DO I HAVE INSURANCE FOR MY CORONAVIRUS LOSSES?

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As the Coronavirus spreads and governments take more and more drastic measures to contain it, the stock market has plunged, and businesses have begun to feel the immediate strain of those drastic measures.

Prohibitions against public gatherings, limits on restaurant services, and shelter-in-place orders are being implemented throughout the country, interfering with virtually every aspect of our businesses. Travel bans from China, Europe, Great Britain, and Canada are disrupting supply lines and personnel.

The long term business impacts of these measures are a matter of conjecture at this point, but pessimism reigns. However, it may be possible that businesses can mitigate some of these negative impacts through their existing insurance.

Businesses should review their commercial package policies or property insurance policies to determine if they potentially have coverage for some of the actual, or anticipated, losses. Most commercial property insurance policies include coverage for lost profits resulting from "property damage."

The coverage for lost income often covers loss resulting from:

- Damage to the policyholder's own property (business interruption)
- Damage to the property of a customer or supplier or a supplier's supplier (contingent business interruption)
- Government action such as evacuation orders (order of civil authority)
- Damage to properties that attract customers to the policyholder's business (lead property)

The event that triggers any of these coverages is property damage — without which there will be no coverage for lost profits under a first party property policy.

So the threshold question is, does the presence of Coronavirus in a particular situation cause or constitute "property damage" and did such damage play a role in the loss of income?

The virus does not cause physical damage to anything, but it can be present in buildings, warehouses, airplanes, trains, tractor trailers, watercraft and other enclosed spaces and on surfaces outdoors. In similar circumstances, some courts have found that the actual presence of harmful substances at or on a property can constitute "property damage" that triggers first party property coverage, even though those substances do not physically harm the property.

As such, an argument can be made that property damage has occurred in places where the virus is present. It is worth noting that many policies make a distinction between the actual presence of a communicable disease versus the threat of such a disease, providing coverage for the former but not the latter.

In addition to coverage for actual property damage, most commercial property policies provide coverage extensions, with specified sub-limits, for a number of discrete losses. For example, cleanup costs, extra expenses, crisis management, and similar expenses are specifically identified as covered losses. In some instances, businesses have negotiated endorsements that cover contractual penalties for things such as failure to take delivery of specified quantities of goods or failure to deliver on time. Businesses should look hard at all of those coverage extensions, whether in endorsements or not.

Contingent business loss coverage. Many businesses purchase a rider to their commercial property policies that provide coverage for contingent business losses. A large portion of the losses suffered by businesses will fall within that coverage, which is a loss caused by damage to a supplier or customer. Many businesses have already reported the loss of overseas suppliers and customers.

The "supplier" whose property damage triggers contingent business interruption coverage may not be limited to the manufacturers or distributors of goods. It could be the transportation that brings customers to your business. To qualify as a "supplier" it is not necessary that the policyholder have a supply contract with the third party.

Closures of public gathering places and all nonessential business activity in major cities worldwide may trigger coverage for losses caused by an "order of civil or military authority" — that is, for loss due to the prohibition of access to a business's premises if caused by property damage within a specified distance of the insured property. When Super Storm Sandy hit New York City in 2012, some businesses were reimbursed for their business losses because they were prohibited from entering their buildings due to police orders.

Ordered closures could also trigger "lead property" insurance, which covers the policyholder's lost earnings resulting from the closure of a property that attracts customers to the policyholder's business. Again, this coverage is typically an endorsement that is specifically purchased by the business because of its reliance upon the business of particular venue or attraction.

The suspension of major cultural centers such as museums or theatres, for example, might trigger lead property coverage for hotels near those attractions.

A range of defenses may allow insurers to avoid, or limit, payment for losses stemming from the Coronavirus.

- First, following the SARS outbreak in 2003, most insurers added broad exclusions for damage caused by biological agents or communicable diseases.

- Second, many policies contain sub-limits for some of the coverages discussed above, or they have waiting periods before the coverage is triggered.
- Third, even if the presence of Coronavirus is considered property damage, most time element coverages insure only the period of time needed to repair the damaged property. Insurers may argue that the virus exists for only a very short period in the air or on surfaces, and that a quick cleaning is all that is needed to eliminate it and thereby restore the property, allowing a very limited period of recovery.
- Fourth, many policies provide extended period of interruption coverage to a certain number of days after property damage has been repaired to allow the policyholder's business to resume normal operations and achieve pre-loss levels of income. There will likely be disagreements over whether a business was closed or access was denied because of actual property damage or as a purely precautionary measure to prevent the spread of the disease.
- Finally, the deductibles applicable to business interruption coverage can be very complicated. Insurers may attempt to stack, or apply multiple deductibles, to a single loss, thereby limiting their payment obligations.

Even if a business has coverage, it is obligated to mitigate the losses as much as possible. Insurance policies, as well as the common law, impose upon policyholders the obligation to mitigate property loss and require the insurer to pay for those efforts. Loss mitigation coverage is triggered by actual loss, damage or injury, so it probably would not apply to purely precautionary measures taken to avoid a possible loss.

However, once a loss or injury has commenced, efforts to contain it, such as closures or costs incurred to make alternative arrangements for employees, may be covered. Extra expenses incurred in order to achieve safer means of production and deliveries of products and services may also be covered.

It is important that our business colleagues review their insurance policies immediately to determine if they potentially have applicable insurance. If you are unsure, reach out to your insurance broker or your attorneys to determine if you have such coverage and, if you do, the applicable limits. Be sure to track your losses. Most importantly, if you believe you have a potential claim under your policy, notify your insurer immediately; every policy imposes a timely notice requirement on the policyholder.

If you have questions regarding your insurance policies or potential coverage issues, please contact Ryan K. Cummings, Michael C. O'Neill, or William A. Ciszewski.

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