COVID-19: CORONAVIRUS LOSSES: WILL YOUR COMMERCIAL INSURANCE POLICIES RESPOND?

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The World Health Organization has declared the coronavirus (or COVID-19) a global health emergency, [1] and our daily news diet continues to include distressing reports regarding its continuing spread and its devastating effects on human health and commerce. As of this writing, the People's Republic of China has reported more than 77,600 cases of infection and over 2,600 deaths. Outside China, cases have been reported in 32 other countries affecting more than 2,500 people and resulting in 33 deaths. [2] And just as the virus is spreading geographically, its impact on businesses is also spreading — from an employee and customer health concern to a supply chain disruption to an interruption in business. Whether your company is involved in providing travel and hospitality services (among the hardest hit industries) or manufacturing industrial or consumer products, you are likely feeling some impact from the coronavirus. The reports of this impact are now widespread and have begun to dramatically affect stock markets around the world. [3]

Accordingly, many risk managers are being asked by company officials and board directors to assess the risk that their companies face from the coronavirus and to report whether their companies are protected from related risks of loss by their existing insurance policies. Many companies carry an array of commercial insurance policies that potentially afford coverage. The range of potential claims, meanwhile, is broad and deep and, as with the assessment of any claim, the availability of insurance coverage will depend upon the factual details surrounding each loss and the specific language of the policies a company has in place. As with any emerging area of risk, commercial policyholders should assess the range of losses they may face from the coronavirus and carefully review their existing insurance policies to determine whether those policies can be accessed to defray their business losses. Several of the potentially implicated coverages are described below.

COMMERCIAL PROPERTY INSURANCE

One of the most highly reported commercial impacts of the coronavirus is supply chain disruption and the resulting interruption in business. For example, Hyundai reported in early February that it was temporarily stopping its production lines in South Korea because of a shortage of parts coming from China. [4] Similarly, Apple recently announced that it will likely miss its revenue guidance for the first quarter of the year because of iPhone production delays in China. [5] Additionally, pharmaceutical companies are raising concerns about drug shortages resulting from their reliance on a global supply chain that significantly depends upon ingredients coming from China. [6] There are different types of policies that potentially respond to such losses.

Business Interruption Coverage

Most companies maintain property insurance that includes business interruption coverage. "Business interruption" coverage typically allows for the recovery of lost income (commonly defined as the reduction in gross earnings less charges and expenses that do not necessarily continue during the period of interruption) and associated "extra expense" (commonly defined as those costs incurred in an attempt to continue some measure of operations during the interruption). In many such policies, however, the coverage requires that the interruption result from "direct physical loss or damage" to insured property caused by a covered peril. It can be anticipated that insurers may argue that business losses foreseeable as a result of the coronavirus may not involve "direct physical loss or damage" to insured property and, accordingly, do not qualify for coverage. Whether insurers are correct in this regard will depend upon the manner in which courts have decided whether the "physical loss or damage" requirement has been met in similar circumstances, and the courts' decisions addressing this issue are highly fact-dependent and not uniform.

It may also be important to consider whether a company's business interruption loss is connected to the viral contamination of tangible property at its business premises, e.g., on uniforms, in company vehicles, or on factory premises. This may be the case, for example, for a cruise ship operator or tour company whose passengers have been found to be infected. This element, however, may present a greater challenge to coverage for other types of businesses, like those of Hyundai and Apple, where insurers may argue the interruption in operations results from physically distant supply chain disruptions.

In addition to the impediment likely to be raised by most insurers that business interruptions related to the coronavirus, to be covered, must result from "physical loss or damage" to covered property, limitations to coverage may arise by virtue of various policy exclusions. These may include exclusions broadly applicable to "pollutants" or specific to bacteria and/or viruses. These latter exclusions have become far more prevalent since the Severe Acute Respiratory Syndrome (or SARs) outbreak in 2003 and subsequent outbreaks of Ebola and Zika, and they seek to bolster insurers' previous attempts to rely on policies' mold and pollution exclusions to avoid coverage for losses from infectious incidents.

Contingent Business Interruption or Supply Chain Insurance

In recent years, the insurance industry has responded to growing concerns about supply chain risk by providing "contingent business interruption" and "supply chain" coverage extensions, which are intended to protect against losses resulting from disruptions in a company's supply chain — namely, interruption of a company's business caused by physical loss or damage to the property of a supplier or a customer of the company. The terms of such coverage can vary greatly and, once again, may be subject to limitations. For example, contingent business interruption coverage is often limited to "direct" suppliers or "direct" customers situated within the geographic territory stated in the policy and often includes a requirement that the damage to the supplier or customer be of a type that is not excluded under the company's policy. Supply chain insurance, in contrast, may be more narrowly limited to disruptions or delay in the receipt of specified products or services from a named supplier or company but may afford coverage for insured events that are not limited to physical loss or damage, such as pandemics or military action. [7]

Business Interruption Coverage Extension – Civil Authority

Property policies may also include additional coverage parts, or extensions, that should be considered. For example, many commercial property policies provide coverage for losses, including extra expense, when access to insured premises is prevented by order of a governmental authority. An example of this kind of coverage provision is as follows:

> This Policy covers the Actual Loss sustained and Extra Expense incurred by the Insured during the Period of Liability if an order of civil authority prohibits access to the Insured Location provided such order is the direct result of physical damage of the type insured against under this Policy at the Insured Location or within five statute miles of it.

