

THE CORONAVIRUS AND YOUR INSURANCE COVERAGE QUESTIONS

Hodgson Russ Torts, Insurance & Products Liability Alert
April 17, 2020

Are My Coronavirus Losses and Claims Covered by Insurance?

As the global crisis stemming from the coronavirus pandemic continues, losses to businesses and other entities continue to mount. Stay-at-home orders, restrictions on the operations of non-essential businesses, and other government action are dealing significant damage to economic activity. The virus itself is also sickening hundreds of thousands of individuals.

The long term business and liability impacts of these measures are a matter of conjecture at this point. But organizations may be able to mitigate some of these negative impacts through their existing insurance.

Coverage for Lost Income or “Business Interruption”

A central concern for businesses and other organizations, including non-profit entities, is the loss of business and income resulting from the current economic slowdown. Managers should review their commercial package policies or property insurance policies to determine if they potentially have coverage for some of these actual, or anticipated, losses. Most commercial property insurance policies include coverage for lost profits or income resulting from “property damage.”

The coverage for lost income often covers loss resulting from:

- Damage to the policyholder’s own property (business interruption)
- Damage to the property of a customer or supplier or a supplier’s supplier (contingent business interruption)
- Government action such as evacuation orders (order of civil authority)
- Damage to properties that attract customers to the policyholder’s business (lead property)

The event that triggers any of these coverages is actual physical loss — without which there will be no coverage for lost income under a first party property policy. Does the presence of coronavirus in a particular situation cause or constitute “property damage” and did such damage play a role in the loss of income?

Attorneys

William Ciszewski III
Ryan Cummings
Emily Florczak
Julia Hilliker
Patrick Hines
Ryan Lucinski
Jason Markel
Christopher Massaroni
Michael Maxwell
Michael O’Neill
Hugh Russ III
Christian Soller

Practices & Industries

Business Litigation
Product Liability & Complex Tort

THE CORONAVIRUS AND YOUR INSURANCE COVERAGE QUESTIONS

Business Interruption Coverage

The virus does not cause physical damage to structures or premises, but it can be present in buildings, vehicles, and other enclosed spaces, as well as on outdoor surfaces. In similar circumstances, some courts have found that the actual presence of harmful substances at or on a property can constitute “property damage” that triggers first party property coverage, even though those substances do not physically harm the property.

As such, an argument can be made that property damage has occurred in places where the virus is present. Courts will be addressing this issue in the coming months and years, as policyholders file suit to recover lost income resulting from the pandemic. In at least two lawsuits filed within the last month, restaurant groups seek judgments that their business income coverages provide for revenue losses stemming from municipal shut down orders. In both cases, the insureds argue that the coronavirus has caused physical damage because it lingers on, and infects, surfaces.[1] Similarly, a Florida scuba company and a Texas movie chain filed suit this week against their insurers seeking business interruption coverage because their businesses have been effectively shut down due to government orders.

A number of non-profits have followed suit.[2] For example, Indiana’s largest non-profit professional theatre filed suit against its insurer, Cincinnati Casualty Company, alleging that it improperly denied coverage for the theatre’s business interruption losses. The theatre claims that it has an “all risk” property policy that covers business losses due to a forced closure. Its insurer claims that there was no physical loss that would trigger coverage under the policy.

The success of these arguments remains to be seen, and we will be tracking these lawsuits closely.

Contingent Business Interruption Coverage

Many commercial property policies contain riders that provide coverage for contingent business losses. A large portion of the losses suffered by businesses will fall within this coverage, which is a loss caused by damage to a supplier or customer. Many organizations have already reported the loss of overseas suppliers and customers as a result of the pandemic.

The “supplier” whose property damage triggers contingent business interruption coverage need not be limited to the manufacturers or distributors of goods. It could be the transportation that brings customers to your business. It is not necessary for a “supplier” to have a supply contract with the policyholder.

Order of Civil or Military Authority and Lead Property Coverage

Closures of public gathering places and all nonessential business activity in major cities worldwide may trigger coverage for losses caused by an “order of civil or military authority” — that is, for loss due to the prohibition of access to a business’s premises if caused by property damage within a specified distance of the insured property. When Super Storm Sandy hit New York City in 2012, some businesses were reimbursed for their business losses because they were prohibited from entering their buildings due to police orders.

Ordered closures could also trigger “lead property” insurance, which covers the policyholder’s lost earnings resulting from the closure of a property that attracts customers to the policyholder’s business. Again, this coverage is typically an endorsement that is specifically purchased by the business because of its reliance upon the business generated by a particular venue or attraction. For example, the closure of local museums, theatres, or sports arenas may trigger lead property insurance coverage.

THE CORONAVIRUS AND YOUR INSURANCE COVERAGE QUESTIONS

Potential Defenses to Coverage

A range of defenses may allow insurers to avoid, or limit, payment for losses stemming from the coronavirus.

- First, following the SARS outbreak in 2003, most insurers added broad exclusions for damage caused by biological agents or communicable diseases.
- Second, many policies contain sub-limits for some of the coverages discussed above, or they have waiting periods before the coverage is triggered.
- Third, even if the presence of coronavirus is considered property damage, most time element coverages insure only the period of time needed to repair the damaged property. Insurers may argue that the virus exists for only a very short period in the air or on surfaces, and that a quick cleaning is all that is needed to eliminate it and thereby restore the property, allowing a very limited period of recovery.
- Fourth, many policies provide extended period of interruption coverage to a certain number of days after property damage has been repaired to allow the policyholder's business to resume normal operations and achieve pre-loss levels of income. There will likely be disagreements over whether a business was closed or access was denied because of actual property damage or as a purely precautionary measure to prevent the spread of the disease.
- Finally, the deductibles applicable to business interruption coverage can be very complicated. Insurers may attempt to stack, or apply multiple deductibles, to a single loss, thereby limiting their payment obligations.

