2024 NAIC SPRING NATIONAL MEETING
Market Conduct and Consumer Affairs (D) Committee

Package Protection Offerings - Insurance Regulatory Issues

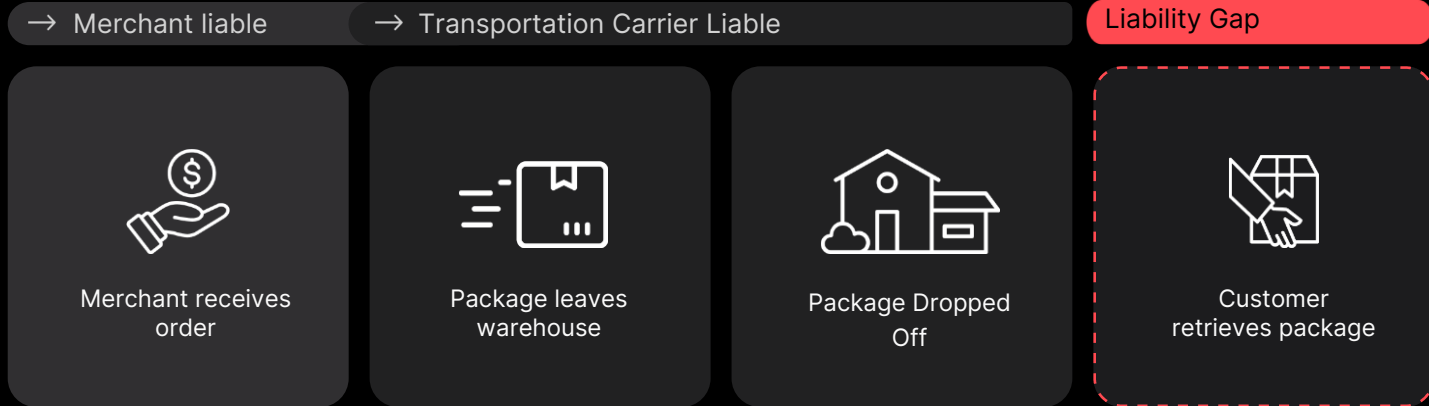Package Protection

Package Protection

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Background

- In 2023, over 275 million Americans shopped online. That's 81% of the American population generating $1.13T in e-commerce revenue.

- With the explosion of e-commerce and online shopping, so too has come an explosion of porch piracy.

- From 2021 - 2022, the share of packages stolen increased 25.6% year-over-year.

- Last year, 75% of Americans had a package stolen – generating a total of 260 million stolen packages.

- Collectively, American consumers lost $13.4B to package theft.

- Because merchant liability typically ends when a package is transferred to a transportation carrier - and the transportation carrier's liability typically ends when the package is delivered - a post-delivery liability gap exists for the time between a package being delivered and the time a package is retrieved by the consumer.

- Conventional transportation carrier liability does not extend coverage to this period as the transportation carrier's responsibility ends when it completes delivery service. Furthermore, theft by porch piracy is a "fortuitous event" outside of the transportation carrier's control. For this reason, even when transportation carriers wish to expand declared value liability to include coverage for losses resulting from theft, they do so via legitimate insurance offerings.

- Homeowners insurance, if present, may cover loss by porch piracy, but standard deductibles typically render homeowners coverage moot.

- Merchants and consumers often turn to shipping insurance to fill the coverage/liability gap.

The Liability Gap

→ Merchant liable   → Transportation Carrier Liable   Liability Gap

Merchant receives order	Package leaves warehouse	Package Dropped Off	Customer retrieves package

Liability Covered by Shipping Insurance

Types of Package Protection

- Online shopping platforms and merchants offer what today is most often referred to as "package protection" to consumers in one of the following manners:

    1. Package protection backed by a shipping insurance policy offered by/through a licensed provider;
    2. Package protection offered by/through unlicensed 3rd-party providers and apps; or
    3. Package protection offerings made directly by unlicensed merchants ("Do-it-Yourself" or DIY" offerings).

