

A photograph of a modern, curved building with a glass and metal facade, illuminated at night. The building is surrounded by trees and a street with light trails from traffic. A large, semi-transparent orange circle is overlaid on the left side of the image, containing the main text.

Risk Advisory Update
Coronavirus, updated
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Updates as of March 18, 2020

We will continue to provide periodic updates as this situation continues to evolve and we learn more about insurance and government response to these issues.

New Jersey – New Jersey is moving forward with a bill that would retroactively remove any “virus exclusion” within the policy relative to business interruption claims. Although the bill is silent as to the “physical loss or damage” trigger for property claims, the intent is to provide business interruption coverage for losses related to the virus. While this would be a major victory for our clients in NJ with regards to these claims, we do expect an immediate challenge in Court by the insurance carriers should the bill pass. We will monitor this closely and provide periodic updates as we learn more.

<https://www.coverageopinions.info/Vol9Issue2/NewJerseyCOVID.html>

Illinois – Although unconfirmed, we have read that Illinois may be considering a similar bill to that in New Jersey.

Louisiana – A restaurant has filed suit against its insurance carrier seeking a finding from the Court that it should be entitled to business interruption coverage due to operating restrictions. The primary issue in that case is whether contamination of the premises by the virus would be considered a “direct physical loss” under the terms of the policy. While this is specific to Louisiana, it will likely set some guiding precedent for other jurisdictions to follow.

<https://www.businessinsurance.com/article/20200317/NEWS06/912333570/New-Orleans-restaurant-sues-for-coronavirus-business-interruption-cover-Oceana-G>

Federal – The Federal Government’s \$1 trillion stimulus package was characterized by Treasury Secretary Mnuchin as primarily a measure to compensate Americans and small businesses for “business interruption.” Congress is still compiling what will be included in this, but the intent appears to be to provide Federal benefits for businesses impacted by this ongoing event.

<https://www.stepto.com/en/news-publications/house-passes-changes-to-coronavirus-response-bill.html>

Claims Processing – We have received multiple inquiries as to when and how to submit a claim. Generally, submitting a claim as soon as practicable after a loss occurs is what the insurance policies require. If your business is shut down due to this pandemic, please contact us to discuss next steps for submitting a claim. We recommend you document any ongoing financial losses, and (when possible and appropriate) also secure written copies of any government mandates or orders requiring the closure of the business. Financial loss documentation may include:

- Production records for the base period, the period during the loss and the period after the loss
- Sales records for the base period, the period during the loss and the period after the loss
- Inventory records for the base period, the period during the loss and the period after the loss
- Tax returns
- Financial statements
- Cost accounting records
- Payroll records
- Records for all expenses incurred due to the loss

We will also need a date of shutdown and the addresses for the specific locations that are closed and/or suffered a business interruption loss.

We have submitted several claims this past week for coronavirus related issues. We have yet to receive a formal response from the carriers as of the date of this memo but will keep our clients apprised accordingly.

General Considerations

- We recommend scheduling a phone conference with your Hauser team as issues regarding potential claims arise. Each client is different and will have different concerns. Each policy is different, and these concerns are best discussed during a call.
- Similar to 9/11, we expect there will be extensive litigation on these issues with regards to coverage, and will need guidance from the Courts as to how carriers must respond. **The definition of “physical loss or damage” in the property policies will be challenged, as that is going to be the biggest hurdle in finding coverage for business income.**
- **The bottom line is that this is uncharted waters and we cannot state with certainty as to how each carrier will respond.**
- We will need to review the facts of any coronavirus related loss to compare against the policy. Although we expect the carriers to disclaim coverage for many of these potential claims, we ask that clients document their losses, contact us and, regardless of how we think the carrier may respond, we will submit claims when appropriate and force the carrier to commit to a response. We will always advocate for the best interests of the client and do whatever we can to push for a favorable outcome.

Property & Business Income

Q: Is there any coverage for an interruption to my business as a result of the coronavirus?

A: It is unlikely there is going to be insurance coverage afforded for business interruption if a business (or portion thereof) shuts down due to the virus. The Business Interruption coverage is invoked through the property policy, which requires “physical loss or damage” in order for a claim to be triggered. A communicable disease such as the coronavirus would likely not be considered “physical loss or damage” which is required to trigger a claim under the policy.

