

Coverage for Coronavirus Claims

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The coronavirus or COVID-19 global outbreak has struck fear in the hearts of many of us. As the disease spreads, however, it brings with it not only health concerns, but also serious financial consequences for commercial enterprise. And with any potential loss of business comes the inevitable question: Will my insurance cover this?

Generally speaking, most businesses purchase both (1) third party liability and (2) first party insurance products. The former covers costs incurred in defense of claims by third parties, and any settlements of judgments satisfying those claims. The latter covers the business itself for its losses due to loss or damage to property.

1. Third party coverage. The two most common liability policies purchased in the ordinary course include (a) commercial general (and products or completed operations) liability coverage, and (b) D&O or management liability coverage.
 - Commercial general and/or product liability ("CGL") policies include "Coverage A" which insures the policyholder for its liability for bodily injury or property damage to a third party caused by an occurrence, which is typically defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. One can immediately imagine what sorts of claims might be made under this type of coverage, and for those of us who have been fighting with insurance companies for decades on behalf of policyholders, we can predict how the carriers are likely to respond. For example, imagine a case where a customer becomes infected with coronavirus through his or her interaction with a company's product or on a company's premises. Sure, the bodily injury requirement appears to be met, but what about the occurrence? Is the exposure to coronavirus an "accident"? It may be an exposure to conditions, but even so, insurers will likely argue that the harmful conditions must exist due to an accident in the first instance, which they will argue, is not present here.
 - However, CGL policies are not limited to "Coverage A." They also include "Coverage B" which covers certain personal and advertising injuries, including such things as false arrest, detention and imprisonment. Now imagine a case where passengers on a cruise ship are quarantined or stranded because of a localized outbreak. The passengers who are not sick may make claim they were falsely arrested or detained. The passengers who get sick may argue that they would not have been made ill if the company had taken certain measures to prevent illness. Unlike "Coverage A" claims, "Coverage B" does not require an accident to trigger coverage. Rather, it is triggered by the harm alleged - i.e., when damages are sought for such enumerated claims. Thus, the existence of an "occurrence" is irrelevant.

- On the other hand, imagine a shareholder of a travel-based business bringing a securities claim or a claim for breach of fiduciary duty against the company and its management team for failing to adequately report, take into account, or prepare for, the onset of coronavirus. Most D&O policies exclude claims alleging bodily injury, but it will be difficult for an insurer to argue that such exclusions apply when the claimant is not alleging damages to his person. In the event coronavirus spawns shareholder litigation, unlike CGL policies, D&O policies appear likely to cover such losses.

2. First party coverage. Property policies might appear to be the most likely to cover actual losses businesses experience due to the outbreak. However, property coverage is usually triggered upon direct physical loss or damage to covered property. Insurers are likely to take the position that coronavirus exposure or the fear of it resulting in business interruption, while unfortunate, is not the result of direct physical loss or damage; therefore, there is no coverage. The courts may have to weigh in on this issue, but coverage may ultimately depend on whether the policyholder can demonstrate that the virus itself damaged property through contamination.

On the other hand, coverage extensions such as "civil authority" or "contingent business interruption" kick in if a civil authority prohibits access to an insured location or if a supply chain is interrupted. These coverages and/or coverage extensions vary widely in their scope and language, but don't assume that your business is covered just because you purchased them. Depending on the policy language, your insurer may take the position that these coverages, too, are triggered only upon direct physical loss to covered property - which physical loss is the cause of the government order or supply chain interruption.

The upshot of this post is to inform commercial policyholders that they should not make any assumptions about their coverage or lack thereof from the coronavirus outbreak. Coverage is both highly fact-dependent and dependent on the particular language of your policy. Always consult experienced policyholder coverage counsel to get advice on coverage before simply throwing up your hands when a claim is made, or your business is interrupted