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Not the Last Word: Potential Coverage Issues That May Arise From COVID-19

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On 11 March 2020, the World Health Organization declared that we have a global pandemic on our hands. It is unsettling to recite the frightening statistics, but, as of today, there have been more than 874,000 confirmed cases, and more than 43,000 deaths, worldwide.

Aside from the extensive detrimental effect on health, the business / commercial losses are incalculable and catastrophic despite brave efforts to mitigate.

The Global Virome Project, a scientific research partnership, which counts the World Health Organization and United Nations as members, has said, “Threats posed by global pandemics and epidemics are greater than at any other point in human history”. A number of factors contribute to this rise including (a) increased human contact with wild animals, as natural habitats are destroyed to create agricultural land, (b) the speed and frequency of global travel, and (c) the progressive concentration of people in cities.

During this global crisis, businesses are scrambling to manage their dire situation, limit their losses, and maybe secure some kind of financial relief. One of the potential sources of relief is insurance.

Commercial Property / Business-Interruption Insurance

The purpose of property insurance, in the commercial context, is to protect the physical assets of a business against loss and/or damage caused by various types of ordinary perils (e.g. fire, flood etc.).

Typically, business-interruption coverage forms part of a commercial property insurance policy, and comes in many forms – it is not standardized. It is intended to cover loss of income that arises from disruption to business operations. Essentially, the insurer agrees to indemnify for

the loss of business income due to the necessary suspension of operations during the period of restoration (it is time limited).

In order to trigger coverage in this context, there typically needs to be direct physical loss or damage to the insured's property, which was caused by a covered peril. For example, a fire (assuming it is a covered peril), which resulted in physical damage and consequent loss of business income, would be considered a covered loss. Conversely, a business that is interrupted due to the loss of data or utilities[1] may not be covered because there would have been no physical damage.

In the context of this pandemic, in order to trigger coverage, insureds could argue that SARS-CoV-2 ("**coronavirus**") is damaging their property by its very presence. Analogously, a federal court in New Jersey, United States, held that property damage had occurred when ammonia was accidentally released into a facility, causing the building to be unsafe until it could be removed.[2] The court reasoned that property can sustain physical damage without experiencing structural alteration[3]. It is in the realm of possibility, therefore, that Canadian courts may be persuaded by this argument, and conclude that the existence of the coronavirus gives rise to physical damage.

The problem for the insured, however, will be that closure and business interruption occurred not because of the presence of the coronavirus, but to circumvent future contamination. So, there would be no prospect of establishing 'physical damage'.

Some businesses (e.g. those in the hospitality and healthcare industries) may have extended coverage for losses caused by communicable or infectious diseases, without the requirement of physical damage to insured property (see 'Civil Authority' section, immediately below).

In terms of period of coverage, and assuming physical damage is established, most policies would provide indemnity only to the point that the business is restored or when coverage expires. The issue would then be the length of the period of restoration. Presumably, insurers would argue that the period was short, based on the short lifespan of the coronavirus. Conversely, it could be argued by the insured that ongoing property damage occurs where multiple people congregate, thus extending the period of restoration.

Some policies may provide an extended period of interruption coverage for the property damage to be repaired, and to allow the business to resume normal operations and reach pre-loss levels of income.

Loss due to Actions of a Civil Authority

In these circumstances, most losses likely were not caused by the fact that a governmental authority forced closure of the insured's premises due to the presence of the coronavirus, but in order to avoid contamination. In other words, it was a prophylactic strategy, which did not result in physical damage.

Some businesses may have extended coverage for business interruption, in circumstances where a civil authority prevents access to premises, which may not require physical damage by a covered peril. So, where active transmission of a contagious disease has simply been identified and notified, civil-authority coverage may respond to a claim for income loss.

Contingent Business Interruption

Some businesses may have specialized contingent business-interruption coverage, which typically doesn't include specific coverage for pandemics.

This type of loss involves damage, not to the insured's property but to a supplier or customer upon which the insured relies. It is basically a loss that occurs along the supply chain, which results in financial loss to the insured. Again, coverage would typically depend on the occurrence of direct physical loss to the customer's/supplier's property resulting from a covered peril.

