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INSURANCE BROKERS

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Insurance Ramifications of Mergers and Acquisitions

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A merger or an acquisition involves the combination of one firm with another, or the purchase of one firm by another. Whether a firm is merging, acquiring, being acquired, or if there is a majority change in ownership, there are risk management and insurance ramifications that need to be considered. Ideally, this analysis should be done in the due diligence phase. There are risk management issues that can be 'deal breakers,' and these should be identified before a deal is consummated.

Mergers

If two firms are merging into one firm, the insurance programs for each firm need to be evaluated and consolidated. This should be done by one broker who understands the insurance and risk management issues, and can coordinate the consolidation of both sets of policies.

The end product should be a single program for the combined entity that picks up the prior liabilities of both firms, and will also involve the cancellation of the unnecessary policies in the most favorable manner.

Acquisitions and Changes in Ownership

The first consideration is whether the acquiring firm is buying stock (assets and liability), or just assets.

It is critical that each party to the transaction understand "who is responsible for what" as it pertains not only to existing liabilities, but current and future insurance as well. In any corporate transaction, the buyer will want to know what they are getting. It will therefore require, from the seller, a long list of representations and warranties whereby the seller provides the state of affairs of the business or assets that are being sold. These "reps and warranties," as they're known, can touch on just about anything, from accounts receivable to tax treatments, pollution conditions, etc.

Although traditionally buyers would ask the sellers to indemnify them for the breach of any representation or warranty, this has not always been effective. As such, several products have been developed by the insurance industry to transfer the risk of these reps and warranties to the insurance company. These reps and warranties can cover either the buyer's or the seller's risk in a number of different situations. (Note that this coverage is heavily underwritten and can be very expensive.)

Insurance Policy Assignment

Insurance policies are a contract between the insurance company and the insured, and they cannot be assigned without the insurance company's consent.* Certain types of coverages, such as Directors & Officers & Employment Practices Liability coverage go a step further and have what is commonly known as a "Change in Exposure" or "Change in Ownership" clause. Essentially, when this provision is triggered, the coverage goes automatically into run off mode. Coverage continues in force for the original ownership, but only covers circumstances which took place prior to the change in exposure or ownership.

It is important to review each policy to determine whether or not there are additional provisions pertaining to a change in ownership. When in doubt, a specific discussion with the underwriter is recommended.

Mergers and Acquisitions *(continued on page 2)*

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**The applicable provision is usually found in the conditions section of a policy and is referred to as "transfer of your rights and duties under this policy."*

Mergers and Acquisitions *(continued from page 1)*

Standard Property Casualty and Auto Insurance

As mentioned above, insurance policies are not assignable without the insurance company's consent. If the acquiring entity is interested in retaining the seller's coverage, approval by the insurance underwriter is required. The seller also needs to consider its future liabilities arising out of its activities prior to the sale. Even if coverage is written on an occurrence basis, accidents could happen post sale arising out of presale activities. If this is the case, Discontinued Operations Coverage should be considered. If coverage is written on a claims-made basis, an Extended Reporting Period (ERP) needs to be evaluated.

Workers Compensation

Workers Compensation also has a non-assignment clause, but when there is a change in ownership you also have to file an ERM 14, "Confidential Request for Ownership Information." This must be done within 90 days of the ownership change and be sent to the Insurance Company of Record. Although, technically an underwriter could agree to assign the policy, most will want to cancel coverage and rewrite it under the new name. Note that this could trigger different rates if there has been a rate change subsequent to the original policies' inception date.

Recognize as well that if the operations of the selling company have not materially changed, then the experience of the selling company will transfer to the buying company. In other words, the acquiring company would inherit the experience modification of the selling company, or the experience of the selling company would be blended in to the acquiring companies experience modification.

Professional Liability, Executive Risk, and Other Manuscripted Policies

The majority of these policies are non-standard or manuscripted and should be individually evaluated to determine the best way to coordinate coverage. As mentioned, most of these policies contain a "Change in Ownership" provision. This means the buyer must purchase a new policy and the seller would have to rely on an ERP to cover their future liabilities arising out of the pre-sale activities. The claims-made nature of these policies (nearly all are written on a claims-made basis) reinforces the need for an ERP extension.

Conclusion

The risk management and insurance ramifications of a merger or acquisition need to be evaluated as part of the due diligence process.

This requires the services of a knowledgeable attorney and insurance broker. All exposures need to be evaluated and coverages need to be reviewed to make sure a coordinated strategy is developed to cover not only existing, but previous liabilities as well.

