

While traditional property/casualty insurance policies have limited coverage for outbreaks and epidemics like the coronavirus, businesses still need to understand the insurance triggers and their critical need to review their policies, and potential for claims.

Beyond the more common lines of workers' compensation, property/casualty and business interruption, other coverages such as professional liability, event cancellation and pollution liability policies in specific circumstances, might also respond to infectious diseases.

Keep in mind as you read through the information outlined below, that this particular epidemic falls into an untested area of coverage. While there may be situations where cover could apply, the carrier approach to a claim may not be cut and dry. The carriers will most certainly work hard to avoid opening the door to claims that are not clear-cut extensions of coverage—this is after all, their job. Know that they are more likely to go to court than they are to open pandoras box.

Outlined below, by line of coverage, are a few considerations our clients, and potentially their clients, should be made aware of regarding insurance and the Coronavirus [2019-nCoV].

For more specific information regarding your individual insurance policies, you should consult with your insurance professional. For legal opinions, you should consult with an attorney. It is difficult to advise whether your business should or should not file a claim – the decision is ultimately yours to make.

Property | Business Interruption

As we all know, property insurance policies typically require a trigger of physical loss or damage caused by an insured peril—diseases and viruses, by definition, are not an insured peril. Even contingent extensions such as denial of access or loss of attraction under such policies, still need an insured peril as a prerequisite for coverage.

However, some specific endorsements are available and are being adopted with greater frequency.

For example, even though standard property policies require physical damage and typically contain contamination exclusions, if the virus is present on a policyholder's premises, there could potentially be coverage for decontamination costs, cleanup and interruption by a communicable disease.

There are also differences in trigger points based on specific industry exposures. In the hotel, restaurant and bar, school and hospital sectors, extensions exist for notifiable diseases. Businesses need to work very closely with their brokers and insurance providers as policies usually define very narrowly what constitutes a notifiable disease—until a disease is classified as such, the policy is unlikely to respond. Further, most insurers now list the specific diseases for which coverage is provided. Coronavirus is a new disease, and therefore, is unlikely to be listed.

We do know however, that as it relates specifically to the restaurant industry, Trade Name Restoration Loss of Business Income and Incident Response Insurance for Foodborne Illness is excluding the coverage. More specifically stating that "this insurance does not cover any actual net loss, incident response expenses or extortion payment directly or indirectly caused by, arising out of, contributed to

by, in consequence of, or resulting from any Influenza, including but not limited to Influenza virus A, B, or C, Avian Flu, H1N1, or any “mutant variations” thereof.” I don’t think it gets any clearer than that.

Keep in mind however, that companies previously affected by SARS, Avian or Bird Flu or Ebola, may have specific extensions such as interruption by communicable/infectious/ contagious diseases, interruption by mandatory closure for pandemic diseases or contingent business interruption extra expense resulting from an affected customer or supplier. Losses covered may include but may not be limited to loss of income, extra expenses, crisis response, cost of decontamination and sanitization. Note: Such extensions are usually subject to separate limits and deductibles.

Rounding out the property considerations, prevention or hindrance of access by a public authority may trigger business interruption coverage, irrespective of physical damage. Although Coronavirus may not be an insured peril in and of itself, the subsequent lockdown and extension of the Lunar New Year holiday period imposed by the Chinese government may give rise to claims.

Pollution

Pollution legal liability policies could potentially respond depending on policy wording and the facts surrounding the claim. Depending on the severity of the disease, businesses might incur cleanup and/or waste removal costs. In extreme circumstances, businesses may even be forced by government authorities to temporarily close.

Insurers are also likely to rely upon pollution exclusions as a defense to coverage for claims directly related to 2019-nCoV. Ultimately, whether viruses are deemed to be pollutants would be a burden the insurer would have to bear in order to avoid coverage. Some policies also contain communicable disease exclusions that may prevent coverage for Coronavirus-related claims. In any event, the specific facts, relevant wording of the policy and the applicable law will determine the availability of coverage for such 2019-nCoV-related exposures.

General Liability

General liability policies could potentially cover illness involving guests and other third parties, but seem unlikely to cover claims based on fear of exposure without medical evidence. With thousands suffering bodily injury due to the coronavirus, the procedures that businesses implement to warn and protect against exposure to the coronavirus may become a potential liability.

For example, retail, travel, entertainment and hospitality businesses may face claims by guests and patrons alleging that the companies were negligent in failing to warn of or protect against the risk of exposure to the outbreak. These businesses may look to their GL policies to provide coverage for such claims. At the same time, insurers will seek to rely on exclusions for exposure to viruses, bacteria, or pollutants—such exclusions must be evaluated on an individual basis.

Due to the number of policies and sub-policies that fall under the umbrella of General Liability, policyholders need to work closely with their brokers and insurers to review their coverage.

EPLI

Employment practices liability policies could potentially respond in cases where an employers' enforcement of corporate and human resources policies during an outbreak could give rise to claims of discrimination against protected classes. To be on the safe side, it would be prudent for business to closely review their EPLI policies with their broker, insurer and general counsel.

D&O

Directors' and Officers' policies, if triggered by the outbreak, could potentially cover litigation by shareholders alleging a lack of preparedness for the potential effect the virus could have on corporate operations, the overall geographic footprint of the Company and its earnings. Particularly since event-driven litigation has become such a hot topic in the D&O world. Note: Even though D&O policies typically include limitations on coverage for illnesses and bodily injury, these limitations may be "broadly worded," so policyholders should review and discuss them with their advisers.

