

Client Alert

Insurance Coverage Issues Arising from the COVID-19 Pandemic

The COVID-19 pandemic and the almost unprecedented societal response to contain it by restricting workplaces, travel and public gatherings, raise a series of potential insurance issues for policy-holding business owners. These issues arise under a broad array of property, general liability, errors and omissions, and directors & officers/management liability policies. While policy forms differ and coverage will depend on the precise policy language and nature of the loss, the following issues are likely to arise.

Business Interruption Insurance

The most likely potential source of insurance coverage for financial losses resulting from the economic slowdown caused by the response to COVID-19 is Business Interruption (“BI”) coverage. When evaluating BI coverage, a threshold question is whether the business interruption losses are caused by the existence of COVID-19 at the insured’s location or due to indirect exposures which may be covered under the Civil Authority, Ingress/Egress or Supply Chain coverages.

BI coverage is typically triggered as a result of “direct physical loss or damage” to the insured’s property occurring during the term of the policy. The key to this coverage is that the insured’s property must have sustained a covered cause of loss. For instance, if one or more employees have contracted COVID-19 potentially at her workplace, a reasonable argument may be made that COVID-19 was present at the worksite and the contamination of the premises constituted property damage.

Indirect exposures may also trigger BI coverage. The most significant indirect exposures that will trigger such losses are Civil Authority, Ingress/Egress and Supply Chain disruption. Civil Authority coverage is in place to address BI losses when a Civil Authority has prohibited access to an insured’s location. Ingress/Egress Coverage is similar to Civil Authority in

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that coverage is in place for BI when access to the insured's location is prohibited due to "direct physical damage" to tangible property. If property policies include these coverages, physical damage to tangible property is still a requirement that needs to be met, although it does not need to be at the insured's location or to the insured's property. Supply chain insurance protects against losses resulting from disruption in a company's supply chain. Significantly, Supply Chain insurance may cover BI losses for insured events that are not limited to physical damage to property and may include pandemic, regulatory action, strikes, or civil or military action.

In addition to businesses evaluating their BI insurance coverage, businesses also should be examining their commercial contracts for other issues related to business interruption. As COVID-19 disrupts supply chains and as federal, state and local government take action to contain the spread, all businesses should be evaluating whether their commercial contracts contain force majeure clauses. A force majeure event is an unforeseen event outside a party's control that excuses performance under a contract. Typically, such events include natural disasters, interventions by the government, or "acts of God". Whether COVID-19 would be deemed a force majeure event will depend on the precise language of the contract at issue and how COVID-19 may have affected a particular party's performance, but as supply chains are increasingly stressed (and in some cases splintered) by the COVID-19 outbreak and quarantines are put in place by governments around the world, businesses should be looking at their contracts to see if they contain such clauses and if so, what notice provisions might apply under the circumstances.

General Liability Insurance

Businesses, particularly those open to the public, may be the target of personal injury claims. It is not surprising that in recent days, many retailers have been notifying their customers by email of the various steps they are taking to make their public accommodations safe and/or reducing hours of operation, as well as implementing rigorous cleaning procedures. It is reasonable to assume, however that some people afflicted with COVID-19 may sue business owners claiming that they were infected while visiting the business premises as a result of managements' failure to take adequate precautions to prevent the spread of COVID-19 at their establishments or by the failure to warn when one of their employees contracts COVID-19.

The alleged spread of COVID-19 at an insured's business is likely an "occurrence" causing bodily injury thereby triggering coverage under most general liability policies including the industry-standard ISO general liability form Commercial General Liability Coverage Form CG 00 01 04 13). Insurers may seek to invoke the pollution exclusion which bars coverage of loss arising from "contaminants," however, it is unclear that courts will broadly interpret this exclusion to apply to COVID-19.

In the event that employees who deal directly with third parties contract COVID-19, consideration should be given to providing liability insurers with a notice of circumstances that may lead to a claim in order to avoid a possible declination of coverage when a claim is brought based on the failure to provide the carrier with adequate notice.

Directors & Officers/Management Liability Coverage

Most D&O policies would not cover claims for bodily injury against a company because of the Bodily Injury exclusion. However, directors and officers should be relieved to know that the Side A coverage of D&O policies for claims against the individuals often omit this exclusion. Further, there are some scenarios in which D&O liability may apply in the event of follow-on exposures:

- If a company's financial performance is materially impacted by COVID-19 or the company's response to COVID-19 and its stock price declines precipitously, there is the risk of shareholder derivative litigation and/or a regulatory investigation by the SEC or by other federal agencies.
- Failure to disclose, or insufficient or incorrect disclosures to investors regarding pandemic exposure (as well as other potential risks such as selective disclosure violations) are particular vulnerabilities for publicly traded companies.

Businesses are facing a myriad of challenges stemming from COVID-19. As they consider their responses, they should keep in mind the contractual and insurance coverage issues that will undoubtedly flow from this epidemic. It should be expected that insurance policies written in 2020 will have a COVID-19 exclusion. Therefore, it is important that any companies concerned about possible claims or subpoenas relating to COVID-19 provide notice of circumstances that may lead to a claim. Notice of circumstances is more important for a claims-made D&O policy or E&O policy than for a general liability policy. Claims-made policies almost never cover claims brought after the expiration of the policy, but one exception is where the insured gives a notice of circumstances that may lead to a claim. A notice of circumstances will act as a placeholder on that policy such that even if a claim is brought long after the policy expiration, the policy's potential coverage will be triggered if the claim relates to the circumstances noticed.

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