Once again, it is often a condition of this coverage that the government order resulted from physical damage to covered property but that condition is not universal. As demonstrated in the example set forth here, coverage under a civil authority extension may be written to apply where there is relevant property damage in the identified vicinity around the insured's property.

Business Interruption Coverage Extension – Ingress and Egress

Property policies often include coverage extensions for interruptions resulting from the prevention of ingress to or egress from the company's location (e.g., where the sole highway leading to the insured's business location has been shut down). Again, these coverage extensions vary widely. It would not be uncommon for an ingress/egress coverage extension to require physical loss or damage to property of the type covered by the policy. In other instances, however, there may be no such requirement. Ingress/egress coverage may also be subject to distance requirements, i.e., that the impediment to access is "within one statute mile of an Insured Location."

EVENT CANCELLATION INSURANCE

Another recently reported, specific impact of the coronavirus was the withdrawal of dozens of companies from Asia's biggest air show taking place this month in Singapore. [8] While organizers of the show pressed forward and did not cancel the event, businesses that routinely provide or sponsor events such as trade shows, conventions, concerts, or sporting events routinely purchase event cancellation insurance. This type of specialized insurance provides coverage if an event is cancelled or postponed or otherwise adversely affected by a "covered event." What constitutes a "covered event" is defined in the policy and typically extends to the physical, practical, or legal inability to hold an event as planned, including as a result of a government order. Once again, however, these policies also are subject to exclusions and must be carefully reviewed, not only when a loss arises but, perhaps more importantly, at the time of purchase.

LIABILITY INSURANCE: CGL, D&O, AND E&O POLICIES

In the coming weeks and months, business owners may face liability claims brought by individuals who assert they were infected with coronavirus while on the business's property or because of some alleged action or inaction by the business. Although these types of claims might be most acute for companies operating in the health care and hospitality sectors, the sheer virulence of the coronavirus suggests that any business with concentrations of people in close proximity might eventually lead to such claims. As a result, risk managers and business owners should evaluate carefully what liability policies their companies have in place that may respond to coronavirus-related liability claims.

Commercial general liability ("CGL") insurance policies are intended to protect the insured in the event of claims for bodily injury (or property damage) brought by third parties (i.e., typically excluding employees). CGL policies often include coverage not only for any settlement or judgment amount resulting from a third party's liability claim but also for mounting a defense to the claim. Thus, CGL policies may be the first line of protection that a business has to coronavirus-related liability claims. Notably, however, certain CGL policies are written on a "claims made" or "claims made and reported" basis, which seek to impose strict limitations allowing coverage only for claims first asserted against the insured and noticed to the insurer prior to the end of the insurance policy period or within a specified "extended-reporting period." Companies should be vigilant in promptly evaluating their existing CGL insurance coverage upon first learning of a third-party claim, to ensure that any timing requirements and other "conditions" in the policy are satisfied. In addition, companies should look to see whether their policies include exclusions for claims resulting from infectious disease incidents.

Depending upon the nature of any coronavirus-related claim being asserted, companies should also consider the possibility that their Directors and Officers ("D&O") policies may respond to an alleged liability, including by way of providing a defense to such claims. D&O policies, for example, may provide coverage for the costs and liabilities arising from shareholder lawsuits alleging that the company acted unreasonably in response to the coronavirus, e.g., allegedly failing to develop supply chain alternatives or allegedly failing to properly disclose financial risk, allegedly resulting in economic loss to the company. Further, certain policyholders — such as hospitals or medical providers — may wish to consider their so-called "Errors or Omissions" ("E&O") policies, which typically cover losses related to claims alleging that errors were made when providing professional services. Once again, however, insurers can be expected to parse their D&O and E&O policies to identify exclusions upon which they can claim to rely to deny coverage for coronavirus-related claims. These may include "bodily injury" exclusions as well as exclusions based on fraud, dishonesty, and willful violations of law.

CONCLUSION

As the coronavirus continues to affect individuals, countries, businesses, and markets across the globe, companies should act promptly to assess their coronavirus-related risks and take stock of their insurance assets. This includes identifying potentially applicable policies, closely reviewing the terms and conditions of those policies, and promptly notifying insurers in the event a potentially covered loss or claim arises.

NOTES

[1] *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV),* WORLD HEALTH ORG. (Jan. 30, 2020), https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

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[5] Press Release, Apple, Investor update on quarterly guidance (Feb. 17, 2020), https://www.apple.com/newsroom/2020/02/investor-update-on-quarterly-guidance/.

[6] Caitlin Owens, *Coronavirus outbreak fuels concerns about pharma's global supply chain*, AXIOS (Jan. 28, 2020), https://www.axios.com/coronavirus-outbreak-pharma-supply-chain-china-5d78af7f-b688-4735-94ea-97d0086e6513.html.

[7] *See Supply Chain Insurance and Risk Consulting*, MARSH, https://www.marsh.com/us/services/marsh-risk-consulting/supply-chain-insurance-risk-consulting.html.

[8] Prashanth Parameswaran, *Singapore Airshow 2020 Takes Off Amid Coronavirus Scare*, THE DIPLOMAT (Feb. 10, 2020), https://thediplomat.com/2020/02/singapore-airshow-2020-takes-off-amid-coronavirus-scare/.

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