- Options (2) and (3) fail to comply with state insurance regulation in that neither a licensed insurance producer nor an actual insurer is involved in the offering.

- These unauthorized offerings are part of an alarming trend of offerings seeking to obfuscate state insurance regulation simply **by calling these offerings something other than insurance** or by arguing the coverage is merely a "tech solution," "guaranty," "warranty," "promise," "protection plan" or a form of "self-insurance."

Insurance Generally

The term "insurance" is often defined as one party paying another party consideration (*i.e.,* "premium") in exchange for assuming risk of loss that is outside the assuming party's control.

- New York, for example, defines "insurance" as "any agreement . . . whereby one party, the 'insurer,' is obligated to confer benefit of pecuniary value upon another party, the 'insured' . . . dependent upon the happening of a fortuitous event in which the insured . . . has . . . a material interest which will be adversely affected by the happening of such event." See e.g., NY Ins. Law § 1101(a).

- A "fortuitous event" generally means an occurrence or failure to occur which is to a substantial extent beyond the control of either party. Theft is a textbook example of a fortuitous event.

- In some states, the definition of insurance is not limited to the concepts of fortuitous or unknown events. For example, in Georgia, "insurance" is broadly defined as "a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies." GA Ins. Code § 33-1-2(2).

- Regardless of the definition applied, shipping insurance is clearly an insurance product subject to state insurance regulation.

Shipping Insurance

Shipping insurance is a type of insurance specifically designed to protect shippers, merchants and consumers against loss or damage caused by acts that are beyond the control of the merchant or transportation carrier.

- Coverage for losses resulting from porch piracy - which is clearly outside the control of the shipper or transportation carrier - is, by definition, insurance.

- Depending on its structure, certain forms of shipping insurance (e.g., "marine" insurance) are exempt from some insurance regulation (such as rate and form filings). However, no state entirely exempts shipping insurance from regulation.

- For the last four years, guidance issued by the Oklahoma Insurance Department specifically advises consumers to consider protecting themselves against losses resulting from porch piracy by purchasing shipping insurance. This year, the Department issued guidance clarifying that package protection offerings must be made through a licensed insurance provider.

- Unfortunately, many package protection offerings made through apps, shopping platforms and merchants do not involve licensed providers.

- These offerings often involve neither a licensed insurance producer nor an actual insurance policy/insurer standing behind the risk - and are nothing short of fraud and the unauthorized transaction of insurance.

Regulatory Guidance for Shipping Insurance

Guidance from the Oklahoma Insurance Department issued on 11/28/23 provides as follows (OK DOI Consumer Alert 11/28/23):

Consumer Alert: Beware of Fake Shipping Insurance This Holiday Season

OKLAHOMA CITY – The Oklahoma Insurance Department is warning consumers of unlicensed insurance providers offering "package protection" that includes stolen-item protection this holiday season. These providers facilitate the unauthorized sale of insurance, which can cost consumers money while not providing protection for stolen items.

"When shopping online for the holidays, pay close attention to your shipping protection options and who is offering the coverage," Insurance Commissioner Glen Mulready said. "Legitimate shipping insurance providers will be licensed companies or producers."

Unauthorized insurance sales are illegal and happen outside the control of regulatory agencies. If these providers become insolvent or are unable to pay for consumer claims, the Oklahoma Insurance Department may not be able to intervene.

Consumers can protect themselves by checking to see if providers listed on the web are licensed insurance entities through the Licensee Lookup tool on our website. Be sure to follow the bulleted guidance on this page to find the company or insurance producer offering shipping protection in Oklahoma.

Homeowners policies might help cover the theft of an online purchase left on your porch. This is best for high-value items worth more than a policy deductible.

For any questions about the unauthorized sale of insurance or to report suspected insurance fraud by a licensed producer, please contact OID at 800-522-0071 or visit oid.ok.gov/file-an-online-complaint/.

