Leveraging Insurance to Aid Your Organization During the Coronavirus

APRIL 28, 2020
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APRIL 28, 2020
COVID-19 INSURANCE TOPICS & DISCUSSION
WHO WE ARE

In 2003, the National Trust for Historic Preservation created a new for-profit subsidiary, National Trust Insurance Services, LLC (NTIS), to meet the challenging insurance issues facing historic properties across this country. In short, National Trust Insurance Services is a specialty broker/agent. The insurance firm of Maury, Donnelly and Parr (MDP), holds all appropriate insurance licenses.

As a specialized broker/agent, NTIS has become the leading expert in providing insurance solutions to preservation organizations, theatres, historic sites, house museums, historic hotels, historic churches, historic commercial buildings, Main Street organizations and other miscellaneous historic structures.

We help procure insurance coverage for all types of policies including, however not limited to, Property, Fine Arts, General Liability, Umbrella Liability, Workers Compensation, Directors & Officers, and Volunteer Accident insurance.

Finally, we work exclusively with a broad range of insurance carriers who also understand this complex class of business and who also feel that this is an elite class of insurance risk because of the highly dedicated Boards and staff who help oversee the building’s maintenance and safety needs.

The ultimate mission of NTIS is to educate clients in regards to their exposures and to secure a comprehensive and competitively priced set of policies that protects the historic asset itself and the organization that operates within.
Today we will sort through all of the various types of insurance policies that are applicable to current COVID-19 circumstances. Within each policy type, we will discuss the purpose of each coverage, whether coverage is (commonly) available, and other general topics around each policy type.

There will be time for Q&A at the end of the session.

Disclaimer 1 – The situation is fluid and there is a lot to unpack. As such, I will perhaps provide more questions than answers. Sorry!

Disclaimer 2 – I’m not an attorney, so will tread lightly.
Type of Insurance Policies Applicable to COVID-19***

1. Workers Compensation

2. General Liability

3. Employment Practices Liability

4. Business Income (saved for last because it is the most complex topic at the moment)

*** This is not an exhaustive list. There are other Policies that could be applicable, however today we are covering the most common policies that could be applicable to your organization.
Workers Compensation

**What does this coverage/policy do?**
- Workers Compensation provides wage replacement and medical benefits to employees (not volunteers!) who are hurt or become ill “on the job”.

- The State dictates the coverage rules and benefits… NOT the insurance company. Thus, all insurance companies (within a particular State) share the same policy wording.

**Would COVID-19 related claims be covered by your policy?**
- *It depends.* For an employee to get covered they would need to substantiate their claim that they contracted the virus “on the job”. To the extent the employee can provide such evidence… they would have coverage.

- Any coverage “denial” would be done by the insurance company *on behalf of* the State’s “rules”. This can be appealed.
Workers Compensation (continued)

Potential issues/topics
- States have begun “loosening” (via legislation) Workers Compensation eligibility rules… particularly for First Responders and Front Line workers. A continuation of this legislation to ALL employees could make it easier for an employee to have a successful claim.

Other considerations
- Coverage is “rated” (i.e. priced) based on annual payroll. To the extent COVID-19 has forced you to downsize staff and payroll, you can provide your insurance agent lower/revised payroll figures which will lower your premium. You can also wait until the annual audit if preferred.
General Liability

What does this coverage/policy do?
- General Liability provides coverage against claims alleging bodily injury to a third party (i.e. patrons).
- The policy provides both legal defense and indemnity. Legal defense is often unlimited and outside the limit of liability. Indemnity falls within the limit of liability.
- Coverage is typically provided for all claims that meet the threshold of the Insuring Agreement that are not otherwise excluded.

Would COVID-19 related claims be covered by your policy?
- It depends. Two issues come to mind…
  1. Does claim meet criteria for Insuring Agreement?
  2. Do any exclusions apply?
General Liability (continued)

Two potential issues…

1. Does claim meet criteria for Insuring Agreement?

   For GL policy to trigger there needs to be legal liability on the part of the insured.

   Meaning, insured needs to be negligent (even partially) in the claimant’s injury.

   Examples of situations that could trigger legal liability (negligence);
   1. Allowing an employee who is known to be infected to work and interact with patrons.
   2. Failure to adhere to civil guidelines.
   3. Refusing service to customers with virus.

   SECTION I – COVERAGES
   COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY
   1. Insuring Agreement
   
   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
Two potential issues...

2. Do any exclusions apply?

As mentioned, claims are covered unless they are excluded. Some policies do have vaguely worded exclusions for:
- “Communicable Disease”
- “Organic pathogen/Fungi/Mold/Microbe” (which sometimes includes “Virus”)
- “Expected or Intended Injury”
- And others...

For example, if the organization requires an employee to continue working who is known to be infected, spreading the virus should be expected/intended.
General Liability (continued)

Potential issues/topics
- Coverage availability has yet to be fully “tested” industry-wide because most businesses are closed to the public. It is yet to be seen how hard insurance companies will fight against coverage.

- In addition to potential exclusions, carriers could point to other policy provisions which could prohibit coverage… including contesting whether an “occurrence” took place (and how many occurrences) and how it can be proven that the third party contracted the virus at your venue.

An Occurrence is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Is passing along a virus an “accident”?

Other considerations
- Pending Legislation and Case Law will likely have a significant impact on whether claims will be covered.
Employment Practices Liability

What does this coverage/policy do?
- Employment Practices Liability provides coverage for employment related issues such as wrongful termination, harassment, violation of employee privacy, civil rights violations, etc, etc.

- The policy provides both legal defense and indemnity. Legal defense is either inside or outside the limit of liability. Indemnity falls within the limit of liability.

