



Insurance Coverage for COVID-19

What You Need to Know

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Last updated March 25, 2020

As the COVID-19 pandemic spreads across the globe, companies are experiencing unprecedented business interruption losses as they cancel events, curtail travel, and shutter retail establishments in compliance with government mandates and shelter-in-place orders. While some jurisdictions have only social distancing warnings in place, many organizations have voluntarily cancelled events and closed stores to reduce transmission of the novel coronavirus, SARS-CoV-2. The NBA, SXSW, Apple, and Nordstrom are high-profile examples. Supply chains are disrupted, as manufacturers close facilities, cancel orders and postpone shipments. Yesterday, the International Olympic Committee announced the postponement of the 2020 Tokyo Games until 2021.

With the economy screeching to a halt, companies are exploring options for mitigating losses, safeguarding business continuity, and avoiding liability to others during this period of extraordinary uncertainty. This post provides a high-level overview of the commercial insurance policies that may provide some protection against the myriad losses sustained by corporate policyholders due to the pandemic. As always, the specific terms of the company's policies govern the applicability of the coverage to any particular scenario. And policyholders should be aware that legislative mandates and widespread coverage litigation may ultimately impact the scope of coverage for COVID-19 losses.

BUSINESS INTERRUPTION

Business interruption coverages found in commercial property policies will be the primary focus for policyholders seeking to recover lost revenue and extra expenses incurred to continue operations during the pandemic. While standard property policies that cover only designated perils may not encompass viruses or pandemics, all-risk policies provide broad coverage subject to policy exclusions. Government orders closing non-essential businesses, restricting public gatherings, and requiring people to shelter in place may trigger civil authority and ingress/egress coverages. Extra expenses necessary to temporarily continue the insured's business as nearly normal as possible may also be covered, potentially including costs incurred for sanitizing and disinfecting property and equipment, the cost of testing and screening employees, and expenses incurred as a result of COVID-19-related delays and disruption. Sub-limits, waiting periods, and time limits applicable to each coverage should be carefully analyzed.

PHYSICAL LOSS OR DAMAGE

Notably, business interruption coverages typically require "physical loss or damage" to property, and application of this requirement to coronavirus-related losses may prove to be an important battleground as policyholders seek to recover losses under their insurance policies. Although insurers may argue the absence of physical damage as a defense to coverage, courts have held that loss of use and function constitutes physical damage. Shelter-in-place orders and other government mandates may specifically tie the directive to both property damage caused by the virus and the high risk of transmission. For example, New York City Emergency Executive Order No. 100 provides that "this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage."

The phrases "physical loss or damage," "physical loss to property," and "direct physical loss" are often undefined in property policies, so their meaning may be left to judicial interpretation. Some courts have found physical loss without structural damage where contamination of a property has made it unusable, even if just temporarily. For example, the Colorado Supreme Court held that there was coverage under an all-risk property policy because "infiltration and contamination of the premises by gasoline" was "direct physical loss" under the policy despite the lack of structural damage to the building. *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968). More recently, applying Pennsylvania law, the Third Circuit Court of Appeals considered the term "physical loss to property" in a homeowner's policy and concluded that the presence of e. coli bacteria in the insured's water well created a fact issue with respect to whether the presence of bacteria made the property "useless or uninhabitable." *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. App'x 823, *3 (3d Cir. 2005). And a New Jersey federal court held that the release of ammonia in a policyholder's facility that "rendered the building temporarily unfit for occupancy and use" was "direct physical loss of or damage to" the property until it was remediated. *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of*

America, 2014 WL 6675934, *7 (D.N.J. Nov. 25, 2014). Other courts have held that temporary damage or non-structural damage is not “property damage” or “physical loss or damage” as used in particular policies.

SPECIFIC PROVISIONS RELATING TO VIRUSES AND MICROBES

Some policies expressly cover communicable diseases, including business interruption losses if access to the insured location was limited by a government order or a decision by the insured due to the actual, and not merely suspected, presence of communicable disease. These policies may also cover clean-up and removal costs, as well as public relations expenses relating to the presence of the disease on the insured’s property.

Other property policies contain exclusions that insurers may argue limit or preclude coverage for coronavirus-related losses, including exclusions for viruses, contaminants, pollutants, microbes, or disease. For example, some policies exclude loss or damage resulting from:

“the actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, but not limited to any epidemic, pandemic, influenza, plague, SARS or Avian Flu.”

One common exclusion precludes coverage 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,” specifically applying the exclusion to “property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.” Other exclusions are more limited in scope, such as a microbe exclusion that defines “microbe” to include “any non-fungal micro-organism or non-fungal, colony-form[ing] organism that causes infection or disease.”

In determining the potential application of these exclusions, a careful analysis of the specific policy language and applicable law will be critical.