Unlicensed 3rd-Party Offerings

Although some shopping platforms (*i.e.*, e-commerce platforms that host online merchants) and individual online merchants partner with legitimate shipping insurance offerings, many do not.

- Some merchants use unlicensed shipping protection apps that assume shipping insurance risks. Although risk is transferred to, and assumed by, these unlicensed apps, it does so without the benefit of a licensed insurance producer, actual insurance policy, insurer or licensed adjusters.

- Other merchants use unlicensed shipping protection apps without the benefit of any risk transfer. These unlicensed app developers require merchants to set their own rates, adjudicate/settle claims, manage claims payouts, handle suspected insurance fraud and more – all without the involvement of an insurer or any licensed insurance professionals. The merchants simply make up whatever rates they wish to charge and pay claims as they see fit.

- One such unlicensed app markets its "shipping protection app" to merchants as a "tech solution" for "self-insurance" or an "alternative" to legitimate shipping insurance offerings and affirmatively encourages merchants to "ditch" legitimate insurance offerings for illusory insurance coverage.

- When merchants raise concerns regarding compliance, some unlicensed apps falsely tout that the unlicensed structure has been vetted with and approved by dozens of state departments of insurance.

Merchant "DIY" Offerings

Some merchants bypass unlicensed apps and implement their own "DIY" or "self-insured" models to offer fake insurance coverage to consumers.

- As is the case with unlicensed apps, neither a licensed insurance producer nor actual insurance policy is involved.

- Again, merchants simply make up whatever rates they wish to charge and pay claims as they see fit.

- Merchants often characterize these offerings as "self-insured"- a characterization that is disingenuous – if not fraudulent.

  - Self-insurance is a form of risk management whereby a party decides not to buy insurance to cover their own losses, but instead to pay for such losses as they arise out of operating funds.

  - Self-insurance is not the collection of premiums from unrelated consumers in exchange for the assumption of risk for fortuitous losses outside the control of the assuming party.

Insurance vs. Warranties

While some merchants affirmatively position their offerings as shipping insurance, others deceptively characterize the coverage as a "warranty" or "shipping guaranty." This characterization fails for several reasons:

- First, neither the merchants nor the platforms are transportation carriers – meaning it is not within their control to mitigate the risk of loss during shipping. Furthermore, even transportation carriers utilize legitimate insurance offerings to expand their liability to include coverage for losses resulting from outside perils such as theft.

- Second, a warranty (as opposed to an extended warranty or service contract - the marketing of which also requires licensure) is provided to consumers free of charge.

- Third, as detailed on the next slide, it is well-settled that protection against a fortuitous event such as theft is not appropriate for inclusion within the context of a warranty or guaranty.

Insurance vs. Warranties (Specific Guidance from NY)

New York has been particularly detailed in providing the following legal distinctions between insurance and warranties.

- To avoid characterization as insurance, warranty coverage must not extend to loss or damage attributable to fortuitous events or circumstances. See, Ollendorff Watch Co. v. Pink, 279 N.Y. 32 (1938); NY OGC Opinion Nos. 09-09-01, 92-99, 92-108, 2003-140 and 07-09-15; and WA AGLO Opinion No. 17 (1976);

- Neither a warranty nor a service contract can provide coverage for theft or loss as such coverages are insurance coverages. OGC Opinion Nos. 92-99, 92-108 and 2003-140; and

- Theft coverage offered in connection with a wireless handset protection program must be offered as a stand-alone insurance coverage (i.e., on an optional basis) that is independent of the service contract and the customer must pay a separate/discernible premium. OGC Opinion No. 08-05-15.

Conclusions

- Everyone is making money on the unauthorized insurance offerings described herein – all at the expense of millions of American consumers. Unlicensed app developers charge merchants a monthly fee for using their apps. Shopping platforms receive monthly fees from the app developers that are tied to revenue – usually a 20% share. Many merchants are charging – and keeping – whatever premiums they choose to charge consumers for non-existent insurance coverage.

