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TIME FOR A POLICY CHECKUP: MAXIMIZING INSURANCE COVERAGE FOR CORONAVIRUS LOSSES



Time for a Policy Checkup: Maximizing Insurance Coverage for Coronavirus Losses

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The Situation: Declared a global health emergency by the World Health Organization, and with

more than 17,000 cases already confirmed worldwide, preliminary estimates indicate that the latest coronavirus outbreak may not peak until late April 2020.

The Result: Business interruption and other losses due to the continued global spread of coronavirus are projected to total in the billions of dollars.

Looking Ahead: Commercial policyholders should proactively review their insurance coverage provisions to guard against the risk of coronavirus and other infectious disease-related losses.

As the international community works to mitigate the evolving coronavirus crisis (e.g., by cautioning against and, in certain instances, restricting non-essential travel to and from mainland China), businesses are understandably concerned about the potential financial impact the continued global spread of coronavirus may have on their operations.

Fortunately, businesses can proactively manage their coronavirus exposure now by carefully reviewing their existing insurance programs to determine whether adequate coverage is afforded for coronavirus and other infectious disease-related losses. While the scope of coverage will depend upon the specific terms of each insurance policy, a number of coverages may respond with insurance for the types of coronavirus losses that may soon be experienced by commercial policyholders.

Business Interruption Insurance

As a consequence of the recent governmental travel advisories/restrictions and increasing public fear over contraction of coronavirus, businesses located in areas where human contraction of coronavirus has been concentrated may experience significant disruptions. Business interruption insurance may respond with coverage for these income losses.

Typically purchased as part of a company's commercial property insurance policy, business interruption insurance is intended to protect businesses against income losses sustained as a result of disruptions to their operations. Contingent business interruption coverage similarly provides insurance for financial losses resulting from disruptions to a business's customers or suppliers, usually requiring that the underlying cause of damage to the customer or supplier be of a type covered with respect to the business's own property.

In many commercial property insurance policies, business interruption coverage is triggered when the policyholder sustains "direct physical loss of or damage to" insured property by a covered cause of loss. In the event of a claim for coronavirus-related business interruption, certain insurance carriers may dispute whether this "physical loss" requirement has been met.

Policyholders should keep in mind, however, that courts across the country have not settled upon a

uniform rule for when insured property has suffered a "physical loss." Courts in a number of jurisdictions have determined that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitutes a "physical loss" sufficient to trigger business interruption coverage. The determination of whether "physical loss" has occurred will therefore continue to require a close examination of the particular facts of each case.

Other specialized insurance policies and extensions of coverage added to standard property insurance policies—including those sold to policyholders in the hospitality and health care industries—expressly provide insurance coverage for losses caused by "communicable or infectious diseases" without requiring physical damage to insured property. Notwithstanding the potential availability of coverage under standard business interruption insurance, businesses especially concerned about the risk of disruptions occasioned by communicable or infectious disease outbreaks should consider whether to also purchase "communicable or infectious diseases" coverage.

In addition, many commercial property insurance policies provide coverage for business income losses sustained when a "civil authority" prohibits or impairs access to the policyholder's premises. Depending upon its specific wording, a policy's "civil authority" coverage may or may not require that the access restriction result from "physical loss" by a covered cause of loss and, if so, often does not require that "physical loss" occur to the policyholder's own property. Accordingly, in the event that a federal, state, or local governmental authority limits access to or from areas where active transmission of an infectious disease has been identified, "civil authority" coverage may respond with insurance for the attendant income losses of affected businesses.

Finally, some forms of political risk insurance may afford coverage for business interruption losses suffered by a foreign entity's operations in the host country resulting from local government regulatory actions. While disruptions resulting from a health edict such as that regarding the coronavirus may not constitute "expropriation" or contract frustration, many political risk policies afford coverage for business interruption, even when there is no physical damage to the business, for actions taken by the host country's government.

Liability Insurance: CGL, D&O, E&O, and Workers' Compensation Coverage

As the incidence of coronavirus illness increases, businesses—particularly those in the hospitality industry—could also face claims by infected guests that they allegedly failed to exercise reasonable care in guarding against, or warning of, the risk of exposure to coronavirus. Intended to protect businesses against third-party claims for bodily injury resulting from exposure to harmful conditions, commercial general liability ("CGL") insurance policies should respond with coverage for these claims.