CORONAVIRUS COVERAGE LITIGATION

Given the financial consequences associated with the response to the COVID-19 pandemic, the question of whether the virus causes covered loss is likely to be heavily litigated, with disputed issues of interpretation being resolved by judges. The first two lawsuits have already been filed.

On March 16, 2020, a New Orleans restaurant filed a suit against its insurer for a declaratory judgment that its all risk property policy does not contain an exclusion for a viral epidemic, that its policy provides coverage for civil authority shutdowns due to “physical loss” caused by COVID-19, and that the policy’s business income coverage applies if COVID-19 has contaminated the insured premises. See *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s, London*,

et al. (Civ. Dist. Ct. Orleans Parish March 16, 2020). In that case, the restaurant plaintiffs pleaded that Louisiana courts have recognized that “lead or gaseous fumes” constitute “direct physical loss” under property policies. Significantly, plaintiffs also acknowledge that their policy does not include any exclusions for a virus or pandemic.

On March 24, 2020, the Chicksaw Nation filed suit against its insurers in Oklahoma, seeking to recover business interruption losses stemming from casino closures in compliance with CDC directives and other restrictions limiting restaurants to take-out service. The tribe argues that its all-risk commercial property policy covers losses resulting from property damage caused by the coronavirus pandemic that prevents use of the property for its intended purpose. More lawsuits are expected as insurers begin denying claims for business interruption claims.

CONTINGENT BUSINESS INTERRUPTION + SUPPLY CHAIN ISSUES

Companies facing supply-chain disruption resulting from covered events that affect suppliers, vendors, and customers may have similar coverage under the contingent business interruption coverage in commercial property policies or under stand-alone supply-chain policies.

Contingent business interruption coverage protects the company from losses it sustains when a covered event disrupts the policyholder’s supply chain. Even if the insured is not directly affected by a covered event, it may face losses if its suppliers, vendors, or customers are shut down in response to a government order.

Stand-alone supply-chain coverage is also designed to cover losses caused by disruption in the insured’s supply chain. The coverage is broader than contingent business interruption coverage because most supply-chain policies do not require property damage and there are fewer exclusions.

CONTAMINATION + OTHER DAMAGE TO PROPERTY

In addition to business interruption coverage, commercial property policies may provide coverage for property damage resulting from contamination by SARS-CoV-2, the virus that causes COVID-19. Consider the cruise ships filled with sick passengers and crew members. In the absence of applicable, enforceable exclusions, policyholders may be able to recover the cost of repairing or replacing property damaged by SARS-CoV-2 by arguing that the presence of the virus constitutes “property damage” or “physical loss or damage” because it makes the property uninhabitable and dangerous. This argument may be particularly compelling in light of recent reports that traces of SARS-CoV-2 were still present in the Diamond Princess some 17 days after infected passengers disembarked.

CANCELLED EVENTS

With governmental entities issuing broad civil orders requiring people to stay home or prohibiting large gatherings, events worldwide have been postponed or cancelled. Other events were cancelled or postponed in response to various warnings before the issuance of governmental orders in an effort to curb transmission of SARS-CoV-2 or in response to participant withdrawals.

Event cancellation policies may provide coverage for certain cancellation-associated losses. These policies are typically customized for the events they insure and often provide coverage for specified perils beyond the insured's control, including venue damage.

Some event policies contain communicable disease exclusions. To the extent these exclusions are limited to losses arising from the fear of a communicable disease, losses resulting from cancellation or postponement in compliance with a government order would arguably survive such an exclusion.

Event cancellation policies typically cover the insured's out-of-pocket costs arising from the cancellation or postponement – including forfeited deposits, contractual guarantees the insured is obligated to pay, lost profits and revenues, lost ticket sales, and advertising revenue. Some policies require the policyholder to try to postpone or reschedule the event before cancelling. Other policies exclude coverage for voluntary cancellations, as distinguished from cancellations made to comply with a civil order.

CUSTOMER DEFAULTS + CREDIT INSURANCE

As the pandemic wreaks havoc on the economy, businesses that carry trade credit insurance may have coverage when buyers fail to meet their debt obligations due to COVID-19-related insolvency, including defaulted payment obligations and delayed payments under a bankruptcy arrangement. Typically, trade credit policies cover only a portion of the covered outstanding debt, often ranging from 75 to 95 percent. Credit insurance may cover an insured's entire portfolio or just a handful of key accounts. Notably, most U.S. policyholders self-insure these losses. If trade credit insurance is not already in place, it is unlikely that such coverage now could be obtained for COVID-19 losses.

