CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Insurance Coverage Issues in the Midst of COVID-19

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The 2019 novel coronavirus ("COVID-19") continues to disrupt everyday life and scientific experts and world leaders agree that there is no concrete end in sight. Policyholders are understandably concerned wondering if their insurance will cover the loss—current or future—caused in part by the coronavirus as well as what will happen during the policy renewal.

Unfortunately, no one-size-fits-all answer exists as to whether coverage exists under a particular policy of insurance for COVID-19 related claims. Rather it depends upon the policyholder's specific factual circumstances, the policy's language and exclusions, and any future developments with respect to government action, case law, and the virus itself.

Although insurers have taken steps to dissuade policyholders from making coverage claims for COVID-19 related losses, it is critical that policyholders closely analyze their specific policy language before concluding that no coverage exists. Indeed, numerous policyholders have already filed coverage suits and states have started taking legislative action to ensure coverage. As litigation and legislation move forward, policyholders may find themselves with additional ammunition favoring coverage for COVID-19 losses under several commonly held policies described below.

First-Party Commercial Property Policies

1. **Business Interruption Coverage**
   Business Interruption coverage protects policyholders from lost profits and related costs when a company is unable to continue normal business operations. Policyholders filing claims under Business Interruption coverage must demonstrate that their losses constitute a "physical loss" or "damage" as defined by the policy.

2. **Business Interruption Extension: Civil Authority Coverage**
   Some property policies extend Business Interruption coverage to include civil-authority coverage, which covers loss of business income when an order of civil or military authority impairs access to the company's business operations. With states, counties, and local governments issuing orders restricting movement and commerce to "flatten the curve" of the pandemic, policyholders may possess a legitimate claim for coverage if operations have stopped due to a mandatory quarantine order or an order that a business close to prevent the spread of COVID-19.

3. **Contingent Business Interruption Coverage**
   Contingent Business Interruption Coverage provides coverage for lost profits and related costs when a company's suppliers or downstream customers suffer business interruptions, causing ripple effects upon the policyholder's business. If applicable, policyholders can assert claims for coverage if any supplier, or even customers, are being interrupted by the COVID-19 pandemic, causing the policyholder losses. The business interruption must result from "direct physical loss or damage" to the supply-chain partner's or customer's property. In addition, Contingent Business Interruption Coverage policies may have detailed technical requirements, so policyholders must take additional precautions to meet all requirements imposed.

To date, insurers have taken a hard line stance that COVID-19 contamination does not constitute a "physical loss" or "damage" and, therefore, no coverage exists for Business Interruption claims. However, while no case law exists determining whether the presence of a virus can constitute property damage, Courts in a number of jurisdictions have held that contamination that renders the property unusable or unfit for its intended purpose constitutes a "physical loss" or "damage." Thus, property damage does not have to be "physical" in nature, but can be found when contamination renders the property unusable or unfit for its intended purpose. Whether this argument will extend to COVID-19 claims remains to be seen.

Third-Party Liability Policies

1. **Commercial General Liability Insurance**
   Commercial General Liability policies provide broad coverage for third-party claims alleging bodily injury, property damage, or personal injury. In the context of COVID-19, this could include claims that a company's negligence led to the exposure and infection of clients or customers; or product-liability claims asserting that the company's air filtration system failed, causing exposure or illness. Whether such claims are covered under the terms of the policy will require a detailed review of the particular policy language and endorsements.

2. **Directors and Officers Liability Insurance**
   Directors and Officers Liability Insurance coverage provides defense and liability costs to directors and officers for claims made against them while acting in their official capacity. These policies may provide coverage for lawsuits that target companies and their officers and directors for drops in stock price or other adverse financial consequences related to the coronavirus. These suits may arise out of allegations that the company did not follow government protocols or that the company misled investors about its exposure to the virus.

3. **Other Third-Party Policies**
   Several additional third-party policies may be relevant as the pandemic continues. Particularly, Employment Practices Liability Insurance (in light of the ongoing layoffs and self-quarantine requirements); Workers Compensation Insurance (employees exposed to COVID-19 while at work); Errors and Omissions Liability Insurance (healthcare provider context).

Special Considerations for Policyholders Moving Forward

First and foremost, policyholders must fully understand the coverage that they have as soon as possible. A firm understanding will allow the policyholder to properly prepare before filing a claim for coverage. Insurers are likely to face an exorbitant number of COVID-19-related claims and therefore will be incentivized to apply a heightened scrutiny to such claims. Consequently, policyholders asserting claims will need to carefully review and comply with all requirements imposed by their policy. Overall, policyholders must consider all surrounding factual circumstances and the policy language together before deciding whether to make a claim. The best strategy for obtaining coverage will vary with the facts and policies at play.

Some key considerations:

- Does the policy include a business-interruption clause? If so, does it require property damage as a prerequisite?
- Does the policy include civil-authority coverage? If so, does it require property damage as a prerequisite?
- Does the policy include contingent-BI coverage? If so, has COVID-19 interrupted the operations of key suppliers or customers?
- What documentation do you have establishing the losses claimed?
- What notice requirements to the insurer does the policy contain?
- Has the coronavirus been detected as physically present in any of your facilities? If so, what documentation do you have?
- Have any of your employees tested positive for the coronavirus? If so, were any of them on your property while experiencing symptoms? Within two weeks of experiencing symptoms? What documentation do you have?

In addition to claim requirements, policyholders also should begin planning for upcoming policy renewals. Policyholders should expect coronavirus exclusions, as well as pricing increases.

Finally, new coverage actions are already being filed almost daily. The Benesch Insurance Coverage Team will continue to monitor these cases and consider all developments in the law as these cases progress.

For more information on this topic, please contact:

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

