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ALERT

Many Liability Insurance Policies May Provide Coverage for Losses from Coronavirus

By Daniel J Healy, Stephen D. Palley and Rhonda D. Orin

As the Coronavirus losses mount, a burning question for many businesses concerns the insurance coverage available to ease these losses. Insurance companies can be expected to push back, disclaim coverage and point to exclusions. But coverage exists for various forms of loss from this pandemic. A review of typical insurance policies held by businesses shows that coverage in multiple lines should be investigated. And as the government and public response continues to unfold, coverage terms should be revisited.

Most articles and guidance from coverage lawyers right now concern property coverage. That coverage is important. However, liability coverage will likely loom large somewhat later as individuals and businesses look to shift their losses by making claims against others.

Liability Policies May Be Increasingly Important Over the Long Run

Many businesses will face claims involving infection, exposure and COVID-19-related losses. Some property owners and other businesses operating in various locations may not shut down or will only shut down after there is a COVID-19 infection associated with their property or operations. Claims based on exposure to COVID-19, or allegations thereof, may allege bodily injury or property damage.

Typical coverage terms are for “all sums” a business owes for damages from bodily injury or property damage. Certainly, sickness from COVID-19 would be a bodily injury. While some policies contain exclusions for communicable or transmitted disease, other policies contain coverage extensions expressly for such disease. Policies with these types of provisions need to be read carefully. They may provide coverage, not exclude coverage or, in some cases, exclude coverage. If a tower of coverage is involved, that puts more variations in play.

Insurance companies will point to exclusions, including those for mold, bacteria and pollutants. Courts have limited the application of these exclusions and held they not apply in various situations, however. Depending on policy language such exclusions may well not preclude coverage for COVID-19 losses. For example,

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courts have held that Legionnaires' disease was not excluded by pollution exclusions.¹

Policyholders should be prepared to demonstrate the harm caused by COVID-19. Skeptical insurance companies in post-loss scenarios may argue that COVID-19 could not have caused physical damage to property. But the same policies often cover liability stemming from air quality issues at a property.²

Additional Layers of Claims

As claims progress, professional liability and E&O policies may be relevant. Such policies may exclude coverage for bodily injury that is better suited for general liability policies, but they may provide coverage for economic loss suffered from advice, consultation or services provided relating to a COVID-19 response.

Many businesses are engaged in active responses to the COVID-19 outbreak. Some will suffer losses traceable to steps taken. Loss and liability from the virus that can be tied to those steps may fall under such coverage. Even if claims prove meritless in the end, defense and litigation costs are important coverages to have.

For businesses that suffer losses, shareholders, investors and other claimants may make claims that fall under D&O policies. Some companies will suffer worse effects from the COVID-19 outbreak and some may not survive the economic downturn associated with the outbreak. Enforced social distancing precautions have more severe effects on certain types of businesses, such as airlines and hotels. Shareholders may believe that management took wrong steps or should have taken different steps to mitigate loss. Lawsuits based on such claims may be covered by D&O policies. Responsive coverage could include coverage for claims for alleged breaches of management's duties.

Conclusion

The viability of coverage for liability stemming from the COVID-19 will be fact-specific and dependent on the particular terms of the policy in question. Policyholders should carefully analyze all policies that may respond when seeking coverage for losses relating to COVID-19 and be prepared to resist defenses against coverage that their own analysis deems invalid. ▲

ENDNOTES

- Westport Insurance Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343-44 (M.D. Fla. 2010), *aff'd*, 513 Fed. Appx. 927 (11th Cir. 2013) (finding that neither a pollution exclusion nor a mold/bacteria exclusion excluded coverage for losses from Legionnaires' Disease).
- Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009).



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