Workers' Compensation

Two tests must be satisfied before any illness or disease, including the Coronavirus, would qualify as occupational and thus compensable under the individual state laws of Workers' Compensation:

1. The illness or disease must be "occupational," meaning that it arose out of and was in the course and scope of employment; and
2. The illness or disease must arise out of or be caused by conditions "peculiar" to the work.

Whether an illness arises out of and in the course and scope of employment is a function of the employee's activities. The simplest test toward determining whether an injury "arises out of and in the course and scope of employment" is to ask: Was the employee benefiting the employer when exposed to the illness or disease? Be warned, this "test" is subject to the interpretations and intricacies of the various state laws as referenced in the first paragraph in this section.

Qualifying as "occupational" is the lower of the two hurdles. The higher hurdle is whether the illness or disease is "peculiar" to the work. If the illness or disease is not peculiar to the work, it is not occupational and therefore would not be deemed compensable under workers' compensation. By definition, an illness or disease is "peculiar" to the work when such a disease is found almost exclusively to workers in a certain field or there is an increased exposure to the illness or disease because of the employee's working conditions.

For example, black lung disease is a disease that is peculiar to the work of a coal miner. Coal miners are subject to prolonged exposure to higher-than-normal concentrations of coal dust leading to black lung disease. This makes the disease peculiar to the coal mining industry.

Qualifying an illness or disease as occupational and, more importantly, peculiar to the work (and therefore compensable) may ultimately require industrial commission or court intervention to sort medical opinion from legal facts. No one "test" is available to declare an illness or disease compensable or noncompensable; each case is judged on its own merits and surrounding circumstances.

Concluding that an illness is occupational, peculiar to the work and ultimately compensable is not necessarily based on the disease in question, but rather on the facts surrounding the worker's illness. Factors investigated and considered by medical professionals and the court include:

- The timing of the symptoms in relation to work: Do symptoms worsen at work and improve following prolonged absence from work (in the evening and on weekends);
- Whether co-workers show or have experienced similar symptoms;
- The commonality of such illness to workers in that particular industry;
- An employee's predisposition to the illness (an allergy or other medical issue); and
- The worker's personal habits and medical history. Patients in poor medical condition (overweight, smokers, heart disease, etc.) and those living in compromised surroundings.

Event Cancellation

Event cancellation insurance is just that—insurance for events that, under specifically designated circumstances within the policy, would be covered in the event of cancellation. Even though the coronavirus is relatively new, it is already affecting the event insurance industry. In the early stages, the exclusion was not placed on Coronavirus, but as the World Health Organization (WHO) declaring it a global public health emergency on January 30, 2020, insurers across the globe are now excluding it as a preexisting condition—as a named virus exclusion.

If, however, you purchased a policy prior to the outbreak of coronavirus and it had communicable disease as part of the coverage, you could potentially be covered.

After seeking further possibilities, we spoke with a number of major underwriters, asking if there was a buy-back provision to remove the exclusion and the answer was a fast and resounding NO. Adding insult to injury, the carrier cannot hedge the exposure with reinsurance either.

The reasons behind the exclusions are simple. Because an outbreak of this nature can become an incalculable loss, the law of large numbers won't work. You can't set a rate to make it work, and reinsurance carriers will not provide carriers with the necessary protection. As you may recall, the market took the same position for the SARS Virus, which of course was removed once the issue became a nonissue.

One thing we want to stress however, is the benefit of purchasing this type of insurance well in advance of the event. Often times, event cancellation policies can be purchased for multiple years at once. This can be beneficial, if for example, you had a summer meeting every year.

Travel Insurance

Given the nature and reach of the illness, one would think it is virtually impossible to find a travel policy that would provide coverage, and in most instances, you would be correct. There are however, a few exceptions to investigate should you be interested in doing so.

1. If you've decided you don't want to travel, given the "fear" surrounding it, a "cancel for any reason" travel insurance policy allows you to cancel your trip even if it's just because you're afraid to travel.
2. Standard "named perils" policies usually exclude epidemics and pandemics. However, they will cover you if you become ill on your trip. Simply being worried about traveling to a destination is not a covered reason under standard trip cancellation insurance, as it would be under a "cancel for any reason" policy as referenced above.
3. If you have not booked your vacation and are still in the planning phase, you can change your destination to avoid Asia or you can buy an insurance policy that will cover you.

Closing Summary

The World Health Organization declared the Wuhan Coronavirus a "public health emergency of international concern." Since that time, that statement has proven to be all-too true. In an effort to do everything in your power to protect the health and safety of your employees, your clients and your company, take the time to review your insurance policies very carefully. If necessary, consult with your insurance broker or coverage counsel about the scope and availability of coverage, as well as any strategies for maximizing insurance recovery for any Coronavirus-related claims that may arise.

In the interim, if you haven't already done so, now is the time to develop and implement a comprehensive Business Continuity Plan (BCP). A BCP is a very important part of your overall emergency procedures plan and should be one that includes the necessary steps to take in the event of an epidemic/pandemic.

And, of course, always follow recommended precautions to keep yourself and your employees safe by staying up-to-date on all recommended travel restrictions and preventative measures.

For further information on this or any other risk management or insurance needs, please contact Jon Jepsen of SentryWest Insurance at jon@jonjepsen.com or online at www.InsuranceArtist.com

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