

Tech Talk: Tech E&O Claims

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Tech E&O Insurance – the Basics:

- Insuring “tech” companies for two general types of risks:
 - Another’s financial loss resulting from the failure of the Insured’s tech product to perform as intended or expected;
 - Another’s financial loss resulting from a negligent error or omission in the course of the Insured’s performance of tech services for another.

Tech E&O Insurance – the Details

- “Product” – includes hardware and software
- “Insured Services” will include:
 - The development, design, installation, modification or servicing of computers, computer hardware, firmware and/or software, computerized networks or similar electronic information systems or Internet services for a fee,
 - The provision of computer system or network related consulting, analysis, programming, training or support for a fee, or

Tech E&O Insurance – the Details (Cont.'d)

- The sale, leasing, licensing, distribution or installation of computers or computer hardware, firmware and software,
- A “catch-all” provision - any other computer related services provided for others.

- Insurance applies to “wrongful acts” defined as:
 - Any actual or alleged negligent act, error or omission committed solely in the performance of or failure to perform INSURED SERVICES.

Tech E&O Insurance – Other E&O Policy Aspects

- Likely “claims made”
- Defence and Defence Costs – it is the allegations that matter
- Indemnity

Who Needs Tech E&O Insurance?

- Programming companies/code-writers:
 - Software developers
 - App Developers
 - Game Designers
- Tech manufacturers/vendors
- Service companies
 - “Geek Squads” – installers, repairers, trouble-shooters
- Anyone whose customer demands it

Typical Kinds of Problems

- An allegation that Program/App does not achieve what was intended
- Programming bugs: intermittent operation, inconsistent, down-times
- Installed Firewall too easily hackable

Distinguishing Between Tech E&O Insurance and Cyber

- Cyber policies typically focus on Data Breaches. Tech E&O Insurance Policies can certainly overlap here but that's not their focus (i.e., a resulting data breach is just one of many ways a program/app can fail)
- “Hybrid” policy: Cyber policies do cover liability to third parties for data breaches but also first-party aspects: indemnifying Insured for costs of dealing with the breach

- Cyber policies typically won't cover liability arising from Insured's products or services
- We expect Cyber Defendants will claim-over/subrogate against Tech E&O Insurance policyholders

Distinguishing Between Tech E&O Insurance and CGL

- Both are third party liability policies but:
 - CGL policies are typically “occurrence” rather than claims made
 - CGL covers bodily injury and property damage, Tech E&O Insurance policies don’t (or exclude them)
 - CGL and Tech E&O Insurance policies exclude each other: CGL’s typically exclude “impaired property” claims, whereas these are a feature of Tech E&O Insurance claims

Current Claims

- “Installation” cases: small-ish office networking, firewall, accounting issues
- Counterclaim against unpaid account
- Product not performing as intended – computerized heat regulator – causing fluctuation in a building temperature – customer’s tenants short-paying rent or leaving building

Future Claims

- Cyber (i.e., data-breach) Spill-overs – passing the blame around
- Productivity and Down-times – e.g., a retailer being down for Cyber-Monday
- Home Security
- Cars: Warnings, auto-braking, air-bag deployment, self-driving
- “Alexa” – everything

Notes on Knowledge and Skillset for Adjusting/Claims Handling

- Tech E&O Insurance Policies are also known as “Technology **Professional Liability**” Policies. But where are the professionals? No college degrees, no governing bodies, no regulators, licenses, no standardized SLA contracts (or no contracts at all), no mandatory note-taking or document preservation ...
- Understanding the Intended Functioning of the Product/Service
- Basic Understanding the Technical malfunctioning of the Product

Adjusting/Claims Handling (Cont.'d)

- Contract v. Negligence (and concurrent liability)
- Corporate Veil issues
- Standard of Care-based Defences
- Causation
- Contributory Negligence – customer and downstream customers misusing or failure to properly follow instructions
- Comparative Negligence – other contributors to the loss (tech or otherwise)
- Identifying Experts – Where to find? How to ‘qualify’?

