



Insurance recovery for COVID-19

As the world continues to address the novel coronavirus (COVID-19) pandemic, an important aspect of managing the response to COVID-19 includes a comprehensive review of insurance with an eye toward identifying coverage that may be available to mitigate losses incurred due to the pandemic and government orders arising from the pandemic. Right now, players on both sides of the insurance debate (insurer counsel and policyholder counsel) are writing articles and posting alerts that make definitive – and, too often, misleading – pronouncements about coverage, or the lack thereof, for losses arising out of COVID-19. A more measured approach is needed. There are no clear cut answers and there are many difficult and nuanced issues. Reed Smith’s Insurance Recovery Group is here to help navigate these challenges.

Reed Smith is a dynamic international law firm, with 3,000 people, including more than 1,700 lawyers across 30 offices, dedicated to helping clients move their businesses forward.

The legal landscape for insurance coverage for losses associated with COVID-19 will evolve as the outbreak progresses and claims are submitted. Reed Smith’s Insurance Recovery Group is monitoring all critical developments, including insurer responses, lawsuits, and proposed legislation that may prohibit insurers from raising certain exclusions. As is always the case, the terms and conditions of policies vary from insurer to insurer and client to client. Although many “standard” policy forms may contain exclusions for viruses, others will not. It is critically important to carefully analyse all potentially available insurance with a focus on each client’s particular circumstances and specific terms of coverage.

Reed Smith clients are already preparing claims for losses resulting from business disruptions caused by COVID-19, while others are experiencing difficult renewals and often double-digit premium increases combined with additional restrictions on coverage. The uncertainties surrounding liability for COVID-19 will make these claims and renewals even more challenging – and the proliferation of “shelter in place” orders may cause additional losses and even interfere with policy renewal negotiations. The insurance professionals in Reed Smith’s Insurance Recovery Group have been helping clients navigate these rapidly developing issues as they arise.

Our collective experience assists clients in responding to both first-party and third-party claims as losses and lawsuits continue to rise in the wake of COVID-19. Below is a brief look at some of the coverages potentially available and the relevant questions related thereto,

Property Damage

Commercial property damage insurance is generally intended to cover losses caused when property suffers “physical loss or damage.” To recover, policyholders will likely need to demonstrate that they suffered some form of physical loss or damage to their property, as those terms are defined in their policies. How this language applies to the current crisis will surely be litigated in court.

Insurers trying to avoid coverage will argue that policyholders’ losses are not from physical loss or damage to property, like a building collapse or fire, but have non-physical causes – e.g., people staying home. This is an overly simplistic argument. Fire, collapse, and similar events are not the only property damage risks businesses face. A different analysis may be warranted, for example, in the event of an actual COVID-19 exposure that requires some form of abatement or remediation.

Courts have held that contamination that attaches to the property, or that physically affects property so as to render it uninhabitable or unfit for its intended use, can constitute physical loss or damage. Similarly, some courts have found a physical loss to property when the air has been contaminated, making the building unfit for occupancy, or because of a strong odor that makes the property uninhabitable. Notably, New York City’s March 16, 2020 Emergency Executive Order addressing the threat of COVID-19 expressly found that “the virus physically is causing property loss and damage.”

In short, because no two policies are alike and because courts do not uniformly interpret the relevant policy terms, policyholders must look at the specific policy portfolios they have, and the provisions in each of these policies. The issues addressed herein change dramatically based on how terms are defined and what exclusions are included. Although the insurers’ initial coverage positions are likely to be unfavorable to coverage, the changing circumstances may make room to expand coverage possibilities.

Business interruption

The purpose of business interruption coverage is to protect a policyholder’s expected income, which would have been earned had there been no interruption of business. However, most business interruption policies require that the interruption is caused by loss or damage to property, raising similar issues as those identified in the section above. An issue that likely will be litigated in this context is whether the suspected presence of the virus in a location, or even the fact that the location is unsafe for its intended use given restrictions on gatherings of people in a single location, might constitute physical loss or damage.

Generally, business interruption policies provide that the policyholder must suspend operations because of covered peril before collecting its losses. Each of these is a defined term, hotly litigated based on the facts and circumstances of each individual case, and coverage often turns on the definition of these terms. The policy language is paramount.

For example, in 2006, during the international outbreak of “bird flu,” insurers began adding exclusions for “loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease.”¹ The drafters specifically had in mind the SARS outbreak (a different coronavirus from 2003), and some policy forms specifically name SARS as an excluded peril. Policyholders must check to see if this exclusion is in their policy and if it is broad enough to apply to their own facts and circumstances.

