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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How Law Firms Can Maximize COVID-19 Insurance Coverage

By **Robin Cohen and James Smith** (May 11, 2020, 6:09 PM EDT)

Robin Cohen

James Smith

As the readers of this publication are all too aware, COVID-19 has disrupted the legal industry in significant ways.

Litigation has slowed as courts have restricted filings and extended deadlines, and deal activity has largely stopped as parties evaluate the economic uncertainties resulting from the pandemic.

The effects of these business downturns have been compounded by sick employees, shelter-in-place orders and law firm telework requirements. And all of this is happening under the growing specter of salary cuts, furloughs and layoffs.

Amid this uncertainty, many law firm leaders are wondering if they can turn to their insurers to recover losses arising from COVID-19, and if recovery can happen quickly. While certain losses may be obvious candidates for coverage, others may be less so, and it is imperative that firms not hastily rule out any possible coverage at this stage.

Experienced insurance recovery attorneys can often be invaluable in making threshold assessments, as well as in developing and managing a coherent strategy to ensure that firms maximize their coverage without unnecessary delay and missteps.

To best assess their coverage potential, law firm leaders should keep in mind the following points.

Identify Relevant Policies and Coverage Provisions

Most first-party property insurance policies contain business interruption or time element coverage, which usually covers a policyholder's loss of business income as well as expenses associated with addressing the interruption. These types of coverage are frequently found in policies that insure physical loss or damage to a property. It is important to identify all of the relevant provisions that may provide coverage under a property damage/business interruption policy. Losses and expenses related to COVID-19 may implicate several different coverage provisions.

For example, coverage may be available under a policy's civil authority, ingress and egress, or prohibition of access provisions. Coverage provisions such as these may be triggered where access to a law firm's office has been wholly or partially restricted by state or local shelter-in-place orders issued because of the COVID-19 pandemic. Law firms should review their policies to determine if they have these specific types of coverage.

As others have noted, many of these coverages require a showing of physical loss or damage to property. Thus, a key question for property coverage policies is if the COVID-19 pandemic has caused physical loss or damage to property. Despite what some commentators have written, there are strong arguments that the novel coronavirus indeed causes physical harm by, among other things, persisting on surfaces for extended periods of time.

There is a nationwide consensus of authority providing that as long as a condition makes a property uninhabitable or unreasonably dangerous to use, that condition will constitute physical loss or damage to the property.[1]

Further, while law firms may not be presently facing lawsuits resulting from the COVID-19 pandemic, it is not difficult to imagine a wide-range of potential claims that could be asserted in the wake of the pandemic. Such lawsuits could include claims that an employee or office visitor contracted COVID-19 because law firm offices were kept open during the pandemic when they reasonably should have been closed.

Law firms' general liability policies may cover lawsuits or demands for bodily injury or property damage arising out of such allegations. Importantly, however, law firms should be aware of and abide by guidelines established by the Centers for Disease Control and Prevention and relevant rules set forth in government orders to avoid insurer attempts to deny coverage on grounds that such injuries were not accidental. Diligent documentation and foresight of a firm's actions and response to the COVID-19 pandemic will be critical in winning these arguments and maximizing coverage.

Push Back on Exclusions

Given the exposure created by the COVID-19 pandemic, law firm policyholders should expect insurers to deny claims or delay the claims process as much as possible, even where losses appear to be facially covered under the policy. For example, insurers will likely seek to bar recovery based on exclusions that pertain to losses caused by virus or bacteria.

Law firm policyholders should be aware that, even if exclusions that relate to viruses are included in their policies, such provisions may not act as a complete bar to coverage. For example, some of these exclusions only implicate certain property coverages or out-of-pocket costs, and do not preclude recovery of lost business income, which oftentimes will constitute the bulk of a firm's losses.

In other instances, exclusions that ostensibly pertain to viruses may be contradicted by language in other parts of the policy, rendering the exclusions void, or limited in application. Policyholders should scrutinize any such provisions cited by the insurer as a basis for denying coverage carefully; as many will contain terms that render them inapplicable to the COVID-19 pandemic.

