

BURR ALERT

Coronavirus (COVID-19) & The Coming Insurance Claims

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As the global coronavirus (COVID-19) pandemic accelerates, so too are the attendant disruptions businesses face, from workplace closures to supply chain disruptions and severe travel restrictions. As a result of these setbacks, companies are already looking to their insurance policies to alleviate the financial burdens imposed by COVID-19. What follows is an overview of the coverages and issues that are sure to be front and center in the COVID-19 coverage litigation that is only beginning to ensue.

Commercial Property Insurance (Business Interruption):

Companies often purchase business interruption coverage as part of traditional “all-risk” commercial property policies. Business interruption coverage is designed to cover lost income (typically in the form of reduced gross earnings) arising from disruptions to an insured’s business operations. While COVID-19 has indeed caused tremendous business-related interruptions, the availability of business interruption coverage to offset insureds’ mounting financial losses may be limited as such coverage typically only extends to physical losses.

Business interruption coverage often only extends coverage to losses caused by specific perils, such as fires, earthquakes, storms, and other expressly designated causes. Business interruption insurance also requires such a designated peril to cause a “direct physical loss” or damage to covered property. While some courts construe the term “physical loss” to mean the loss or impairment of covered property’s use or habitability, others adopt a more narrow approach, interpreting “physical loss” to mean an alteration or physical harm to property that brings it into an “unsatisfactory” state or condition. For example, a restaurant or bar that is required to shut down pursuant to local authorities’ directives or the directive of the CDC to limit gatherings of 10 or more may be able to pursue a business interruption claim in one state that merely requires the covered property’s loss of “use”, but a restaurant or hotel in another state may not be able to pursue a business interruption claim because that state law requires physical damage to the business’s physical premises.

Many property insurance policies also include “Civil Authority” coverage, which covers similar business income losses that result from a public authority restricting the use of or access to an insured’s premises. These scenarios may become more commonplace as state and local authorities continue to escalate quarantine and safety measures like temporarily ordering the closures of bars, restaurants, and theaters. However, as with business interruption coverage, “Civil Authority” coverage often requires the underlying civil order or restriction to directly result from physical loss or damage to the property (e.g., an earthquake’s damaging a property’s foundation to such an extent that a public official deems it unsafe).

Some insureds will likely struggle to establish this “direct physical loss” requirement where their losses are caused not by the direct contamination of covered property, but rather by more remote supply chain disruptions caused by COVID-19. Insureds who elected to purchase so-called “supply chain” or “contingent business interruption” coverage, however, may indeed have coverage for such supply chain disruptions. The terms and limitations of these coverages vary greatly, with some covering only named supplier or customer disruptions and excluding losses resulting from events like pandemics or military actions, and others providing much more expansive coverage.

Finally, many insureds may find business interruption claims for COVID-19 related losses precluded under exclusions in their policies. In response to the SARS outbreak in the early 2000s, some insurers added policy language excluding communicable diseases as triggers for business interruption coverage. For instance, ISO form CP 01 40 07 06, titled “Exclusion for Loss Due to Virus or Bacteria”, provides that the insurer “will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

As demonstrated, the availability of business interruption coverage is highly dependent on the facts of a particular loss, the laws of a relevant jurisdiction, and the specific policy language. In fact, at least one court has already been asked to confront these variables. On March 16, 2020, a New Orleans restaurant filed suit seeking a declaratory judgment to proactively force its insurance carrier to pay for COVID-19 related losses. See *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al.*, Civil District Court for the Parish of Orleans, Louisiana. Specifically, the restaurant alleges that it is an insured under an “all risks” property policy, which includes a business interruption policy covering “direct physical loss”, as well as an “extension of coverage in the event of the businesses closure by order of Civil Authority.” However, the Complaint makes clear that the policy does not include a virus exclusion. Therefore, the restaurant claims it is entitled to Civil Authority coverage, and potentially business interruption coverage, for necessitated decontamination of the restaurant and potential closure (i.e. physical loss) due to the presence of COVID-19. This suit, likely the first of its kind, will certainly not be the last.

Event Cancellation Insurance:

As the number of confirmed COVID-19 cases climbs, event cancellations and suspensions continue to occur, halting Broadway production, Disney-goers, cruises, concerts, and sporting events, including the NCAA tournament, the NBA and NHL seasons, and PGA tour. Inevitably, disputes over coverage under event cancellation policies are also on the rise.

An event cancellation policy may protect an insured from financial losses such as lost ticket sales, out-of-pocket expenses, contractual guarantees, and perhaps reimbursement to attendees. Similar to business-interruption policies, the extent of coverage under these specialized policies is dependent on the specific language used and whether a communicable disease and/or pandemic similar to COVID-19 falls within the policy definition of a “covered event.” What constitutes a “covered event” typically extends to the physical, practical, or legal inability to hold an event as planned, including inability as a result of a government order.

