Now that COVID-19 has migrated across the globe, the pandemic’s impact on both public health and business is triggering a barrage of insurance claims across the entire spectrum of traditional coverages. Clients are experiencing loss arising from circumstances ranging from business interruption and event cancellation to illness and death. The unique circumstances of a situation and whether the specific wording of an insurance policy will result in coverage are consequently matters of immediate concern that will have long-term effect. This article identifies the types of insurance that policyholders might pursue for coverage and the positions insureds and insurers are likely to take for and against coverage, so practitioners can consider a client’s situation, address coverage weaknesses and gaps, and determine whether to litigate any coronavirus claim.

The high-risk losses arising from the steadily escalating spread of coronavirus are partly about supply chain and partly about movement of people. As the supply chain suffers drastic disruption and governments shut down entire regions or countries, general themes are beginning to emerge to help the insurance industry and policyholders comprehend where they stand and how to deal with claims going forward. Of immediate concern are the following:

- Travel insurance policies coalescing around the distinction between destinations where advisories not to travel are in place as opposed to a more general reluctance to travel because of the coronavirus situation as a whole
- Event cancellation coverage which is moving toward a focus on the need for cancellation as it relates to exclusions or extensions involving infectious diseases
- Business interruption insurance that requires physical property damage under all but the most specialized policies; state legislatures are attacking these contractual provisions through legislation that would force insurers to cover business interruption claims in the absence of damage to the insured’s covered property, in spite of the arm’s length negotiated insurance agreements in place between those insurers and their sophisticated business insureds
- Cyber claims are expected to skyrocket because of the increased risk of cyber criminals asking for sensitive information—and–
- CGL policyholders have insurers gearing up for litigation because of the spike in infections on cruise ships and in the hospitality and other industries
- The extent to which other reasons exist for financial loss, such as political instability or Chinese New Year

How these trends might impact insurers and policyholders alike is explored more fully below.

**Travel Insurance**

Coverage under travel policies may not be available, depending upon the restrictions insurers have put into place since approximately late January, when the coronavirus became a known event. Policies issued before the virus was widely reported in global media are most likely to cover claims arising from trips impacted by coronavirus, with most insurers considering policyholders aware of the outbreak after January 21, 2020. Further, most international plans exclude coverage related to pandemics if a travel warning is issued for the policyholder’s intended
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destination. As of March 12, 2020, the Center for Disease Control had issued a Level 3 travel health notice for China, South Korea, Iran, and most of Europe, including Italy, France, Germany and Vatican City.

However, insureds stranded in lockdown cities may have reasonable claims for the cost of accommodations or flight changes. These claims must be fair and reasonable, as insurers will not issue limitless payments for unnecessarily expensive charges. Policies that restrict coronavirus may also continue to cover unforeseen losses like lost baggage, broken limbs, or events arising out of a significant weather event.

If travel arrangements are not impacted by coronavirus but a policyholder simply changes his or her mind or is apprehensive about travelling, those circumstances will not support a claim under a travel policy.

**Business Interruption Insurance**

The business interruption coverage that most companies purchase typically allows for recovery of lost income and associated extra expense, but coverage requires the interruption result from direct physical loss or damage to the insured property caused by a covered peril. Exclusions broadly applicable to pollutants or specific to bacteria or viruses may also limit coverage for business interruption.

The case that may guide coverage counsel around this setback for policyholders is Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D. N.J. Nov. 25, 2014), where a New Jersey federal court defined physical damage as a distinct, demonstrable, and physical alteration of a property structure. Reasoning that a property can sustain a physical loss or damage without experiencing a structural alteration, the court concluded that ammonia, a dangerous gas that rendered the insured’s premises uninhabitable, constituted a direct physical loss sufficient to trigger coverage under the insurer’s policy. Other opinions suggest that the issue, even post-Gregory Packaging, is not as cut and dry as one might wish.

Further bolstering the insurer’s position in spite of the lone decision in Gregory Packaging is ISO form CP 01 40 07 06 [Loss Due to Virus or Bacteria] which provides:

> We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease.

The ISO exclusion goes on to specifically provide that it applies to business income (i.e., business interruption).

Attorneys have already moved ahead with the nation’s first coronavirus business interruption case, even though the client insured has not yet suffered a covered loss, or had a claim denied by its insurer. Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al., Civ. Dist. Ct. La. (2020), filed March 17, 2020 in the Louisiana state court, seeks a declaratory judgment that New Orleans restaurant’s all-risk business interruption policy should respond in the event of a future direct physical loss from coronavirus. Counsel should monitor development in this case.

