fees in reaching and finalizing the settlement. These and other changes have greatly increased the number of claims being settled as compared to pre-2003.

Settlement, of course, is not always a good option. The claimant may demand more to settle the case than the claim is actually worth. In addition, you cannot settle an employee's right to file future claims, and as a result, many employers are wary of settling claims when the claimant is still employed and the claimant could suffer or allege additional injuries, leading to another claim or claims in the future.

Naturally, for insured businesses, the ultimate decision regarding whether or not a claim or claims will be settled rests with the insurance company, subject to the policy's terms and conditions. Employers, however, are often in a very good position to identify an opportunity for an economical and mutually beneficial settlement. Employers are usually in touch with their employees on a frequent basis and in a good position to understand the claimant's unique circumstances, and thus employers can help identify when a claim might be a good candidate for settlement. If you have a claim or claims that you feel might present a good opportunity for a beneficial settlement, you should consider bringing this to the attention of the claims adjuster and/or your counsel.

If you have any questions about the claims settlement process, or any other issues you may have with regard to Workers' Compensation, please do not hesitate to contact us.

[1] The parties still may not settle the claimant's right to medical benefits in non-orthopedic occupational disease claims, such as claims for occupational pneumoconiosis.