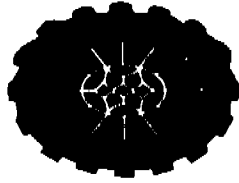


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CREATIVE RISK
MANAGEMENT INC.

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An Aggressive Approach to Reducing Premises Liability

Premises liability has been a concern for property owners since the crumbling of the walls of Jericho. In 1902 in *Hupfer v. National Distilling Co.*, The Supreme Court of Wisconsin considered an action involving the death of Mr. Simon Hupfer following injuries sustained when he fell into the defendant's slop vat. The court found that the owner of the property was guilty of negligence.

Today, property owners have much more to worry about than unfenced vats and penalties are considerably higher than the \$1,000 assessed in *Hupfer*.

In 1993, a female tenant sued an Atlanta apartment complex for failing to provide her a safe place to live. The apartment owners settled out of court for \$530,000.

Negligence is the basis for most premises liability suits. Negligence is carelessness. When a person is invited to come onto the property, they may hold the owner responsible for any loss or damage caused by a defect, *whether or not the defect is known to the owner or tenant*. There is an obligation to inspect, correct or warn of hazards of all types. This includes security hazards. For example, a hotel may be liable for failing to warn a guest of a specific prior crime.

The American Trial Lawyers Association has even set up an *Inadequate Security Litigation Group* to track cases involving injuries arising from the inadequacy of security practices.

An aggressive approach to premises liability is a necessity. While there are no set rules that define specific actions, the following guidelines will reduce the likelihood of litigation:

- It is the duty of owners to make tenants and customers aware of prior crime on premises. Prior hostile events are a primary consideration in predicting the probability of security problems.
- The court will consider management's attitude toward safety and security. The best video cameras, locks and lights are only as good as the manner in which they are maintained.
- Always take any notice of a defective condition seriously. In *Frances T. vs. Village Green Owners' Association*, the plaintiff asked the association to install lights in her courtyard because her condominium had been burglarized. The board of directors voted not to install lights. The plaintiff was subsequently raped. The court ruled that individual directors could be found liable if they "specifically authorized, directed, or participated" in the negligent acts or did not act to prevent injury.
- Owners who allow violations of statutes, codes and regulations to occur will be held strictly accountable for their actions. This includes violation of the National Fire Protection Association Codes. The fire marshal should be consulted to identify the requirements of each property.
- Education programs should be initiated to ensure that all employees are familiar with laws and ordinances affecting interaction with clients and members of the general public. In a recent case, a

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patron of a nightclub stepped on another patron's toe. Words were exchanged and the bouncer ejected the offender using his martial-art skills. The offender suffered a fractured skull and was in a coma for two weeks. The nightclub's insurance carrier refused to defend the nightclub because the insurance policy excluded "claims arising out of assault and/or battery." This illustrates the importance of using minimal force.

- Plans should be developed for power outages, fires, bomb threats, inclement weather, civil disturbances, and hazardous material spills.

The cost of a proactive review of security measures will be insignificant when compared to potential losses. Many areas can be corrected with minimal financial costs by the proper application of policies and procedures.

How and When Will The American with Disabilities Act Affect You?

By Sandy Arp

Our Government has committed itself to the strict enforcement of the Americans with Disabilities Act. The ADA includes two major parts that affect private businesses:

TITLE I covers employment practices. It prohibits employers from discriminating against qualified individuals with disabilities. (*See Solutions, December 1994*)

TITLE III targets facility accessibility of any operations open to the public. It mandates that disabled individuals cannot be denied goods, services, facilities or advantages of a public accommodation because of their disabilities. This requirement includes removing any communication barriers and providing goods and services in an integrated setting.

Title III states those businesses that service the public or have offices open to the public *must* remove barriers where "readily achievable." The Act interprets this as eliminating any barriers that can be removed without much difficulty or expense. Standards of "difficulty" and "expense" have not been clearly delineated and court action will most likely test their meaning.

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Under Title III, *all* newly constructed or altered facilities whether "commercial facilities" or "public accommodations" **must** comply with all Title III requirements *regardless of the cost*. These requirements number 76 pages and include guidelines encompassing exterior routes, parking, curb ramps, entrances, ramps, stairs, elevators, doors, drinking fountains, toilet rooms and bathrooms, public assembly areas, storage, alarms, public telephones, seating and tables, automatic teller machines and dressing/fitting rooms.

What follows is a sample of the major provisions of these guidelines:

- Establish at least one accessible route from public transportation lines, accessible parking spaces, passenger loading zones, public streets or sidewalks to the building entrance.
- A minimum of 50% of all public entrances must be accessible meeting all specific requirements.
- Storage areas such as lockers, retail shelves and racks, checkout counters, etc. must be accessible as defined by specifications.