A client’s efforts to secure business interruption coverage stand to receive a welcome assist from state regulatory authorities. The New Jersey Legislature is currently taking the extraordinary step of considering Bill A-3844, which would eliminate the ISO virus exclusion which the legislature approved years ago.

As drafted, this law would mandate that insurers cover COVID-19 losses of certain businesses under their business interruption policies, irrespective of whether the regulator-approved virus exclusion is contained in a policy. The proposed New Jersey bill also initiates a special purpose apportionment that would force business interruption carriers to spread the cost of the coronavirus claims they cover over the other non-business interruption carriers that conduct insurance business in New Jersey. This unprecedented legislative move—which not only sidesteps the virus exclusion but decimates the foundational property damage element of business interruption policies—could transfer the financial burden of coronavirus to virtually all carriers insuring New Jersey risks. Other states are expected to follow New Jersey’s example.
The New York State Department of Financial Services has also issued guidance to all DFS regulated entities, requesting that they have preparedness plans in place to address the risks that coronavirus poses. The guidance also calls for special reports to all authorized property and casualty insurers, requesting that they provide policyholders with information and developments surrounding business interruption and related coverage written in New York.

These and other regulatory developments need to be closely monitored and given due consideration in any coverage analysis for coronavirus business interruption claims.

Other specialized types of business interruption insurance may afford coverage for coronavirus-related losses. Contingent business interruption or supply chain insurance, which is more narrowly limited to disruptions or delay in the receipt of specified products or services from a named supplier, may cover events that are not contingent upon physical loss or damage, such as pandemics. Another type of business interruption coverage extension where an order of civil authority prohibits access to the insured location may cover financial loss, although direct physical damage may be required. Business interruption extensions based upon interference with ingress and egress to the insured’s business location may also be part of your client’s coverage package, but the details in these provisions vary widely and may or may not impose a physical damage prerequisite as well as distance requirements.

Finally, political risk insurance may cover loss arising from business interruption if the losses that a company suffers in a host country result from a local government’s regulatory actions. Government shutdowns and travel restrictions issued by local governments in response to coronavirus could fall into this loss category. While it is by no means certain that disruptions from an edict relating to coronavirus would constitute expropriation or contract frustration, a political risk policy may offer a viable alternative to an otherwise problematic business interruption claim even in the absence of physical damage to the client’s place of operations.

**Event Cancellation Insurance**

With the cancellation of a slew of events across the nation and worldwide, including the remaining NBA season, the NCAA men’s and women’s basketball tournaments, political primaries, conferences, and even the entertainment along the Las Vegas strip, event cancellation carriers will also experience an unprecedented increase in claims. Many jurisdictions are specifically prohibiting gatherings of 250 people or even less if the group is comprised of elderly participants who are more susceptible to coronavirus. Although the parameters of what constitutes a covered event are specified in each policy and typically extend to the physical, practical or legal inability to proceed with an event as planned, these policies are subject to exclusions that you must carefully consider when assessing the viability of a claim.

**Liability Insurance – CGL/D&O/E&O**

In the coming months, business owners will be faced with liability claims filed by those who allege they became infected with coronavirus while on the company’s premises or because of something that the company did or did not do. While the hospitality industry and cruise lines may be the predominant defendants in these cases, the sheer virulence of coronavirus indicates that any business that involves concentrations of people in close proximity may be required to defend claims.

CGL policies will most likely be the first line of protection for businesses facing the risk of being sued for negligently causing someone to contract coronavirus. These policies are written on a claims made or claims made and reported basis, which limits coverage to claims first asserted against the insured and noticed to the insurer before the end of the policy period or within a specified extended reporting period. Counsel should advise companies to be vigilant in promptly providing notice upon first learning about a claim to ensure that these types of specific policy conditions are satisfied.

Directors & Officers Liability policies may provide coverage for loss arising from shareholder lawsuits alleging a company acted unreasonably or improperly in response to the coronavirus. Examples of potential shareholder allegations against directors and officers include failing to develop supply chain alternatives or other contingency
plans, failing to observe required government protocols, and failing to adequately disclose the risk that coronavirus poses to continuation of the company’s business or its financial status. Counsel must consider the so-called absolute bodily injury exclusions that are included in these policies and expect insurers to deny coverage on any shareholder claim with any connection to a coronavirus-related bodily injury, however attenuated. Certain conduct exclusions may also complicate coverage under a D&O policy claim.

Some businesses, such as hospitals and healthcare providers, may also seek coverage under their Errors & Omissions policies, which cover losses relating to claims over errors made during the providing of professional services. Applicable exclusions upon which insurers will rely include bodily injury exclusions, in addition to exclusions for fraud, dishonesty, and willful violations of law.