Most property insurance policies also exclude coverage for communicable disease or viruses. The simple answer is we expect to see carriers denying coronavirus claims relative to business interruption and taking the position that these claims do not meet the “physical loss or damage trigger.” This will be a contentious issue that the Courts will need to address and offer some clarity on in the immediate future.

Q: Is there any coverage because my supplier/vendor is shut down and cannot ship to me?

A: Again, the “physical loss or damage” requirement is written into contingent business income coverage. This coverage typically picks up a loss due to a distributor not being able to get their product from a manufacturer due to a covered loss. However, this loss of income would have to occur if the original manufacturer had been shut down by civil authorities due to a direct physical loss and the insurance carrier would recognize that direct physical loss as a covered cause of loss.

Q: What if I have to shut down my business because of a government quarantine or an order from a civil authority?

A: Most property policies do provide coverage for business income and extra expense if you are denied access to your property by order of a civil or military authority, but only to the extent that order arises from a “covered loss.” As that definition again generally requires “direct physical loss or damage” to property, we can expect carriers to deny the claims for the same reasons discussed above, and any “disease” exclusions would also be invoked.

General Liability

Q: Do I have coverage if someone contracts the virus at my business and sues me because of it?

A: Possibly, barring any exclusions for “virus, bacteria or communicable disease.” The policy language typically covers the insured for “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” The facts of the claim will always need to be reviewed against the policy language, as there are exclusions and endorsements relative to “microbes”, etc.

Certain General Liability policies also contain specific exclusions relative to claims for “injury arising out of virus or bacterial exposures.” We can expect the carriers will deny claims against policies containing those exclusions.

Worker Compensation

Q. Is there coverage if one of my employees contracts the disease at work or while traveling for work?

A: It appears that there should be coverage in the event that an employee acquired the virus while conducting business in the scope of his/her employment, either at their place of employment, travelling for business or while interacting with another individual within their scope of employment. The example would be that one of your employees makes a sales call and interacts with an individual that has the virus. Your employee becomes ill and can conclusively show that the interaction with that third party as to the cause of your employees’ illness then workers compensation coverage should apply.

Directors & Officers

In addition to third-party claims brought against businesses themselves, D&O coverage may be implicated against officers based on allegations of actions or inaction in response to the implications of the virus. Directors and officers (“D&O”) insurance policies may provide coverage for the costs and liabilities arising from these shareholder lawsuits. However, these policies also typically contain “bodily injury” exclusions which may preclude coverage, depending on the how the particular exclusion is worded. We can expect that this issue will soon be litigated as well.

Employment Practice Liability

Management Liability and Employment Practices Liability coverage will be implicated as employers determine how to respond to the various decisions for employees to work from home. Employers will need to look closely at their sick leave and paid time off policies. We can expect to see claims arising from employees alleging some form of discrimination if they have the disease or are suspected of having it. Discrimination may be covered under the policy based on national origin or medical condition of the employee, but these will need to be reviewed on a case by case basis.

Cyber/Crime Policies

We also expect to see an uptick in cyber attacks and crime claims as this event progresses. We are advising clients to be vigilant about phishing attacks, e-mails from unknown senders, and disclosing any potentially confidential information (i.e. bank accounts, routing numbers, ACH information, etc.) to parties they are unfamiliar with. This is even more critical as employees move into “work from home” situations. Please contact us in the event that you experience any potential breach or loss to discuss potential cyber or crime claims.

Summary

We expect coverage for coronavirus related claims to be an evolving and contentious issue within the entire industry of insurance. It is important to note that the insurance industry has not been formally tested yet with how it will respond to these claims. We continue to monitor the situation with an eye towards how the insurance industry responds to such claims. Each claim is factually unique, and the facts of the claim will need to be looked at against the policy language for potential coverage. Our hope is that the Courts will provide some clarity on these issues as things progress and claims become litigated. Regardless of how the carrier may respond, we recommend that our clients document any losses and contact us in the event that claims or potential claims arise.