

Insurance Coverage Implications of COVID-19

March 24, 2020

The global COVID-19 (coronavirus) pandemic is likely to raise numerous questions regarding the potential applicability of insurance coverage for damages suffered as a result of the impact of the virus. The pandemic will certainly give rise to both first- and third-party claims, and impact different types of insurance coverage. This article provides an overview of the coverage issues insurers may see relating to business interruption coverage, third-party claims and special events coverage.

Business Interruption Coverage

First party property insurance often includes coverage for business interruptions – known as business income coverage. Generally understanding how this property coverage works amidst the COVID-19 outbreak and the resultant widespread business shutdowns is now of keen interest.

The insuring agreement for this coverage routinely requires that the business interruption result from a “direct physical loss of or damage to” the insured’s property from a covered cause of the loss that is not otherwise excluded by the policy. Additional coverage for business interruption caused by the action of a civil authority that prohibits access to the described premises may be pertinent, but this coverage also requires direct physical loss of or damage to property other than the insured premises.

Setting aside the political and societal pressures that may be brought to bear, this requirement – direct physical loss of or damage to property – as generally applied to the facts surrounding COVID-19 claims suggests that these claims likely do not satisfy this basic requirement of coverage, because the virus does not satisfy this direct physical loss or damage to property requirement. Of course, one must examine each claim on its own merits.

There will be challenges to coverage denials based on no physical loss or damage to property when a business is closed because of the actual presence of COVID-19 at the premises; and even if this is determined to satisfy the initial coverage grant, and is not otherwise excluded, this condition likely can be expeditiously remedied by thorough cleaning and disinfecting, such that – the business interruption should be of limited duration. One suit has already been filed – *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al.*, Civil District Court for the Parish of Orleans, Louisiana. In that case, discussed further herein, the insured asserts that the closing of the premises was caused by a direct physical loss from the alleged presence of the virus triggering business interruption coverage.

Most commercial property policies contain exclusions for infectious diseases, flu outbreaks, viruses, microorganisms and epidemics (e.g., ISO BP 06 01 01 07). If a property policy contains this type of exclusion, there should be no coverage for COVID-19 business interruption claims, even if an insured

were able to show direct physical damage to premises caused by the virus. It is noteworthy, however, that New Jersey is considering legislation to vitiate these exclusions as applied to COVID-19 (Bill A3844). Whether that legislation would survive the expected legal challenges remains to be seen, but we may see more state and/or federal legislative attempts to fashion this type of a workaround.

Third-Party Claims Relating to COVID-19

There will no doubt be third-party liability claims asserted that allege, for example, that a company failed to take proper precautions or cease operations once it learned of COVID-19 contamination at its facility. And insurance carriers can expect insureds to request insurance coverage for those claims under their general liability policies. Insurers should consider the following issues that may be presented under policy language typically found in standard commercial general liability policy:

Bodily injury – Presumably this requirement for coverage would be satisfied by most claims. However, it is important to consider whether mental distress or mental anguish are included within the policy's definition of bodily injury, and if so, whether the mental distress or anguish must result from physical injury or disease.

Property damage – In the event a claim seeks lost income or loss of business, courts in most states find that pure economic loss is not sufficient to satisfy the standard definition of property damage. Careful analysis will be needed, however, to consider whether the portion of the definition for "loss of use of tangible property that is not physically injured" may be satisfied.

Occurrence – This likely will be a key issue for these types of claims, and it will largely depend on the particular facts alleged. An insurer should consider the extent to which it is alleged that the insured was aware of COVID-19 contamination at its facility and that the injury or damage was the natural and foreseeable result of the insured's conduct in failing to take proper safeguards. This may depend on the timing of the insured's conduct.

For example, in the early days of the disease, little was known about the virus and the scope of its reach was not anticipated – and certainly not on the scale we are currently experiencing. However, after that initial period, information about the virus became widely known and guidance was issued by the CDC and other governmental agencies about proper precautionary measures. All of these factors should be considered to determine whether the insured's conduct constitutes an accident sufficient to satisfy the policy's definition of "occurrence."

