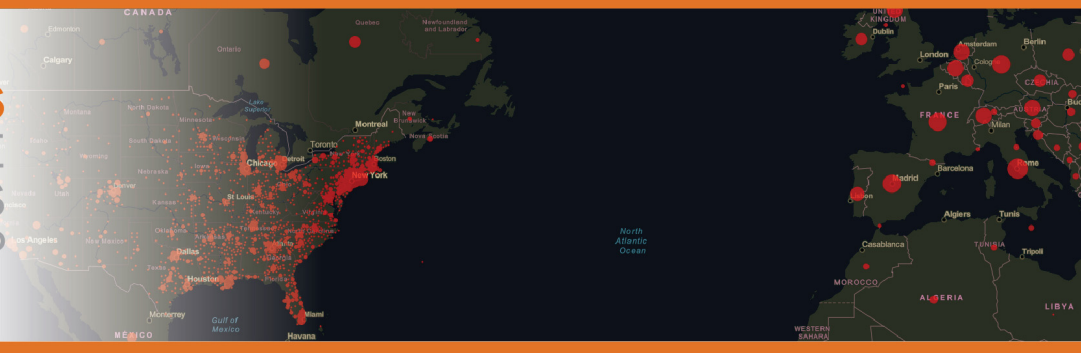
NICOLAIDES
FINK THORPE
MICHAELIDES
SULLIVAN LLP



COVID-19: Challenges for the Insurance Industry

March 25, 2020

People and businesses throughout the United States and around the world have been—and, by all accounts, will continue to be for some time—significantly impacted by the novel coronavirus disease (COVID-19). We anticipate that individuals and businesses seeking recovery for their losses due to virus exposure and the operational interruptions the virus is causing will assert creative liability theories in an effort to recover under their insurance programs. We expect these claimants to aggressively pursue claims premised on novel measures of damages in support of their recovery efforts. As a result, the insurance industry can expect that all types of insurance products will be tested as they are challenged by policyholders, reexamined by state and federal legislatures, and scrutinized by courts across the globe.

Insurance Products Will Be Tested

Businesses across all industries are looking to insurers to respond to COVID-19-related claims and lawsuits. The nature of these claims and lawsuits, as well as the scope of the damages sought, will test both conventional and more contemporary policy forms. Anticipated claims include, but are not limited to, the following:

- Commercial First Party/Business Interruption: Claims that mandated closures constitute direct physical loss or damage to the insured's property, or fall within civil authority clauses.
- Commercial General Liability: Claims for bodily injury arising from an alleged failure to prevent infection, or for property damage when a business is forced to close (either for decontamination or by governmental edict). Coverage B claims based on purported false arrest, detention, or imprisonment by cruise ships, purported disparagement of competitors' products as less effective at fighting the virus, or right of privacy violations relating to patients' identities.
- Employer's Professional Liability: Claims that employers failed to timely close businesses, put effective safety measures in place, or comply with government orders or recommendations.
- Errors and Omissions (E&O): Claims that hospital errors relating to proper cleaning of common areas exposed patients to coronavirus, or that patients were injured using non-FDA-approved treatments.

- Directors & Officers/Management (D&O): Claims alleging that a decline in company stock was due to mismanagement of the pandemic, or that companies created an unfair or hostile work environment by requiring employees to continue to work in a situation made dangerous by coronavirus.
- Pollution Legal Liability: Claims for coverage of the costs of decontamination as clean-up costs, or of bodily injury by exposure at a premise as the purported result of a pollution condition.

Many of these types of claims are anticipated to fall outside the coverage offered by standard policies, though each claim must be evaluated based on the facts and the specific policy language at issue.

Insureds have already filed at least three declaratory judgment actions. On March 16, 2020, a New Orleans restaurant sued for coverage of remediation costs and lost business income under a first-party all risks policy. The restaurant seeks a declaration that there is no exclusion for a viral pandemic and that the various orders issued by the government entities in Louisiana trigger the civil authority provision of the policy at issue. The insured asserts that, in the event its property is contaminated, this is a direct physical loss. The case is *Cajun Conti LLC, Cajun Cuisine 1 LLC and Cajun Cuisine LLC d/b/a Oceana Grill v. Certain Underwriters at Lloyd's of London and Governor John B. Edwards, Case No.* 2020-2558 in the Central District Court for the Parish of Orleans, Louisiana.

On March 24, the Chickasaw and Choctaw nations sued over a dozen insurers seeking declarations that their business interruption policies cover losses stemming from the temporary closure of their casinos and related businesses. These cases are *Choctaw Nation of Oklahoma v. Lexington Insurance Company*, Case No. CV-2020-00042 in the District Court of Bryan County, Oklahoma; and *Chickasaw National Dept. of Commerce v. Lexington Insurance Company, et al.*, Case No. 2020-00035 in the District Court of Pontotoc, Oklahoma.

While these pending coverage cases relate to first-party coverage, various types of plaintiffs have filed lawsuits against assorted defendants asserting claims ranging from negligence to securities fraud that could give rise to claims under third-party liability policies. For example:

- Passengers aboard a quarantined Princess Cruise Lines ship allege that the cruise line has caused them emotional distress by negligently failing to adequately warn them of the risks of contracting COVID-19. *Ronald Weissberger, et. al. v. Princess Cruise Lines Ltd.* (C.D. Cal. Case No. 2:20-cv-02267).