Most often, event cancellation policies are crafted to kick-in when events become either legally or physically impossible to hold. Thus, policyholders canceling events in light of official state-wide bans on public gatherings of a certain number of people, or the CDC guidance recently issued, are more likely to be eligible for coverage. Under most policies, policyholders are not excused from mitigating the

extent of their losses and must also put forth a good-faith effort to reschedule the event before completely cancelling. For example, the NBA has postponed its season, it has not canceled the season. If you go on Ticketmaster's website, you will see that Ticketmaster is not refunding money for postponed events, only for cancelled events. If the NBA reschedules the game, then the tickets are good for the rescheduled event and consumers will not receive a refund. Moreover, while the cancellation of an event may be in the best interest of the business and the safety of attendees, the cancellation may not be covered when it was within the control of the organizers or attendees. Put simply, a mere fear of spreading COVID-19 by putting the event on or traveling to the event does not likely amount to a "covered event" absent additional circumstances. Further, certain policy exclusions may apply and the terms of policies must be evaluated on a case-by-case basis.

Workers' Compensation Insurance:

Workers' compensation insurers may also experience a significant number of claims from workers who contract COVID-19 while on the job. This is especially likely for retail and medical care workers as the risks of exposure and contraction are inherently higher.

Generally speaking, workers' compensation policies cover employees for injuries "arising out of or in the course of employment." Usually, losses related to "occupational diseases" are covered under workers' compensation policies, while "ordinary diseases of life" (i.e., those that are not work-related) are excluded. Thus, the success of these workers' claims will depend on whether their exposure to the virus was sufficiently tied to their work, which may be hard to prove given that our current understanding that individuals with COVID-19 may be asymptomatic and contagious for a period of 14 days. There is really no way to know for sure how or from whom someone contracts COVID-19. However, those businesses requiring exposure to potentially infected persons provide a better nexus between the occupation and the virus.

General Liability Insurance:

Additionally, general liability insurers should be prepared to receive an influx of claims against businesses by individuals alleging they contracted COVID-19 while on the businesses' premises, or as a result of the company's actions or inactions. As the pandemic unfolds, businesses and their general liability insurers will likely see such lawsuits in the form of negligence claims, products liability claims, personal injury claims, and exposure claims. Much like the evolution of the virus itself, the trajectory of litigation ensuing as a result of the virus is also uncertain.

Typically, commercial general liability policies provide liability coverage for third party claims for "bodily injury" and/or "property damage" resulting from an "occurrence." Thus, the inevitable question is: was the bodily injury caused by an accidental occurrence? Jurisdictions will wrestle with the standard for determining if bodily injury as a result of COVID-19 was due to an infected person negligently or unintentionally exposing another to the virus. The standard for determining if a bodily injury was caused by an accident already differs substantially between states. To complicate the forthcoming COVID-19 cases, each case will be factually different and involve a multitude of uncertainty as the virus is highly contagious, easily spread, and symptoms are generally not immediate. Additionally, as the number of confirmed cases rise, the procedures businesses implement to warn and protect against COVID-19 may become a potential liability. Each case will hinge on the court's interpretation of what exactly constitutes an accident under the circumstances.

Pollution Liability Insurance:

Lastly, unlike most property policies, pollution liability (PLL) policies do not require physical loss in order for coverage to apply. Rather, PLL carriers broadly construe the term “pollutant” to include virus-related exposures like COVID-19, as well as man-made exposures causing harm to both humans and the environment. Like most coverage disputes, whether the PLL policy provides coverage for COVID-19 related exposures will turn on whether the policy language considers a virus a “pollutant” and whether transmission of such virus constitutes “release” of the virus/pollutant. While some PLL policies expressly provide coverage for “biological or thermal irritants or contaminants,” others may not. The PLL policies containing language that more closely resembles a potential viral pandemic more strongly suggests COVID-19 will be considered a “pollutant.” Even policies without such express language may also provide coverage as transmission of COVID-19 could be analogized to the “release” or “escape” of a liquid or gaseous contaminant/pollutant. However, some PLL policies state the opposite and expressly exclude from coverage communicable diseases and/or viruses.

Under these pollution policies, disinfection and decontamination expenses are often specifically defined, and coverage is generally only extended to the properties scheduled in the policy. Whether or not a policy provides coverage for COVID-19 related disinfecting measures will depend on the specific policy wording. While some policies may exclude disinfection for communicable diseases (like COVID-19), other policies may provide coverage for disinfection regardless of how the virus is transmitted.

Conclusion:

Courts across the country will soon be asked to apply policy terms, definitions, and exclusions to an incredibly diverse set of COVID-19-related facts and losses. While insurers may seek to rely on the plain language of policy extension of coverage, exclusions, and/or limitations as bars to coverage in many cases, insureds will likely advocate for potential policy ambiguities with respect to policy extension of coverage, exclusions, and/or limitations that should be construed in the insured’s favor. These competing coverage positions must be evaluated on a case-by case basis, examining facts of the alleged loss, specific policy language, and specific governing law; and a myriad of arguments will unfold in the coming months as insureds, insurers, and courts handle the aftermath of the current pandemic.

To discuss this further, please contact:

For any insurance coverage questions or disputes that you may encounter as a result of COVID-19’s impact, please contact [Ginger Busby](mailto:gbusby@burr.com) in Birmingham at gbusby@burr.com or at (205) 458 5341 or the Burr & Forman attorney with whom you normally consult.

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