Monday, March 23, 2020

As more and more businesses are impacted, meetings and events are cancelled, projects are halted, and operations are closed in response to the unprecedented effects of COVID-19, the issue of potential insurance coverage has become relevant for most companies. While the question of coverage is complex, fact-specific, and subject to the varying endorsements, limitations, and exclusions of individual policies, there are some key types of coverage that are implicated by COVID-19.

**Business Interruption Insurance**

Most client inquiries we have received have been about business interruption insurance. Business interruption insurance can either be purchased as part of a commercial property insurance policy or as a stand-alone policy or provided through
a captive insurer.

General business interruption insurance is intended to protect a business against profits that are lost as a result of unintended interruptions to the business or its supply chain. Typically, business interruption policies are triggered when the company suffers some sort of direct physical damage, and that physical damage leads to an interruption of its business operations.

If your policy contains a requirement of physical damage, as most do, a determination will have to be made regarding whether the COVID-19 virus is deemed to be physical damage. However, some policies do not have a requirement of physical damage if the loss arises from certain diseases. A determination will have to be made whether the virus rendered a facility totally or partially unusable or required additional costs such as testing or cleaning. COVID-19 is not a disease that has ever been mentioned in any policies.

Other policies contain contingent business interruption coverage. Rather than requiring the policyholder to suffer a direct physical loss, contingent business interruption coverage responds to some losses that impact a company’s supply chain. To the extent that a supply chain is impacted by slow-downs or stoppages in the United States, China, Europe, or within the NAFTA free trade area, a company may see more benefit from the contingent business interruption coverage than from traditional business interruption coverage. However, this coverage ordinarily requires physical damages to a supplier or customer’s property by a peril covered under the company’s policy.

Another type of business interruption insurance which may have broader applicability is civil authority coverage. The coverage applies when you are unable to operate your business due to the order of local, state, or federal authorities. Several months ago, some insurers began writing limited and optional coverage for COVID-19, particularly for “civil authority” orders, where governments or health officials issue orders restricting the use of businesses or properties. If you purchased this coverage, it is likely to have certain sub-limits (which may be relatively low), but it will need to be closely reviewed. This supplemental coverage may also apply without the physical presence of COVID-19 on your premises.

**Commercial General Liability/Professional Liability**

A company’s commercial general liability (“CGL”) insurance is typically the first thought when people ask general questions about insurance. CGL coverage responds to claims that the policyholder acted in a way that caused personal injury or bodily harm to a claimant. The typical example is a slip and fall of a patron in a public building, a products liability claim, or other physical injury caused by the policyholder that resulted in injury to another.

If businesses are sued by customers or patrons for causing, spreading, or failing to take adequate steps to prevent COVID-19 transmission, the CGL policy will be the first line of defense. However, many CGL policies contain exclusions for virus and bacterial-related bodily injury. On the other hand, CGL policies for certain industries that are more susceptible to contagious disease outbreaks (including
restaurants, event centers, and hotels) are more likely to be sold with optional coverage that may include bacteria and viral infection, as these industries have historically demanded optional coverage for contagious disease.

**Workers’ Compensation**

Workers’ compensation insurance is required of most employers; either explicitly by statute or implicitly by business contracts. Workers’ compensation insurance generally covers jobsite injuries, as well as occupational diseases that are peculiar to a trade, occupation, or employment. For example, the hallmark occupational diseases include asbestosis and mesothelioma for those who worked with asbestos and black lung disease for underground coal miners.

Individual state law will control whether an “ordinary disease” – i.e., one which the general public is exposed to outside of employment – will be covered by workers’ compensation. Typically, an employee who contracts an “ordinary disease” will not be covered under worker’s compensation insurance. Some states apply the “peculiar risk” approach to determine whether the risk was increased because it was related to the employment. To the extent that your employees are hospital workers, nursing home workers, or other front-line healthcare workers who may be exposed to COVID-19 on a heightened basis, your business workers’ compensation insurance may cover those employees. Law enforcement, firefighters, and other emergency responders may also have similar claims. The farther your particular employees are from the “peculiar risk” of being exposed to COVID-19 in the workplace, the less likely it would fall within your workers’ compensation insurance. Employees bringing workers compensation claims for COVID-19 will also have to prove that they were exposed at the workplace, rather than as members of the general public.

**Directors & Officers Liability Insurance**

Directors & Officers (“D&O”) liability insurance almost always contains exclusions for bodily injury. However, as the COVID-19 pandemic begins to negatively impact financial markets, credit markets, and share prices, shareholders may bring claims that a company’s executive leadership grossly mismanaged the company. Against the background of the turmoil currently roiling the financial markets, these claims may be specious at best, but the D&O policy may respond to such claims that are based on the drop of a public company’s stock prices.

**Conclusion**

Regardless of what you see, hear or read about insurance coverage for COVID-19, you still need to have your policy read by an attorney experienced in the area of insurance coverage.

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