If the supplier's customer's property is contaminated with the coronavirus, the insured may be able to argue that there is coverage, on the basis that physical damage has occurred.

Again, closure of the supplier's/customer's business due to an order of civil or military authority – basically the customer/supplier has lost access to its business premises - may trigger coverage, but it might depend on whether there is physical damage, either on the customer's/supplier's premises or within a certain radius of it.

Loss-Mitigation Coverage

Loss-mitigation coverage usually requires actual loss, damage or injury, so it would likely not be available in situations where prophylactic steps have been taken to avoid contamination by the coronavirus. However, if a premises has already been contaminated, and efforts were taken to contain contamination by closures, etc., resultant costs may be a covered loss.

Potential Defences / Limitations on Coverage

There are several potential defences that come to mind, which insurers could raise in the context of business interruption to deny or limit coverage, including the following:

- The premises was closed as a prophylactic measure, so there was no physical damage.
- If the coronavirus happens to be a covered loss, which is found to have caused physical damage, many policies have sub-limits and/or waiting periods before coverage is triggered.
- The time period required to repair the damaged property would be very short, given the biological behaviour of the coronavirus.

Unoccupied Building

Another question that arises, in the context of a commercial property policy, is whether coverage would be jeopardized in the event the insured was forced to leave the building unoccupied, and a covered loss, such as a fire, occurred.

A building is considered vacant unless at least a certain percentage of its total square footage is occupied and the operations conducted are in accordance with building use. Some standard

commercial property policies exclude coverage for water damage, theft and sprinkler leakage if the building is vacant for more than 60 days [Note: wording and definitions vary].

In the coronavirus case, owners are being forced to vacate their buildings, and any obligation to inspect while vacant would not be possible to fulfil because, by law, nobody is allowed to enter the premises. This would essentially result in frustration of the insurance contract – the government, due to COVID-19, has rendered it impossible for the insured to fulfil its contractual obligations. The typical result of a frustrated contract is that both parties are excused from fulfilling their obligations. Consequently, this would likely result in no coverage for the insured.

Event-Cancellation Insurance

Businesses in the hospitality industry often purchase event-cancellation insurance, which would include coverage for cancellation fees, other out-of-pocket expenses and lost income that was anticipated from the event.

These types of policies often contain an exclusion for communicable diseases, however, much larger events (e.g. the Olympic Games) may have purchased coverage, which specifies that a communicable disease is a covered peril. Having said that, it is doubtful that many organizers of very large events seriously contemplated a global pandemic (although, almost certainly, it will be a major consideration in the future).

If there is coverage, the circumstances of cancellation would be a factor. For example, there may be no coverage if cancellation or closure was prophylactic rather than the result of the actual presence of the disease.

Commercial General Liability Insurance

Businesses ought to be prepared for claims for bodily injury resulting from the negligent exposure to the coronavirus (harmful conditions) and/or a failure to warn of dangerous conditions.

It is anticipated that CGL policies may have to respond to these types of claims, although it would be subject to an aptly worded pollution exclusion.

The typical pollution exclusion is broad, and usually excludes claims arising from contamination due to ‘solid, liquid, or gaseous contaminants or irritants’. It is arguable, however, that this should apply only in the context of industrial chemicals or waste, such that the exclusion would not apply.

Assuming coverage cannot be denied on the basis of the pollution exclusion, it may be challenging for a claimant to succeed because he/she would have to demonstrate that the negligent act caused the loss. As the coronavirus has a lengthy latency period, it would likely be challenging to prove causation, although such a claim could give rise to lengthy and complex litigation involving significant experts’ testimony.

It is noteworthy that, following the 2003 outbreak of SARS, many insurers adopted exclusions specifically designed to remove coverage for loss or damage caused by viruses and bacteria[4]. Most mould and fungi exclusions serve to remove coverage for bacteria or organisms, but a virus is not a bacterium, and is (arguably) not an organism. Some forms of fungi exclusions were extended to include viruses, but it is not common.