RISK MANAGEMENT SEMINAR SERIES

Sexual Harassment Prevention Training
Friday, September 7, 2012
Registration: 7:30 am
Program: 8:00 am - 10:00 am

Webinar: Understanding Your X-Mod
Friday, September 14, 2012
Registration: N/A
Program: 8:00 am - 10:00 am

Parent Care Conversation
Friday, October, 2012
Registration: N/A
Program: 8:00 am - 10:00 am

All training sessions available to our clients
*** Reserve early / seating is limited!**

Register for upcoming seminars

Contact **Bethany Mongold** at **mongold@cavignac.com** or call **619-744-0540**

*** Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.**

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Merger and Acquisition Insurance Questionnaire

Named Insured * ______________________________

1. **Name of Firm Being Acquired *** ______________________________

    Address ______________________________
    Phone Number ______________ **Fax Number** ______________
    E-Mail Address ______________________________
    Insurance Contact ______________________________
    Phone Number ______________ **Fax Number** ______________
    E-Mail Address ______________________________

2. **Date of Merger or Acquisition** ______________________________

3. Did you acquire assets only or stock? Assets only ☐ Stock ☐
4. Who will be responsible for the firm's prior acts? ______________________________
5. Please attach the following:
    - Copy of all current insurance policies **
    - Most recent insurance application(s)
    - Loss history (10 years if possible) – all lines
    - Copy of Purchase Agreement
    - Copy of current workers compensation experience modification report and most recent Workers Compensation Insurance Rating Bureau inspection
7. Has the firm you are acquiring made an inquiry of its staff to make certain that any claims or circumstances which could give rise to a claim have been reported to its current insurance company? *** Yes ☐ No ☐
8. Have you considered Representation & Warranty insurance? Yes ☐ No ☐

*** (Include any other companies, entities or prior entities which should be included for insurance or ERISA bond purposes)***

**** If you are acquiring prior liabilities or if you have a residual exposure to prior liabilities, have you had the insurance policies of the acquired or merged company assigned to you, in writing, by the insurance companies? Have you been named as an additional insured on those policies?***

***** This is critical on claims-made policies such as Professional Liability, Employment Practices Liability and Directors & Officers Liability***

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LIVE WELL, WORK WELL

Eat Sensible, Eat Seasonal, Eat Local

Are you a locavore? If you eat seasonal produce and meat sourced locally, you are. If not, below are six good reasons to "eat local," and tips on how to do it:

Seasonal, local food is fresher and tastes better. Local farms don't need to cultivate produce or breed livestock suitable for long-distance travel; instead, they can focus on producing the tastiest food possible.

Local produce is more nutritious than food that is out of season. As soon as a fruit or vegetable is harvested, its nutrients start breaking down. The longer it takes to get to your table, the fewer nutrients it has.

You get to know your farmer and where your food comes from. When you buy local, you get the opportunity to meet the person producing your food, and confirm that you are comfortable with how they do it.

Local food is often less expensive. Because transportation costs are minimal when you buy local and in-season, farmers are often able to sell their goods at reduced prices.

You support local farmers. When you buy directly from local farmers, you ensure that they get a fair price for their products and you stimulate your local economy.

Eating local is good for the environment. When you eat food that doesn't require a diesel-powered semi to transport it across the country, you reduce your carbon footprint.

Tips for Eating Local

- Know what's in season
- Ask grocery store managers about the origins of their products
- Shop at farmers' markets and farm stands

- Participate in community supported agriculture
- Dine at restaurants that source their food locally
- Visit locally-owned food producers regularly

Adult Immunization

August is National Immunization Awareness Month—the perfect time to make sure you and your loved ones are up to date on your vaccinations.

Many people mistakenly believe that vaccinations are most beneficial for children; however, immunizations are just as important for adults. In fact, the Department of Health and Human Services reports that 50,000 adults die from vaccine-preventable diseases each year.

Check with your health care provider today to confirm that you are up to date on the following vaccinations:

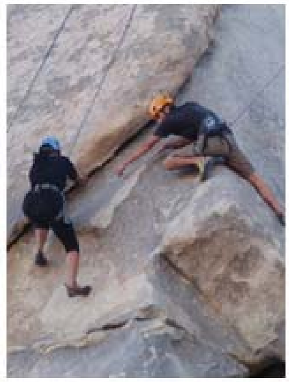
- Tetanus, diphtheria, and pertussis
- Measles, mumps, and rubella
- Pneumococcal pneumonia
- Influenza
- Hepatitis A and B
- Varicella (chickenpox)

DID YOU KNOW

Some people believe that immunizations aren't safe, but the CDC cites that vaccines undergo years of testing before they can be used, making them both safe and effective.

San Diego Humane Society and SPCA

OUTDOOR OUTREACH



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