

# Risk Monitor



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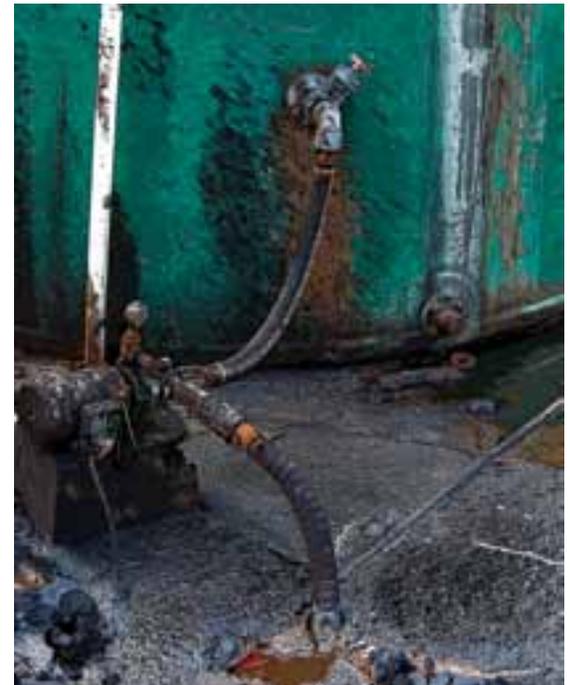
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## Oil and Water Don't Mix: Does Your Business Need Pollution Coverage?

In April 2010, an oil drilling rig owned and operated by Transocean Ltd. exploded and sank in the Gulf of Mexico. The accident killed 11 people and set off a massive oil spill, causing catastrophic damage to marine life and imperiling coastal areas in four states. Transocean was operating on behalf of the giant energy corporation BP. BP came under intense criticism from the president, Congress, and the public for what was perceived to be inadequate safeguards to prevent the disaster. The companies involved in the incident may have legal liability for economic damages and clean-up costs totaling billions of dollars.

Most U.S. businesses are not drilling for petroleum but they may still face similar loss exposures on a smaller scale. Millions of companies have fuel storage tanks above or below ground, or transport fuel or chemicals. Manufacturers use a variety of toxic substances in their operations. If any of these substances leak into the land, water or air, the companies may be responsible for remediation costs and damages. If these companies do not have the right insurance, these costs may drive them out of business.

The standard commercial general liability insurance policy does not apply to most accidents involving pollution. It does not cover injuries or damages caused by the escape of a "solid, liquid, gaseous or thermal irritant or contaminant," nor does it cover any costs the business incurs because it was asked or required to clean up the contamination. There are some exceptions; for example, the policy covers a contractor if fuel or fluids leak from construction machinery brought to a job site. It also covers injuries or damages caused by heat, smoke or fumes resulting from an uncontrollable fire.



However, the insurance companies that offer this policy do not intend to cover incidents similar to the gulf oil spill.

Some companies offer a pollution liability policy that fills much of the coverage gap. It covers injuries or damages caused by an "emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water." It defines pollutants in the same terms as does the general liability policy. One significant feature is that it is a "claims made" policy; it cov-

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## Welcome to the Elliot Whittier Insurance Newsletter!

It is with great satisfaction that we bring this newsletter to you. In this issue and in coming months, we will discuss pertinent risk management topics which may affect your organization. We sincerely hope that you will find this newsletter informative and please do not hesitate to contact us should you have any questions or needs.



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# Common Misconceptions Causing Business Owners Not to Purchase EPLI

Some of the most common lawsuits heard in courtrooms are discrimination suits against businesses. This is confirmed by the fact that in 2009 over 130,000 complaints were filed with the Equal Employment Opportunity Commission alone. There is no officially estimated figure as to the total cost of discrimination lawsuits on businesses, but a reasonable estimate is around two billion dollars per year.

Fortunately for businesses, there is an insurance product designed to protect businesses from these kinds of lawsuits: employment practices liability insurance, or EPLI. Insurance companies offer EPLI as part of their business insurance product line. However, there is a disparity involved: a lot of eligible companies do not purchase EPLI. Despite the fact that the United States has become a litigious society, and despite the huge costs to businesses who do not have this kind of insurance, it seems odd that so many would resist protecting themselves from this incredible liability.

