

# Coronavirus Coverage Conundrums

PROPERTY &amp; CASUALTY INSURANCE | CORONAVIRUS | MARCH 24, 2020

**Steven J. Brodie****Jeffrey Michael Cohen****Robert W. DiUbaldo****Heidi Hudson Raschke****VISIT THE CARLTON FIELDS CORONAVIRUS RESOURCE CENTER**

In a few short weeks following the COVID-19 outbreak in China, the world turned upside down. As governments scramble to contain the spread of the virus, the impact on individuals and businesses is just beginning. Inevitably, eyes will turn to insurance coverage for potential relief from the financial impacts of business closures and event disruptions. The question whether existing policies are designed to respond to these new issues will present a plethora of puzzles at the intersection of the coronavirus and insurance coverage. The answers will be policy-specific and may require years of litigation after the courts reopen. Some of the anticipated issues are noted below.

## **Business Interruption**

Perhaps the biggest hotbed for potential disputes will be related to business interruption coverage under all-risk property policies. The standard ISO form provides coverage for the actual loss of business income caused by a suspension of the insured's operations. However, the suspension must be caused by a physical loss or damage to the insured property. While it seems clear that businesses are not closing as a result of physical loss or damage to property, insureds may argue that the presence of the virus (particularly if the business closes as a result of an infection on its premises) is sufficient tangible injury to property to trigger coverage. In addition, the inquiry may not end with the question whether there is physical loss or damage to insured property.

Regardless of whether there is physical loss or damage, many business interruption policies contain exclusions for loss due to viruses or bacteria. These exclusions were designed to preclude coverage for business interruption losses caused by an event like a pandemic. Nonetheless, insureds may look for ways to find coverage, or state governments may intervene. For example, New Jersey recently introduced a bill that would require property insurers that cover risks in New Jersey to pay for business interruption losses due to the disease, despite their policies expressly excluding coverage for losses due to viruses or bacteria. While such laws will be subject to constitutional challenges for trying to rewrite insurance contracts, they will lead to uncertainty regarding coverage, if passed. Whether there is coverage for any potential claim depends on the specific policy language and facts, but disputes regarding the existence or extent of business interruption coverage available for business closures resulting from COVID-19 are likely. In fact, at least one case has already been filed by a restaurant in New Orleans.

## **Civil Authority**

Some policies also provide coverage for business interruption losses when the government orders a business to close. However, the coverage generally requires that there be a physical loss or damage that compels the government to restrict access. For example, after a large fire or other disaster damaging property adjacent to a factory, the government may require the factory to shut down in order to protect the public. Similar disputes related to whether the presence of the virus is physical loss or damage are likely with respect to a claim for coverage under a civil authority provision.

## **Contingent Business Interruption**

Contingent business interruption coverage provides coverage for losses resulting from an interruption of the policyholder's business that is caused by events impacting the policyholder's suppliers or customers. For example, if a business depended on receiving parts from Wuhan, China, or selling products in Wuhan, it is likely that the business will suffer loss. However, contingent business interruption coverage typically requires actual physical damage at the site of the supplier or customer. Without physical damage, a court should not find that a loss triggers coverage. Again, the question whether a virus is physical loss or damage is bound to play out in the courts.

## **Workers' Compensation**

Workers' compensation carriers may see claims for coverage if workers are exposed to the virus and claim infection was the result of their employment. This question is likely to be resolved by the evidence rather than the policy language, i.e., can the employees prove that their illnesses arose out of their employment rather than some other source? Benefits are typically available if the injury was "work-related."

## **Liability**

Liability policies may also see claims for coverage resulting from the COVID-19 outbreak. For example, if a business has an infected employee, but does not close, could it lose its workers' compensation immunity leading to claims by employees? Or could a customer make a claim for injury resulting from exposure? And will directors and officers liability policies respond if the company's shareholders bring suit because the company's leaders negligently dealt with issues related to the consequences of the pandemic? More significantly, there may be claims made against health care providers related to diagnosis or failure to diagnose. Any such claims will turn on the individual facts and policy language at issue, and policyholders will face hurdles to prove coverage, which could include, for example, demonstration of "but for" causation and evidence of negligence rather than intentional conduct.

## **Other Coverages**

COVID-19 will likely raise coverage issues in a great variety of insurance products. For example, the sport and entertainment industries purchase "event" insurance for protection from unanticipated cancellations. In recent days, virtually every significant event that brings groups of people together has been canceled. There will be disputes concerning whether the basis for cancellation is covered, e.g., was it a fortuitous cause such as a government ban or did the policyholder intentionally cancel to show goodwill or based on the recognition that no spectators were likely to attend. "Wedding" insurance covers the cost of a ceremony that is canceled because of events beyond the participants' control. "Travel" insurance protects the traveler when a scheduled trip is canceled for reasons delineated in the policy. Individuals purchase "income protection" policies that typically pay if the policyholder is ill, but will such a policy cover a policyholder who decides to self-isolate or who loses income if his or her employer closes the business? In short, a number of disputes may arise, and the insurance industry and the consumers of its products will likely be involved in litigation over many of these issues that will last much longer than the virus.

## **Conclusion**

The impact of the coronavirus pandemic on the insurance industry cannot be underestimated. Consumers purchase insurance to protect against the risk of known and unknown perils, in short, to obtain peace of mind from the economic uncertainties of modern life. Insurers provide consumers with the desired protection by evaluating the risk and spreading it over a large population in order to earn a profit. The worldwide disruption caused by the virus and its economic consequences portend long-term litigation to resolve a wide array of coverage issues.

©2021 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.