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ALERT

Insurance Coverage For Possible Ebola Claims

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As Americans absorb news of the first Ebola cases on U.S. soil, job one is to maintain perspective, and confidence in the ability of U.S. public officials and health care providers to contain the disease. Ebola is difficult to contract, and widespread outbreaks in the U.S. remain unlikely. That said, the risk of being affected by Ebola — either directly or indirectly — is a significant concern for businesses across the country.

While the first concern of every business is the safety of its workers and customers, most will not need to take special operational measures. Exceptions include those in the health care, hospitality or travel businesses. At present, the Centers for Disease Control and Prevention workplace guidance (http://www.cdc.gov/vhf/ebola/index.html) is directed solely toward health care providers.

Companies in industries most at risk — and, to a lesser extent, companies generally — do need to take prudent measures to mitigate potential financial losses stemming from Ebola or other infectious disease outbreaks, including review of the coverage provided by existing insurance policies. Since policy language varies, businesses should review current exposure and take steps to secure coverage where it may be lacking.

Some insurance brokers and insurance companies are rushing to market policies specifically designed to cover Ebola-related losses. Companies most at risk, such as hospitals, may want to consider buying such coverage, but they should first closely analyze whether existing policies, e.g., hospital pollution liability, already provide adequate coverage. Other insurance that may protect against the risks posed by Ebola and other infectious diseases include business interruption, workers' compensation, general liability, D&O and E&O. Below, we consider each in turn.

Business Interruption

It's an ordinary morning at the Dew Drop Inn — until news breaks that a guest who checked out the prior afternoon is now in isolation at nearby Mercy Hospital, diagnosed with Ebola. By noon, 40% of reservations have canceled.

Business income losses caused directly or indirectly by Ebola can be covered under business interruption insurance. Business interruption coverage is typically purchased as part of a business's property insurance. This important coverage is designed to protect businesses against lost profits due to disruptions to their operations. Contingent business interruption coverage may apply to losses stemming from similar disruptions to a company's suppliers or customers — but usually only if

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the underlying cause of damage is covered with respect to the policyholder's own property.

In most property policies, business interruption coverage is triggered when the policyholder suffers physical damage to insured property. Physical damage, however, can include contamination. Moreover, some policies, particularly those written for policyholders in the hospitality industry, expressly provide coverage for losses stemming from infectious diseases without requiring other physical damage to property. Further, many property policies include civil authority coverage, which is triggered when authorities limit access to an area in which a business is located, even if there is no physical damage to the policyholder's premises.

In recent years, hospitals and other health care facilities have become increasingly aware of the business risks posed by hospital-acquired infections, and many — though by no means all — have bought hospital pollution liability coverage, which can include business interruption, as well as disinfection and remediation, evacuation of patients, emergency expenses and crisis management. Some brokerages are rushing to introduce business interruption coverage specifically for Ebola — which may or may not be redundant for health care facilities that have purchased hospital pollution liability insurance. At the same time, certain insurance companies are warning that they plan to introduce exclusions for Ebola-related losses on new and renewed coverage sold to policyholders with increased risk of such losses.

Workers' Compensation

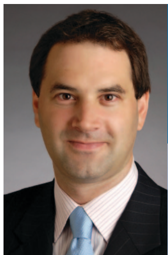
It was an unpleasant morning for the bussing staff at the Sunshine Diner, after a customer vomited in the bathroom. That afternoon, news breaks of an Ebola case in the city hospital. By evening the patient's movements have been documented — and included breakfast at the Sunshine. Staff are instructed to take their temperature twice a day. Ten days later, a staff member develops a high fever and is subsequently diagnosed with Ebola.

Assuming one or more of a company's workers become ill, are those workers entitled to workers' compensation benefits? The answer depends on how the worker became ill, and the nature of the illness. Virtually every state's workers' compensation statute provides that an employee is entitled to benefits for what is known as an "occupational disease." To constitute an "occupational disease," two conditions must be met: (1) the disease must be due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation or employment; and (2) the disease cannot be an ordinary disease of life, to which the general public is equally exposed outside of employment.

