

Coronavirus Position Paper

March 27, 2020

The Coronavirus is affecting every segment of our personal and business lives. The Insurance industry is being hit hard with insurance questions from customers who want answers as to how their insurance will respond to a myriad of real and possible economic losses. Insurance companies are putting out advisories as well numerous other sources, such as law firms, who are speculating on how various coverages might respond. We are getting a lot of different answers which is confusing and puts us in a difficult position to give our customers direction or any “definitive” answers. The reality is that we do not have “definitive” answers and will continue to monitor the situation.

The purpose of this position paper is to give some guidance as to best practices in dealing with our client’s questions in this very difficult time and provide some clarity to insurance questions, where possible.

This document is not intended to provide any legal advice or opinion on any individual situation and should not be relied on to determine insurance coverage or lack thereof as relates the Coronavirus. Insurance forms and endorsements vary based on insurance company, changes in edition dates, regulations, court decisions, and state jurisdiction. The information is based on review of insurance coverages, sources we deem to be reliable and communications we have received from insurance companies and other resources. We make no representation or warranty as to the accuracy of information as applied to individual cases. Please advise our office if you want to submit any claim for coverage with your insurance companies.

OVERVIEW OF THE CURRENT SITUATION

One of the major problems with the spread of the virus is that situations are changing minute by minute. The fluidity of the situation is creating more panic, confusion and potential for economic ramifications to businesses and individuals.

“As SARS-CoV-2 (COVID-19) has spread, there have been suspensions and disruptions of factory operations and supply lines, cancellations of conferences, concerts and music festivals, and meetings, closures of motion picture theaters, cancellations of and restrictions on sporting events, a substantial drop in attendance at sporting events, movies, concerts, theater shows, attractions, and restaurants, closings of business and schools, and the widespread adoption of temporary telecommunicating/“work from home” policies. The economic losses are projected to be at least in the hundreds of billions of dollars with disruptions potentially lasting for two years.” (Pasich Legal Alert. March 2020. www.pasichllp.com).

As these situations arise, the question is whether there is any insurance coverage available. It is important to remember that in all situations listed above that the reason for the disruptions is a

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virus and the ultimate answer as to coverage will be how the various policies respond to the “virus” and whether there is any compensational incident that occurred to activate coverage.

- Many businesses are voluntarily closing, either short term or for an unspecified period. This is being done as a pre-cautionary measure for public safety.
- Many businesses are closing or suspending operations because they are mandated to do so.

OVERVIEW OF INSURANCE CONSIDERATIONS

All insurance coverages could come into play as a result of Coronavirus. From the most obvious types of coverage to the most unlikely responses. As a reminder, policies must be reviewed to render an opinion. There are two subsets to the review of coverages: “standard” insurance response and legal counterparts. Law Firms are publishing reports fostering argument as to the legal interpretation of coverages based on case law that could provide coverage where conventional wisdom may think otherwise. Attorneys are warning that coverages might be overlooked because of overly broad interpretations of exclusions such as the “communicable disease” exclusion or because of the interpretation that a virus does not constitute physical loss or damage to property. For that reason, we cannot give definitive answers that could later be interpreted as bad advice resulting in an error or omission for failure to submit claims in a timely manner.

1. Business Income/Business Interruption/ Extra Expense

Standard Insurance Response

- Business Income pays for the actual loss of business income, due to a suspension of operations, during the period of restoration, due to direct physical loss of property at the premises described, caused by a covered cause of loss.
- The argument against coverage is:
 - There is no direct physical loss.
 - There is no “restoration.”
 - There is no covered cause of loss.
 - There are exclusions for “pollutants;” “contaminants.”
 - Exclusion for “consequential losses.”
 - Following the SARS epidemic, many insurers added specific exclusions for bacterial or viral infections to their coverage.
- Civil Authority coverage is provided, but only as a result of a covered situation.
- There is a waiting period for coverage on many forms ranging from 24 to 72 hours.
- There may be Dependent Property coverage; however, it responds to “covered losses” at premises identified on the endorsement. Coverage is subject to the territory of the policy.

