In August 1958, rockabilly artist Eddie Cochran released "Summertime Blues." The subject of the song lamented about having to work late all summer, preventing him from seeing his girlfriend or enjoining the typical carefree activities we associate with summer. While we all carry this idyllic notion from childhood that summer should be carefree, no one knows better than insurance agents and brokers just how fraught with peril summer activities could be for your insureds. With potential exposure to your insureds from claims, comes related errors and omissions exposure to your agency or brokerage if those claims are not covered. In this issue of The E&O Report, we highlight certain risks your insureds could face and the potential E&O exposure that might arise.

The Risks

While warm weather months carry many of the same risks that exist throughout the year, they are also characterized by an increase in activities most often associated with the outdoors and by nature those activities that are highly risky.

Pool parties with invited and non-invited guests, barbeques – cookouts, backyard open fire pits, fireworks (yes even sparklers), trampolines, archery, lawn darts, boating, waterskiing, Jets Skis and all water-related activities and crafts pose the risk of property damage and catastrophic injuries and claims. Also associated with the warmer weather are home improvements, which can result in significant property damage losses.

Are these activities and risks covered under existing policies? Are the coverage limits high enough? Do your customers need standalone policies? For example, Jet Skis, jet boats or boats might require a standalone policy depending on their length, designation or engine horsepower. Are pools excluded? Do the limits adequately cover claims that could arise from a pool accident when a wrongful death occurs?

Each one of these risks is unique. However, they present potential exposure for your customers and, in turn, possible E&O exposure for your agency or brokerage if there are uncovered claims.

The Source of E&O Exposures

Your possible E&O exposure from the above examples comes from the same place as all other E&O claims. These are currently and wrongly argued by the plaintiffs’ bar as what they call the “Knew or Should Have Known” exposure. We have written on many occasions about the troubling law on policyholders asserting a “special relationship” as a way of attempting to hold a broker or agent liable for an uninsured claim. A simple way of thinking about what that means in practice is the idea that a broker or agent “Knew or Should Have Known of the Risk” and either obtained coverage for the risk or at the least advised the insured of the need for such coverage. We are increasingly seeing this type of claim raised. What makes it somewhat insidious in the context of summertime risks is that there is a much greater chance a broker or agent is either generally aware or had some firsthand knowledge about the risk at issue.

Policyholders uninsured for a claim/lawsuit look back at their interactions with their broker or agent and put it all in the E&O context. Say you are at a pool party, on a client’s boat or talked about the client’s son on his Jet Ski, etc. Even if the conversation had nothing to do with insurance or procurement, you could unwittingly present the opportunity to raise the “Knew or Should Have Known” argument and with it dire exposure.
Case in Point
Several years ago, a 16-year-old was operating a 2002 Sea-Doo Bombardier jet drive boat, model GTX-DI, behind his home in Mill Basin, Brooklyn, when he accidently struck and killed a 17-year-old, also on a Jet Ski. A wrongful death action was filed, and the defense and indemnification was tendered to the homeowner’s carrier. Our client was the broker for the parents of the operator who assisted in the procurement of the homeowner’s policy on which the tender was made.

The homeowner’s insurer denied coverage, citing the “large watercraft” policy exclusion that excluded “coverage for any damages arising out of the ownership, maintenance, use, loading, unloading or towing of any watercraft 26 feet or longer or with more than 50 horsepower…” There is a difference between Jet Skis and jet boats, and the carrier noted in support of its disclaimer that a 2002 Sea-Doo Bombardier, model GTX-D was powered by a 130-horsepower engine, well in excess of the 50-horsepower limitation contained in the insurance policy.

When the broker was sued for failing to procure the correct coverage, it was alleged a duty to procure or at least provide advice arose when the broker was at the house of the insured for the purposes of getting the homeowner’s application signed. At that time, the broker saw the dock with the jet boat moored behind the house. This is the “Knew or Should Have Known” argument mentioned above. While the case was ultimately decided in favor of the insurance broker, it presaged a template of assertions to come.

Conclusion
At this point, you are probably asking yourself, “What to do?” The answer requires the consideration of the law as well as an accounting of costs, manpower and office efficiency. That being said, as we always advise, document as best you can offers of coverage options, rejections of coverage or increased limits and information customers provide you concerning their exposures. Email or written correspondence is preferred. Try to follow up telephone calls and/or personal meetings with written confirmations. Remember to always be careful and precise in the language you use.

Understand that nothing will prevent you from being sued for failing to procure coverage if an insured so desires. However, the prudent insurance agent or broker who has properly documented his/her file should have the ability to successfully defeat the E&O claim. Maintaining your files and all communications, including emails, has repeatedly proven to be key in a successful defense against an E&O claim or lawsuit involving summertime or other seasonal activities.

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