With respect to similar claims for bodily injury brought against a company by its own employees, most states' workers' compensation statutes provide that an employee is entitled to benefits for

"occupational diseases." While "ordinary diseases of life" (i.e., those to which the general public is equally exposed) are generally excluded from workers' compensation insurance programs, if an employee can establish a direct causal connection to the workplace, there may be a valid argument for workers' compensation insurance coverage. Although coronavirus is transmitted primarily through animal or human contact (and thus arguably constitutes an "ordinary disease"), laboratory-acquired coronavirus illness could conceivably qualify for workers' compensation coverage. Nevertheless, to the extent that other claims for employee-related coronavirus illness do not qualify for workers' compensation benefits, coverage might still be afforded under certain CGL insurance policies.

In addition to CGL insurance, many health care providers also purchase errors and omissions ("E&O") insurance, commonly referred to as hospital professional liability coverage. These specialized insurance policies protect against damages that the health care provider is required to pay for bodily injury arising out of the provision of, or failure to provide, medical services. Although they typically exclude coverage for bodily injury to employees occurring during the course of their employment (which can be covered under workers' compensation insurance policies), hospital professional liability policies should respond with insurance for coronavirus-related bodily injury claims of non-employees.

In addition to third-party claims brought against businesses themselves, a company's directors and officers may be subjected to shareholder lawsuits alleging that their unreasonable actions (or inaction) in response to coronavirus or other infectious disease epidemics caused the company economic loss. In particular, a company's shareholders may contend that management allegedly failed to develop adequate contingency plans, allegedly failed to observe protocols recommended or required by governmental authorities, and/or allegedly failed to properly disclose the risks of coronavirus posed to the company's business and financial performance. Directors and officers ("D&O") insurance policies may provide coverage for the costs and liabilities arising from these shareholder lawsuits.

Although the majority of D&O insurance policies exclude claims for bodily injury (with some exclusions worded more broadly than others), when afforded a "strict and narrow construction," as they must be under the laws of most states, such exclusions should not preclude insurance coverage for shareholders' economic loss claims. Nevertheless, policyholders should be mindful of the fact that insurers may attempt to invoke certain D&O policies' so-called "absolute" bodily injury exclusions (e.g., excluding coverage for any claim "*based on, directly or indirectly arising out of, or relating to* actual or alleged bodily injury") to deny coverage for shareholder claims with any connection to a coronavirus-related bodily injury, no matter how attenuated. At the time of purchase or renewal, policyholders should therefore consider negotiating the removal of this "absolute" language or the addition of carve-outs to the exclusion that expressly preserve coverage for shareholder claims, whether or not they arise out of underlying bodily injury claims.

Along the same lines, policyholders should also examine the scope of their D&O insurance policies' "conduct exclusions." Many D&O insurance policies exclude coverage for certain misconduct by the

insured, which can include deliberate fraud, dishonesty, and willful violations of the law. The particular language of these "conduct exclusions" can become significant if company management's response to coronavirus risk becomes the subject of shareholder litigation. Certain D&O policies require only that the proscribed conduct occur "in fact," while others provide that the exclusion applies only if the insured's misconduct is established by "final adjudication." Neither formulation of the exclusion is ideal from a policyholder perspective, as insurers may attempt to assert that they themselves can determine the exclusion's application (under the "in fact" trigger) or have the exclusion's application determined through insurance coverage proceedings (under the "final adjudication" trigger).

Where possible, policyholders should accordingly seek to have any conduct exclusions in their D&O insurance policies expressly worded to apply only if the insured's misconduct is determined through a "final, non-appealable adjudication in the *underlying* action," which should foreclose an insurer from attempting to trigger the exclusion absent a conclusive determination in the underlying litigation.

Conclusion

While the foregoing has surveyed the various types of insurance that may respond with coverage for coronavirus and other infectious disease losses, the scope of coverage will ultimately depend upon the specific language of each insurance policy. Businesses interested in proactively managing their coronavirus exposure will accordingly be well-served to evaluate the adequacy of the coverage provided under their existing insurance programs before the potential onset of such losses.

Two Key Takeaways

1. Various types of insurance policies may respond with coverage for coronavirus and other infectious disease-related losses.
2. Businesses interested in proactively managing their coronavirus exposure should accordingly evaluate the adequacy of the coverage provided under their existing insurance programs before the potential onset of such losses.

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