

ALERTS

Business Interruption and Related Insurance for Losses from COVID-19

March 17, 2020

On March 10, 2020, the New York State Department of Financial Services (“NYDFS”) instructed all authorized property/casualty insurers to “explain to policyholders the benefits under their policies and the protections provided in connection with COVID-19.” The instruction requires insurers to provide specific information concerning business interruption, contingent business interruption, civil authority and supply chain coverage to their policyholders.

Insurers are Required to Explain Coverage for Business Interruption Losses

By March 18, 2020, each insurer is required to provide to each of its policyholders and the NYDFS a “clear and concise explanation of benefits that is suitable for policyholder review,” including, without limitation, the following questions and requests:

- *“What type of commercial property insurance or otherwise related insurance policy does the insured hold?”*
- *“Does the insured’s policy provide ‘business interruption’ coverage? If so, provide the ‘covered perils’ under such policy. Please also indicate whether the policy contains a requirement for ‘physical damage or loss’ and explain whether contamination related to a pandemic may constitute ‘physical damage or loss.’ Please describe what type of damage or loss is sufficient for coverage under the policy.”*

- *Does the insured's policy provide 'civil authority' coverage? If so, please describe what type of damage or loss is sufficient for coverage under the policy. Please also describe any relevant limitations under the policy. Please explain whether a civil authority prohibiting or impairing the policyholder's access to its covered property in connection with COVID-19 is sufficient for coverage under the policy.*
- *Does the insured's policy provide 'contingent business interruption' coverage? If so, please describe what type of damage or loss is sufficient for coverage under the policy. Please provide the 'covered perils' under such policy. Please also indicate whether the policy contains a requirement for 'physical damage or loss' and explain whether contamination related to a pandemic may constitute 'physical damage or loss.'*
- *Does the insured's policy provide 'supply chain' coverage? If so, is such coverage limited to named products or services from a named supplier or company? Please also indicate whether the policy contains a requirement for 'physical damage or loss' and explain whether contamination related to a pandemic may constitute 'physical damage or loss.'*
- *For each instance of coverage described above, please provide the applicable waiting period under the insured's policy. Please also indicate the amount of time coverage remains in effect once becomes active for a given incident."*

Key Business Interruption Coverage Issues

Whether or not business interruption or contingent business interruption coverage will respond to COVID-19 claims will depend on the terms of each individual policy. Many business interruption policies, for example, specifically require physical damage or loss while other policies may exclude losses arising out of infectious diseases. (Certain states, including New Jersey, are considering bills to remove the infectious disease exclusions in the wake of COVID-19.)

Directors and Officers ("D&O") Coverage

COVID-19 business losses will likely result in claims against directors and officers alleging wrongful acts or failures to act that are alleged to have

resulted in business losses. These claims could include allegations that the business failed to develop and timely implement contingency or business continuity plans or failed to adequately disclose risks inherent to the business from disease, supply chain disruptions or governmental actions. D&O policy claims will have to overcome bodily injury exclusions typical to those policies, however, such exclusions may not apply where loss is wholly economic.

General Liability (“GL”) and Workers’ Compensation

For businesses that serve customers who become infected by the coronavirus, third party GL insurance should be available where a claimant can show that the infection was the result of their interaction with the business and the business failed to exercise reasonable care. Employees may also be able to assert bodily injury claims which should trigger coverage under their employers’ workers’ compensation policies. In some cases, insurers may argue that the infection did not occur during the course of employment and that the coronavirus was not an occupational disease as distinguished from a disease to which the general public is ordinarily exposed.

Other Coverage

Policyholders should also be mindful of potential coverage under specialized insurance policies including Key Man, Political Risk and Event Cancellation, as well as Pandemic Disease Insurance policies developed in response to the Ebola and SARS epidemics.

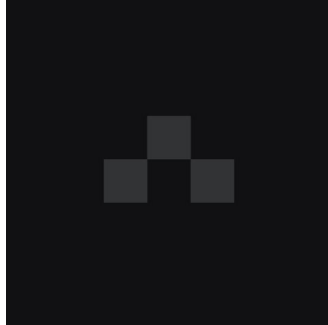
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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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