Regrettably, there are many myths about EPLI that have taken hold in the popular business consciousness. It is necessary to dispel these myths in order to drive home to businesses that they need to protect themselves from discrimination-related litigation.

- 1) Too many companies believe, whether due to the structure of their business or some other factor, that they are immune from lawsuits. This is flat out false; no matter what kind of company it is or how it is structured, even if it is set up as a corporation, that legal protection can be stripped away instantly by a judge. Depending on the size of the business, it may not have the human resources practices and policies necessary to prevent a discrimination lawsuit. Therefore, if the business does not have that administrative structure in place, they are more exposed than they realize, and thus are a candidate for EPLI coverage.
- 2) Aside from believing that a business is immune from lawsuits, believing that they can absorb the costs of a lawsuit is the next most damning myth. Legal action is inevitably costly, and not just financially costly, either. Since in legal situations management staff and other professional members are asked to testify, gather evidence, and perform other actions for the court, the more time they spend on these non-

core business activities, the less time they are focusing on the bottom line. Therefore, the more time it takes, the more lost money it costs that business. It is actually quite easy for a business to go bankrupt as the result of a lawsuit.

In addition to the non-calculable cost through lost earnings, an examination of the precise costs to businesses from discrimination lawsuits is very revealing. In two 2005 cases, Wachovia Corporation and Consolidated Freightways agreed to pay over five million and three million dollars to settle their respective lawsuits. In 2004, United Airlines was forced to pay over thirty-six million dollars to settle its own discrimination lawsuit case.

- 3) The final myth involves business owners failing to understand the full extent of their current coverage. Falsely, many think that general business insurance protects them from discrimination lawsuits, when in fact, it does not. Business owner policies, workers' compensation, general and professional liability policies actually sometimes specifically exclude liability from discrimination suits.

Despite all possible non-insurance precautions that businesses take, EPLI is still the only way to fully protect themselves from the costs of lawsuits based on discrimination. EPLI provides coverage from liabilities like sexual harassment, general discrimination, wrongful termination, breach of employment contract, negligent evaluation, failure to employ or promote, wrongful discipline, deprivation of career opportunity, wrongful infliction of emotional distress, and management of employee benefit plans. Clearly, EPLI provides comprehensive protection from every possible kind of discrimination-related liability.



## RMV offering FREE reminder service

Did you know – the RMV is offering a new customer convenience to help you remember to renew your MA driver's license or MA ID. With this free service you can determine just how the RMV reminds you: by phone, by email or text! Check out <https://secure.rmv.state.ma.us/RMVReminder/intro.aspx> to find out more information!

As an alternative, here at Elliot Whittier we have access to a free reminder service for not only your Driver's License Renewal, but also your Safety Inspection and your Vehicle Registration, via our trusted carrier Plymouth Rock. Call Chris Millerick 857-816-4935 for more information!



# D&O Insurance: A Necessity for Your Business

For the last several years, stories of wrongdoing and bad judgment by corporate managers have filled the headlines. Enron, Worldcom, and Countrywide are just some of the companies that became household names because of mistakes or criminal acts their leaders committed. These stories became big news because they were exceptional; the vast majority of companies do not fail in such a spectacular fashion. However, all corporate managers have the potential to make mistakes, and some mistakes can lead to significant losses for the company, its shareholders, employees and vendors. When this happens, having the appropriate insurance coverage can make all the difference between survival or corporate and personal bankruptcy.

Most businesses carry commercial general liability insurance that covers the business's legal liability for bodily injury, property damage, and personal and advertising injury suffered by others. However, this insurance probably will not cover claims against corporate officers for their errors in running the company. These claims often involve allegations of monetary losses, such as falling stock prices or loss of capital. While real, these losses do not meet the CGL policy's definition of "property damage," which is physical injury to tangible property, including resulting loss of use, or loss of use of property not physically injured. In these claims, people lose money but their property is intact. Therefore, companies that rely solely on their CGL policies will have no insurance in these cases.