Document Expenses and Be Mindful of Common Pitfalls

It is too soon to tell when we will be back to a normal pre-COVID-19 world, or what "normal" will look like. But law firm leaders must prepare for a legal landscape that may be markedly different from the one we had before the crisis. To maximize their coverage at this stage of the pandemic, law firms should not rule out coverage for any COVID-19-caused losses without performing due diligence.

Costly business interruptions should be tracked and documented. Insurers should be notified of potential claims, and firms should document their decisions to address events related to the pandemic. The documentation should clearly explain the role that the pandemic played in their management decisions and link those decisions with any nonroutine costs and expenses.

While this may seem cumbersome, your firm's accounting department can be helpful in managing this process by, among other things, establishing a ledger to separately track pandemic-related expenses that exist outside of normal business expenses or sending out forms to the firm's various offices so that the relevant office managers can track COVID-19-related expenses in real time.

There are numerous different expenses that are worthwhile to track. For example, expenses incurred to enable smooth transition towards working remotely amid office closures, such as the purchase of laptops, printers, scanners, monitors,and other office supplies, as well as software necessary to enable employees to work remotely.

Such costs may very well be covered if properly accounted for. Lost or diminished rent for any subleased spaces may also be covered. Damages for lost business, such as the productivity losses due to the inefficiencies of teleworking or the cancellation of previously scheduled work (such as depositions or court hearings) should also be assessed and tracked.

Loss prevention expenses — that is, expenses incurred to minimize the presence of COVID-19 in firm offices — may also be recoverable. These may include the costs of additional janitorial services and cleaning supplies and could be recoverable if properly documented.

No matter the coverage provision, law firm leaders must be alert to their policy's notice requirements. Notice provisions are often critical in coverage disputes as a quick way to deny coverage. And depending on the type of coverage asserted, notice requirements may vary.

For example, some policies require notice of loss as soon as possible. In other cases, such as when loss prevention measures are taken, notice can be required in as little as 48 hours. Other policies may require notice before the policy's expiration. Failure to give timely notice could result in the law firm having to pay for otherwise reimbursable expenses.

Other conditions precedent may also serve as headwinds to timely reimbursements. These can include provisions limiting where, when and how suits can be brought. While some of these provisions are common in commercial contracts, others are often unique to insurance agreements in either form or effect. For example, choice of law and venue provisions can handicap a policyholder's ability to apply the law of a favorable jurisdiction or from bringing suit in their preferred court.

Other provisions may require mediation of any dispute, followed by a waiting period before a lawsuit can be filed. These cooling off provisions restrain policyholders by further limiting when they can file suit, thereby causing material delays in recovering their expenses.

Additionally, many policies contain provisions that shorten the statute of limitations and mandate a time period in which claims against the insurer must be brought. These provisions may limit a law firm's ability to sit back and see how the cases of other policyholders are resolved before filing their own suit.

Law firm leaders should be aware of these and other provisions lurking in their insurance agreements, being alert to potential interplays and nuances that can serve as traps for the unguarded policyholder.

Conclusion

Once you have identified your firm's relevant policies, you should proactively pursue insurance coverage for all of your firm's coronavirus-related expenses. It is important to develop a plan of action early as failing to follow even a seemingly trivial condition precedent may lead to a denial of coverage.

Robin Cohen and James Smith are principals at McKool Smith PC.

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[1] See, e.g., Motorists Mutual Insurance Co. v. Hardinger, 131 F. App'x 823, 824–26 (3d Cir. 2005) (holding that presence of E.coli bacteria in the well of a house, which made the inhabitants of the house ill with respiratory, viral and skin conditions, could constitute physical loss or damage to a structure); Port Authority of New York & New Jersey v. Affiliated FM Insurance Co., 311 F.3d 226, 236 (3d Cir. 2002) (direct physical loss or damage could be found if the policyholder could demonstrate that "there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility."); Mellin v. N. Sec. Ins. Co., 115 A.3d 799, 803 (N.H. 2015) ("[W]e conclude that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched . . . .").