

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware



www.meritas.org

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Business Insurance Considerations During the COVID-19 Pandemic

With COVID-19 and a resulting increase of employees remotely working outside of The COVID-19 pandemic has caused business leaders to assess whether and to what extent their insurance programs may cover any of the emerging liabilities and risks. Whether a business insurance program may afford coverage for a specific claim will necessarily depend on the language of the specific policy and the facts at issue. This alert provides a basic review of some of the business coverages that may come into play and some of the coverage issues that may arise with COVID-19 claims. As you consider whether insurance may respond to the losses your business may experience as a result of COVID-19, it is important to review the insurance policies themselves, which may include notice and other obligations that require action in the short-term, in order to preserve and document a covered claim.

Business Interruption

Property insurance programs often include coverage for business interruptions and lost profits. Businesses are facing mandatory or voluntary shutdowns, staffing and supply shortages, as well as declines in demand for goods or services. As more and more of our clients are experiencing some form of interruption while the COVID-19 outbreak spreads, understanding how these coverages work has become a matter of heightened interest.

The business interruption coverage part of most property insurance policies requires that the business interruption result from a “direct physical loss of or damage to” the insured’s property. The direct physical loss or damage must also result from a covered cause of the loss that is not otherwise excluded by the policy. There may also be contingent business interruption coverage, which would cover disruptions caused by key suppliers suffering a direct physical loss to their property or customers. “Civil authority” coverage may also be included, which would potentially cover losses arising from civil authority orders that impair or prohibit access to an insured’s property.

With the exception of certain specialized business interruption policies or endorsements made available to certain industries, most standard form business interruption programs will likely not afford coverage available for COVID-19 losses, because most standard forms will require a direct physical loss or damage to property, even under the contingent or civil authority coverage. Generally, absent the direct physical loss or damage to the property, for losses arising from voluntary shutdowns or from a lack of business activity, coverage will likely not be available; direct physical loss does not include consequential or resulting economic loss.

Of course, there will be challenges to coverage denials when a business is closed because of the actual presence of COVID-19 at the premises. At least one suit has already been

filed – Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al., Civil District Court for the Parish of Orleans, Louisiana – where the insured is arguing that the contamination of the premises caused by the virus is a direct physical loss triggering business interruption coverage.

However, it is important to note that, in the mid-2000s, most commercial insurers adopted exclusions for infectious diseases, flu outbreaks and epidemics. In the Cajun Conti case, the policy did not contain such an exclusion. If your business program does contain one of these exclusions, as most do, there likely would be no coverage, even if you were ultimately able to show direct physical damage to premises caused by the virus. These exclusions are sweeping in nature. Notably, at least one state (New Jersey) has recently taken up legislation to possibly vitiate or overturn these virus exclusions in the wake of COVID-19 ([Bill A3844](#)). It is unclear whether a legislative contract reformation like this would survive constitutional challenge, but we do suspect that, like in New Jersey, there will be more legislative attempts and political pressures to find coverage under these programs.

The industry has developed endorsements that specifically provide coverage for business interruption due to viruses or diseases, even absent evidence of direct physical damage. If your business is in line for coverage renewals, you should consider these coverages if you do not have them already.

Directors & Officers Liability

A company’s directors and officers may be subjected to shareholder lawsuits alleging that their unreasonable actions (or inaction) in response to the COVID-19 pandemic caused the company economic loss. For example, a company’s shareholders may contend that management allegedly failed to observe protocols recommended or required by governmental authorities, failed to develop adequate contingency plans, failed to properly disclose the risks posed to the company’s business and financial performance, etc. Directors and officers (D&O) insurance policies may provide coverage for the costs and liabilities arising from these shareholder lawsuits.

Indeed, this month, at least two such suits have been filed. On March 12, 2020, a shareholder of Norwegian Cruise Lines filed a securities class action lawsuit in the Southern District of Florida against the company, its CEO, and its CFO. The complaint purports to be filed on behalf of a class of shareholders who purchased the company’s shares between February 20, 2020 and March 12, 2020. The complaint alleges that defendants made false and misleading statements or failed to disclose that: “(1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants’ statements



Steven B. Davis



Jeffrey D. Grossman

For more information, contact Steven B. Davis at 215.564.8714 or sdavis@stradley.com, or Jeffrey D. Grossman at 215.564.8061 or jgrossman@stradley.com.

regarding the Company’s business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times.” A lawsuit was filed on March 12 against Inovio Pharmaceuticals in the Eastern District of Pennsylvania, alleging securities law violations in connection with allegedly false and misleading public statements made in connection with the company’s development of a COVID-19 vaccine.

