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Avoiding the Potholes [and Pitfalls] with Last Mile Delivery

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The expansion of e-commerce and use of online shopping has led to significant development within the market for last-mile delivery. Additionally, with consumers shopping online for larger items, such as appliances, merchants have shifted away from the use of carriers such as FedEx and UPS that carry mostly smaller items, and have started using carriers that can provide last-mile services that consumers have come to expect, such as tracking options and scheduled deliveries.

Several trucking companies have noticed this change in the last-mile market and have expanded their operations to provide delivery services consumers and merchants are seeking. Many companies have found a niche market and have even started offering assembly and installation along with delivering products to consumers.

A recent article published by Bloomberg examined the types of services trucking companies are providing in their last-mile deliveries. Numerous companies referenced in the Bloomberg article now have their drivers deliver kitchen appliances and furniture—to name a couple products—as well as unpack, assemble and install such products at purchasers' homes. J.B. Hunt uses both third-party contractors as well as its own drivers to carry out these tasks. As employees take on more responsibility, there is a greater chance employee will commit negligent acts in the course of delivering and installing products.



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Earlier this year, Spanx Founder and CEO Sara Blakely posted on LinkedIn this photo of the front porch of her apartment that served as Spanx Headquarters in the early days of Spanx. She noted some drivers would drop off the product, leaving her front door inaccessible. The carrier's act of leaving the boxes as it did arguably created a hazardous condition and the potential for liability. With ingress and egress blocked, imagine if the occupant was trapped inside and a fire broke out. Consider coming home and having to move the boxes to get inside: can you say "herniated disc!" The owner or occupant might sue the carrier under various theories of negligence. Premises liability claims are likely. Product liability claims may be pursued. The typical negligent supervision,

training, hiring and retention claims brought against trucking companies may take on more traditional tort claims based on a driver's conduct and vicarious liability.

Another issue for trucking companies to consider is whether any liability insurance would apply to such claims. Trucking companies typically obtain liability insurance under commercial auto policies, which generally provide liability coverage only for those claims that arise from the ownership, maintenance or use of a covered motor vehicle. Claims that arise out of the negligence of a driver in delivering or installing a product very likely are not going to be considered to arise out of the ownership, maintenance or use of a covered auto, and insurance companies are likely going to deny coverage under commercial auto policies.

However, a potential option for insurance coverage for these claims may exist through commercial general liability ("CGL") policies. Such policies provide coverage for claims of bodily injury or property damage that arise out of an "occurrence," or accident. As demonstrated above, trucking companies can face claims of bodily injury resulting from negligently delivered products, however, trucking companies may also face claims of bodily injury resulting from negligently installed products. An improperly installed kitchen appliance or an improperly assembled item of furniture may result in bodily injury to an individual, thereby exposing the trucking company to another type of claim for bodily injury. The same holds true for claims of property damage. For example, a driver delivering a large item may break other items in its path, causing damage to floors and walls, or damage the product itself or surrounding property during installation, thus exposing the trucking company to a claim for property damage. And consider what impact an improperly installed product may have on a manufacturer's warranty

A trucking company venturing into these last-mile services should be aware that the amount of coverage provided by a CGL policy is likely very limited. CGL policies contain several exclusions that may apply to remove coverage for claims of bodily injury or property damage. The Expected or Intended Injury exclusion in such policies removes coverage if the insured reasonably could have expected or intended the property damage or the claimant's injury, even if it was of a different degree or type than actually expected or intended. For example, if a claimant alleges that a driver was not adequately trained in delivery or installation, an insurance company may argue that the trucking company could have expected the claimant's injury and raise this exclusion as a defense to coverage.

Other potentially applicable exclusions are those for Damage to Property and Damage to Your Product. The Damage to Property exclusion removes coverage, in relevant part, for property damage to that particular part of any property that must be restored, repaired or replaced because the insured's work was incorrectly performed on it. This portion of the exclusion applies only to property damage to the product that is being delivered and/or installed. Thus, an insurance company can raise this exclusion as a defense to coverage for claims of property damage that involve damage to the delivered or installed product that must be restored, repaired or replaced because a driver incorrectly delivered or installed it.

The Damage to Your Product exclusion precludes coverage for property damage to a product that is manufactured, sold, handled, distributed or disposed of by the trucking company. Because

trucking companies at least “handle” the delivered or installed products, insurance companies will likely raise this exclusion as a coverage defense for claims of property damage to products that are delivered or installed by trucking companies.

Finally, CGL policies typically contain Employer’s Liability exclusions, which remove coverage for claims of bodily injury to an employee if the employee’s injury arises out of the performance of their duties related to the conduct of the insured’s business. If a driver were to sustain an injury while delivering or installing a product, such injury likely will be considered to arise out of their duties related to the trucking company’s business of delivering and installing products. Therefore, employer’s liability is another source of liability trucking companies need to be aware of. However, the reason this exclusion exists in CGL policies is because such claims would be covered by a workers’ compensation policy. Will a Worker’s Compensation Policy cover activities beyond driving, loading and unloading?

As seen above, a CGL policy may not provide coverage for all potential claims involving the delivery or installation of products by trucking companies. However, trucking companies are not without options. For instance, if trucking companies are contracting with manufacturers to deliver and install their products, trucking companies may negotiate with the manufacturer to require the manufacturer to obtain liability insurance which names the trucking company as an additional insured. Additionally, trucking companies should look into whether an endorsement may be added to a CGL policy which would cover claims of bodily injury or property damage arising out of a product that is delivered or installed by the trucking company. Such an endorsement would amend the coverage under the policy to provide coverage for such claims, and prevent the application of certain exclusions discussed above.

Before trucking companies make the decision to expand their services to include last-mile deliveries, they must consider the level of risk exposure associated with this type of service. Traditional carriage services most likely require commercial auto policies to adequately cover potential liability. However, adding last-mile delivery to a trucking company’s offered services exposes trucking companies to a vast amount of bodily injury and property damage claims. While such claims are covered by CGL policies, the specific services offered through last-mile deliveries especially increases the potential that at least one of the exclusions discussed above will apply to allow an insurer to deny coverage. As the holidays approach, there are likely to be more deliveries like those made to Ms. Blakely’s apartment. Thus, trucking companies should stay informed of the potential liability they face and take the appropriate steps to ensure they are minimizing risk and maximizing coverage for any potential claims. Otherwise, the last-mile delivery may be a trucking company’s first mile to the courthouse.

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