

COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

Will traditional business insurance policies apply to claims related to the Coronavirus?

BY BOWDITCH & DEWEY • MARCH 20, 2020

In the coming weeks and months, we expect to see a lot of discussion, and ultimately litigation, concerning the interpretation of insurance policy provisions and whether Coronavirus-related claims will be covered. We expect to see both first-party claims and third-party claims.

A number of publications have recently suggested that it is unlikely that coverage will apply under many traditional policies. Nonetheless, insureds should not assume that suggestion to be true for their policies and should not make any statements concerning the possible inapplicability of coverage. Ultimately, determinations will likely be made in the courtroom if coverage is denied by the insurer.

It is important to analyze your policies closely because the language within policies can differ, the interpretation of policy language is usually controlled by state law (which can vary widely), and coverage is often fact-dependent.

FIRST-PARTY POLICIES

First-party policies concern losses suffered by your business. Sometimes these are described as commercial property or all-risk policies, depending on the scope of coverage. They are mostly known for covering damage to your property, but can also include coverage for additional losses, which might be relevant to the Coronavirus outbreak. These policies might include the following relevant coverages:

Business Interruption

Business Interruption provides coverage for lost income and extra expenses incurred in attempting to continue your business operation following a covered loss. Many policies require the interruption to be caused by a direct physical loss or damage to your property. For instance, if your business cannot operate because a fire destroyed your property, you might be afforded coverage for lost income while you rebuild.

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Litigation under these policy provisions is likely to turn on whether (1) the Coronavirus has caused a physical loss or damage to your property and (2) whether such physical loss or damage is a direct cause of your business's interruption.

Perhaps a hotel or restaurant that is contaminated with the virus might meet the test for having physical loss or damage to its property and receive coverage for the short period of time while disinfecting takes place, but the fact that most businesses are currently experiencing a downturn while customers practice social-distancing is unlikely to trigger coverage.

Experts seem to think that the most prominent argument will be that insureds' HVAC systems were "damaged" by the presence and spread of respiratory droplets containing the virus.

Contingent Business Interruption and Supply Chain

Contingent Business Interruption and Supply Chain provides coverage for lost income and extra expenses when a supplier or customer experiences a loss that disrupts their supply chain. Many Contingent Business Interruption policies will limit coverage to instances where a *direct* customer or supplier has suffered a physical loss or damage to its property within a specific geographic area. Supply Chain policies can be a variation of CBI by covering specific products or specific suppliers during certain events, such as a pandemic or civil action.

Ingress and Egress

Ingress/Egress provides coverage for business interruption that arises when you cannot come and go from your property. Imagine, for example, that the only road to your warehouse is closed. This type of policy may contain a mileage limit. The policy language may or may not require damage to your property. If current government bans expand in scope, this type of coverage may gain importance for Coronavirus claims.

Civil Authority

Civil Authority provides coverage for business interruption that arises from "civil authority" orders. This coverage typically requires government action that impairs or prevents access to an insured's property *as a result of physical damage to property* at or nearby the insured's location. Although recent government orders have shut down restaurants and bars, it is unlikely that those orders will trigger this coverage without satisfying the property damage element.

Event Cancellation

Event Cancellation is designed to protect against expenses and lost revenue from the cancellation of an event that is beyond the insured's control, such as hurricanes, terrorism, labor strikes, or the non-appearance of a celebrity. These policies can be written to cover all events during a policy period or specific events. Some policies permit optional coverage for an additional expense to cover communicable/infectious diseases. Reports indicate that there was a growth in the purchase of this type of coverage following the SARs outbreak, but it has declined recently.

LIABILITY (THIRD-PARTY) POLICIES

Commercial General Liability Policies ("CGL")

CGL policies cover claims for bodily injury or property damage brought by a third-party. Importantly, they often include coverage for costs to defend claims, including attorneys' fees. Therefore, these may be the first line of defense against Coronavirus claims if a third-party alleges that a business's negligence caused them bodily injury. We have already seen the filing of at least one lawsuit claiming a million dollars in damage due to a cruise ship company's negligence in dealing with the Coronavirus outbreak.

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Coverage will depend on whether contracting the Coronavirus is considered an "occurrence" within the policy. An occurrence is usually defined as an accident. The question has been argued in courts for decades with various results. With respect to the Coronavirus, the answer will likely turn on whether the insured foresaw that the claimant would contract the virus — which could be hard to defend against if certain businesses remained open after the recent government guidance and forced closures to prevent the spread of the virus. Notably, some of these policies are written on a "claims made" or "claims made and reported" basis, which seek to impose limitations on when and how many claims may be asserted. In addition, the scope of coverage can depend on whether the policy is written to allow claims "because of" or "for" bodily injury/property damage.

It is important for companies to make sure that they comply with all notice requirements and other conditions within their policy so as to not waive coverage.

Directors & Officers Liability Policies

As described, these policies are designed to protect against claims concerning how directors and officers acted or failed to act. Potential claims against directors and officer are expected to vary widely concerning the Coronavirus, but will likely include suits brought by shareholders alleging that these individuals failed to act reasonably in anticipating and/or responding to the impacts of the Coronavirus. Such claims might be made based on a business's decision to remain open, inadequate precautions, reporting errors, inaccurate or inadequate disclosures, or failure to comply with government orders.

Errors & Omissions Liability Policies

These policies typically cover claims alleging that professionals made errors and/or omissions in rendering services. Illegal acts and purposeful wrongdoing are typically excluded. These claims might come into the discussion concerning how medical professionals, accountants, and universities responded to the Coronavirus.

EXCLUSIONS

It is important to note that coverage may be disclaimed under some or all of these policy provisions based on specific policy language. Some policies contain exclusions under general terms, such as for losses caused by viruses, communicable/infectious diseases, bacteria, mold, fungi, spores, any microorganism that causes harm to human health, contamination, pollution, government quarantine, and pandemics. Some policies contain exclusions on a more specific basis, such as for losses caused by SARs, Ebola, or Zika. We may see disputes as to whether there is a difference between bacteria-borne illnesses and viral infections under exclusion language. It is important to review your policy language.

OTHER CONSIDERATIONS

It has recently been reported that certain legislative bodies are seeking to enact legislation to retroactively apply insurance coverage to Coronavirus claims, despite exclusions for viruses. Whether such legislation will become law and whether it will ultimately be challenged by insurers in court remain to be seen.

Recommendations

1. Do not assume that coverage will be disclaimed under your policies.
2. Do not make statements concerning the inapplicability of coverage.
3. Review your policy language for coverage and exclusions.
4. Provide timely notices to your insurer and fulfill all conditions of your policies to prevent against a waiver of coverage.

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5. Document your losses, such as lost profit.

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