Failure to comply with Title III guidelines can result in civil penalties including fines of \$50,000 for the first offense and \$100,000 for the second offense.

The Americans with Disabilities Act affects you and your business *now*. As a responsible business, you need to develop an Action Plan for compliance with Title III. You can begin your plan with these important steps:

- Prioritize any renovation needs
- Determine if any renovation will be necessary before leasing or purchasing any properties
- Analyze any costs associated with planned moves or expansion
- Review customer access to your facility
- Since the requirements of Title III can result in substantial increases in reconstruction costs after an insured loss, make sure you have Ordinance or Law coverage. (*See Solutions, February 1995*)

By keeping well informed and evaluating your premises you will be well equipped to make wise business decisions and plan for compliance with the Americans with Disabilities Act.

(Sandy is a Commercial Account Representative. She has been with The McLaughlin Company since 1989 when she moved here from Michigan. Sandy and her husband Hobert live in Woodbridge, Virginia with their two daughters, Megan and Amanda.)

*The following is a condensation of an article which appeared in the February 1994 issue of **RISK MANAGEMENT***

Flexible Benefit Programs

The origin of benefit plans can be traced to 1794, when the first profit sharing plan was introduced by Albert Gallatin in his glassworks in Pennsylvania. The first private pension plan was started by American Express Company in 1875. In 1910 Montgomery Ward created the first group life and accident insurance policy. Today the benefits scene is complex. Employers are legally required to provide certain benefits such as Social Security, unemployment compensation, and workers' compensation. Other benefits such as health and dental coverage and life insurance and pensions are voluntary. With benefits costs increasing each year, employers face the task of balancing benefits costs and the needs of their employees.

One of the relatively new options is the flexible benefit plan that allows employees to choose between various benefits that are tailored to meet their individual needs.

Flexible benefit plans are designed to offer employees several levels of benefits in a number of categories including medical, dental, life insurance and long term disability. The company provides employees with a predetermined amount of benefit dollars they can allocate to their desired level of coverage. Usually, a before-tax

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plan is established so that any additional coverages chosen by the employee can be paid with pre-tax dollars.

Flexible Benefit plans make sense for a number of reasons. One primary benefit is cost containment. Costs are reduced because a portion of the benefit cost is shifted from the employer to the employee and also because employees elect to participate in more cost-effective plans. Flexible benefit plans are also attractive because of the diversity of the options available, the ability to pay for plan options with pre-tax dollars and the option to accumulate cash in flexible spending accounts on a pre-tax basis for child care or elder care benefits.

There are disadvantages as well. For employers, a principal disadvantage is the cost associated with administering the plan. For employees, the increased responsibility that comes with flexible benefits programs can be a disadvantage if workers do not make the effort necessary to learn about the various benefits being offered.

Employers should take care that giving their employees the final decision on benefit choices does not lead to inadequate coverage. Some employees might opt for an inadequate level of benefits or refuse coverage entirely in favor of taking an annual cash payment. This problem can be avoided by requiring each employee to select at least a basic level of coverage or be able to provide documentation that they are covered by a spouse's insurance plan.

Flexible benefit plans appear to be a growing trend in the employee benefits arena. Although they offer many advantages to both employers and employees, the plans must be monitored to ensure that each employee received enough information to make informed coverage choices.

TOLL FRAUD UPDATE

In the December 1994 issue of **SOLUTIONS** we alerted our readers to the risk of financial loss resulting from theft of long distance services. Unfortunately, we recently learned another insured has become a victim of **TOLL FRAUD**. Our client suffered a loss in excess of \$50,000. It appears the hacker gained access through a maintenance port. **Contact your vendor today and request that all maintenance ports be deactivated immediately!**

From time to time, Ted Pappas just has to get things off his chest. In the following article, Ted shares the frustration he experienced during the adjustment of a recent fire loss.

Leased Equipment: Uninsured Total Loss

If you lease computers, telephones, photocopiers, postage machines, furniture, medical apparatus or contractors equipment -- *pray you never have a loss!!*

You list your equipment. You agonize over its value. You buy special insurance for it and pay a higher premium because the coverage is supposed to be broader.

Then you have a major loss and the insurance company pays off the lease and leaves you with toasted computers and fried furniture....



...HAVE A NICE DAY!

What about the promise of insurance to make you whole... to bring you back to the financial condition you were in immediately prior to your loss? True -- but read your policy!

This is what the general policy form says about *leased equipment*: "...however our payment for **loss**...will only be for the account of the **owner** of the property." The lessor **owns** 100% of the property, but his **loss** is limited to the value of the buyout of the lease. You **own** nothing. While you are not left with any debt, you have lost the future useful life of the property beyond the lease and that loss is uninsured.