Directors and officers liability insurance covers a business's legal liability for "wrongful acts" of its directors and officers acting within their capacity for the business. A typical policy defines "wrongful act" as including errors, misstatements, misleading statements, acts, omissions, neglect, or breaches of duty actually or allegedly committed or attempted by an individual in her capacity as a director or officer of the insured business.

Directors and officers are subject to lawsuits from many sources, including the entity they work for, shareholders, employees, government entities, competitors, vendors, and other third parties such as consumer groups or groups that represent segments of the population. Leaders of all types of organizations

are vulnerable, though the source of a legal claim will vary by the type of entity. Most claims against public companies come from shareholders, while employees file most of the claims against non-profit organizations and half the claims against private companies. Customers and competitors are also frequent sources of suits against private companies.

D&O insurance covers many types of claims, including:

- A lawsuit by one shareholder against the majority owners, claiming that the company lost money because the majority gave themselves excessive compensation.
- A key employee leaves one company and joins a competitor as a director. His former employer sues him and the competitor, claiming that he violated his contract and used confidential company information with his new employer.
- Shareholders sue a company and its directors and officers, claiming that they misrepresented the quality of a potential new product when they sought funding for its production.
- A shareholder sues the president of a company for failing to promptly notify shareholders of a major pending transaction and for not pursuing litigation against a partner company that did not live up to its agreement.
- A lender sues a company for allegedly failing to repay a loan.
- Members of a private company's board of directors are sued for allegedly using their positions for personal gain.
- The government sues a company for alleged anti-trust activities.

Even though courts dismissed some of these lawsuits, the legal defense costs were still significant; D&O insurance covers these costs. Because all organizations and their leadership are vulnerable to these types of claims, they should work with professional insurance agents to identify companies that can provide the coverage they need at a reasonable cost. Businesses face many different risks today; consequently, D&O insurance is a necessity.

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## Damage due to Flood is NOT COVERED on most Home Insurance Policies Flood Maps Change – Flood Risks Change

If your property is newly mapped into a high-risk flood zone, your Mortgage Company will be requiring you to carry flood insurance.

If you find that your property is newly mapped into a high-risk flood zone due to a map revision on or after 1/1/2011, you may be eligible for a lower-cost Preferred Risk Policy for 2 policy years from the map revision date.

A Preferred Risk Policy is significantly less expensive than a Special Risk Policy.

Whether your property is mapped into a high-risk or moderate-to-low risk flood zone, you should always consider flood insurance as a way to reduce overall risk. What to do? Call US at 800-696-3947.

We can help you plan for ways to mitigate your risks at the lowest reasonable costs.

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## Oil and Water Don't Mix: Does Your Business Need Pollution Coverage?

ers pollution incidents that occur on or after a date specified in the policy (called the "retroactive date") and for which claims are made during the policy term. For example, if the policy has a term of January 1, 2010 to 2011 and has a retroactive date of January 1, 2007, it will cover a claim made in May 2010 for an incident that occurred in August 2008. It would not cover a claim for an incident that occurred in August 2006.

The pollution liability policy does not cover many of the same types of losses that the CGL policy excludes, but there are some differences. For example, the pollution policy specifically states that it does not apply to property damage to or clean up of a waste storage facility. It also does not cover the business's liability for acid rain or for deliberately failing to comply with government regulations.

Because so many types of businesses use potentially toxic substances (paints, oils, printer chemicals, etc.), the pollution liability exposure is not limited only to manufacturers and energy companies. All business owners should consult with professional insurance agents to identify their vulnerabilities to pollution claims and ways to handle them. The exposure may be manageable without insurance, but the time to find out is before a loss occurs.

### Speaking of Oil Pollution...What about your Home?

Most homeowner's insurance policies do not include coverage for costly cleanups from a spill from one's oil burner. Soon, a new law goes into effect in MA called Homeowner Oil Heating System Upgrade & Insurance Law. As of September 30, 2011, you must upgrade your home system equipment to prevent leaks from tanks and pipes that connect to your furnace. Call us with questions or if you are interested in adding this important coverage to your home insurance policy—it's not expensive.



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