

COULD COVID-19 COVERAGE BE HIDDEN IN YOUR INSURANCE POLICY?

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It is hard to believe that only a month ago we were sitting in traffic, frequenting restaurants and local businesses, and purchasing the necessities of life without worry whether there would still be milk and eggs on the shelf when we arrived at the grocery store. Work and business were going as usual. Since the coronavirus pandemic and government shutdowns, most of life as we

knew it has come to a screeching halt. Business closures, supply chain disruption, event cancellations, potential third party claims of liability for COVID-19 exposure and countless other challenges are causing businesses to suffer significant financial losses in the wake of the coronavirus pandemic. Fortunately, some insurance policies may offer relief to businesses during these times. In some instances the coverage currently exists; in other instances, coverage may become available or even mandated.

Given the uncertainty of coverage for COVID-19 related events, if you are a business owner it is worth reviewing your insurance policies for potential coverage. While many insurance carriers have initially denied coverage to policyholders, that may not be the last word. It may be advisable to question an insurer's initial denial of coverage for COVID-19 related losses. Last week, President Trump remarked that business interruption coverage should cover COVID-19 losses as a matter of fairness, on the basis that business owners have paid insurance premiums for years without filing business interruption claims and now have legitimate losses which should compel the payment of benefits. Tendering claims promptly will preserve their viability as political pressure increases on insurers to honor business interruption claims. Ultimately, the devil is in the details and COVID-19 business income coverage may be lurking in the details of your insurance policy. The below offers some insight to uncover potential coverage and tips for timely documenting claims.

Business Interruption Coverage

Commercial property insurance policies may include business interruption coverage which covers losses arising from interruption, including loss of profits. Policies differ as to what triggers the coverage, but many require a "direct physical loss or damage to property." Insurers have argued that COVID-19 related losses are not covered due to the lack of any physical structural damage to property. Claimants, in turn, have argued that the COVID-19 pandemic has rendered their property unfit for its intended purpose and, as a result, the "direct physical loss or damage" requirement has been met. Several lawsuits have already been filed contesting the denial of coverage for business interruption losses. How the courts will interpret specific policy language in light of the COVID-19 pandemic is still unknown. Also, some policies expressly provide coverage for damages resulting from a "loss of use" of property that has become uninhabitable or unusable as a trigger for business interruption coverage. This may extend to the COVID-19 related shutdowns. It is extremely important to review the specific

terms of your policy, since the determination of coverage for a specific loss will depend on the policy terms, the facts of the loss and the law.

Whether COVID-19 losses will be covered may depend on how the virus interacts with people and property. Some argue that the fact that the virus can live on surfaces for days supports the conclusion that the virus causes physical harm to property. Other considerations of the physical nature of virus transmission include whether a product the business produces is contaminated, whether surfaces are contaminated at the business locations creating a medium for spreading the virus, or whether the HVAC system could be contaminated. Since the coronavirus is new, creative, novel arguments may provide a basis for coverage under existing insurance policies. But beware of exclusions in your policy. Insurers have argued that a variety of policy exclusions operate to exclude COVID-19 losses from coverage. Some policies contain express virus exclusions. The extent to which these exclusions will be found to be applicable to COVID-19 is not yet known. The scope of these provisions depends on the specific language of the exclusions.

Civil Authority and Specialized Coverage

Some insurance policies contain specialized coverage, which may offer another latent form of COVID-19 coverage.

For example, some commercial property policies include civil authority coverage, which provides coverage for loss of income as a result of restrictions on access to the insured premises imposed by a civil or government authority. This coverage may also require some element of physical loss or damage to property. It remains to be seen whether California courts will extend coverage to circumstances where property has become unsafe or uninhabitable in the absence of structural damage, simply due to government mandates.

Certain industries may contain unique coverage extensions under which COVID-19 may be a covered peril, such as contingent business income coverage, which covers losses incurred as a result of an interruption to a third party business that is a supplier for a major part of the insured operation.

Liability Insurance

Liability coverage may also provide protection against any liability claims that may arise in the future as a result of COVID-19. This may include:

- Liability coverage for any negligence or product liability which leads to customers or employees being exposed to the virus and at risk of infection;
- D & O coverage for directors and officers making business decisions to address COVID-19 that may have put them at risk (these claims may be more scrutinized in the aftermath of COVID-19);
- Employment practice liability coverage for employment decisions made as companies are reducing the workforce or making employment decisions to address COVID-19, including discrimination, retaliation, coercion, or other employment claims as means to recover against an employer;
- Workers compensation may provide coverage for employees making claims for contracting COVID-19 during the course and scope of employment; or
- Professional negligence coverage, depending on your business, may cover a failure to meet the duty of care in the wake of COVID-19 circumstances.

Potential Legislation May Be on the Horizon

Take note that the California Insurance Commissioner has directed insurance companies to submit data to the California Department of Insurance regarding coverage of commercial business interruption related to COVID-19 to assist state policymakers to understand the scope of insured and uninsured losses to businesses in order to help businesses recover. The Insurance Commissioner has already ordered the return of premiums paid by individuals and businesses carrying particular forms of coverage for the months of March and April, and additional orders and relief may be forthcoming. Moreover, proposed federal legislation may likewise expand coverage availability. Filing claims for COVID-19 losses, even without clarity on the coverage of your policy, may give insight to the Department of Insurance and other state and federal policymakers on what type of relief is needed for businesses, and may ultimately impact the policies and solutions that get passed.

Conclusion

Ultimately, documentation of how any contamination affects your property or business is essential to substantiate your claim. Some important tips for accessing claims coverage include: tender notice of claims promptly, strategically document your claim, note mandatory government closures, and contemporaneously document your losses (i.e. keep records, invoices, receipts, payroll records, overtime records, outside vendor estimates, cancellation notices, etc.). Even if policies do not contain specific coverage for disease, track any contamination that impacts your property, or those of your suppliers or customers, record any impact on operations, revenues and extra expenses incurred due to the virus.

If you receive a denial for coverage, you should consider questioning the determination and seek the advice of professionals, including coverage and claim consultants and attorneys, to conduct an extensive review of your policy coverages, including all extensions, riders, exclusions and other endorsements, as well as for notice requirements, waiting periods or other time limitations, and proof or quantification of loss requirements. If you have questions regarding your potential COVID-19 insurance claims, please contact Kim Gambrall or Candice Harper at Trainor Fairbrook.