Insurance Coverage and COVID-19

By Robert Tomilson / Mar 27, 2020

In times of crisis, individuals and corporations rightly turn to their insurance policies in the expectation of alleviating current and future loss. When doing so, they discover, for the first time, the policies' exclusions, named perils, deductibles, self-insured retentions, specific and aggregate limits (and sub-limits) of coverage. On March 23, 2020, Swiss Re, the world's largest reinsurer by market capitalization, announced a $250 million exposure to any cancellation of the Tokyo Olympics. The International Olympic Commission (IOC) is said to have an event cover that exceeds $800 million. A cover of this size was likely manuscripted by a fleet of insurance professionals who scrutinized everything down to the last comma in the last sentence of the policy. The IOC likely knows what it purchased and when and to what extent it will be reimbursed in the event of postponement or cancelation.

Most commercial lines policies, however, are issued on non-negotiated forms. Corporate policyholders have only a vague understanding of their policies' mechanics coupled with unrealistically high expectations of coverage. This confusion typically results in wasteful litigation and sometimes judicially created a cover that insurers never intended to provide. An insurance company's understanding of its policies and confidence in its ultimate limited exposure, will not deter what will likely be tens of thousands of lawsuits filed by individuals and businesses seeking reimbursement for the incomparable loss that is likely to result from COVID-19.

Property Insurance (business interruption)

Currently, more than 18 states have state-wide stay at home orders and many of the nation's largest cities are similarly closed for business. Naturally, many small business operators will remember (or be reminded) that their "business owner's policy" may have business interruption (BI) coverage. Large corporations will have business interruption and perhaps even contingent business interruption (CBI) coverage, included in their commercial property policy. Most commercial property insurance policies provide coverage for business income loss by adding an endorsement to the insured's property policy. Typically, such an endorsement protects the insured for losses of business income sustained as a result of direct loss, damage, or destruction to insured property by a covered peril. This type of policy would seemingly not respond to loss resulting from COVID-19. Similarly, CBI covers an insured's business income loss resulting from loss, damage, or destruction of property owned by others, including direct "suppliers" of goods and services to the insured or direct "receivers" of goods or services manufactured or provided by the insured. The property damage to these suppliers or receivers must be of a type that would be covered by the insured's policy had the damage happened to the insured's property.

The current pandemic seemingly has caused no "physical" property damage, except perhaps contamination. Undoubtedly, insureds will argue that the physical contamination of the property prevents its use and is therefore covered loss. Additionally, certain businesses, including large manufacturers, have shuttered entire operations due to a single employee found to be infected by the virus. Insureds will likely draw on case law citing gas, ammonia and other air-borne hazards, as well as asbestos, and claim, by analogy, that the mere presence of COVID-19 in a structure satisfies the "direct physical loss of or damage to" requirement. At least one such case has already been filed in state court in Napa, California: *French Laundry Partners LP et al. v. Hartford Fire Insurance Co. et al.* (March 25, 2020).

Certain specialized insurance policies as well as endorsements to standard commercial property policies, including those used for the hospitality and healthcare industries, expressly provide insurance coverage for losses caused by "communicable or infectious diseases" without requiring physical damage to insured property. These policies and endorsements will each have their triggers, exclusions, and limits that will need to be carefully reviewed. Conversely, in 2006, the Insurance Services Office (ISO) promulgated a "virus" exclusion that is found in many commercial property policies that, if included in a policy, would seem to bring the question of coverage to an end. But, almost certainly, it will not. Those exclusions likely will be read extremely narrowly and subject to all manner of parsing. Ironically, the absence of an ISO exclusion in a commercial property policy may well be used by many insureds to claim that their policies provide "silent" COVID-19 coverage.

Some commercial property insurance policies provide coverage for business interrupted when a "civil authority" prohibits or impairs access to the policyholder's premises. For the average policyholder, such a provision might seem uniquely suited to the current situation. It probably is not. Depending upon the specific wording, a policy's "civil authority" coverage may or may not require that the access restriction result from "physical loss" by a covered cause of loss. These provisions typically cover instances where a Fire Department or Housing Authority, for example, condemn a building, prevent access due to hazards, or otherwise find the premises unsafe for habitation or occupation. Accordingly, federal, state, or local governmental authorities limiting access to or from businesses merely to prevent the active transmission of an infectious disease would seemingly not be encompassed by these provisions.

Liability Insurance (CGL, D&O)

Insurance companies' exposure to third-party liability in the wake of COVID-19 will be manifold. We only touch on two of these exposures.

Cruise ships, amusement parks, movie theaters, and concert venues could all face claims by infected guests alleging that the operator failed to exercise reasonable care in protecting against the risk of exposure to coronavirus. Commercial general liability (CGL) policies, intended to protect businesses against third-party claims for bodily injury resulting from exposure to harmful conditions, often have both defense and indemnity provisions. The defense coverage in CGL policies is often triggered despite the tenuousness of the claims.

In addition to third-party claims brought against businesses, a company's directors and officers may be subjected to shareholder lawsuits alleging that their

wrongful acts (or inaction) in response to COVID-19 caused the company economic loss. A company's Directors and Officers (D&O) policy may provide indemnity and defense from these shareholder lawsuits. Shareholders may contend that management failed to (i) develop adequate contingency plans, (ii) failed to observe protocols recommended or required by governmental authorities, or (iii) failed to properly disclose the risks COVID-19 posed to the company's business and financial performance, generally. The majority of D&O policies exclude claims for bodily injury when afforded a "strict and narrow construction," as they must be under the laws of most states. The "absolute" bodily injury exclusion found in most D&O policies, which excludes coverage for any claim "based on, directly or indirectly arising out of," or relating to actual or alleged bodily injury, may permit insurers to deny coverage for shareholder claims with any connection to COVID-19. Nevertheless, such a shareholder class action has already been filed in the United District Court for the Southern District of Florida, *Douglas v. Norwegian Cruise Lines et al.* (March 12, 2020).

Workers Compensation and Disability Income Insurance

There will likely be a hardening market in the wake of COVID-19 for workers' compensation (WC) and disability income insurance. Most state workers' compensation statutes provide that an employee is entitled to benefits for "occupational disease." The "ordinary diseases of life" that the wider public is generally exposed to are generally excluded from WC insurance programs unless the employee can establish a direct causal connection to the workplace. Coronavirus is transmitted primarily person-to-person and seemingly would constitute "ordinary disease," but likely not a workplace injury. Employees of hospitals, cruise ships, delivery services, and other occupations, however, who have worked throughout the spread of COVID-19 may be able to draw the necessary causal connection.

Insurers of disability income insurance will see an increase in claims worldwide. Those who contract COVID-19, exhaust the elimination period, and remain disabled, will be entitled to disability benefits. Not enough is known about the general recovery period for COVID-19 to predict the cost to the insurance industry for disabled employees. Anecdotally, the virus would appear to quickly overtake those with compromised immune systems, lead to relatively quick recovery for most of the people, and have a lasting respiratory injury for a smaller segment of the population. It is conceivable that the increased number of disability claims and length of time out of work could trigger specific and aggregate excess of loss reinsurance for certain disability carriers.

Conclusion

Clark Hill will continue to monitor and report on developments by regulators, lawmakers, and courts that may affect the insurance industry. Clark Hill's Insurance & Reinsurance Group, consisting of more than 40 lawyers in 25 offices across the United States, is prepared to bring its regulatory, contract wording, and litigation experience to assist insurers, reinsurers, and intermediaries in identifying enterprise risk, offering defense in jurisdictions across the United States, and negotiating with state and federal regulators.