

Coronavirus and Business Income Losses

Author: Chris Boggs

COVID-19, better known as the Coronavirus, originated in Wuhan, China. Latest theories point to bats and snakes as the origination points of the virus. Bats with a strain of the virus were hunted and eaten by snakes. The snakes were hunted, gathered and sold for food in markets within the Wuhan province. The disease-laden snakes were eaten by humans transmitting the virus to humans; at least this is the theory. (It's rather ironic that a mammal would transmit the virus to a reptile that transmitted the virus back to mammals.)

According to the Centers for Disease Control (CDC), the Coronavirus is thought to be transmitted person-to-person through "respiratory droplets produced when an infected person coughs or sneezes ... these droplets can land in the mouths or noses of people ... or possibly be inhaled into the lungs."

Major manufacturing operations in China have reportedly slowed or even ceased operations, travel into and out of China is at a bare minimum, and supply chains are severely disrupted in many industries. In reality, the ultimate global economic impact of this virus will remain unknown for many months after the danger and fear have passed. (Another irony of this virus is that some operations have enjoyed increased business. My neighbor teaches students in China online; since the outbreak of this virus, her student count has increased dramatically as kids are staying home to attend classes.)

The Virtual University continues to receive calls and emails nearly every day regarding the insurance implications of this virus, and the most common question relates to business income, specifically: "Is there business income coverage if a governmental authority (civil authority) requires businesses to close?"

No, there is no business income coverage. This is the short answer. Before business income responds there must be damage to property leading to the cessation of a business. This requirement applies to business income dependent property losses (supply chain) and civil authority losses covered by business income policies. Additionally, there is a specific property exclusion applicable to viruses that may (generally will) apply. This is true of "standard" business income forms; there may be some proprietary forms that respond, but these are rare.

Insurance Services Office (ISO) continually monitors emerging issues and trends that may affect the insurance industry, and the unknown ultimate result of this virus certainly qualifies as an emerging issue. In response to the Coronavirus, and because many if not most policies contain a virus exclusion, ISO created two business income endorsements as a specific response to the Coronavirus:

- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus – Edition February, 2020; and
- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus (Including Orders Restricting Some Modes Of Public Transportation) – Edition February, 2020

Note that neither endorsement is assigned a form number. Why? Because ISO did not file these endorsements on behalf of the industry. Rather, ISO made these advisory forms available for use by any member carrier. Any carrier that desires to use either or both endorsements must file them with the relevant regulatory authority. (On a side note, if ISO had filed these endorsements, both would have been assigned a CP 15 XX number because they are business income endorsements.)

Coverage provided by both endorsements:

- Begins immediately upon suspension of the insured's operations (there is no waiting period).
- Extends for the time period specified in the schedule.

- Is provided on an annual aggregate basis limited to the amount stated in the Schedule.

Both endorsements:

- Provide limited coverage when/if there is a suspension of operations due to closure or quarantine at the insured location ordered by a civil authority attempting to avoid or limit the spread of infection by a Coronavirus.
- Extend dependent property coverage (contingent business income) for named locations, if the policy includes dependent property coverage, when there is an interruption in the insured's business due to closure or quarantine to avoid or limit the spread of infection by a Coronavirus ordered by a civil authority at the dependent property.
- Apply to income loss suffered by insureds operating from a vehicle or mobile equipment, if the policy is endorsed to recognize such vehicle-based operation.

The Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus (Including Orders Restricting Some Modes Of Public Transportation) – Edition February, 2020, contains one additional feature not found in the other endorsement. This endorsement adds coverage if the insured suffers a suspension of operations due to mandated closure or restricted usage of public bus, rail or ferry lines or related stations or terminals serving the area where the insured's business is located.

Lastly, both endorsements specifically exclude:

- Intentional action by any person, group, organization or sovereign state to introduce or spread the virus;
- Costs to clean, disinfect, dispose of or replace any property;
- Costs to disinfect or dispose of any bodily fluids or waste materials;
- Costs of testing for or monitoring the presence or absence of the virus;
- Loss or expense due to fear of contagion, e.g., when customers, tenants or vendors avoid a part of the insured's premises not under quarantine;
- Loss or expense related to absence of infected workers or those suspected of being infected; and
- Any fines or penalties.

ISO specifically states in this filing that it has not developed policy-writing or rating rules. Each company is responsible for assessing the exposure for the classes of business written under these endorsements, developing its own rules and filing the forms as required by the regulatory authority.

Whether these will be the model for future "pandemic" endorsements from ISO is not clear. For now, it is up to the individual carrier to decide whether to use these endorsements or not.

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Coronavirus and the CGL (GENERAL LIABILITY)

Author: Chris Boggs

Because of the fears (warranted or not) stemming from the Coronavirus, questions and answers regarding insurance policy response to the virus appear almost daily in various publications. To date, two articles have been published by the VU in relation to insurance and the virus:

- Coronavirus and Workers' Compensation
- Coronavirus and Business Income Losses

Although the VU has not yet received questions regarding how the commercial general liability (CGL) policy will respond, the CGL's response must still be understood. Various publications have addressed the CGL's response to the coronavirus with varying degrees of accuracy (be careful and don't depend on other sources of information).