MANAGEMENT LIABILITY CLAIMS

Two coronavirus-related shareholder lawsuits already have been filed, both arising from falling stock prices. A Norwegian Cruise Lines shareholder filed a securities class action against the cruise line and two executive officers for alleged misrepresentations made in an effort to downplay the seriousness of the COVID-19 pandemic and avoid a dip in sales. See *Douglas v. Norwegian Cruise Lines, et al.*, 1:20-CV-21107 (S.D. Fla. March 12, 2020). The complaint alleges the company's SEC filings were false and misleading because they failed to disclose that "(1)

the [c]ompany was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, [the d]efendants' statements regarding the [c]ompany's business and operations were materially false and misleading and/or lacked a reasonable basis[.]” Stock prices dropped after news of the company's sales tactics hit the press in mid-March.

The same day, Inovio Pharmaceuticals shareholders filed suit after its CEO claimed the company had developed a COVID-19 vaccine and would be ready to begin testing the vaccine this summer or sooner. *McDermid v. Inovio Pharm. et al.*, 2-20-CV-01402 (E.D. Penn. March 12, 2020). The complaint alleges that the price for Inovio stock quadrupled over just a few days, then dropped 71% when the company issued corrected information, stating that it had developed a “vaccine construct” – a precursor to a vaccine, not a vaccine.

Directors and officers liability (“D&O”) policies generally protect company directors and officers against liability for “wrongful acts” committed in their capacity as corporate officers. Most D&O policies define “wrongful acts” to include misleading statements and other errors or breaches of duty committed by corporate directors and officers.

Lawsuits against corporate directors and officers arising from misstatements relating to the company's financial performance will likely trigger coverage under most D&O policies. If the corporate policyholder has its own stock in company 401K plans and those shares suffer a similar drop, the corresponding ERISA litigation may be covered under the company's fiduciary liability policies.

BODILY INJURY CLAIMS

Princess Cruise Lines is already facing numerous lawsuits alleging that the cruise line negligently exposed them to the new coronavirus by embarking on a cruise with knowledge that passengers on the same ship during a recent cruise had symptoms of COVID-19. See *Austin, et al. v. Princess Cruise Lines Ltd*, 2:20-CV-02531 (C.D. Cal. March 17, 2020); *Dalton, et al. v. Princess Cruise Lines*, 2:20-CV-02458 (C.D. Cal. March 13, 2020); *Abitol, et al. v. Princess Cruise Lines*, 2:20-CV-02414 (C.D. Cal. March 13, 2020).

In the absence of specific exclusions, commercial general liability (“CGL”) policies should respond to claims and lawsuits alleging bodily injury, sickness, or disease caused by allegedly negligent conduct during or response to the COVID-19 outbreak. Some CGL policies exclude coverage for communicable diseases. Others exclude loss or damage caused by microbes, which may include non-fungal microorganisms that cause infection or disease. In some instances, however, the microbe exclusion does not extend to microbes that were transmitted directly from person to person. Insurers may disclaim coverage based on pollution exclusions, which typically

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exclude loss or damage caused by “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”

Ultimately, the potential application of these exclusions to coronavirus claims is likely to be determined through coverage litigation.

TIPS + TAKEAWAYS

As we navigate the uncertainty of the coming months, here's a short list for corporate policyholders to consider as they begin to assess the insurance coverage available to offset their losses:

- ◆ Examine all potentially applicable policies and understand the parameters of each coverage to identify all avenues for recovery.
- ◆ Pay close attention to notice and reporting requirements, including deadlines and substantive requirements relating to the particular information that must be provided. Lawsuits trigger notice obligations under liability policies, but pre-suit demand letters, subpoenas, and investigations may do so as well.
- ◆ In some instances, the policyholder may have the opportunity to provide notice relating to potential claims before any claim is made. Since renewal policies will almost certainly exclude COVID-19 risks and losses, there are advantages to providing pre-claim notice before the applicable policies expire if the policy allows it, but the company should carefully adhere to policy requirements in providing the notice.
- ◆ We recommend that corporate policyholders act without delay in providing notice to corporate insurers who may have an obligation to cover COVID-19-related losses.
- ◆ For business interruption and extra expense claims, documentation is critical. Track potentially covered losses carefully and separately from ordinary corporate expenses. Download copies of government orders, mandates, and emergency proclamations that are relevant to the claim, as web links may expire. Engage a forensic accountant who has deep experience with insurance claims for large or complex claims.
- ◆ Lawmakers in some states have proposed legislation to expand the scope of coverage for coronavirus-related losses, but it is too early to know what effect these regulations may have.

If you need help identifying and evaluating potentially applicable insurance coverage, preserving your company's rights under its policies, or navigating the claim process, our experienced team of insurance coverage lawyers can help. Contact us for more information.

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Armed with decades of insurance-focused experience, our talented team rivals the insurance recovery section of any large law firm in the country. Facing a challenge? We can help.

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