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Practice Update

Assessing Potential Insurance Claims and Disputes Stemming from Coronavirus

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One of the likely results of the COVID-19 (coronavirus) pandemic will be attempts to seek recovery for the mounting losses suffered by individuals and businesses as a result of the medical and economic consequences of the spread of the disease. While there are various potential claims that likely will be asserted, two of the most likely types of coverage that may be affected are commercial general liability insurance and business interruption insurance.

Commercial General Liability Coverage

Businesses will undoubtedly be faced with liability claims based on allegations that they negligently failed to prevent the spread of the virus by not appropriately cleaning premises or taking other measures to provide reasonably safe premises. Although the pandemic is only months old, several cruise ship passengers have already filed suit alleging claims of negligence and gross negligence based on the cruise line's alleged failures to prevent passengers from being exposed to an unreasonable risk of harm, failing to have proper screening protocols and continuing to sail and operate despite the knowledge of prior infections. There is no reason to believe that similar theories of liability will not be pursued by claimants against other businesses in other contexts. It is, of course, uncertain whether these theories of liability will prove viable given the

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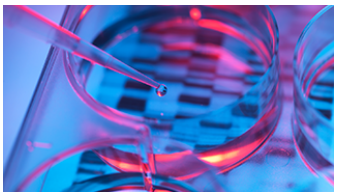

challenge of establishing causation when trying to identify the source and means of transmission of the virus.

Most businesses maintain commercial general liability insurance policies which generally provide liability coverage for bodily injuries and property damage caused by an occurrence under Coverage A. An occurrence is typically defined as an accident. Accordingly, one of the threshold issues that will likely be litigated is whether any alleged bodily injury or property damage arising out of an insured's failure to prevent or limit exposure to the coronavirus can be considered accidental. While the courts throughout the country do not take a uniform approach to the determination of what constitutes an accident for purposes of liability coverage, the question will generally turn on the extent of the insured's knowledge of the risk associated with the coronavirus. Specifically, the more it is alleged or established that the insured had knowledge of instances of infection or other particular risks that increased the likelihood of the virus spreading, the more likely that a court may find that an instance was not accidental and, therefore, not an occurrence coming within the coverage grant of a commercial general liability (CGL) policy.

To the extent coronavirus claims allege an occurrence, it is likely that there will be considerable litigation concerning various exclusions contained in CGL policies. Standard CGL policies contain pollution exclusions which generally exclude coverage for claims arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. Pollutants are typically defined as including, in relevant part, any solid, liquid, gaseous or thermal contaminant. Although the pollution exclusion is most often litigated in the context of environmental pollution claims, not claims because of the exposure to viruses or diseases, it is likely that there would be some litigation regarding whether coronavirus is spread through exposure to contaminants to the extent the

virus is spread or contracted through contact with surfaces, etc.

Another exclusion that is frequently included in CGL policies is the Fungi and Bacteria exclusion. This exclusion excludes coverage for bodily injury or property damage that would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any fungi or bacteria on or within a building structure, including its contents. Because coronavirus is a virus, not a bacteria, it would appear unlikely that the Fungi and Bacteria exclusion would be applicable to coronavirus-based claims. It warrants notes that some Fungi and Bacteria endorsements specifically include reference to viruses so the subject CGL policy would need to closely reviewed to determine the potential applicability of the Fungi and Bacteria exclusionary endorsement to coronavirus claims.

Although less prevalent, some CGL policies include pathogen based or communicable disease exclusions. There is a mold or organic pathogen exclusion which generally excludes coverage for bodily injury or property damage arising out of, in relevant part, any organic pathogen which is defined to include any type of virus. Similarly, some policies include a communicable disease exclusion generally excluding coverage for claims or suits based on, or directly or indirectly arising out of, or resulting from any form of communicable disease, including the failure to perform services either intended to or assumed to prevent communicable diseases or their transmission to others. These pathogen and communicable disease exclusions would appear to provide a significant obstacle to coronavirus-based liability claims. Again, however, these exclusions are not particularly prevalent in the majority of CGL policies.

Although it is impossible to predict all of the coverage issues that are likely to arise in the context of coronavirus-based claims, other potential sources

of coverage disputes will likely involve loss of use claims. CGL policies typically define property damage as including the loss of use of tangible property that is not physically injured. This definition leaves open the possibility of claims alleging the loss of use of premises and other tangible property due to the alleged negligent failure to prevent or limit the transmission of the coronavirus. Another potential coverage consideration under CGL policies is personal and advertising injury coverage (Coverage B). In particular, it is possible that claims could be made arising from allegations that individuals were wrongfully detained or quarantined. Such claims may give rise to disputes regarding personal injury which CGL policies define to include false arrest and imprisonment. Personal injury coverage is typically subject to pollution exclusions which would call into question, as discussed in the context of bodily injury coverage, whether the coronavirus can be considered to be a contaminant.

