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Numerous Insurance Coverage Questions Are Being Raised by the Coronavirus Pandemic

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The economic devastation wrought by the coronavirus pandemic has business owners across the country scrambling to see if they have insurance coverage for their losses. In many cases, they are being advised by their brokers and insurers that the news is not good: most standard insurance policies, they are told, do not provide coverage. The following questions and answers are presented to illustrate the typical questions we are hearing from policyholders pursuing coverage under their standard business policies, including property, general liability, workers' compensation, event cancellation, and directors and officers (D&O) policies.

Q: My commercial property policy includes business interruption coverage. Shouldn't that cover at least some of my lost profits due to the Coronavirus pandemic?

A: According to the insurance industry, between one-third and one-half of all businesses acquire business interruption coverage as an add-on to their property policies. Most insurers are denying that such coverage applies to lost income due to the coronavirus pandemic for one or both of the following reasons: (1) the policy expressly excludes coverage for losses from exposure to viruses and/or (2) the policyholder cannot show that its property suffered "direct physical loss or damage" due to the coronavirus. Unfortunately, it will be difficult for most policyholders to challenge these coverage denials.

Many insurers added a "virus exclusion" to their property policies after the Ebola outbreak in West Africa in 2014. The exclusion is often found in a policy endorsement entitled "Virus or Bacteria Exclusion." This exclusion is the first thing a policyholder should look for to determine if its property policy covers lost income due to the coronavirus. If your policy contains such an exclusion you can probably stop right there: you will not have coverage for losses to your business caused by the coronavirus *except* in the

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unlikely event that your policy also contains a superseding pandemic coverage endorsement, which we have seen in a few property policies, mainly ones issued to colleges and other large institutions.

To be sure, not every first-party property policy contains a virus exclusion. For example, policies issued by Lloyds of London often do not, and many commercial property policies contain virus exclusions that only apply to the general liability part of the policy, not to the first-party property coverage. Insureds should read their policies carefully to see if the virus exclusion applies to both the liability and property coverage parts of their policies.

Unfortunately, even if your property policy has no virus exclusion, it most likely only covers “direct physical loss or damage” to the insured property. “Direct physical loss or damage” is usually not defined in property policies. A few courts have held that such damage includes situations where the insured property *cannot be used* for its intended purpose, even where the property has not suffered direct physical damage. An example is where a building is contaminated by a hazardous substance, such as ammonia, that causes no direct physical damage but nevertheless renders the insured a building uninhabitable.

Citing such cases, policyholders may argue that the *threat* to a building from the presence of the coronavirus renders it unusable, and therefore constitutes direct physical loss or damage to the building. While such arguments may carry the day where building occupants are clearly threatened by the presence of the virus (such as a hospital or health clinic), most courts are likely to reject this argument. Nevertheless, you should check your property policy carefully to see if it is triggered by the *loss of use* of the covered property in addition to (or instead of) “physical loss or damage to” the property.

Q: My property policy has a “civil authority” clause that covers my business against losses that result when access to my property is curtailed due to “action of civil authority.” Shouldn’t that clause cover my business losses due to a government order that, in effect, prohibits or severely limits access to my business property as part of the effort to mitigate the coronavirus pandemic?

A: The “civil authority” clause common in many property policies presents another exception to the general rule that you must have physical loss or damage to your own property to have business interruption coverage. Under many such clauses, if access to the covered property is curtailed by government order there may be business interruption coverage provided that the government order is due to the physical loss of or damage to the covered property *or to other property*. An example of such a situation is where a business is forced to shut down due to a government edict ordering citizens to vacate an area threatened by an approaching wildfire. Most “civil authority” clauses, however, have a major limitations: either the insured property itself or property in the vicinity (e.g. within 1000 feet of) the insured property *must suffer physical loss or damage*. Citing this limitation, insurers are likely to reject most claims for coverage under the civil authority clause.

Q: I decided to temporarily close my restaurant—even though not ordered to do so by civil authority—after one of my employees tested positive for the coronavirus. Are my lost profits due to that closure covered under my policy?

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A: There would arguably be coverage if you can show that the insured building has been rendered uninhabitable due to the presence of the coronavirus. There are a number of judicial decisions holding that “damage” to a building due to the presence of harmful substances (such as ammonia or other toxic gases, asbestos, mold or bacteria) constitutes “physical damage” to that building. These cases may support an argument that the mere presence of the coronavirus in your building rendered it uninhabitable, and therefore constituted physical loss or damage to the building. The biggest hurdle in such cases will be the necessity of showing that the covered property was actually contaminated by the coronavirus. Some policyholders may be able to surmount this hurdle by showing that *multiple occupants* of the covered building contracted the virus, such as a nursing home where numerous infections have been reported. Consequently, it can be presumed that the building is contaminated with the virus.