Even if a policyholder has coverage, it is obligated to mitigate the losses as much as possible. Insurance policies, as well as the common law, require insureds to mitigate property loss and require the insurer to pay for those efforts. Loss mitigation coverage is triggered by actual loss, damage, or injury, so it probably would not apply to purely precautionary measures taken to avoid a possible loss.

However, once a loss or injury has commenced, efforts to contain it, such as closures or costs incurred to make alternative arrangements for employees, may be covered. Extra expenses incurred in order to achieve safer means of production and deliveries of products and services may also be covered.

Is there Insurance Coverage for Coronavirus-Related Lawsuits?

While attention to the emergency has focused on public health issues and economic contraction, there will likely be a wave of coronavirus-related litigation against businesses and other entities in the near to medium term. No one can predict the nature of this litigation or its outcome, but liability insurance is likely to play a key role in mitigating any losses on this front.

Commercial General Liability Insurance ("CGL")

The media is rife with stories of serial coronavirus outbreaks in enclosed communities or environments, many of which are operated by businesses or non-profit organizations. Numerous cruise lines have experienced ship-wide coronavirus outbreaks, and nursing homes and retirement communities are confronting similar situations. Aside from these newsworthy examples, there are sure to be myriad cases where individuals become sickened while on the premises of a business or other entity. These organizations may find themselves as defendants in tort suits alleging negligence or other theories of liability, and seeking damages for coronavirus infections.

THE CORONAVIRUS AND YOUR INSURANCE COVERAGE QUESTIONS

In actions claiming that an organization bears tort responsibility for a plaintiff's coronavirus infection, CGL insurance may provide coverage. This is a standard commercial insurance coverage, and most entities that own or operate premises are likely familiar with it. Among other things, CGL insurance provides the insured with coverage for indemnification and defense costs for claims for bodily injury, sickness, and/or disease caused by an "occurrence," *i.e.*, an accident.

While the CGL coverage grant is broad, it is important to scrutinize each policy to determine whether coronavirus-related coverage is available. Some policies may include a communicable disease exclusion, which would bar coverage for contagious sicknesses like coronavirus. Moreover, these policies will not cover claims by employees who allege they contracted the virus while at work—that contingency is discussed below.

Directors and Officers Liability Insurance

Given the pandemic's negative effects on the stock market and business forecasts in many sectors of the economy for the foreseeable future, many firms are experiencing significant drops in profitability, and in the case of publicly traded companies, their share prices. This turmoil may lead to a significant number of corporate governance and related suits alleging mismanagement or securities law violations.

In such cases, D&O insurance may apply. These policies provide coverage for suits against managers alleging a "wrongful act," which is typically defined to mean "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted." Some D&O policies also provide coverage to the insured corporation for securities claims.

For example, claims against an insured corporation and its managers for failing to adequately disclose information about the likely effects of the pandemic on the corporation may be covered by a D&O policy. This insurance would also likely cover claims that management's actions or omissions in response to the coronavirus pandemic resulted in additional harm to the entity.

Many D&O policies preclude coverage for claims for bodily injury, sickness, disease, or death of a person, and D&O insurers may argue that claims arising from the pandemic are not covered pursuant to these policies' bodily injury exclusions. But these exclusions are unlikely to bar coverage for the corporate governance and securities violation claims discussed above. These are not claims for sickness or disease, but for "wrongful acts" within the meaning of a D&O policy.

Regardless, and as with all policies, it is important to examine each policy for more specific provisions that may restrict coverage with respect to a given claim.

What about Workers' Compensation Coverage?

Employers are dealing with potential claims by employees that they contracted the virus during the course of their employment. **Workers' compensation insurance** serves two purposes: it assures that injured **workers** get medical care and **compensation** for a portion of the income they lose while they are unable to return to work and it usually protects employers from lawsuits by **workers** injured while working. To trigger such coverage, however, the causal event must be a workplace injury or exposure. Based on the nature of the coronavirus and how it is readily transmitted, it will be very difficult for most employees to establish that their exposure occurred at work as opposed to some other social interaction. Nonetheless, to the extent they can satisfy their burden of proof, an employer's workers' compensation policy should

THE CORONAVIRUS AND YOUR INSURANCE COVERAGE QUESTIONS

respond to the claim.

Business Takeaway

It is important that our colleagues in all industries and sectors review their insurance policies immediately to determine if they have potentially applicable insurance. If you are unsure, reach out to your insurance broker or your attorneys to determine if you have such coverage and, if you do, the applicable limits. Be sure to track your losses. Most importantly, if you believe you have a potential claim under your policy, notify your insurer immediately; every policy imposes a timely notice requirement on the policyholder.

If you have questions regarding your insurance policies or potential coverage issues, please contact Ryan K. Cummings (716.848.1665), Michael C. O'Neill (716.848.1590) or William A. Ciszewski (716.848.1623).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>

[1] The cases are *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.*, case number 2020-02558, Civil District Court for the Parish of Orleans, Louisiana, and *French Laundry Partners, LP dba The French Laundry, et al. v. Hartford Fire Insurance Company, et al.*, Superior Court for the State of California, County of Napa.

[2] *Indiana Repertory Theatre, Inc. v. Cincinnati Casualty Company*, case number 49D01-2004-PL-013137, Marion County Superior Court, Indiana.