“Take-Aways”

- Tech E&O Insurance arrived, and is a growth area
- Tech E&O insurance fills in gaps in CGL and Cyber liability policies
- These claims involve different kinds of damages than CGL policies, and different kinds of practitioners than standard professional liability claims
- Claims/cases still relatively rare, but the underwriting is now expansive – best to be prepared for a volume of these claims

The *Cannabis Act* (Bill C-45): What Insurers Need to Know

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Introduction - The *Cannabis Act*

- Coming into force on October 17, 2018
- The *Cannabis Act* allows adults to possess up to 30 grams of cannabis in public and to grow up to four cannabis plants at home
- Minors prohibited from possessing more than 5 grams of cannabis, and are prohibited from growing cannabis plants
- Unlawful importation/exportation of cannabis is prohibited, as is the sale of cannabis to minors, and the unlawful sale of cannabis generally
- Three separate penalty regimes: 1) Criminal sanctions; 2) statutory offences (imprisonment and/or fines); and 3) administrative monetary penalties. Provinces will be left with considerable jurisdiction to enact their own complimentary cannabis regimes
- In Ontario, minimum legal purchase and possession age will be 19. Proposed changes to provincial legislation by the current Ontario government mean that cannabis may be sold in private retail stores, while the province will handle online sales

Introduction – What this Means for Insurers

- Many new challenges for insurers, now faced with re-evaluating a variety of risks in order to adapt or create new products
- Insurers are doing so without the benefit of sufficient or reliable data
- Federal and provincial regulations still being drafted and implemented
- This may mean more thorough risk assessments at the time of application and/or renewal

Life Insurance – “Smoker” vs “Non-smoker”

- The underwriting process for life insurance is changing
 - Cannabis smokers traditionally categorized as “smokers”
 - Now increasingly considered “non-smokers”
 - Lower premiums
 - “Non-smoker” designation also applies to medicinal users
- The Canadian Life and Health Insurance Association recently stated that Canadians who smoke two joints of cannabis or less per week should not face higher life insurance premiums
 - For example, BMO has extended non-smoker rates to those who fit within this category



Health Insurance – The Current Climate

- Certain insurers now beginning to offer medical cannabis as part of their health insurance (e.g. Sun Life)
 - Requires an additional premium, and only extends to a handful of conditions as a last resort
 - A cautious approach remains the norm across the industry, with widespread reluctance in the face of limited research.
 - This informational deficiency will likely change with the growth of the cannabis industry
- Green Shield Canada, Great-West Life and Manulife all indicated they are considering or planning coverage



Health Insurance – Proceed with Caution

- Important for insurers to proceed with caution as the cannabis industry and related industries evolve
 - Several related industries significantly under-regulated, making the current environment something of a Wild West
 - Unclear whether medical cannabis increases prescription drug abuse (conflicting studies)
 - Prescription of cannabis often occurs under minimal medical scrutiny (e.g. Skype consultations, online applications)



Property Insurance – Pre-*Cannabis Act* Policy Interpretation

- Property insurance potentially to undergo significant change in light of cannabis plants being allowed in homes
- Pre-*Cannabis Act* case law on interpretation of homeowners' policies in the context of medicinal cannabis
- *Stewart v TD General Insurance Co* (Ont Div Ct)
 - Coverage clause in question read: “We insure the contents of your dwelling and other personal property you own, wear or use while on your premises **which is usual to the ownership or maintenance of a dwelling**” (emphasis added)
- *Pietrangelo v Gore Mutual Life Insurance Co* (Ont Sup Ct)
 - Policy exclusion in question read: “Nor do we insure direct or indirect loss or damage, in whole or in part... to dwellings or detached private structures or unscheduled personal property contained in them, **used in whole or in part for the cultivation, harvesting, processing, manufacture, distribution or sale of marijuana**... regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.” (emphasis added)

Property Insurance – Future Implications

Stewart v TD General Insurance Co

- Will “usual to the ownership of a dwelling” change in light of increasingly common use and possession of cannabis in dwellings post-*Cannabis Act*?
 - Hypothetically, every Canadian adult could maintain cannabis plants in their dwelling
 - Increased risk of theft, vandalism, fire damage, water damage, electrical damage, etc.

Pietrangelo v Gore Mutual Life Insurance Co

- Given the impending increase in homes containing cannabis plants, we foresee two potential outcomes:
 - Increased amount of claims denied under similar policies (or extended coverage?)
 - Consumer demand will force a modification to cannabis exclusions



Property Insurance – Future Implications (continued)

- Different risk factors, such as number of plants and proximity to fire hydrant
- Wording of coverage and exclusions will also need to be revised
 - Where personal cannabis cultivation in private residences is permitted, it will no longer be covered by the “criminal activity” exclusion.
 - Insurers will have to determine contours of the “innocent insured” exception
- Insurance contract should include clause setting out nature of the control that insurers exercise over clients’ statements regarding their personal cannabis cultivation (e.g., verification by telephone or in-person inspection).
- Insurers may also want to add clause requiring insured to implement and comply with certain security measures for their facilities