Pollution exclusion – The pollution exclusion may apply to preclude coverage for COVID-19 claims in those jurisdictions where traditional environmental contamination is not required. In those jurisdictions, contamination by COVID-19 may constitute the dispersal or migration of a "pollutant" (*i.e.*, a gaseous irritant or contaminant).

Fungi or Bacteria exclusion – The standard language of this exclusion precludes coverage for “bodily injury” or “property damage” that would not have occurred but for contact with or exposure to fungi or bacteria. Because COVID-19 is viral and not bacterial, this exclusion may not be implicated.

Number of occurrences – If coverage is triggered under a CGL policy, the insurer should carefully consider whether a single occurrence is alleged such that only a single policy limit is available, or whether multiple occurrences may be alleged that implicate multiple policy limits. Given that the standard policy’s definition of “occurrence” includes “continuous or repeated exposure to substantially the same general harmful conditions,” multiple exposures to the virus would constitute a single “occurrence.”

Conditions – notice, voluntary payments – As always, the insured’s conduct in complying with the policy’s conditions should be considered. This includes providing timely notice of claims and suits, cooperating with the insurer’s investigation of the claim, and refraining from voluntarily making payments on a claim without the insurer’s consent.

As is true for any insurance coverage issue, the particular facts of the claim alleged against the insured and the particular policy language at issue will be keys to fully analyzing each claim.

Event Cancellation Insurance

Event cancellation insurance is a special type of insurance that is issued to provide coverage for one-off events. Examples include concerts, festivals, conferences/ conventions, sporting events and even weddings. These types of events have been cancelled around the world due to the COVID-19 pandemic.

The organizers of such events may have purchased event cancellation insurance. A careful examination of the event cancellation policy is paramount. Cancellation of an event does not automatically mean that the event cancellation policy will apply to provide coverage. While the triggering event for such policies is the cancellation of the event, the reason for the cancellation may be the determining factor with respect to whether insurance coverage is available.

In order to obtain coverage for a cancellation that is the result of a pandemic, such as COVID-19, it may be necessary to have purchased a rider that provides coverage for cancellation resulting from the spread of a communicable disease. Even then, the language of the rider is critical. It may apply in certain circumstances, such as when the government takes action relating to the communicable disease that requires cancellation of the event. If the event is cancelled before such a directive is put into place, it could impact the availability of insurance coverage under the rider.

Certain exclusions may apply to preclude coverage. Some event cancellation policies include an exclusion that applies if the cancellation is due to the spread of a communicable disease. Another

exclusion to be mindful of is an exclusion that precludes coverage if the event becomes prohibited by local, state or federal law. An event cancellation policy may also contain an exclusion that applies when an event is cancelled due to confinement or compulsory quarantine. Finally, if the event cancellation policy was issued within the past two months, it may even contain an exclusion that specifically applies to COVID-19.

As with analyzing the availability of insurance coverage under any insurance policy, a thoughtful reading of the language of the contract is critical. Examine the insuring agreement to determine whether the terms of the agreement have been satisfied. Review the policy exclusions for any that may be applicable, and determine whether an endorsement or rider has been added to the policy that may impact the coverage determination.

First COVID-19 Closure Coverage Lawsuit

A lawsuit has already been filed seeking insurance coverage as a result of the COVID-19 pandemic – *Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, Civil District Court for the Parish of Orleans, Louisiana. On March 16, a New Orleans restaurant filed a lawsuit asking a state court judge to hold that its property and business interruption insurance policy, issued by Lloyd's of London, provides coverage for the losses it has incurred and will incur as a result of government-mandated closures due to COVID-19.

In its complaint, the insured contends that the policy does not contain any exclusions relating to losses stemming from quarantines resulting from a pandemic. The policy's insuring agreement, however, requires "direct physical loss" to property in order for there to be coverage. Regardless of the lack of an exclusion relating to a quarantine or pandemic, this provision of the insuring may be difficult to satisfy.

COVID-19 will certainly raise questions relating to insurance coverage, some of which will have to be resolved through litigation. Due to the unique nature of this global pandemic, some questions will be difficult to answer and may present issues of first-impression.

Plunkett Cooney's Insurance Coverage Practice Group will continue to update pertinent developments, and is available to address any questions relating to the coverage implications of COVID-19. For more information about Plunkett Cooney's Insurance Coverage Practice Group, please visit the firm's website.