PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Economic Affairs Interim Committee

61st Montana Legislature

as of August 14, 2010

Memo

To: Economic Affairs Committee Members
From: Pat Murdo, Committee Staff
Re: Followup on Liability Issues Related to Exemptions and No Work Comp Coverage

At the June 29, 2010, Economic Affairs Committee meeting there was a presentation on exemptions to the Workers' Compensation Act and implications for liability. Chuck Mazurek, with Payne Financial Group asked for an opportunity to discuss the difference between workers' compensation policies and employer liability coverage. Questions sent back and forth to further try to understand the implications of not being covered with a workers' compensation policy included comments from Jacqueline Lenmark with the American Issurance Association.

Mr. Mazurek in an email dated June 30, 2010, provided the following insights into (and some questions related to) workers' compensation coverage and employers' liability insurance:

> Workers Compensation is not an insurance policy. It is an Act created by the legislature to deliver certain benefits to injured employees whose accident and injury comport with title 39 of MCA and case law.
>
> Employers may acquire a policy of insurance that provides the insurer will assume the liability of the employer to provide those benefits.
>
> Workers Compensation benefits and provisions are ***mandated*** by the legislature meaning only it and/or court decisions can make binding changes regards benefits, exemptions and the like.
>
> The Montana State Fund policy is consumer friendly in that it clearly identifies w/o ambiguity in its Section A Insuring Agreements exactly what it will provide its insured employer as regards mandated provisions of the WC ACT.
>
> Part Two of the State Fund policy pertains solely to **Employers Liability Insurance**. This is not a mandated by the legislature coverage. Consequently if an employer chooses to go bare as respects ELI he or she may do so.
>
> As I indicated above WC is subject to title 39.
> Employers Liability Insurance is casualty insurance (Title 33) not subject to the Workers Compensation Act meaning it is not subject to oversight by the Dept of Labor and is not within the jurisdiction of the Workers Compensation Court.
>
> Claims/Suits under ELI are within the jurisdiction of Montana's district court system and are subject to oversight by the Montana Commissioner of Insurance.

What is really interesting is---- a claimant making claim for WC benefits and also bringing an action against the employer outside the Acts Exclusive Remedy provision-------- which should be covered by ELI.

However, the ELI cover requires the bodily injury must arise out of and in the course of the injured employee's employment by the insured employer.

If the comp court decision is the injury does not arise out of and in the course of---the employer has no insurance coverage to cover the cost of defense and indemnification. So the question then is: Does the comp court decision under title 39 apply to title 33 casualty insurance?

Is it possible that a claimant may not be within the course and scope under title 39 but fall within the purview of course and scope under title 33?
If exclusive remedy does not protect the employer for claims outside the Act and the employee is determined to not be in the course and scope--------there is no trigger for ELI to protect the employer. So the question ----Is ELI an illusory coverage?
I do not have the answers to these questions.

As respects your quote of my comments regards EL coverage to be applicable separate WC coverage must be in place. This needs to be clarified------the SF[State Fund] WC policy includes ELI cover. However some Montana employers do business out of state i.e. Washington State a monopoly state. These employers may acquire ELI insurance by endorsement to their GL [General Liability] policy.

During your presentation you mentioned, Work Comp Coverage, Employers Liability Coverage, General Liability and Home Owners policy in respects your contract for lawn care. It was apparent the contractor did not have WC cover for his employees. I doubt you as a home owner would be found to be an employer if an employee of the contractor was injured on your property.

However, even if the contractor had WC on his employees you as the home owner would have exposure for BI [bodily injury] or PD [property damage] to the employee which may arise out of a hazard on your property. Your Home Owners policy MAY apply to defend and indemnify you.

Many home owners would seek status as an "additional insured" on the contractors GL policy that might provide protection for the homeowner in the event the contractors employee is injured on the home owners property.

When ever having work performed on a home by contractors the home owner should practice good risk management by seeking advice from his/her insurance agent or attorney as respects the transfer of risk and/or coverage.

Jackie Lenmark commended Mr. Mazurek's remarks in a June 30, 2010, email and also noted concerns about court decisions and insurance principles. She responds regarding a question in Mr. Mazurek's comments (above), which was whether any state had tested to see when employers' liability insurance is triggered in relation to course and scope:

I didn't hear the presentation, but I don't believe Chuck's questions below [above in this memo] anticipate an answer from you or anyone; they are posed rhetorically. I am having similar discussions with attorneys over the implications of the court's recent *Alexander* decision. Chuck doesn't have the answers because the questions are not expressly addressed in statute and the

> Supreme Court's decisions have either not addressed them or confused insurance principles in a way that the questions are created. Whether other states have addressed your "trigger" question, if I understand it correctly, is something I and others are looking at now.
>
> Chuck's summary outline or clarification of the differences between the workers' compensation coverage and the employers liability coverage is excellent and should be commended to the committee.

In response to a question asking for further clarification on what was meant that workers' compensation is not insurance, Jackie Lenmark had the following comment in a July 28, 2010, email:

> I and others often make this statement meaning that while "insurers" (note the definition of "insurer" in 39-71-116(14), MCA) provide coverage, the Montana Workers' Compensation Act is the "policy." The statute and the case law is what defines what provisions will be included in the "policy." All employers, excepting the specific statutory list of excepted employments, are required to provide coverage, whether through a purchased policy from Plan 2 or 3 or through self-funded payments from Plan 1, as provided in the "policy"/statute. The reason the term "systems" is used is because self-funded coverage (Plan 1) is not "insurance" regulated under the Insurance Code, nor is the coverage provided by the State Fund (Plan 3).
>
> I am not aware of any Plan 2 property/casualty insurers selling general liability or umbrella policies in lieu of workers' compensation coverage.
>
> Only Plan 2 workers' compensation is regulated under the Montana Insurance Code and is "insurance" in that sense. Title 33, chapter 16 relates only to Plan 2 insurers and the regulation of their rates. All workers' compensation insurers (Plans 1, 2, 3) are regulated by DOLI/ERD under the benefit delivery scheme in Title 39, chapter 71.

And finally, in response to a question about whether property/casualty insurers might be selling general liability insurance/umbrella policies to someone in lieu of workers' compensation insurance and whether there were implications for the uninsured employers' fund, Mr. Mazurek had the following comment sent in a July 30, 2010, email:

> Simply put there are no insurance products on the market that would fall within the purview of “in lieu of workers compensation insurance” If an insurer or agent represents to an employer a policy of insurance in lieu of WC that would be an Error or Omission on his part and the agency mal-practice coverage would be triggered. Under that scenario I see no implication or claim presented to the UE Fund.
>
> To intentionally sell an insurance product under the scenario you pose would be grounds for the Commissioner to discipline the agent.

There seemed to be general agreement by Ms. Lenmark, Mr. Mazurek, and perhaps anyone reading this memo that workers' compensation coverage issues can be complex, as is the work comp intersection with employers' liability insurance and general liability insurance.