Commercial Host Liability - Dispensaries and Clubs

- Dispensaries: in addition to the normal insurance coverage a storefront business might consider (i.e. sewer backup, business interruption, and extra expense), dispensaries might also consider crime coverage
 - Dispensaries are not licensed to **grow** cannabis – they cannot get product liability insurance for the products.
- Cannabis consumption lounges, or “clubs”, are likely to be exposed to commercial host liability, similar to bars and restaurants with respect to liquor, if jurisdictions choose to allow clubs
 - Not uniform across Canada (e.g. regulated in Vancouver vs repeatedly shut down in Toronto)
- Liability coverage also important where club allows customers to sample different products, in case customers fall or hurt themselves as a result of intoxication



Commercial Host Liability – Dispensaries and Clubs (continued)

- Clubs will typically be looking for premise liability to satisfy their landlords and basic equipment coverage. Some clubs may also pay additional premium for full CGL coverage or stock coverage
- Currently, limited insurance options and limited coverage available and such coverage is primarily through specialties markets
 - number of insurers offering coverage for dispensaries and landlords with dispensaries/cannabis club tenants is limited. The premiums for such coverage can be sizeable, but over time, as insurers get more comfortable with such businesses, the cost of coverage will likely drop.



Automobile Insurance – Proving Intoxication

- Difficulties already exist for proving intoxication with respect to under-tested substances
- *Venkataya v Insurance Corp of British Columbia* (BC Sup Ct)
 - Insurance action for the recovery of the value of a vehicle that was written off in a single-vehicle accident
 - Insurer sought to deny coverage on two grounds: 1) insured was intoxicated; and 2) insured misrepresented that he had not taken drugs or alcohol in 12-hour period prior to the accident
 - Immediately prior to accident, insured had been drinking Kava, a tea-like drink known for inducing euphoria and sleep, and relieving anxiety
 - Court rejected insurer’s argument and expert evidence that Kava is a psychoactive drug
 - Notwithstanding substantial subjective signs of intoxication (e.g. vomiting, slurring words), court found subjective evidence insufficient



Automobile Insurance – Implications for Cannabis

- Like Kava, cannabis poses difficulties with respect to objective evidence
 - Difficult to present reliable objective evidence in the absence of a reliable, objective road-side test (like a Breathalyzer)
 - Cannabis much more complex, with more active ingredients than alcohol
 - Effects of cannabis may also be more subtle than alcohol, depending on the strand of cannabis
- Insurers may face similar challenges to drug-related exclusions in automobile insurance
 - Illustrates the importance of retaining expert well-versed in the effects of cannabis
 - Potential need for experts with sub-expertise in specific strands of cannabis, given its complexity



Automobile Insurance – Implications for Cannabis (continued)

- Roadside testing in development and soon to be implemented, but not in time for coming into force of *Cannabis Act*
 - E.g. the Draeger DrugTest 5000 → saliva screening equipment
 - Only measures level of THC in blood – not other active ingredients
 - Use of roadside testing will be at the discretion of individual police forces (e.g. Vancouver police will not be using the Draeger machine)
- Canadian Association of Chiefs of Police has indicated that police forces will likely be unable to meet their stated goal of officers trained to administer roadside testing
 - For an indeterminate period, this means there will be no effective way to evaluate whether drivers are impaired
 - Concerns about false positives leading to violations of *Charter* rights



Product Liability

- Product liability insurance for commercial cannabis
 - Commercial growers must obtain license – licensing process deals with many concerns generally identified by underwriters
 - E.g. building construction, security measures, neighbouring risks, access to fire departments, proximity to fire hydrants
 - Requires specialized equipment and strict requirements for growing conditions, meaning specialised property and equipment breakdown coverage

Product Liability

- Product liability insurance will not be limited to commercial cannabis
 - Future legalization of cannabis edibles and derivatives
- Also consider: stamping, pricing, labelling of products
 - Requirements as stringent as any other commercial product



Employment Benefits

- Uncertainty surrounding whether employee benefits should include medical cannabis
 - Several major companies offering cannabis benefits (e.g. Loblaws)
 - Recent human rights decisions and labour arbitrations finding that cannabis benefits are required
 - *Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*
 - *Calgary (City) v. Canadian Union of Public Employees (CUPE 37)*

Conclusion

- Still a very unsettled field, with many moving parts
- Other types of insurance to consider going forward:
 - Broad form Building & Equipment
 - Equipment Breakdown
 - Business Interruption
 - D&O Liability
 - Crime – for example, for coverage of employee theft
 - Cargo/Transit – licensed procedures will have to consider whether to rely on the shipper's insurance, or to obtain their own coverage for shipping products

Questions?