- Rideshare drivers assert in putative class actions that Uber and Lyft misclassify their drivers as independent contractors and therefore do not pay them sick leave under California law, forcing their drivers to continue working and risk compromising their own health and exposing riders to the coronavirus. *Spencer Verhines v. Uber Technologies, Inc.*, (San Francisco Case No. CGC-20-583684; *John Rogers v. Lyft, Inc.* (San Francisco Case No. CGC-20-583685).

- Multiple securities fraud shareholder actions have been filed against Inovio Pharmaceuticals and its CEO J. Joseph Kim, alleging that Kim falsely announced that Inovio had developed a COVID-19 vaccine "in a matter of about three hours," when in fact it had developed only a vaccine construct (a precursor to a vaccine). Allegedly, after the misstatements were exposed, Inovio's stock price lost 71% of its value. *Inovio Pharmaceuticals, Inc. Class Action* (Multiple jurisdictions including E.D.N.Y. and E.D. Pa.).

- Missouri's Attorney General sued televangelist Jim Bakker and Morningside Church Productions, Inc. seeking a permanent injunction forbidding them from selling or promoting a "Silver Solution" as a treatment for COVID-19. *State of Missouri v. Jim Bakker, et al.* (Stone County, Missouri Case No. 20SN-CC00084).

Focus on Business Interruption Claims

Businesses of all sizes offering a variety of services and selling all types of products are facing mandatory closures and dramatically reduced revenue and profit. Those businesses are looking to their insurers for recovery. The market's initial focus is on business interruption coverage under commercial first-party insurance policies. Insurers and courts will look to authority developed after previous disasters, including prior pandemics such as SARS and MERS, other pathogenic outbreaks such as listeria and E. Coli, the 9/11 attacks, and hurricanes in resolving these claims.

Insurers addressing COVID-19-related business interruption claims should first consider whether the claim entails direct physical loss or damage to the insured's property. This analysis may be driven by science that is still developing (i.e., how long does the virus live on a surface?), and evaluation of questions such as whether the policyholder needs to show evidence of actual contamination (i.e., a positive test), or whether a closure order gives rise to a presumption of contamination. Insurers may need to determine whether recontamination constitutes separate direct physical loss or damage. Insurers will also need to assess whether business interruption coverage includes a civil authority clause, which may afford coverage for business income losses when a civil authority prevents the policyholder from accessing their premises.

Many business interruption policies also include a waiting period for coverage (e.g., 72 hours). Further, business interruption claims due to COVID-19 will require insurers to evaluate applicable exclusions for viruses or bacteria, pollution, or fungi/mold. Finally, involved policies often contain sub-limits for business interruption claims and further limit the coverage to a set indemnity period. Thus, analysis of the specific business interruption coverage form will guide the determination of whether business interruption coverage applies.

Anticipating economic losses stemming from COVID-19 shutdown orders, numerous states have signaled the introduction of legislation to circumvent virus exclusions in first-party policies, thereby forcing insurers to provide business interruption coverage. Such exclusions generally preclude coverage for coronavirus and may make references to previous pandemics (e.g., SARS). New Jersey introduced A-3844 on March 16, 2020, a bill that proposes that insurers

cover losses as of March 9, 2020 when the state's governor first declared a state of emergency. According to its sponsors, the purpose of the bill is to provide "coverage for business interruption due to global virus transmission or pandemic." While a vote on the bill was set for March 16, 2020, it was reportedly pulled to allow the insurance industry time to independently address the issue. The law would apply to New Jersey businesses that have fewer than 100 full-time employees and that had policies in place before March 9. The legislation has raised constitutional concerns over the government's interference with private contracts. In addition, legislating coverage may have a chilling effect on insurers' products or result in premiums that consumers cannot pay. Nevertheless, some policyholder advocates are calling for even broader legislation to address eliminating the threshold requirement of direct physical loss or damage.

Additionally, several states' Departments of Insurance or Departments of Financial Services have issued guidance to policyholders regarding whether business interruption insurance will be a source of coverage for COVID-19 related losses. To date, Connecticut, Georgia, Kansas, Louisiana, Maryland, Minnesota, New Hampshire, New York, Oregon, and South Carolina have released guidance specific to the COVID-19 pandemic and business interruption coverage. The guidance generally advises policyholders to review their policies to determine the scope of coverage, and that business interruption insurance typically requires direct physical loss. However, the New Hampshire Insurance Department provided the following illustration for determining whether direct physical loss occurred:

> In addition to a covered peril, package policies will also require that any business interruption be the result of a direct physical loss. For example, if a person suffering from COVID-19 were to go to work at a restaurant, contaminating the kitchen by coughing, there would be an argument that there is a direct physical loss sustained by the restaurant for the period of time that it had to close to decontaminate the kitchen. This fact pattern is different from a restaurant that closed because customers ceased coming to the restaurant out of a general fear of infection.

This example may be used to try to establish direct physical loss from the COVID-19 pandemic.

Moving Forward

Nicolaides Fink Thorpe Michaelides Sullivan LLP is dedicated to exclusively representing the interests of the insurance industry around the world. Our attorneys understand the issues that arise under a wide variety of insurance products. We address emerging risks and evaluate complex insurance issues. As such, we are uniquely prepared to assist the insurance industry as it faces the challenges presented by COVID-19. We look forward to providing litigation and legislative updates, as well as our insights, as to the developing implications of COVID-19 related claims. In the meantime, for more about the nature and scope of our insurance coverage practice, please visit www.nicolaidesllp.com.