- Dependent Property coverage is an available coverage on Business Income Policies. Dependent Property used to be titled, “Contingent Business Interruption.”
 - It may be included automatically, may be sub-limited, can be endorsed for higher limits.
 - When writing Dependent Property on a standard Business Income policy, coverage is limited to the “territory” definition of the policy which is “domestic.”
 - Some companies will offer international dependent property coverage for a sub-limit.
 - In all cases, the loss at the dependent property must be a covered cause of loss on the insured’s policy.

Legal Counterpart

- The argument is being made that the mere presence of SARS-CoV-2 may constitute insured loss of or damage to property and may trigger coverage for business income.
- When property, such as surfaces or airspace, is contaminated including by virus, it may be deemed to be damaged.
- Many courts have recognized that contamination of property by a hazardous substance is property damage.
- Some of the cases being cited include:
 - *AIG Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) (“Contamination of the environment satisfies” the requirement of property damage);
 - *Motorists Mutual Insurance Co. v. Hardinger*, 131 F. App’x 823 (3d Cir. 2005).
 - *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 3267247 (D. Ore. June 7, 2016),
 - *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

2. Trade Disruption Insurance/ Supply Chain Coverage

- Trade disruption insurance (TDI) focuses on the consequential loss potential as a result of loss of earnings, extra expenses and contractual penalties incurred as a result of delays or disruptions in trade flows growing out of the events listed above.
- TDI differs from the standard business income coverage by NOT requiring that there be a direct physical loss to goods or their conveyances.
- The coverages to which TDI apply are listed on the policy.
- Such policies could provide some level of protection to companies with complex global supply chain interdependencies.

NOTE:

- i. Trade Disruption has been generally unavailable in the marketplace for some time due to the market shift.

- ii. When available, it is typically very expensive, and few insureds elect to purchase the coverage.

3. Event Cancellation Insurance

- Event Cancellation Insurance covers losses as a result of cancellation or postponement of event because of “insured risks.”
- An event cancellation policy can protect an insured from financial losses such as lost ticket sales, out-of-pocket expenses, contractual guarantees to others and sometimes even reimbursement to attendees for their purchased tickets.
- Typical policy language usually requires the loss to be the result of an unexpected cause “beyond the insured’s control.”
- One issue to be aware of is the Communicable Disease exclusion that excludes coverage where a loss arises out of fear of any world epidemic determined by the World Health Organization.
- While this exclusion may exist in some Event Cancellation policies, coverage still may be provided in some circumstances, such as if the venue where the event was to take place were closed under the order of a government or public or local authority due solely to a communicable disease that manifested within the venue.
- The cancellation of an event while possibly in the best interest of the business may not necessarily be covered under such policies because the cancellation was not beyond the control of the event organizers or attendees.

4. Travel Insurance

- People are cancelling their travel including reservations for airlines, hotels, events, tours, cruises, etc.
- Many tour companies are offering people “credit” on future bookings.
- Many people have purchased separate travel insurance policies.
 - i. Epidemics are usually not included in standard travel insurance coverage.
 - ii. Most travel companies won't refund travelers who cancel trips because they are worried about contracting a virus.

5. Commercial General Liability

Overview:

- In simplest terms, liability for businesses could arise from people who enter a premises/event as a customer or guest.
- Examples would include restaurants, airplanes, cruise ships, hospitals, retail stores, schools, etc.
- Possible Liability Scenarios
 - i. Claims that seek to hold people responsible for causing others to contract Coronavirus (NOTE: this is the impetus for many businesses to voluntarily.

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- close as pre-cautionary measures and to mitigate the potential legal ramifications).
- ii. Allowing an employee who is **known** to be infected with the virus to continue working.
 - iii. Failure to adhere to required health and prevention guidelines.
 - iv. Remaining open following an order by a civil authority to close.
 - v. Not screening and refusing service to customers with the virus.