Businesses should be aware that the majority of D&O insurance policies exclude claims for bodily injury (with some exclusions worded more broadly than others). Some D&O policies contain so-called “absolute” bodily injury exclusions (e.g., excluding coverage for any claim “based on, directly or indirectly arising out of, or relating to actual or alleged bodily injury”). Whether and to what extent these broader exclusions may bar coverage for shareholder claims with any connection to the virus is likely a subject for disputes.

Businesses should also examine the scope of their D&O insurance policies’ “conduct exclusions.” Many D&O insurance policies exclude coverage for certain misconduct by the insured, which can include deliberate fraud, dishonesty and willful violations of the law. The particular language of these “conduct exclusions” can become significant if a company’s pandemic response becomes the subject of shareholder litigation.

Workers’ Compensation

Workers’ compensation policies generally afford coverage for injuries “arising out of or in the course of employment.” Such injuries could include certain illnesses. For coverage to be afforded by a workers’ compensation policy, the employee generally must demonstrate that his or her illness was caused by the employment. In most industries, the causation question will be difficult for the employee to prove in the case of the virus. Exceptions may occur for employees in the health care industry, particularly at the beginning of an outbreak in a particular area.

Workers’ compensation claims, like all others, should be reviewed on a state-by-state, case-by-case basis. Coverage

and scope questions may differ from state to state, and may also change over time as the crisis evolves. For example, earlier this month, the Washington state Department of Labor and Industries issued an order to pay wage-loss and medical treatment expenses for any health care worker or first responder who is quarantined because of coronavirus exposure. Washington operates a monopoly workers' compensation system, so that policy impacts every employee in the state who is covered by the state system. In Kentucky, the Kentucky Employers Mutual Insurance Co. announced that it will pay wage-replacement benefits for any first responder or employee in the medical field who is quarantined because of direct exposure to a person diagnosed with COVID-19.

Other Liability: e.g., CGL, E&O

As the incidence of illness increases, businesses—particularly those in the healthcare industry—could face claims by third-parties/guests that the company allegedly failed to exercise reasonable care in guarding against, or warning of, the risk of exposure to the virus. Commercial general liability (CGL) insurance policies protect businesses against third-party claims for bodily injury resulting from exposure to harmful conditions, and these should respond with coverage for COVID-19, bodily injury claims. With respect to claims for bodily injury brought against a company by its own employees, the CGL coverage will generally exclude such claims, and as discussed above, the availability of workers' compensation coverage is questionable. In addition to CGL insurance, many professional organizations, such as health care providers, also purchase errors and omissions (E&O) insurance or professional liability coverage. For health care providers, these policies protect against damages for bodily injury arising out of the

provision of, or failure to provide, medical services. These policies also typically exclude coverage for bodily injury to employees occurring during the course of their employment (which might be covered under workers' compensation insurance policies in certain cases). Nevertheless, whether all employee-related claims arising from the pandemic warrants case-specific analysis.

Event Cancellation

Groups of all types have been deciding whether to cancel events. Many events have already been canceled, and businesses planning or otherwise taking part may have purchased event cancellation insurance policies to offset any costs associated with an unexpected cancellation. Event cancellation insurance is typically more tailored to a specific insured and event. Many policies will exclude cancellations due to viruses or infectious diseases, but some will cover such risks under specific circumstances for an additional premium. Of course, many policies purchased in 2020 will expressly exclude cancellations related to COVID-19.

Cyber Insurance

With a far greater number of employees working remotely during the COVID-19 outbreak, cybercriminals are ramping up their efforts to infiltrate business IT infrastructures and steal or encrypt sensitive company data, extort funds, or outright steal funds through social engineering fraud and other schemes. Many insurers offer cyber coverage to respond to these first-party risks and the third-party claims that may arise following unauthorized access to or exfiltration of sensitive customer data. If your business does not yet have cyber insurance, now may be a good time to reconsider.