It is small comfort to know the insurance company would have adjusted the same loss differently if you had owned the equipment outright, or purchased it under an installment sale and not a lease purchase agreement.

What makes this situation even more frustrating is that differences in the knowledge and experience levels of insurance company claims adjusters result in variations in the manner in which losses of this type are settled. Much of the confusion results from the fact that the limitation on leased equipment is not in the exclusions --

it is in the valuation section of the policy. We even had one underwriter insist the coverage trigger was *legal liability* meaning that the company was only obligated to pay if the insured's negligence was responsible for the loss. This was an interesting approach: "If the loss resulted from the insured's negligence, we will pay off the lease. If it is an accident there is no coverage." Wrong!

Many insurance company underwriters are unaware of this limitation and may deny there is a problem until confronted with a loss that a claim adjuster will not pay.

There is a problem and the insurance industry has no adequate coverage form to correct this settlement inequity. A lease is a favorable financing arrangement and an insured should not be penalized for utilizing this method.

How can you remedy this problem?

- You can specifically describe each lease and schedule every item and assign a specific value to it. At each anniversary, it will be necessary to reevaluate the replacement cost of the scheduled equipment or furniture.

or

- You can add a manuscript endorsement.

The important thing to remember is that it takes action on your part to ensure that you do not suffer a "leased equipment: uninsured total loss."

If you think you have a problem -- call us. We will help you make sure your interest in leased equipment is insured. This is just another of the services we provide for our clients.



Erin Mullican Attains ARM Designation

In February, Erin Mullican became The McLaughlin Company's newest Associate in Risk Management. Erin earned the ARM designation by completing three thirteen week college level courses in Risk Management. At the end of each course, she had to demonstrate her understanding by passing a stringent national examination. The attainment of this designation represents a substantial amount of time and effort. Congratulations, Erin!

Few areas generate more questions from employers. Each time an employee rents a vehicle, questions arise regarding who is insured, limits of liability, valid licenses, coverage on family members and the ubiquitous Collision Damage Waiver. In the following article we will focus on the troublesome question of whether you accept or reject the Collision Damage Waiver.

Rental Car Damage Reimbursement

The car rental companies do not provide insurance on physical damage to their vehicles. They retain that exposure. It is euphemistically called "self-insurance." What the rental car companies offer to the renter is a Collision Damage Waiver (CDW). If you elect this option, the rental company will agree not to make you reimburse them for damage to their auto or the lost rental income while the auto is being repaired. The fee for this option runs between \$8.95 and \$14.95 a day.

On an annualized basis the fee would range from \$3,000 to \$5,500 -- which is, of course, outrageous. But when confronted with the prospect of reimbursing the rental company for high repair bills and the cost of the lost rental income, many renters accept the CDW.

A Personal Auto Policy will generally cover the repair of rental vehicles.

In order for a Commercial Auto Policy to respond to this type of loss, a symbol "8" (Hired "autos" only) must appear in the *Comprehensive Coverage* and *Collision Coverage* blocks on the declarations page

If there is no symbol "8" in those boxes there is no coverage.

If the name of the employer does not appear on the rental contract, the employer's insurance will not automatically respond. (The qualification "automatically" is used because an employee may sue an employer to obtain coverage by showing the accident did actually occur in the course of employment.)

If the employer's name appears on the rental contract, but the employee is using the rental auto for personal or vacation purposes -- such as adding vacation onto a business trip in order to get an over Saturday night air fare-- the employer will be covered, but the employee will not. Why? The activity is not in the course of

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employment and the insurance company would have the right to subrogate against the employee's personal auto insurance.

Can these situations be rectified? Yes, but it will take a properly endorsed Commercial Automobile Policy and a firmly stated and communicated policy on the use of automobiles. In addition, some employers have been successful in negotiating CDW's with rental car companies. Under some circumstances, rental car companies have agreed to limit the liability to \$2,000. While these concessions are becoming more infrequent, they are still available if the employer agrees to make a commitment of as much as \$25,000 a year in rental contracts. One of our insurance companies extends a program to its agents that gives us a substantial discount on our car rentals and CDW free of charge.

This is a very broad overview of the problem and we will be happy to work with you to develop a company statement on the use of rental autos and make sure your Commercial Automobile Policy properly responds to that statement.



In the next issue of

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Many people underestimate the complexity of their own personal insurance policies. The homeowners policy is a mini-package policy and your personal auto policy is in many ways more complex than a commercial auto policy. We will devote the next issue of SOLUTIONS to answering questions that involve personal insurance policies including:

- home offices
- coverage on property of students living away from home
- boat rentals
- jewelry limitation
- personal injury

If you have personal lines questions which you would like us to answer in this special issue, fax them to us at 202-857-8355 or e-mail them to SOLUTNS@AOL.COM