

## How To Maximize Insurance Coverage For Coronavirus Issues

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The novel coronavirus was recently declared a pandemic by the World Health Organization. As such, it is having an effect on people and businesses around the world not seen perhaps since the beginning of the 20th century. As financial losses continue to mount, policyholders are looking and will continue to look to maximize insurance coverage for their losses.

Local schools are closing, universities have resorted to all-online classes, major sporting events are being played in front of empty stadiums or leagues have suspended play entirely, music festivals are being cancelled or delayed, and industries such as airlines, restaurants and any other business where strangers are in close proximity will suffer significant reductions in business.

Every day brings more news about the virus and more reaction to it, and no one knows how long the outbreak will continue to affect businesses and global markets.

During any time of financial loss people and businesses turn to their insurers to be made whole, but a pandemic is unlike other disasters that create significant insurance claims. Whereas natural disasters profoundly impact one geographic area, this pandemic is affecting people and business all around the world, simultaneously.

And while natural disasters create identifiable property damage, this pandemic is creating property avoidance, in which undamaged property is still not being used and businesses are not being patronized in an attempt to halt the spread of the disease.

Policyholders should follow the below steps to maximize coverage.

### Review of Coverage in Place

The first step in order to maximize insurance coverage for losses caused by coronavirus is to carefully examine the coverage you have in place. Already, there are reports of insurers claiming their policies do not cover cancellation due to infectious disease. While some policies expressly



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cover loss caused by communicable disease, the coverage may be narrowed by exclusions or could be subject to low sublimits or high retentions.

Many property policies include coverage for business interruption, loss of profit that would have been earned had the business continued to operate as it had before a given loss. However, a major potential hurdle to typical business interruption coverage is that most property policies require there to be property damage for business interruption coverage to be triggered.

If an insurer takes the position that there has been no property damage sustained if people are staying away from a given business, policyholders should consult their policies to see if loss of use of property qualifies as property damage.

In policies that include loss of use as property damage, whether in the definition of property damage or elsewhere in the policy, the policy contemplates that there can be property damage other than tangible physical damage to property, and that is the kind of property damage policyholders can show as a result of coronavirus.

For example, in the case of an empty arena that would otherwise be hosting a NBA or NHL game, although the arena property is intact and undamaged, the policyholder has suffered loss of use because the property cannot be used now that those leagues have suspended their seasons due to concerns of coronavirus exposure.

Policyholders can reinforce this argument by reminding insurers that they have a policy- or common law-based duty to mitigate their loss or damages. By cancelling events, flights, classes or whatever other form their business takes, the policyholder is acting in accordance with that duty to mitigate.

Another potential avenue to coverage under property insurance policies is coverage for property damage or loss of access to property by civil ordinance or law. In many areas affected by the virus, governments have enacted prohibitions on gatherings of people above a given maximum size. Business interruption due to such ordinances would likely be covered under many property insurance policies.

While businesses at the moment may be seeking coverage primarily for business interruption under their first-party insurance policies, it is not difficult to imagine a wide variety of claims being asserted against businesses as a result of the coronavirus.

Businesses that close could face claims from employees who have been dismissed or otherwise told not to report for work due to the disease. Businesses that stay open could risk negligence or intentional tort claims from employees who are told to come to work or customers who patronize the business while it is still open.

These types of claims, and the damages sought, are more than likely covered under a policyholder's third-party liability policies. The plaintiffs in these claims may not be limited to individuals who actually contract the coronavirus or who suffer serious symptoms in need of advanced medical treatment; claims could be asserted for infliction of emotional distress and seek mental anguish damages for the stress induced by the increased possibility of having the disease. These claims are particularly amenable to class actions on behalf of all employees or all customers of a given business.

In this third-party liability context, a key first step in the event of a claim made against a policyholder is to review the policy to determine whether there are provisions requiring insurer consent prior to

engaging defense counsel, public relations firms or other professionals. If consent is required to engage the firms the policyholder would like to engage, it is essential to work with the insurer to obtain that consent at the onset of the claim rather than wrangle with the carrier in the future over whether and to what extent costs incurred without consent are covered.

5. Note that in the review of policies to determine what coverage is available, it is never too early to hire coverage counsel to perform or assist with the review and the initial stages of any claims being made. Early involvement of coverage counsel can enable the policyholder to best position a claim at the outset and avoid any missteps that coverage counsel would have to try to minimize if hired in the later stages of the claim.

### **The Claim Process**

Virtually all policyholders, and certainly all insurance brokers, are aware of the importance of providing prompt notice of claim, or notice of circumstances of a situation that could evolve into a claim, to potentially implicated insurers, and to cooperate thereafter with reasonable requests for information made by the insurer.

However, more and more insurers are using the information gathering process to indefinitely delay the claim process until more information emerges, information that may allow the insurer to deny coverage. This is especially prevalent in large claims in the tens or hundreds of millions of dollars, and the coronavirus outbreak has the potential to cause very large claims.

To avoid being stuck in that claim purgatory, policyholders should document their cooperation with all insurer information requests. This documentation should include requesting confirmation from the insurer that (1) it received information in response to a given request and (2) that at the time it does not require any more information in response to that request.

Moreover, policyholders should communicate clearly and in writing when they do not possess information responsive to a given request. These steps will best position a policyholder should its insurer attempt to play for time during the claim process. Corporate policyholders can use the services of claim advocates from their insurance broker or coverage counsel to assist with creating this record.

To best present a claim for business interruption coverage, it is important for businesses to carefully identify and document specific business opportunities lost due to the outbreak. Businesses should also assess what records or models are available to as accurately as possible demonstrate past revenue and demonstrate what future revenue would have been if not for the outbreak.

### **Hope for the Best, Prepare for the Worst**

Policyholders should be prepared in the event of an adverse claim decision, and given the exposure insurers will likely face as a result of the outbreak, it is reasonable to expect them to deny claims at a greater rate or seek to delay the process as much as possible. It is advisable to retain coverage counsel before a problem arises so that a policyholder can have the benefit of counsel's advice from the very onset of an issue and be best positioned to press its claim.

To prepare for an adverse claim decision, policyholders should be aware of any alternative dispute resolution provisions in their policies that may require them to perform certain steps in the claim process before litigation can be commenced, such as nonbinding mediation. These provisions may also

impose a cooling-off period, a number of days that the parties must wait after the final alternative dispute resolution process before litigation can be commenced.

Policyholders should also be aware of the effect of suit limitations provisions (requiring suit to be brought within a given time from the date of the loss or claim), forum selection clauses or choice of law provisions on the procedure and merits of any litigation over their claim. Based on these provisions, coverage counsel can advise policyholders as to which jurisdiction is the most advantageous to the policyholder to file suit.

## **Conclusion**

Understanding these provisions and their impact can help policyholders proceed with their claim in the most aggressive fashion and exert the most pressure on their insurers to maximize coverage they may badly need in this time of global crisis.

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