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Client Alert: Insurance Coverage Issues Stemming From Coronavirus Losses

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The spread of COVID-19 has impacted businesses across the country—some due to government-mandated closures, some due to economic hardship, and some due to a dwindling workforce. While facing these unprecedented economic challenges, business owners are turning to their insurance policies as a potential source of relief. Business interruption coverage is having its moment in the limelight, but in reality, there are several types of policies and policy coverage extensions that will be examined by insureds and insurers over the coming months in connection with coronavirus-related losses.

Business Interruption Coverage under a Commercial Property Policy

Business interruption coverage is most commonly contained within a commercial property insurance policy. It is sometimes called "Time Element" coverage because it stems from the idea that the time required to repair damaged property can lead to loss of business. This coverage reimburses an insured business for lost revenue when it has to halt operations unexpectedly due to a covered cause.

Most business interruption policies, however, require that there be a "direct physical loss or damage" to property for coverage to apply. The phrase "direct physical loss" is rarely defined in the policy, which creates uncertainty regarding whether the effect of a global pandemic like COVID-19 on the insured's property is sufficient to trigger coverage.

An insured business will argue that COVID-19 has infiltrated its premises (*e.g.*, through the building's structures and duct work), causing a loss of functionality of that property that is, in essence, physical loss and damage to the workplace. This claim would present factual issues for experts, including the issues of how the virus spreads and how long the virus can survive on surfaces or materials so as to damage the property. For this type of claim, insurers will likely demand scientific proof of the duration of the contaminant, and will otherwise argue that the mere threat or suspicion of a coronavirus contamination will not meet the requirement of showing direct physical loss to property.

There have been previous cases where courts have found that "direct physical loss" to property can include the effects of airborne contaminants, and is not limited to structural damage to the insured's premises. Examples include:

- an ammonia release at a factory;
- smoke from wildfires that infiltrated the business's premises;
- asbestos in the air of a building;
- bacteria contamination of a home's water supply where the "functionality" of the property was nearly eliminated or destroyed, or the property was rendered uninhabitable; and
- a home rendered uninhabitable by toxic gases released by defective drywall

This issue is far from settled though, as there have also been cases where the court ruled in favor of the insurers on similar types of issues, holding that "physical loss" requires damage to a structural component. Ultimately, the current flood of coronavirus litigation will need to be monitored, and interested parties will need to "wait and see" how the case law develops regarding the issue of whether or not the presence of COVID-19 at a business site will satisfy the requirement of "direct physical loss" to the insured's property.

Apart from the issue of what constitutes a "direct physical loss" to property, the physical loss or damage must also be caused by a covered cause of loss. An insured will need to review its policy to determine if it is an "All Risk Policy" or a "Named Peril Policy." An "All Risk Policy" covers all causes unless specifically excluded, such as by an exclusion for virus or contamination. A "Named Peril Policy," on the other hand, contains a list of covered causes (though these lists are typically very comprehensive).

Lastly, business interruption policies often contain exclusions that may affect coverage for business interruptions due to a virus. Over the years, insurers have taken steps to attempt to exclude epidemics from coverage under their policies, even as companies' supply chains have become more complicated and international, thus increasing the risk that their business could be affected by a virus or epidemic. These efforts may have included the insertion into the policy of an exclusion for "virus" or "contamination," which is often defined broadly to include the actual or suspected presence of viruses, disease, or illness-causing agents. Not all of these exclusions are a model of clarity, and therefore, each such exclusion should be read carefully to see if it meets the high threshold imposed by law for the efficacy of an exclusion in an insurance policy.

"Coverage Extensions" Under a Commercial Property Policy

Other potential sources of coverage for coronavirus-related losses may be found in various "coverage extensions" under the commercial property policy. These extensions are essentially à la carte add-ons to a commercial property policy and some provide coverage for business interruption.

For example, a property policy may have coverage extensions for business interruption and/or clean up/response costs caused by "communicable disease." This coverage may not require a showing of "direct physical" loss or damage to property, but the insured may be required to show "the actual, not suspected" presence of communicable disease. That issue will depend on the facts particular to the insured business, including, among other things, whether that business has had employees or customers who have tested positive for the coronavirus.

Additionally, many policies have a coverage extension for "ingress and egress." This coverage extension is designed to compensate for the loss of income triggered by physical loss or damage that prevents or hinders ingress to or egress from the insured's business. Although this coverage may also require that access to the insured's premises be restricted by "physical damage," the damage usually does not have to occur on the insured's premises—it can occur in the vicinity of the insured's business or on a third party's premises.

Particularly relevant to the COVID-19 outbreak is the coverage extension for "civil authority," which may provide coverage for business losses resulting from a government-mandated closure of the insured's

business. This extension, however, likely still requires that the government restriction arise from a "direct physical loss or damage" to an insured's property or to a property within a certain distance from the insured's property. Again, all of these coverage forms must be read carefully to determine whether they apply to the insured's circumstance.

Coverage for business losses resulting from supply chain issues may be found in a "contingent business interruption" extension. This type of extension can potentially cover losses due to disruptions to the business of a third party, like the interruption of business at the premises of a customer or supplier. A "contingent business interruption" extension may cover specifically-named third parties or the policy may simply blanket all customers and suppliers. Like many other business interruption coverage extensions, the interruption of the customer or supplier must usually be the direct result of physical loss or damage to the types of property covered by the policy.

