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# INSURANCE & RISK MANAGEMENT 2020 EXPERT GUIDE

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## Insurance Issues and Covid-19

By Matthew Pepping & Manuel Mungia

Covid-19 has frozen the world economy. As we write this, the United States has largely been under stay-at-home orders for more than a month and parts of Europe are approaching their second full month of a lockdown. The economic fallout of these Covid-19 lockdowns has been immediate and far-reaching. More than 26 million Americans have filed for unemployment in a little over a month, and businesses across the globe have seen their revenue streams evaporate.

As the economic uncertainty grows, businesses and individuals are increasingly looking to their insurers to recover some of their losses. There has been an avalanche of claims and lawsuits across a wide range of policies and coverages, including all-risk, business interruption, commercial general liability, management liability, and directors' and officers' liability policies—not to mention the expected increase in cyber-related claims resulting from the near-global transition to working remotely.

Policyholders' initial focus has been on their first-party insurance. The first wave of lawsuits was filed on the heels of the stay-at-home orders and focused on first-party policies that provide business interruption coverage.<sup>1</sup> Attorneys representing both policyholders and insurers are openly debating the related cov-

erage issues in public forums,<sup>2</sup> and plaintiffs firms are actively preparing to pursue additional claims on behalf of policyholders. In fact, plaintiffs have already requested that the Judicial Panel on Multidistrict Litigation consolidate federal lawsuits seeking coverage under business interruption policies, arguing that whether coverage exists for Covid-19 related losses is of overwhelming national importance.<sup>3</sup>

The claims arising out of Covid-19 are not limited to first-party insurance, and the next wave of claims and litigation is likely to be even more widespread. Plaintiffs will eventually look to policyholders and their insurers to pick up potentially catastrophic losses. Significant litigation relating to liability coverage for Covid-19 related lawsuits is certain to occur, and it is not difficult to imagine the scenarios that could lead to such coverage disputes.

D&O policies will certainly see increased claims activities. Early into the pandemic in the United States, the SEC was already reminding publicly traded companies "to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the

coronavirus."<sup>4</sup> If a company fails to do so and suffers a stock drop, a shareholder action may result. Private companies may likewise see increased claims that may implicate their D&O coverage. Putting aside the merits of such a lawsuit, whether coverage applies will turn on the policy's specific terms and exclusions.

The policy's exclusionary language will be key in the resulting disputes. Most D&O policies include exclusions for bodily harm and property damage, pollution, and, in some instances, communicable diseases. As with all exclusionary language, the preface language is important. For instance, bodily injury exclusions often apply to claims "for bodily injury, sickness, disease, emotional distress, or death of any person" if the word "for" at the beginning of the exclusion, however, is replaced with the broader "for, in connection with, relating to, or arising out of," then such claims may not be covered. Similarly, communicable disease exclusions may preclude claims concerning "the transmission of a communicable disease, virus or syndrome." Whether that exclusion is introduced by the word "for," "arising out of," or "in connection with" may be determinative of whether the exclusion applies.

Pollution exclusions also are likely to be implicated in these coverage disputes. These exclusions often preclude coverage for any claim "based upon, arising out of, or attributable to the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." And "pollutant" can be defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste."

Courts have long grappled with what constitutes a pollutant, and jurisdictions have varying interpretations of this exclusion. Some courts interpret pollution exclusions broadly, consistent with their plain and expansive terms. For instance, in *Landshire Fast Foods of Milwaukee v. Employers Mut. Cas. Co.*, 676 N.W.2d 528 (Wis. App. 2004), a Wisconsin court found that damages resulting from a listeria outbreak were excluded by the pollution exclusion.

<sup>1</sup> See *Scientific Evidence in Coverage Disputes*, Press Release 2020-53, SEC Provider Confidential Report, <https://www.sec.gov/news/press/2019/COVD19-019>, (Mar. 4, 2020), available at <https://www.sec.gov/news/press/release/2020-53>.

sion because "[b]acteria, such as *Listeria monocytogenes* ... falls squarely within the plain and ordinary meaning of 'contaminant.'" *Id.* Such jurisdictions are likely to determine that Covid-19 is a contaminant.

On the other hand, some courts limit the exclusion to traditional environmental pollutants, and it is unclear if a virus would fall within that definition. See *Westport Ins. Corp. v. VV Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343 (M.D. Fla. 2010) (holding pollution exclusion did not preclude coverage for claims arising out of exposure to legionella bacteria).<sup>5</sup>

Coverage under CGL policies also will be implicated in the pandemic. Certain areas in the United States are aiming to "reopen" their economies before medical experts suggest it is prudent, and, in fact, some states have already started to significantly lift their stay-at-home orders. The current medical consensus seems to be that there is also a risk of Covid-19 returning in the fall. Couple these facts with the increased ability of technology to trace where individuals have been and contracted the virus, and there are ripe grounds for lawsuits against the owners of places where the virus spread.

CGL policies generally require the insurer to "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage." If an insured is responsible for bodily harm or transmits the virus to another property, and results in the loss of use of the property, claims may result. As with the management liability policies, CGL policies contain broad pollution exclusions and some also have communicable disease exclusions, which will be key in determining whether coverage exists.

Covid-19 is—hopefully—a once in a generation event. There is no facet of the global economy that is not affected. As the world works through the devastation it has caused, it is safe to assume there will be much higher claims activity and litigation.

<sup>5</sup> Of course, to the extent that a policy's pollution exclusion precludes coverage, the policyholder may look to any pollution liability policies, but such coverage is much more in the marketplace.

<sup>1</sup> See e.g., *Berkowitz-Rojas 2020 v. Aspen Am. Ins. Co.*, No. 3:20-cv-848 (N.D. Tex., filed Apr. 17, 2020).

<sup>2</sup> See Mitchell, *Bernard et al., Coronavirus Is Not a Direct Physical Loss*, *Physician Legal Update*, 6(4) (Apr. 9, 2020).

<sup>3</sup> Allison Frankel, *The race is on to lead business interruption insurance litigation*, *Reuters* (Apr. 21, 2020).