Cyber Liability

The disproportionate number of employees who, currently, are working remotely from home on end-point terminals and home laptops, which are less well protected, will, inevitably, result in increased susceptibility to cyber attack, data theft, phishing and social fraud etc. Furthermore, staff shortages of the insured will likely result in decreased verification and policing of a business' computer systems.

Only today, Ontario's Beer Store was hit with a cyber attack, rendering its electronic payment systems unusable. Consequently, the public has to use cash, which will increase personal exposures.

Coverage for cyber losses often fall under a standard GL policy or first-party property policy, so it would depend on the specific wording of the policy. It should be mentioned, however, that insureds might run afoul of representations and warranties, made at the time of obtaining coverage, with respect to remote business operations.

Professional-Liability / Errors & Omissions Insurance

Professionals such as healthcare providers, lawyers and engineers are covered by errors and omissions / professional liability insurance.

A typical claim would involve the allegation that a healthcare provider, for example, caused bodily injury as a result of the provision of, or failure to provide, medical services.

In the coronavirus context, this type of policy should respond, although the claimant would be faced with the same challenge of causation, described above.

Directors' and Officers' Liability Insurance

Directors and officers of a company would face the same liability exposure with COVID-19 as any other shareholder dispute, in which there are allegations of unreasonable action or inaction of the directors and officers, which resulted in economic loss to the company.

With respect to the coronavirus in particular, shareholders may allege that management failed to have adequate contingency plans in place, failed to observe protocols and procedures prescribed by governmental authorities, misrepresented the company's level of preparedness in the face of a pandemic, and/or failed to properly disclose the risk of the coronavirus to the company's business and financial performance/productivity.

While D&O policies often exclude claims for bodily injury, they would not, likely, exclude coverage for shareholders' economic loss claims, although, in some cases, if the economic loss arose from bodily injury, it may not be covered.

D & O policies often contain conduct exclusions, including wilful violation of law (in this case, the company's failure to adhere to the edicts of government), although the exclusion may apply only if there has been a final adjudication on the merits.

Discussion and Key Takeaways

The availability of coverage under any head of insurance will always depend on, and be governed by, the wording of the applicable policy: in each situation, the specific wording will have to be carefully interpreted, and then accurately applied to the particular facts. This will be especially important in the context of business interruption, where policy wording isn't standardized.

Since insurers can anticipate an exponential increase in claims related to the COVID-19 pandemic, it is probably a good idea to be proactive and keep apprised of the general issues and trends that are arising, to get a sense of how to address and manage claims.

Looking into a Crystal Ball: what does the Future hold for Insurers?

Typically, underwriters analyze past and present trends in a particular circumstance, in order to guide them with respect to future underwriting endeavours. Usually, the more incidents that occur, the better understood is the risk, such that insurers can develop new products.

Post-COVID-19, demand for pandemic insurance is guaranteed to increase. It is questionable, however, whether specific coverage for pandemic business interruption will ever be introduced in any significant way. Business-interruption coverage was never designed to respond to pandemics, but rather to cover standard risks at a reasonable cost. Each pandemic is so unique and has no boundary (unlike an earthquake or a flood). So, underwriters would have a hard time mapping, understanding and defining the risk, quantifying it, and then pricing it (pandemics are so unpredictable, with each having an entirely unique behavioural path, so they likely could not be priced as a generalized peril). Even if the risk could be priced, it would then be a question of affordability – most businesses likely could not afford it (while pandemic coverage has been available in the past, it was purchased relatively rarely because it was typically subject to strict conditions, low limits, and generally was too expensive, at least for small businesses).

In the meantime, then, underwriters may wish to carefully review and tighten their current wording, in particular, exclusionary language pertaining to viruses and other contagious diseases.

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[1] Often, businesses purchase additional utilities coverage.

[2] *Gregory Packing, Inc. v. Travelers Property Cas. Co. of America*, 2014 U.S. Dist. LEXIS 165232 (D. N.J. Nov. 25, 2014).

[3] Subsequently, courts in the states of Oregon and New Hampshire also found property damage without actual structural alteration.

[4] Post-SARS, ISO introduced a specific exclusion.

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