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COVID-19 and Key Commercial Insurance Issues

The ongoing Covid-19 pandemic has resulted in extraordinary business impacts. The extent of commercial insurance coverage for these impacts is uncertain and will be hotly disputed between policyholders and insurers. This is to briefly review several key insurance issues. As with all insurance issues, the available coverage depends most significantly on the terms of the policy (which can vary significantly) and the jurisdiction in which those terms will be considered—which also vary widely in application of the policy terms.

Important Points:

- Insurance coverage for anything related to Covid-19 is likely to be disputed.
- Most insurance policies have deadlines for making a claim. If you believe you have a covered loss or claim, provide notice under all potentially implicated policies. Tardy notice can eliminate coverage.
- Documentation of losses is extremely important. Maintain good records of income and expenses, from both before and after Covid-19 problems. These records are vital.

Business Interruption and Loss of Business Income—Direct Physical Loss

Business interruption insurance is a component of commercial property insurance coverage (often through BOPs—Business Owners Policies) and generally provides coverage for a policyholder’s loss of income and extra expenses when the business is partially or entirely shut down. Contingent business interruption coverage, another variety, applies when the policyholder suffers loss because of the closure of a supplier.

For the most part, this coverage applies when there is a “direct physical loss” to the insured property (or the supplier’s property). A simple example of a direct physical loss is a fire at the business premises—which physically damages or destroys the business premises and renders the premises uninhabitable or less productive.

With Covid-19, significant disputes are emerging as to whether there is direct physical loss to property sufficient to trigger coverage. While physical structures are not damaged by it, in the same sense as fire and smoke damage, the physical presence of Covid-19 may render a structure unfit for habitation. The physical presence of the virus in property may be direct physical loss to property and trigger coverage.

Several suits against insurers have been filed to address denials of coverage by commercial property insurers. The existence of direct physical loss likely will depend on technical evidence—whether or not Covid-19 has a physical presence and its duration—as well as particular policy terms and how these factors are treated in the courts of various jurisdictions.

Bottom line, the existence or absence of insurance coverage is presently uncertain, is arguable, and is likely to be subject to considerable litigation.

Civil Authority

Most commercial property policies also provide coverage for loss of business income due to “action” by civil authorities. A common example of this coverage is, for example, when a fire at a nearby premises results in local authorities barring access to your business for a period of time. This coverage provision also typically applies to a limited period of closure—several days, sometimes up to month or longer.

This coverage typically depends on the existence of “direct physical loss” to some property, although not necessarily the policyholder’s property. As with business interruption insurance, the same uncertain question exists about whether a “direct physical loss” exists to anyone’s property from Covid-19.

Virus Exclusion

Starting in 2006, many commercial insurers begin issuing a policy endorsement entitled “Exclusion of Loss Due to Virus or Bacteria”. If your commercial property policy has this endorsement, it will be a significant factor in business interruption or civil authority coverage, even if Covid-19 results in a “direct physical loss” to insured property.

The virus exclusion generally provides, “We will not pay for loss or damages caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

But the terms of many policies do not contain the virus exclusion, and in others application of the virus exclusion is modified or limited by endorsements providing coverage enhancements.

Commercial General Liability

Commercial general liability policies provide coverage against liability claims made against policyholders by third parties for physical injury, property damage, and certain other damages. Liability claims could be made—and have already been made—against businesses alleging negligence because of failure to take sufficient measures to protect customers and others from Covid-19. Liability claims are also possible for taking excessive measures related to the virus.

Coverage for these claims under liability insurance will vary depending on the allegations, the injuries involved, and the terms of the involved policy. There are several general policy terms which could be implicated.

For example, most liability policies provide coverage for accidents or unintended injury. Whether or not a failure to take sufficient protective measures to guard against Covid-19 was accidental can be challenged.

In addition, most liability policies also have a “pollution exclusion”, which generally excludes coverage for injury resulting from contamination by pollutants. The scope and application of pollution exclusions varies widely by both policy terms and jurisdiction. That Covid-19 is naturally occurring—and not the product of an industrial process—may weigh significantly in the potential application of pollution exclusions.

In general, the terms of liability policies vary widely, and the possible Covid-19 allegations against policyholders vary even more widely. Coverage for such allegations will depend on the relationship of these and other factors.

Other Liability and Specialty Policies

There are numerous other types of liability insurance policies, including Directors & Officers liability, professional liability, and Errors & Omissions, among others. All of these will have similar issues as commercial general liability policies with respect to coverage for third party claims against policyholders related to Covid-19 and may have other issues arising from their unique terms.

Of potential special significance are “Event Cancellation” policies. For the most part, these types of policies provide coverage for lost revenue and expenses arising from cancelled events when the cancellation was the result of specified causes. Coverage may be disputed if the event cancellation was, for example, because of the fear of contamination rather in response to a governmental order barring large gatherings. Coverage may also be limited if there are no or limited efforts to reschedule or mitigate cancellation-related damages.

Conclusion

There is significant uncertainty about insurance coverage for Covid-19-related injury, losses, and claims. An event like this, on this scale, is outside the modern experience of insurance and law. Those that say coverage certainly exists are wrong, just as those who say coverage certainly does not exist are wrong. Insurance coverage in this context depends on the involved policy terms and jurisdictions and is evolving and developing and will be for years.

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