Workers’ Compensation Insurance

Hospital and other healthcare employees, as well as workers throughout various industries who may be exposed to or contract coronavirus as a result of and during the course of their employment, can turn to workers’ compensation insurance for coverage. While the ordinary diseases of life, which are interpreted to mean those to which the general public are also equally exposed, are excluded from workers’ compensation insurance, there could be an argument for workers’ comp coverage if counsel can prove a direct causal connection between the worker’s infection with coronavirus and the workplace. In addition, although coronavirus is transmitted through animal and human contact, a worker who acquires coronavirus in the laboratory could possibly qualify for coverage.

Marine and Transport Insurance

The spread of coronavirus has also affected the marine and transportation industry. Marsh LLC has reported that the impact resulting from China’s plummeting industrial production levels, the drop in crude oil prices, and the lessening of oil demand across the global energy market has resulted in the futures market moving into what is called a contango state. A market is in contango when it has unexpectedly weakened to the extent that the commodity’s market price is expected to be lower on delivery than it was when agreed within futures contracts. This confluence of events has caused Marsh to raising concerns about the marine insurance market for marine cargo insurance, marine hull insurance, oil traders’ liability insurance, charterer’s legal liability, and protection and indemnity cover. Counsel that represent clients in this niche area must keep abreast of these developments and consider the effectiveness of a client’s insurance cover in the current contango market.

Trade Credit Insurance

With the increase in supply chain disruption and shutdowns of entire states and even countries, a spike in business bankruptcies is likely to occur. If your client trades in a red zone area, they must expect their credit insurer to review its exposure to limit losses in the coming months. Although trade is expected to fall, insurers will try to reduce exposures to a need only basis (i.e., what is being delivered, what is pending, and what is being ordered). It is likely that insurance will cover some insolvency or defaults on any valid due debt.

Health Insurance

Health insurance coverage for coronavirus is a more straightforward analysis. Absent any misrepresentation in an application for health insurance which could void coverage, individuals infected with coronavirus can expect to be reimbursed for the costs of testing and treatment. Full coverage for the public health sector is being boosted by legislative and regulatory efforts on both the state and federal level, with state insurance departments and the federal government extracting agreements from carriers to waive copays and deductibles for all COVID-19 testing. Additional mandates involve prohibitions against surprise billing, waiver of treatment copays, free home delivery of prescriptions, liberalized prescription refill rules, and telemedicine. Coronavirus testing has also been deemed an essential health benefit within the meaning of the Affordable Care Act rules, which impacts small group insurance
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plans as well as Medicaid. Employers with self-insured health plans are also exploring how to modify plan designs so plan participants can more easily seek testing and treatment for coronavirus without incurring out-of-pocket expenses or surprise medical bills from out-of-network providers. CMS has also issued Medicare guidance which clarifies coverage for diagnostic tests, vaccines, inpatient hospital care, inpatient hospital quarantines, prescription refills, ambulatory services and emergency ambulance transportation for all coronavirus patients.

Life Insurance

Barring any issues that may arise during a life policy’s two-year incontestability clause, coverage for the death of an insured resulting from coronavirus should result in full payment of benefits. Life insurers facing potentially large payouts in the event of a spike in the coronavirus death toll are also facing a severe downturn of their investments as the stock markets continue to fall. This is a potential double dilemma that could require increases in a life insurer’s statutory reserves if its claim payouts are high enough and state regulators get nervous about an unprecedented multiplying of risk scenarios. Although life insurance policies already in place will not likely see any changes or coverage disputes due to coronavirus, even if a policyholder is travelling to a highly compromised area or the virus spreads in his or her community, individuals applying for life insurance policies during the pandemic must be fully transparent about past or future travel plans to avoid an invalidated policy in the event that a claim eventually occurs.

Conclusion

The coronavirus has migrated from a health concern for employees and customers, to a supply chain/business interruption issue, to an almost complete breakdown of operations in travel and hospitality industries and a dangerous shortage of manufacturing industrial and consumer products. As the world watches to see if the ongoing rise in confirmed cases and deaths will begin to level off as drastic containment measures are put into place, counsel for commercial policyholders should assess their coronavirus-related risks, identify policies that could potentially provide coverage, examine conditions and exclusions, and immediately notify insurers if a potentially covered loss or claim occurs. Counsel representing insureds and insurers alike should also expect more litigation in the coming year as business losses start to add up and attorneys seek better ways around the limits and exclusions that insurers inserted into policies following the exposures they faced after Ebola and H1N1. Until the dust settles, the goals are to minimize loss, maximize coverage, and implement response strategies to make recovery from the pandemic as smooth as possible.

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