MARCH 18, 2020

COVID-19: Insurance Claims Considerations

Author: George J. Pollack

The COVID-19 outbreak is a challenge for all. We are here to assist in this rapidly developing situation. The following provides an overview of insurance claims considerations relating to the COVID-19 outbreak.

Potential Exposures

The COVID-19 outbreak is disrupting global business and supply chains, due to factory shut downs, reduced transportation resources and the imposition of travel restrictions as well as social distancing measures. It is causing significant business losses, especially in the manufacturing, travel, hospitality and transportation sectors. These losses will undoubtedly mount and spread to virtually all sectors of the Canadian and global economies as governments around the world impose increasingly severe measures and restrictions aimed at slowing the spread of the outbreak within their respective jurisdictions.

It is natural in the current climate for businesses to look to their insurance coverage in order to mitigate financial losses. Most companies will have a fairly typical suite of business insurance policies in place, including property, commercial general liability and business insurance coverage. Some businesses – primarily those engaged in tourism, hospitality and healthcare – may have specific coverage against infections at or in close proximity to their locations (such coverage became more widely available after the SARS outbreak in 2003).

Property damage policies generally cover against the risk of physical loss of or damage to property and premises. Commercial general liability policies cover against liability for property damage or bodily injury caused to third parties. Business interruption insurance affords coverage against financial losses that occur when a business, or one of its key customers, is unable to maintain its operations. As mentioned above, some insurance policies will contain infectious disease extension clauses that add coverage for financial losses or the closure of a business due to the order of a competent government authority that is imposed as a direct result of a contagious disease.

The availability of coverage under the types of policies referred to above will differ from one jurisdiction to the next, and policy terms can be highly variable from one insurer or policy to another.

Insurance policies provide coverage against fortuities – namely, unknown or unforeseen risks. We believe the courts are likely to qualify COVID-19 as a fortuity. However, that, in and of itself, would not be enough for financial losses caused by infection to be recoverable.

Property Insurance

Coverage under a property insurance policy will generally be triggered by physical damage to insured property caused by an insured peril. Although an infectious disease (unless excluded) is likely to be considered a fortuity, insurers can be expected to take the position that pandemics, and measures intended to curb them, are not insured perils and that even if they were, they do not result in physical loss or damage to insured property of the kind necessary to trigger coverage under a property insurance policy.

While we do not foresee that there will be many, or significant, claims for actual physical damage caused by COVID-19, businesses will incur expenses in cleaning and sanitizing property to render it safe for human occupation and use. Insureds may take the position that such expenses should be covered, as well as claims for losses arising from the denial of access to premises or loss of attraction resulting from government-imposed containment measures. Whether or not such claims will be covered will depend in each case on specific policy wording and how insurers and courts interpret that language. Looking to the future, we encourage our clients to meet with their

insurance brokers to determine what property-related coverage extensions can be purchased to cover future pandemic-related contingencies.

Commercial General Liability Coverage

Under commercial general liability (CGL) policies, insurers must pay the sums that an insured becomes legally obligated to pay as damages because of bodily injury and property damage caused to third parties to which the insurance applies. We believe that CGL policies should, as a general rule, cover pandemic events in instances in which claims are made against insureds for failing to protect others from infection when they had a duty to do so. In some instances, however, policies will contain exclusions for claims caused by exposure to infectious diseases. Here too, policy language will determine the scope of coverage available.

The notion of claims alleging a failure to protect third parties is not far-fetched. In fact, lawsuits claiming millions of dollars in damages alleging exactly this have already been filed against Princess Cruise Lines by a number of passengers who had the misfortune of being aboard the Grand Princess vessel. We expect that claims alleging a similar breach of duty could be made in a wide variety of other business contexts, ranging from the hospitality to the retail sectors. Again, whether or not a given claim is covered or excluded under a CGL policy will depend in each case on the language of the policy.

Business Interruption Coverage

One coverage line that we expect COVID-19 to generate significant claims is business interruption. This type of insurance is designed to cover against lost income and expenses caused or incurred when business operations are disrupted as a result of a disaster. Coverage may also be available when the operations of critical suppliers or customers are similarly affected and result, for example, in business losses resulting from supply chain disruptions.

There are a number of important restrictions on this coverage and, as in other types of business insurance, the specific policy terms matter. The most important consideration to keep in mind is that most business interruption policies will provide coverage only when physical loss or damage has been caused to the insured's premises or property used in the operation of the business. In most instances, however, coverage will not depend on whether the insured owns or leases the property that is the basis of the claim. It should be noted, however, that business interruption policies may contain endorsements that extend coverage to losses tied to infectious diseases and measures imposed by competent authorities to contain them. In each case, the language of the policy will determine whether coverage is available when there is no physical loss or damage but access to an insured facility is either prohibited entirely or restricted because of pandemic-related containment measures.

Substantiating business interruption claims can, in the best of coverage circumstances, be a difficult exercise given the uncertainty of valuing future losses. If you intend to make a business interruption claim, it is essential to keep complete accounting and financial documentation. Such documentation is necessary because it is the insured's burden to prove the value of a business interruption loss, and you should be prepared to substantiate a loss by reference to past performance, industry trends and benchmarks, budgets and forecasts.

Conclusion

In summary, whether a particular policy will respond to a COVID-19–related claim will depend on its particular language. The starting point, in each instance, will be to review your policies and to seek guidance from an insurance-related specialist such as an insurance broker or experienced counsel. They can assist you in determining whether, in the particular circumstances, coverage is available. And if you anticipate making a claim, we encourage you to carefully document any lost income or expenses incurred as a result of the COVID-19 outbreak.

One practical rule of thumb should guide businesses in all cases. Whatever the field of activity, businesses must act prudently. This means taking all reasonable precautions to prevent the spread of COVID-19 and to protect customers and third parties. This includes compliance with measures directed by government and other competent authorities aimed at limiting the spread of infection.

For any questions regarding insurance coverage, we encourage you to contact one of the lawyers listed below.

Resources

George J. Pollack - 514.892.0887 (mobile), Elliot Greenstone - 514.209.6581 (mobile), Faiz Lalani - 438.882.3249 (mobile) and Matthew Milne-Smith - 647.393.5595 (mobile)

Key Contacts: George J. Pollack, Elliot A. Greenstone and Matthew Milne-Smith

This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.

© 2024 DAVIES WARD PHILLIPS & VINEBERG LLP