

Jim's Perspective...

Insurance Coverage and Coronavirus

As I am sure you can appreciate, there are many people now asking about insurance coverage for the problems caused by COVID-19. While I have no experience with property and casualty insurance coverage for COVID-19 related financial losses, neither does anyone else, so below are some thoughts about some property and casualty policies and coronavirus.

Business Interruption Insurance.

There are two subsets of this coverage:

1. Business interruption coverage which applies when the insured's own business is interrupted.
2. Contingent business interruption coverage which can be purchased as an "add on" to the basic business interruption coverage. This contingent coverage applies if a supplier or customer has to suspend operations which then interrupts the business of the insured.

All business interruption coverage requires that the suspension of operations be due to a covered loss (for example, fire or tornado). However, some business interruption coverage can be triggered based upon actions by government officials or law enforcement. As I recall, this coverage was triggered after Hurricane Katrina when government officials would not allow people to access certain areas damaged from the hurricane. This might occur now if federal, state, or local government imposed a mandatory quarantine that limited access to a policyholder's office or other facilities. I think, though, that structural damage to the property may be a requirement for this coverage in some policies. This type of coverage may also have a waiting period of, perhaps, 72 hours before coverage is triggered. Proof that contamination or other relatively intangible conditions like bacteria, gases and fumes that "rendered the insured property temporarily or permanently unusable or uninhabitable" may support a finding that the loss was a physical loss to the insured property. See for example, Mellin v. Northern Sec. Ins. Co., 115 A.3d 799, (N.H. 2015).

Workers' Compensation Insurance.

I have not seen much discussion of this problem, but it is certain to arise. What if an employee claims to have contracted COVID-19 in the workplace or during the course and scope of employment? I think we could see a lot of workers' compensation claims although it might be hard to pinpoint when the worker actually contracted the disease. Was it at work, or while the employee attended a high school basketball game? Of course to the extent employers provide paid time off for the quarantine period, nothing much will be submitted under workers' compensation.

Political Risk Insurance.

This is a specialty line of insurance that will usually be purchased by a commercial entity that does business outside the United States. It can cover losses as a result of a government mandated

shutdown. However, with many political risk policies, this form of indemnity often necessitates a waiting period of 90 days prior to coverage activation.

D & O Liability Insurance.

D & O insurance coverage could come into play if investors or customers eventually sue a company and its directors and officers as a result of losses incurred from breaching a quarantine or failing to take timely or appropriate action to mitigate the impact of the COVID-19 disease, resulting in additional sickness, a company shutdown and, eventually, lost revenues as a result of failing to properly respond to the coronavirus risk exposure. Note, however, that many D & O policies have a bodily injury exclusion that may apply, but if the claim involves only loss of revenues, perhaps the exclusion won't be a problem.

Liability Insurance.

This will be important to the owners and operators of public facilities such as restaurants, malls, hotels, senior living facilities, office buildings, government buildings. Corporations or individual owners could face claims by infected guests for failing to exercise reasonable care in guarding against, or warning of, the risk of exposure to coronavirus. I vaguely remember that there was a significant amount of this type of litigation associated with Legionnaires' disease. However, some policies may exclude coverage for communicable disease.

Property Coverage.

We usually associate this coverage with a covered cause of loss such as fire or tornado. But I think some commercial policies may also provide some form of coverage when tangible property is rendered unusable. Of course, there may also be a communicable disease exclusion that applies. However, some policies provide a sub-limited coverage for income loss due to disease, murder or suicide which makes the insured location unusable. This limited coverage is usually within the business interruption coverage.

Even if coronavirus is not excluded, there is the additional issue of determining whether the disease actually caused the loss sustained by the insured. If a business loses money because of a loss of workers, a voluntary quarantine, or just because of a decline in the demand for its product, none of this may rise to the level of a "direct physical loss" which is found in some commercial policies. Other policies may refer only to "loss caused by" a covered peril or not excluded under the all-risk coverage.

There seems to be a lot of concern out there, that the phrase, "direct physical loss" will be a big hurdle to overcome in order to recover COVID-19 related economic loss under commercial property coverage. However, as I mentioned about a year ago, most Nebraska case law determines causation based upon the tort standard of causation which is called "proximate cause." Even if the policy contains the stricter standard of causation by requiring a "direct physical loss" by a covered peril, most Nebraska cases do not give any special significance to this phrase, and the standard is still one of proximate cause. Clouse v. St. Paul Fire & Marine Insurance Co., 152 Neb. 230, 40 N.W.2d 820 (1950) is probably the fundamental case dealing with the issue involving multiple potential causes of loss. There was evidence to show that the building collapsed immediately after being struck by lightning, and other evidence tending to show that water seeping into the ground

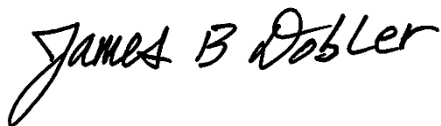
around the foundation weakened the structural support for the building and caused its collapse (loss caused by groundwater being excluded). The court acknowledged that there were probably multiple causes of this loss, but coverage should still be based on a proximate cause analysis. It outlined this causation standard as follows:

In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is attributed is the dominant, the efficient one that sets the others in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss.

The proximate cause analysis probably provides a little broader standard for finding coverage when there are multiple causes of loss. There is case law in other states that does enforce the more burdensome standard of “direct physical loss.” Note too, that proximate cause is a fact issue for the jury to determine. Any issues involving interpretation of the insurance contract is an issue of law to be determined by the court.

I have seen some publications suggesting that the insurance industry is developing a line of coverage specifically targeting this risk of loss involving disease or epidemic. In May 2018, for example, it was reported that Marsh, in collaboration with Munich Re and epidemic risk modeler Metabiota, had launched PathogenRX, a fully integrated pandemic coverage product. “Using triggers like Metabiota’s new Pathogen Sentiment Index, which provides extensive analytics into infectious disease outbreaks, businesses can model their potential financial loss from an outbreak and protect against the threat through an insurance policy underwritten by Munich Re. The policy is customizable and can be tailored to provide coverage for specific expenses, geographies, types of disease or portions of a calendar year.” *Insurance Journal* (May, 2018). As the insurance industry develops products specific to pandemics, I suspect we will see pandemic exclusions in most commercial policies following the ISO format.

COVID-19 is an incredibly new and complex virus. It is a new epidemic which reflects one of the fundamental characteristics of insurance, which is that the cause of loss must be fortuitous. There is extensive discussion of how we will provide for people and businesses that sustain injury or loss resulting from this virus. This is what insurance has always been about. There is continuing public planning about how to contain the virus which is basically, “risk management,” another fundamental characteristic of insurance. As I listen to the COVID-19 public discussion across America, I just keep thinking about how much the invention of insurance is so interwoven in our society and operates as a fundamental, indispensable, financial service in the day-to-day life of human beings.



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