- Unlicensed app developers typically require merchants to set their own rates, adjudicate/settle claims, manage claims payouts, handle suspected insurance fraud and more – all without the involvement of an insurer or any licensed insurance professionals. The current environment is ripe for fraud and discrimination.

- It remains unclear whether the platforms and merchants who make these unauthorized insurance offerings do not know (or do not care) about insurance regulation. Many seem convinced that calling an insurance offering something other than insurance removes the offering from the scope of insurance regulation.

- Class action attorney are starting to pay attention to unauthorized shipping insurance. *See, ,* https://www.taulersmith.com/shipping-insurance-claims-and-ucl/.

- Given how pervasive the unlicensed sale of shipping insurance has become, guidance must be issued clarifying that shipping insurance (regardless of what it is called) is subject to the same licensing requirements applicable to other forms of insurance. Such guidance would serve to protect consumers who fall victim to fake insurance offerings – as well as merchants who may not understand insurance regulation. It would also level the playing field for licensed shipping insurance providers.

Websites to Review

- https://navidiumapp.com/ (Navidium's website)
- https://www.youtube.com/watch?v=pAgQOBGRKJ4 (YouTube video explaining Navidium to merchants)
- https://apps.shopify.com/navidium-shipping-protection (Navidium's Shopify listing)
- https://www.shipaid.com/?gclid=CjwKCAjw3ueiBhBmEiwA4BhspIPU9Ej9NkrwXatGL4ZyQUpwPuABr8fHB_MCMbOvz97C3XYGd3gJKRoCf5cQAvD_BwE (ShipAids's website)
- https://www.heatpressnation.com/pages/navidium-shipping-protection (Sample merchant website explaining Navidium)
- https://www.americanbluesdenim.com/pages/navidium-shipping-protection (Sample merchant website explaining Navidium)
- https://twitter.com/navidiumapp/status/1563629373726593024?ref_src=twsrc%5Etfw (Navidium's statement regarding having vetted its offering with a dozen state regulators)
- https://guardia1.com/# (Guardia's website)
- https://www.corso.com/terms (Corso's website)
- https://blog.corso.com/shipping-protection-is-it-worth-it **(Corso's merchant info page)**
- https://convoyop.com/for-customers/ (Convoy's website)
- https://norton.buysafe.com/businesses/package-protection-by-easypost/ (Norton's website)
- https://useonward.com/ (Onward's website)
- https://www.protectmyorder.io/ (ProtectMyOrder's website)
- https://yumikim.com/pages/shipping (Sample Onward customer)
- https://savedby.io/ (SavedBy's website)
- https://www.shiptection.com/consumers (Shiptection's website)
- https://apps.shopify.com/simply-insurance (Simply Shipping's website)
- https://www.bbwheelsonline.com/guaranteed-delivery/ (Sample DIY merchant)
- https://www.tees2urdoor.com/package-protection/ (Sample DIY merchant)
- https://kangacoolers.com/apps/help#hc-how-much-is-shipping-insurance (Sample DIY merchant)
- https://www.cutsclothing.com/pages/shipping-protection-policy (Sample DIY merchant)
- https://cozyearth.com/pages/faq (Sample DIY merchant)
- https://www.trueclassictees.com/pages/help-center?referrer=homepage#delivery-and-shipping#shipping (Sample DIY merchant)
- https://www.shopburu.com/pages/faqs (Sample DIY merchant)
- https://built.com/products/shipping-protection (Sample DIY merchant)
- https://dossier.co/pages/faq (Sample DIY merchant)
- https://www.ursamajorvt.com/pages/help-center?hcUrl=%2Fen-US%2Fwhat-is-shipping-protection-218232 (Sample DIY merchant)
- https://maventhread.com/products/protectmyorder?_pos=1&_psq=protect&_ss=e&_v=1.0&variant=44302400880880 (Sample DIY merchant)
- https://heatfreehair.com/pages/shipping-returns (Sample DIY merchant)