As a result of the many varieties of coverage extensions that could be included in a commercial property policy, it is imperative that the policy—including its coverage clauses and exclusions—be reviewed to determine whether coverage would extend to coronavirus-related business losses.

Business Interruption Coverage under a Commercial Trade Disruption Policy

Although rare, some businesses may have a potential avenue for coverage of coronavirus-related losses through a "Commercial Trade Disruption" policy. These types of policies are designed to provide coverage for a loss of earnings or extra expenses arising from the disruption of trade flow. Not many businesses have this type of commercial coverage due to the fact that these policies are designed to cover high-dollar losses for massive companies, and thus have a very high deductible.

Business Interruption Coverage under a Captive Insurance Policy

If a business has a captive insurance program, it should investigate potential coverage for coronavirus-related business interruption losses under its captive insurance policies. Insurance policies written for captive insurers offer more variety in terms of coverage for business interruption. Some captive policies are written specifically to address events like the loss of a supplier, the loss of a major customer, other supply chain or trade disruptions, and trade credit issues. A captive policy may cover business interruption that is not caused by physical damage to property. Additionally, some captive policies provide broad difference-in-condition ("DIC") coverage, which is intended to fill in the gaps of an insured's commercial property policy to include, for example, coverage for perils which may be excluded in such a commercial policy.

Generally, a captive policy is often designed to cover risks that are not commonly covered by commercial policies. Captive policies are usually manuscripted policies, meaning that they are specifically tailored to meet the needs of the insured. Thus, a captive policy could theoretically be drafted specifically to cover things like an epidemic or communicable disease. Also, captive policies are often worded broadly and may have vague or ambiguous terms that favor coverage, and captive policies typically do not contain the long list of carefully worded exclusions that are found in commercial policies.

As a result of the unique nature of each captive insurance policy, the language of the policy must be thoroughly reviewed to determine if coverage is available.

Coverage for Liability Claims against the Insured

During a global pandemic, businesses are certainly not immune from lawsuits. As a result, business owners may ask whether their liability insurance will cover them for lawsuits resulting from the COVID-19 outbreak.

A business's commercial general liability (CGL) insurance policy is designed to cover claims against the insured for bodily injury or property damage. In the context of COVID-19, these policies could, for example, provide coverage if the business is accused of negligence in connection with exposing members of the public to a safety risk related to coronavirus. A CGL policy may have no specific exclusions for coronavirus or pandemics. General liability policies, however, protect only against third party claims and typically do not provide first party coverage for business interruption losses.

A directors and officers insurance policy could provide coverage for a lawsuit by shareholders or other third parties who claim that management did not respond appropriately to COVID-19 or took the wrong steps to mitigate loss related to the virus. Directors and officers policies vary widely in terms of the scope of coverage they offer and, therefore, must be reviewed carefully to determine whether coverage is available under such a policy.

A business's professional liability or errors and omissions policy may provide coverage for claims asserted by parties who incurred economic loss from the advice, consultation, or services provided by the insured related to a COVID-19 response.

Lastly, an employer's liability policy may cover a lawsuit by one of the business's employees who contracted COVID-19 on the theory that the employer did not inform its employees that dangers in the workplace existed, or that the employer refused to implement sanitary procedures to protect against exposure to communicable disease.

All of these types of liability policies must be carefully reviewed to determine if coverage applies.

Coverage for Employees under a Workers' Compensation Policy

Employees of a business who are affected by COVID-19 may have coverage under their employer's workers' compensation policy. These types of policies can cover medical expenses and a portion of lost wages for employees who become injured, ill, or even die on the job. For a workers' compensation policy to cover the employee, the employee typically must have contracted an occupational disease due to a cause or condition that is specific to that person's occupation or employment. With regard to COVID-19, that means that a hospital worker infected with the virus would likely be covered, while an auto worker infected by the virus may not.

Efforts to Consolidate Coronavirus Coverage Litigation

Litigation on these various coverage issues related to COVID-19 is quickly spreading across the country. Some efforts are being made to consolidate some of this coverage litigation in the following ways:

- Multidistrict Litigation – Some businesses have suggested that a new federal multi-district litigation (MDL) program be established to consolidate the growing number of insurance coverage cases surrounding the coronavirus.
- Class Actions – Other businesses are seeking to have the coverage issues resolved in class action litigation involving all similarly-situated insureds.
- Legislation – Some state legislatures have introduced bills in various forms attempting to force insurers to provide coverage for coronavirus losses. Insurers will certainly challenge the validity of such legislation, especially if it does not provide a mechanism to fund the insurers' payments.

It remains to be seen if these efforts, or other efforts, will be successful in providing clarity on coverage issues to policyholders and insurers across the country.

Duty to Notify the Insurer

With any type of policy listed above, the policyholder has a duty to give prompt notice to its insurer if it believes that it has a claim for losses due to COVID-19. Regardless of the type of policy and regardless of how the case law and legislation on these coverage issues regarding COVID-19 develop in the coming months, a policyholder could lose any prospect of coverage if it did not issue proper notice of its claim to its insurer.

Shumaker's Insurance Coverage group is following the development of the case law on these issues and is available to answer any questions you have. Feel free to contact John Nelson at jnelson@shumaker.com or 419.321.1251 or Katelyn Dwyer at kdwyer@shumaker.com or 419.321.1398.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource & Return-to-Work Guide at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock. To receive the latest news and updates regarding COVID-19 straight to your inbox, sign up here.

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