Q: Can my employee successfully assert a workers’ compensation claim if she can show that she contracted the coronavirus while on the job?

A: This depends on whether or not your employee can show that COVID-19 is an *occupational* illness. This, in turn, will require the employee to show two things: (1) she contracted the illness while acting within the scope of her employment, and (2) the illness arose out of conditions “peculiar to” that employment. The “peculiar to” requirement can often be difficult to meet. The employee will need to demonstrate that contracting the coronavirus is a significant risk for *her particular type of employment*. A coal miner, for example, could readily show that black lung disease is peculiar to his line of work, but could probably not make such a showing with respect to COVID-19. In contrast, a health care worker at a hospital that treats numerous COVID-19 patients should have little trouble showing that contracting the virus was peculiar to her employment. One way employees can meet the “peculiar to” test is to show that a significant number of other workers in her occupation (e.g. health care workers) have tested positive for the virus.

Q: If somebody sues my business claiming they contracted the coronavirus due to my company’s negligence, will my general liability policy cover that claim?

A: This is an issue of particular concern to the hospitality and cruise ship industries. Assuming your commercial general liability (CGL) policy does not contain a virus exclusion, you may have coverage for third-party claims alleging that the claimant contracted COVID-19 due to your negligent act or omission. Even where your CGL policy doesn’t contain a virus exclusion, insurers can be expected to deny coverage based on the policy’s “pollution” exclusion. Most CGL policies contain some form of that exclusion. If yours does, whether you have coverage for coronavirus-related claims will often depend on how the policy defines “pollutants” as that term appears in the exclusion. Some policies define “pollutants” to include viruses, but many do not. Finally, even if your policy defines “pollutants” to include viruses, it may only exclude coverage where the pollutants are released into the natural environment, which arguably does not include the interior of buildings or other enclosed spaces. Such policies should cover claims against the insured alleging the exposure of pollutants within a confined space, such as a building, airplane or ship. Obviously, it is important for policyholders to carefully read the wording of the pollution exclusion, and the definition of “pollutants” to determine if they have

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coverage.

Q: My company had to cancel a major event due to the coronavirus. Do we have coverage for the losses we incur from that cancellation, such as the cancellation penalty we have to pay the hotel where the event was scheduled to take place?

A: You may have coverage if you purchased “event cancellation” insurance covering that particular event. Event cancellation policies are highly customized and the coverage they provide can vary widely from policy to policy. Such coverage is usually written on a “covered perils” basis, meaning that the cause of your loss from the cancellation or postponement of the covered event must fall within one of the covered perils listed in the policy. Often event cancellation policies do not list communicable diseases as a covered peril, and insurers are likely to argue that, as a result of that omission, such policies don’t cover losses from cancellations due to the coronavirus pandemic. However, some event cancellation policies include “order of civil authority” as a covered peril. If yours does, you should argue that you have coverage for any losses you suffer due to the cancellation of your event due to a government directive. Also, policy endorsements are available that expressly provide coverage for cancellations due to “communicable diseases.” Be sure to check and see if your cancellation policy has such an endorsement.

Q: Would my directors and officers (D&O) policy cover claims brought against me or my company alleging that we negligently caused the claimant to contract COVID-19?

A: D&O policies typically cover the policyholders’ upper management, and the company itself, from claims alleging losses due to a “wrongful act,” as defined in the policy. However, many D&O policies exclude claims arising out of bodily injury, even if the injury was due to a wrongful act. If your D&O policy does *not* have such an exclusion you should have coverage. If your policy does have a bodily-injury exclusion, your insurer will probably argue that contracting COVID-19 is a type of bodily injury that precludes coverage.

Q: Is it true that some states are considering legislation that will require insurers to pay business income losses due to the pandemic, even for insureds whose property policies contain virus exclusions?

A: Lawmakers in several states, including New Jersey, Massachusetts, and Ohio, are considering such legislation but so far none of those bills have passed.

Q. Is there any downside to my sending a claim to my insurance company for losses due to the pandemic, even if coverage may be doubtful.

A: We don’t see any downside to your doing so. If in doubt, we usually advise clients to go ahead and file a claim against the insurer, either directly or through their brokers.

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Q: Can I buy insurance going forward that covers my losses due to the pandemic?

A: A few insurers are already selling insurance that covers losses due to a pandemic, for a significant premium. Many insurers can be expected to offer such for such insurance.

For additional information please contact your Butzel Long attorney or the author of this Alert.

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