Importantly, even if a virus exclusion is included in the policy, some states are pushing back against it. For example, as of March 16, 2020, the legislature of New Jersey is considering a law that, if passed, would force insurers to pay even if a virus exclusion is in the policy.²

¹ See ISO form CP 01 40 07 06.

² New Jersey Bill A-3844 (available at https://www.njleg.state.nj.us/2020/Bills/A4000/3844_11.HTM).

Taking a different approach, as of March 10, 2020, New York State requires insurers to (1) disclose certain information to regulators about their business interruption policies, and (2) make specific disclosures to policyholders about the scope of their insurance coverage. The enforceability of this exclusion may change drastically over the next several months to the extent that different state regulators want to protect their policyholders and the insurance markets more generally.

Contingent business interruption

Contingent business interruption insurance provides coverage for a policyholder's lost profits caused by loss or damage to a key customer's or supplier's property, which the policyholder needs to conduct its business operations. This type of coverage functions much the same as business interruption coverage, but addresses interruptions elsewhere in the supply chain. Given shipping restrictions recently imposed by the federal government, and the potential inability of Asian and European countries to satisfy orders, losses demonstrably caused by these stoppages could be covered. These policies raise similar issues as those under property damage and business interruption policies, such as virus exclusions and damage to property. But unlike property damage and business interruption coverages, policyholders need not show physical loss or damage to their own property.

Civil authority orders

Some policies have language that specifically allows for collection of business interruption losses caused by government closure actions or orders. Often referred to as "civil authority clauses," these provisions indicate whether, and how much, the insurer will pay for losses caused by a government action or order preventing the policyholder or its customers from accessing its property. Insurers seek to cap these losses by placing a time limit for recovery. Additionally, this coverage is rapidly changing in response to the COVID-19 pandemic; new form language is currently being drafted for future policies to address closures due to coronaviruses.³ The policy language for civil authority clauses varies, and policyholders need to know if they have this coverage and the duration of coverage provided.

Event cancellation

Within the past week, major global events, scheduled as far in advance as June 2020, have been cancelled in their entirety, or at the very least postponed. There is even discussion that the July 2020 Summer Olympics hosted in Tokyo could be affected. More immediately, and of notable importance from an insurance recovery standpoint, states such as New York and California, as well as counties and cities, are increasingly issuing shelter-in-place orders or, at the very least, guidelines that prohibit social interactions of groups with more than a certain amount of people, all of which have harsh effects on planned events and the movement of consumer goods.

Because event cancellation policies typically require an order banning large public gatherings for coverage to be triggered, companies with event cancellation policies might be able to tap into coverage for cancellations and postponements, particularly if the policy covers communicable diseases or pandemics. Although policy language varies, event cancellation insurance can provide companies with coverage for interruption, postponement, cancellation, relocation or reduced attendance of scheduled events, as well as lost profits and revenues. Despite this potential coverage, event cancellation policies might contain specific exclusions for diseases or viruses. Thus, it is important to read the policy language carefully and consult an insurance recovery attorney for coverage advice.

Political risk and trade disruption insurance

Political risk insurance is a specialized form of first-party insurance that covers the risks to assets and investments, sometimes including business interruption, in politically risky parts of the world. Unlike standard property insurance, political risk coverage may expressly insure against specified political perils such as nationalization of property, confiscation of assets, significant regulatory changes, war, and terrorism. Protection from danger to an expatriate workforce is often packaged with political risk insurance, and may include coverage for salaries or other expenses where government actions force employees to stop work, leave the country, or relocate.

³ See "ISO provides business interruption endorsement in response to coronavirus," March 18, 2020 (available at <https://www.nuco.com/fcs/2020/03/18/iso-provides-business-interruption-endorsement-in-response-to-coronavirus/>).

A political risk claim, while it has specialized triggers of coverage, is in substance much like any first-party property claim. Such claims require legal analysis, valuation of damage and loss, forensic estimation of lost revenue, and the like. Reed Smith's Insurance Recovery Group is experienced in these areas, including in the context of political risk claims. Procedurally, many political risk policies include arbitration clauses, and many arbitrations are directed to take place in London or under English law. We have significant international insurance arbitration experience in London and globally.

Political risk insurance is, by definition, tailored coverage. There is little uniformity across policies in coverage grants, exclusions, or triggers for business interruption coverage. Accordingly, policies must be individually analysed based on the particular government action taken or the contingency resulting from the virus. In these times of drastic government actions in response to the coronavirus's spread, businesses should not ignore political risk insurance as a potential source of coverage.

