

ALERTS

Practical Insurance Advice in the Wake of COVID-19

April 1, 2020

In a prior *Alert*, we reported on the New York State Department of Financial Services (“NYDFS”) directive to insurers, requiring that they provide their policyholders with an explanation of how their commercial property and business interruption insurance policies will apply to losses resulting from COVID-19. We have had the opportunity to review a number of responses from the insurers. As expected, many of the insurers did not specifically address each policyholder individually, but rather forwarded general position papers to their policyholders and the NYDFS. See Chubb’s response as an example.

The insurers’ typical response with respect to commercial property coverage is to refer the policyholder back to the policy terms. Insurers also emphasize that coverage applies only where there is physical loss or damage to property caused by a covered peril, but do not discuss under what circumstances, if any, COVID-19 would trigger the coverage. The insurers also raise other coverage issues — for example, Chubb’s notice to policyholders indicates that policy exclusions may apply to COVID-19 claims.

With respect to business interruption (“BI”) insurance, the insurers have offered a more detailed and nuanced discussion. The insurers again emphasize that the policy generally applies only where there is physical loss or damage from a covered peril. In addition, the insurers add that, in the absence of a communicable disease coverage endorsement, an infectious agent or disease alleged to have resulted in loss will generally not be considered to have caused physical loss or damage. According to

the insurers, physical loss or damage means something physical or structural, or that the property has been altered by a covered peril. We have not seen any insurer response that directly addresses coverage for BI losses as a result of a civil authority restricting access to a covered premise.

Based on what has been published and discussed, it appears inevitable that courts will be called upon to decide the key question — whether a virus present in the environment — that results in a pandemic — that causes a civil authority to limit access to premises — resulting in business interruption losses — qualifies as physical damage within the meaning of commercial property insurance policies? The insurers' preliminary positions and their responses to NYDFS make clear that insurers intend to assert that, absent an infectious disease coverage endorsement, the presence of COVID-19 does not constitute physical loss or damage.

Courts have come to different conclusions with respect to what the policy term "physical loss or damage" means. Some courts have required measurable physical or tangible change or alteration of the property, other courts have reasoned that physical loss or damage does not necessarily have to be something that can be seen or touched, finding that odors constitute physical loss.

Review Your Management Liability and Property Insurance

Losses resulting from COVID-19 could potentially implicate insurance under numerous types of policies including commercial property, management liability, employment practices liability, workers' compensation, event cancellation and travel insurance policies. For most businesses and fund managers, commercial property insurance and management liability policies will be the most important.

We must caution that any discussion of insurance coverage and policy interpretation defies broad generalities and is dependent on the terms of the specific policies at issue. Policyholders are advised to consult an insurance professional or counsel for assistance involving policy evaluation and interpretation.

Checklist for Fund Managers and Financial Professionals

- Do you have a management liability policy? Many investment managers have a suite of coverages under the umbrella of investment management insurance. The coverage typically includes director & officers' ("D&O"), errors & omissions, ("E&O") and employment practices liability ("EPL").
 - D&O policies are designed to provide protection for directors, officers and managers as well as the insured entities and general partners and members against allegations of wrongful acts, errors, omissions or a breach of fiduciary duty. This could include coverage for third-party claims against insureds for mismanagement of the portfolio through the pandemic and resulting market turbulence. D&O policies may have broad bodily injury exclusions.
 - E&O policies are intended to cover the investment advisor, the general partners and members against claims alleging wrongful acts, errors, omissions, misstatements, misleading statements, negligence or breach of duty with regard to professional services and advice given to third parties. In the current business climate, such services and advice could give rise to third-party claims alleging negligence associated with the pandemic.
 - EPL is written to provide an employer with protections against allegations of workplace discrimination, harassment or wrongful termination. Under present circumstances, should an employee be dismissed and allege wrongful dismissal related to the pandemic, EPL coverage could be implicated.
- Do you have property and BI insurance?
 - Is your policy "All Risk" or "Named/Covered Peril"?
 - If your policy is All Risk, it requires the insurer to exclude specific perils.
 - Does your insurance require physical loss or damage?
 - Some policies have non-physical damage or loss extensions.

- Is there coverage for BI losses resulting from the order of a civil authority?
- Is access to your premises prohibited?
- Is there a physical loss or damage requirement tied to BI losses?
- Is your policy endorsed to provide infectious disease coverage?
- Does your policy have an infectious disease exclusion?
- Is your business contingent on support from third parties who cannot or are prohibited from operating?
- Does your policy provide for disruption in your supply chain?

Notice of Circumstances

- Policyholders should consider giving notice of circumstances.
- Recent publications have suggested that insurers are considering adding broad infectious disease and pandemic exclusionary provisions to policies at renewal.
- A notice of circumstances may preserve a policyholder's rights under its existing insurance policies.

Recent Legislative Developments

- Legislators in certain states, including New York and Massachusetts, have introduced bills that, if passed, would require that BI insurance (for businesses with less than 100 employees) cover losses arising from COVID-19. New Jersey had previously considered such legislation but the bill has reportedly been withdrawn.
- Under these proposed bills, COVID-19 losses would be covered for the duration of a declared state of emergency subject to policy limits.

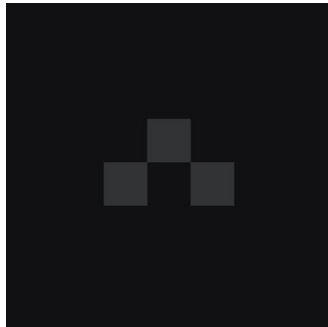
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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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