Business Interruption Coverage

With the amount of economic disruption caused by coronavirus, policyholders will likely look to their Business Interruption policies as a source of potential recovery. Business losses caused by coronavirus will present a few interesting and novel (no pun intended) coverage issues. Understanding the precise terms and conditions of the applicable Business Interruption coverage is critical to the coverage analysis.

Direct Physical Loss or Damage to Insured Property

The threshold issue is that Business Interruption coverage is typically triggered when the insured's business losses are caused by "direct physical loss or damage" to the insured property. The presence of viral particles at a property does not strictly speaking cause physical loss or damage, certainly not one that can be easily seen or perceived. Even further removed from the "physical loss or damage"

are proactive workplace shutdowns, that are intended to slow the spread of the disease, rather than contain an actual outbreak at an insured location.

Policyholder counsel will likely argue that physical damage does not equate to damage that has to be visible to the naked eye or structural damage, and the presence of viral particles at a property can satisfy the policy requirement. A similar argument has been made and rejected by the court in *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974 (S.D. Fla. 2018). Mama Jo's, a restaurant, argued that migration of dust and construction debris from the roadwork project adjacent to the restaurant was a direct physical loss to the insured property. Mama Jo's sought various damages, among them replacement of certain affected structures and cleaning. The court held that dust and debris did not damage the structures, and the claim for cleaning was not one for direct physical loss. In the court's view, a direct physical loss contemplates an actual change in the insured property. The court refused to adopt a definition used by some other courts that deemed a property physically damaged where it was rendered uninhabitable or unusable. See e.g., *Port Auto. of NY & NJ v. Affiliated FM Ins. Co.,* 311 F.3d 226 (3rd Cir. 2002) (presence of large quantities of asbestos in the air of a building such as to render it uninhabitable presents a direct physical loss to its owner).

For coronavirus claims, courts will have to decide whether the presence, or the threat, of viral contamination satisfies the direct physical loss requirement. A stronger argument for coverage can be made where the insured can demonstrate that a number of workers have contracted the virus and the spread is traceable to the insured property. Even so, this will be a challenging claim for policyholders to prevail on because at its core, coronavirus injures people, not property. And, where a business was shut down proactively or in response to merely potential infections, there will be even less likelihood of a finding of coverage.

Civil Authority Coverage

Business Interruption policies typically cover losses from a number of risks. Given the widespread shutdown of activities ordered by state and local governments, the Civil Authority Coverage will be relevant for many claims. While not requiring direct physical loss to the insured property, the Civil Authority Coverage is still typically triggered by shutdown orders that directly result from a direct physical loss to some real property, typically property adjacent to the insured property. Thus, the same threshold issue of whether coronavirus qualifies as a direct physical loss to some property will have to be decided for this coverage to be triggered.

Moreover, Civil Authority Coverage typically will require that the shutdown occur as a result of an order by the governing authorities. Thus, a government advisory that urges precautions and/or proactive closures but does not explicitly prohibit access to a worksite would likely not trigger coverage.

Exclusions for Viral Contamination

The next key issue will be whether coronavirus losses, even if they satisfy the "direct physical loss" threshold, are excluded. Many policies contain exclusions for viruses or bacteria. It would be difficult for policyholders to circumvent this type of exclusion that is drafted to address losses exactly like the ones caused by coronavirus. Other policies may not contain a specific virus exclusions, but may include viruses within the scope of the pollution exclusion. While many courts have taken liberties with the pollution exclusion, often limiting it to very narrow circumstances, where an exclusion's plain language encompasses viruses, it would be typically be more difficult for a policyholder to convince a judge to completely disregard clear policy intent.

Potential Legislative Action

Given the magnitude and scope of the coronavirus pandemic and the virtual shutdown of economic activity it brought, it would not be surprising for legislators to attempt to ease the burden on policyholders. As of the writing of this article, a bill in the New Jersey legislature has been proposed that would require carriers to cover coronavirus losses, even if their policies specifically exclude coverage for virus-related losses, with some of the payments to be potentially recouped from a fund that would be set up to spread the losses more broadly among other carriers operating in that state. At its core, the proposed bill arguably interferes with contractual relations between parties by essentially retroactively rewriting their policies. Whether the proposed legislation will be passed in New Jersey, and in what form, is uncertain at this juncture, as is whether any such law would ultimately deemed constitutional. What is certain is that similar steps may be considered by other states struggling to mitigate the economic losses from the pandemic.

What's Next?

In sum, carriers will have robust arguments rooted in the typical language of Commercial General Liability and Business Interruption policies to decline coverage for losses stemming from coronavirus. It is also true, however, that with the coronavirus pandemic, carriers and their counsel are treading in uncharted waters and prior precedent is no guarantee of what courts and legislatures will do with respect to coverage to mitigate the unprecedented losses to the nation's economy. When the nation overcomes the crisis stage, the legal issues stemming from the pandemic will likely remain for many years.

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