Cyber risks

With many clients having to suddenly transition their workforce to function remotely, hackers are likely to take advantage of the chaos. Normal authentication protocols for such everyday transactions like wire transfers, withdrawals, and lending approvals may not be possible. In addition, customer accounts or transactions may be impacted in the process. In the event of a breach of security, our clients should understand the coverage available under their cyber liability policies. In addition, for customer claims arising from the banks' handling of customer accounts during this hectic time, companies may be able to turn to their professional liability policies for coverage.

Directors and officers liability insurance

On March 13, 2020, the Securities and Exchange Commission issued an order granting conditional relief from certain obligations under the federal securities laws for companies facing challenges due to COVID-19. Notwithstanding this order, however, there are still a number of securities law considerations that public companies may face. For example, companies with upcoming shareholder meetings may have to consider virtual or hybrid shareholder meetings. Further, the uncertainties surrounding COVID-19 and its financial impact may prove challenging when faced with certain disclosure requirements. Unsurprisingly, two shareholder lawsuits have already been filed. In one, investors accused the company of misleading them regarding the adverse impact of the outbreak on the business. In another, investors who bought shares in a pharmaceutical company accused the company of making misleading statements regarding the development of a potential vaccine. Given the significant drop in stock prices across the board, more such suits, questioning companies' preparedness for the crisis, their response, and the public disclosures they made to their shareholders, are almost certain to follow.

Clients faced with these issues should review their directors and officers (D&O) coverage. D&O policies are designed to protect directors and officers, and, in some instances, the organization itself, from losses resulting from legal actions brought by shareholders or other third parties for alleged wrongful acts (i.e., breach of duty, neglect, error, misstatement, misleading statement, omission or act) done in the director's or officer's capacity. This coverage could extend to alleged misleading statements made in financial disclosures, or to any alleged breach of duty or neglect arising out of managerial duties. Companies may, depending upon the coverage options they purchased, also have coverage for derivative investigation costs. As with any contract, it is important to conduct a comprehensive review of the operative insurance policy language to determine the full scope of available coverage.

Employment practices liability

In the wake of production halts, event postponements, and supply-chain issues, many companies might be faced with the difficult decision to furlough or lay off their employees. Subject to certain exclusions, employment practices liability insurance (EPLI) policies might afford protection to companies that are forced to suddenly downsize their workforce. EPLI policies typically provide coverage to employers against claims made by employees alleging discrimination, including any alleged mistreatment if an employee is suspected of being infected or wrongful termination. For example, Family and Medical Leave Act (FMLA) or Americans with Disabilities Act (ADA) claims made by employees who are impacted by quarantine and unable to work and are seeking accommodations or leaves of absence, may be covered.

Again, policy language is important: some EPLI policies may include a downsizing exclusion; however, other EPLI policies may have simply imposed a higher premium or deductible to specifically insure against companies that participate in large-scale layoffs.

General liability insurance

General liability insurance typically provides coverage against third party claims of property damage or bodily injury, as well as coverage for personal injury offenses of false detention and imprisonment. These policies might trigger coverage if a third party claimant alleges that an individual contracted COVID-19 due to some act taken or not taken by the insured company. An example would be claims brought against companies that were aware of the presence of COVID-19 but ignored information that could have prevented the spread. General liability policies might also provide coverage for government-mandated shutdowns and any related expenses incurred as a result. If individuals potentially exposed to COVID-19 by the policyholder were subject to a mandatory quarantine, there may be coverage under the general liability policies' coverage for false imprisonment. Insurance companies might assert pollution exclusions to deny coverage under general liability policies. Depending on the policy language, however, the definition of "bodily injury" is typically broad and many pollution exclusions do not specifically reference disease or virus.

Workers' compensation insurance

For companies that have employees who have contracted COVID-19 through the workplace, coverage may be triggered under workers' compensation policies. These policies will be especially useful to companies, and those employees, who are required to take time off from work to recover and who incur medical expenses. Key questions for coverage will include whether COVID-19 was contracted during the course of employment and as a result of conditions specific to the employee's work.

For workers' compensation policies, premiums are generally determined by a post-policy period audit. Policyholders must consider how premiums will be impacted by the spread of the disease through workplace contact and by decisions to direct employees to work remotely.

We are here to help

The COVID-19 outbreak is a unique threat that defies cookie-cutter answers. As policyholders work through these challenges, Reed Smith's Insurance Recovery Group is ready to assist in all aspects of the insurance recovery process – from evaluating policies, to drafting claims to insurers, to counseling during policy placements, to litigating as necessary to perfect recovery for our clients. If you are dealing with a loss or lawsuit, have questions about the risks to your business related to COVID-19, or are facing a challenging renewal, Reed Smith's Insurance Recovery Group is here to help. Please reach out to our Practice Group Leader David Halbreich at dhalbreich@reedsmith.com for assistance.

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