While occupational diseases are covered and ordinary diseases generally are not, there are circumstances where the latter may be covered if a direct causal connection to the workplace can be established. Because Ebola is generally contracted only through contact with an infected person's bodily fluids, the question of whether a worker contracted the disease in the course of employment is likely to be clearer than with other diseases.

Many workers' compensation insurance policies, particularly poli-

who's who



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cies providing excess coverage, provide insurance coverage beyond an initial self-insured retention for each accident and/or each employee, after which unlimited coverage is provided up until the applicable statutory caps. Thus, if an illness is deemed to constitute a "disease," most policies would apply a separate retention for each individual employee asserting a "disease claim."

However, if an illness outbreak is triggered by a causal event at the workplace and directly flows from the work being performed — which is likely in Ebola cases — it may be argued that the resulting disease has been produced by an "accident" causing bodily injury, as opposed to a disease. In this case, a business would only be required to pay one self-insured retention, no matter how many employees were actually exposed to contagion or contaminant.

CGL, D&O and E&O Coverage

A large city hospital that is part of a larger for-profit entity is caught flat-footed when a patient admitted to the emergency room develops Ebola. It emerges that the patient sat for hours in the crowded emergency room before being treated. Staff who first treated the patient did not have adequate protective gear or hands-on training. A nurse, a nurse's aide and two orderlies develop the disease. The public shuns not only the hospital in question, but all hospitals throughout the chain. Shareholders sue, alleging managerial negligence caused them financial harm.

Commercial general liability insurance is designed to cover against claims alleging that the policyholder's conduct caused bodily injury to the claimant, such as sickness or disease resulting from exposure to harmful conditions. Since most claims by sickened non-employees fit this description, commercial general liability coverage is a key source of protection.

Due to how disease is contracted and spread, any policyholder that receives even one such claim faces the risk of being the target of additional claims. Thus, it is important that notice be given as soon as possible to prevent the insurance company from denying coverage on grounds that it was prejudiced by late notice that prevented it from helping to stem the policyholder's exposure.

It is possible that individuals other than those personally sickened, e.g., shareholders in companies adversely affected by an outbreak, may make claims against companies or their executives based on allegations that management's acts or omissions caused such claimants to suffer financial losses. Directors' and Officers' policies may respond to such a claim. Although most D&O policies contain exclusions for claims alleging bodily injury, claims for financial damages are covered under D&O insurance. In most cases, the bodily injury exclusions should not come into play in financial claims — though some broadly written exclusions may prove problematic. As with commercial coverage, it is important that when policyholders become aware of such claims, they give notice to their insurance company as soon as possible, and certainly before the policy and/or reporting period for their current D&O coverage expires.

Hospitals and health care facilities often purchase specialized errors and omissions, or hospital professional liability coverage for damages that the facility must pay because of injury or death arising out of the provision or failure to provide professional services such as "medical, surgical, dental, nursing, counseling or psychological diagnosis or treatment to such person." Hospital liability policies frequently contain exclusions holding that the insurance does not apply "to bodily injury to any employee of the insured arising out of and in the course of employment by the insured." Thus, if a nurse sues her place of employment claiming she contracted Ebola because the hospital did not implement the appropriate safety protocols, there may not be coverage for the hospital under a standard medical E&O policy — but there should be coverage under workers' compensation policies, as noted above. However, if another patient alleges that he contracted the disease because he was placed in a room with a patient who was later diagnosed with Ebola, that case could potentially be covered. At issue will be the policy's definition of "professional services," and whether the allegations fall within that definition (i.e., HPL coverage would be triggered) or not (i.e., CGL coverage would probably be triggered).

Read the Policy

For each type of insurance, coverage may depend in large part on language specific to the policy. Risk managers should conduct a coverage analysis now to determine what coverage exists and whether to consider changes or additions.