Standard Insurance Response

- Coverage applies to “bodily injury” and “property damage” only if:
 - The “bodily injury” or “property damage” is caused by an “**occurrence**” that takes place in the “coverage territory.”
 - Within the CGL an occurrence is defined as *an accident, including continuous or repeated exposure to substantially the same general harmful conditions.*
 - Is contracting a virus an occurrence within the policy form?
 - One exclusion could possibly negate coverage for spreading the coronavirus to members of the public, exclusion **2.a. Expected or Intended Injury**.
 - For example, if the insured requires an employee to continue working or come to work who is known to be infected, spreading the virus should be expected (even if not intended). No coverage due to the exclusion.
 - In addition, CGL Policy often contains or are endorsed with a Communicable Disease Exclusion (CG 21 32 05 09).

Legal Counterpart

- General liability insurance typically covers claims or suits for bodily injury, property damage, and various instances where the ability to use, occupy, or enjoy property is compromised.
- In many versions of this insurance, coverage also is afforded for claims of emotional distress.
- Defense coverage is provided under a Commercial General Liability typically outside the limit. Insurers owe a duty to the insured to defend cases even if they are “meritless.”
- These policies may apply not just when claims are made or lawsuits are filed, but also to steps taken to reduce the possibility of exposure to SARS-CoV-2.

6. Excess Liability and Umbrella

- Umbrella and excess insurance policies are designed to be additional layers of coverage above primary insurance policies, such as, commercial general liability policy or a business auto policy.
- However similar they are, umbrella and excess policies are not the same.

- Policies may have their own exclusions for transmitted illness, sickness, or disease; exclusion also applies to personal injury resulting from fear of contracting a disease.

7. Workers Compensation Insurance

- Does **any** disease or virus that declare a pandemic create a true workers' compensation exposure?
- Does the Coronavirus create a workers' compensation exposure?
- The short answer is, not likely." Other than the fact that the Coronavirus is currently garnering intense attention, in most cases it is no more occupational than the flu.
- Contracting the virus at work is not enough to trigger the assertion that it is a compensable occupational illness.
- Considerations:
 - Does the employee have an increased risk of contracting the virus due to the peculiarity of his or her job?
 - Health Care Workers
 - Employees traveling outside the country for business

8. Directors and Officers Liability

- Businesses should brace themselves for a likely flood of shareholder suits related to the COVID-19 outbreak, but the success of any litigation may depend on companies' willingness to fully disclose directors and officer's liability-related risks now, say many experts.
- A company's directors and officers may be subjected to shareholder suits alleging that unreasonable actions (or inaction) in response to the coronavirus caused the company economic loss.
- Although D&O policies generally exclude claims for bodily injury, such exclusions should not preclude coverage for shareholders' economic loss claims that allegedly stem from management-level decisions.

9. Employment Practices Liability

- In addition to D&O suits, commercial policyholders may face lawsuits and claims related to employment practices liability, fiduciary liability and cyber liability stemming from COVID-19 that may impact Executive Liability Programs or Wrap Programs.
- Since it is difficult to list every possible basis on which employment-related discrimination can be alleged, most, but not all, policies also contain what are known as "catchall provisions" or "omnibus clauses."
- These provisions apply to claims alleging various types of discrimination and, in addition, include within their definitions of discrimination the statement that coverage also applies to "... any other status that is protected pursuant to any applicable federal, state, or local statute or ordinance."

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- For example, Employment Practices Liability may be triggered if an employment termination occurs because of an employee has been exposed to COVID-19 .

10. Employee Benefit Liability and FMLA

- The FMLA is a federal law that guarantees up to 12 weeks of unpaid job protection for certain eligible employees dealing with their own serious health condition or taking care of a qualifying family member with a serious health condition.
- As the number of cases continues to grow, so will the number of employees be seeking job protection under the Federal Medical Leave Act (FMLA).
- An employee diagnosed with COVID-19, or responsible for caring for a qualifying family member with COVID-19, also should be permitted to use FMLA leave.

11. Cyber Liability

- Companies determined to protect their employees and minimize the impact of COVID-19 are enforcing travel restrictions and strong work-from-home policies.
- As workforces take up social distancing to shelter at home, the risk of attacks against corporate remote access systems goes up.
- Criminals target employees to harvest their VPN credentials as a backstage pass to corporate assets.
- VPN credentials grant legitimate access to remote administrative tools, like PowerShell and Microsoft Remote Desktop Protocol (RD).