- Coverage is typically provided for all “Wrongful Acts” (which is defined in your policy)… subject to policy terms and exclusions

Would COVID-19 related claims be covered by your policy?
- Yes, very likely. As mentioned above, claims are covered unless they are specifically excluded. Most exclusions are unrelated to virus circumstances.
Employment Practices Liability (continued)

Potential issues/topics
- N/A

Other considerations
- Is your current limit sufficient?
Audience Poll

“Has your organization filed a Business Income claim with your insurance carrier related to COVID-19?”
Business Income

**What does this coverage/policy do?**
- Business Income is a type of Property insurance coverage that covers loss of income (and related expenses) due to a covered cause of loss.

- If covered, Business Income means the;
  - Net Income *(not gross revenue)*
  - Continued normal operating expenses (including payroll)

- Paraphrasing a typical insuring agreement reads as follows…

  “We will pay for the actual loss of Business Income . . .
  1. The loss or damage must be caused by or result from a Covered Cause of Loss . . .
  2. Must be caused by direct physical loss of or damage to property at premise”

**Thus, two ‘hurdles’ to cross.**
Business Income (continued)

Would COVID-19 related claims be covered by your policy?
- Unlikely at this point. Can “we” get over the two hurdles?

Hurdle 1 – “The loss or damage must be caused by or result from a Covered Cause of Loss”

- Question - What is a “Special Form Cause of Loss”? (Note – “Special Form” is most common, so we'll focus on that)

- Answer -
  - Covers all risks of direct physical loss unless the loss is Excluded.
  - Standard Exclusions on Special Form Cause of Loss are largely unrelated to virus. However… sometimes policies have the “Exclusion of Loss Due to Virus or Bacteria” form or wording.

If a Peril is not specifically excluded… is it then covered? … AKA “The President Trump argument”
Hurdle 1 – “The loss or damage must be caused by or result from a Covered Cause of Loss”

This endorsement modifies insurance provided under the following:

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from “fungus”, wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to “pollutants”.

D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
   1. Exclusion of “Fungus”, Wet Rot, Dry Rot And Bacteria; and
   2. Additional Coverage – Limited Coverage for “Fungus”, Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.
Hurdle 2 – “Must be caused by direct physical loss of or damage to property at premise”

- Question - What does “Direct Physical Loss” mean?
- Answer – This is one of the most important financial questions in the world at the moment!

Does the presence of the virus constitute a “Direct Physical Loss or Damage”?

Let’s consider both sides... via prior Case Law
NO… the presence of the virus does not constitute a Direct Physical Loss or Damage.

In the case of *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*,

“The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable….

“The mere adherence of molecules to porous surfaces, *without more*, does not equate to physical loss or damage.”

The garments without mold would not meet the Direct Physical Damage threshold unless they later "develop odor or other effects so as to require washing or such treatment that they may not be sold as first-quality goods."

In Summary - There must be some permanency to the damage and not just temporary impairment. However odor and the necessity to clean/disinfect is a gray area that could work in your favor.
YES… the presence of the virus does constitute a Direct Physical Loss or Damage.

In *Motorists Mutual Ins. Co. v. Hardinger*, the Third Circuit found that the bacteria contamination of a home's water supply constituted a “direct physical loss” when it rendered the home uninhabitable.

In *Essex v. BloomSouth Flooring Corp. the First Circuit found* that an unpleasant odor rendering property unusable constituted physical injury to the property.

In *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va.2010) a federal court in Virginia found “direct physical loss” where a “home was rendered uninhabitable by the toxic gases” released by defective drywall.

In Summary - There is Case Law to support the fact that Direct Physical Loss or Damage can occur if a building becomes uninhabitable or unusable (even if no structural damage is present)
What about “Civil Authority”?!

- Civil Authority is an Additional Coverage provided by most Business Income policy forms that provides coverage if the suspension of your operations is the result of a Civil Authority prohibiting access to the premise.

- The issue with Civil Authority coverage is that it also requires the “civil order” (to close or prohibit access) to be in response to a “direct physical loss of or damage to property” in the area around the building.
  - For example, a water main break closes a street, or rioting in the area (which damages other buildings), or a large fire in the area prohibits access, etc.

**B. ADDITIONAL COVERAGES**

1. Civil Authority

We will pay for the actual loss of *business income* you sustain for up to the number of days shown on the Declarations for Civil Authority resulting from the necessary *suspension*, or delay in the start, of your *operations* if the *suspension* or delay is caused by order of civil authority that prohibits access to the *premises* or *reported unscheduled premises*. That order must result from a civil authority’s response to direct physical loss of or damage to property located within one mile from the *premises* or *reported unscheduled premises* which sustains a *business income* loss. The loss or damage must be directly caused by a *covered cause of loss*.
Business Income (continued)

**Potential issues/topics**
- The logic outcome is that insurance companies are going to deny BI claims because of the “direct physical loss or damage” issue.

- It is anticipated that large lawsuits or legislation will shape the insurance industries response (positive or negative).

- Other “policy wording issues” exist, however I covered the two major issues/hurdles.

**Other considerations**
- You should file a claim regardless of the expected outcome! It can’t hurt and larger forces at play (legislation, other court decisions, etc) could be a means to get coverage down the line.
Sources and Recommended Reading


• https://www.lexology.com/library/detail.aspx?g=49c91b2d-1c71-4122-88fc-a2a096f04ca4

• https://www.venable.com/insights/publications/2020/03/business-interrupted-is-covid19-physical-loss-or

• https://www.insurancejournal.com/blogs/big-i-insights/2020/03/25/562354.htm

• https://www.insurancejournal.com/blogs/big-i-insights/2020/03/25/562354.htm

Sample (ISO) Business Income For, Cause of Loss Form, Virus Exclusion


THANK YOU

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