Legal Liability Required

To lead into the CGL's response to the coronavirus, one key fact must be understood. If there is no legal liability, coverage is not triggered in the CGL and the policy will not respond. Legal liability exists when:

- The wrongdoer is found guilty of "Negligent Conduct" (meaning they breached a duty owed to the injured party);
- The injured party suffers actual damages; and
- The wrongdoer's "Negligent conduct" is the proximate cause of the injury or damage.

Far more than these triggers are required to ultimately establish legal liability, but such detail is not the focus of this article. For more detail on what is required to establish legal liability see, Are You Applying the MOST Basic CGL Coverage Rule and How Does a 'Person' Become Legally Liable.

Because the insured must be legally liable before the CGL responds, what actions or inactions could possibly lead to the insured being found legally liable for an injury from the coronavirus? To answer this question requires some imagination considering the requirements that must be met to be held legally liable. Following are a few ideas (but not all the possibilities):

- Allowing an employee who is **known** to be infected with the virus to continue working;
- Failure to adhere to required health and prevention guidelines;
- Remaining open following an order by a civil authority to close;
- Maybe (but not likely) selling a product from China on which the virus can live for long periods;
- Not screening and refusing service to customers with the virus; or
- Other weird actions or events.

To be direct, the likelihood a business owner may be held legally liable for injury to a third party who contracted the coronavirus on the insured's premises is very low to almost non-existent. Thus, it is unlikely the CGL will be called upon to respond. But the lack of legal liability doesn't stop people from trying to sue to prove negligence and legal liability – especially in the face of irrationality.

But if the insured does breach a duty owed and is held legally liable (although unlikely, nothing is impossible), will the CGL respond? Review the unendorsed CGL and no exclusion is found within Coverage Part A, Bodily Injury and Property Damage.

Was There an "Occurrence"?

A second requirement contained within the insuring agreement plays a role in the CGL's response to any injury supposedly arising from the coronavirus - the injury must qualify as an "occurrence" before the policy responds. The CGL form reads:

b. This insurance applies to "bodily injury" and "property damage" only if:

*(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" that takes place in the "coverage territory"*

Within the CGL an occurrence is defined as *an accident, including continuous or repeated exposure to substantially the same general harmful conditions*. Is contracting a virus an occurrence within the policy form?

To decide if this qualifies as an "occurrence" the question must be asked, is passing along a virus an accident? Maybe, but there are too many variables are involved to provide a definitive answer. As part of the question of an "occurrence," the injured party has to prove that the virus was contacted at the insured's premises or arising from its operations. Given the specifics, this might be almost impossible.

For sake of the overall discussion, assume making another person sick qualifies as an "occurrence" in the CGL, and that the person is able to prove that his/her only exposure was at the insured's locations or a result of the insured's operations.

If the insured is legally liable, if there is an occurrence as defined in the CGL and if the exposure can be narrowed down to the insured, the next step is to look for exclusions within the CGL.

Are There Any Exclusions?

Review the exclusions in the unendorsed CGL and only one exclusion could possibly negate coverage for spreading the coronavirus to members of the public, exclusion 2.a. **Expected or Intended Injury**. For example, if the insured requires an employee to continue working or come to work who is known to be infected, spreading the virus should be expected (even if not intended). No coverage due to the exclusion.

Look back at the earlier examples that could trigger a liability claim and many of those questionable actions may fall under the expected or intended injury exclusion. If a reasonable person could or should expect the virus to spread because of actions taken or decisions made, this exclusion is likely to apply.

If, however, the expected or intended injury exclusion does not apply, there do not appear to be any other exclusions applicable to the spreading of the coronavirus. Although some enterprising claims person would surely try to use the pollution exclusion.

This leaves us with the impression that the CGL may provide coverage for infecting a third in certain circumstances. But this is not necessarily true.

A Common (Ubiquitous) Exclusionary Endorsement

Even if an incident leading to bodily injury from coronavirus clears all the required hurdles (the insured is legally liable, the incident qualifies as an occurrence, the injured party can prove the exposure is the from the insured's actions, and the claim is not hindered by the expected or intended injury exclusion), there is still one roadblock – an exclusion common to most CGL policies – the CG 21 32 05 09 - Communicable Disease Exclusion.

If and when this endorsement is attached, coverage for injury from the coronavirus appears to disappear. The form reads (in part):

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

- a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;*
- b. Testing for a communicable disease;*
- c. Failure to prevent the spread of the disease; or*
- d. Failure to report the disease to authorities.*

Undoubtedly the question to be answered is, does a virus qualify as a disease? In a "roundabout" way, yes. It's not the virus that causes harm, it's the disease that results from the virus. The immune system destroys some viruses before they can cause any harm, but some viruses overpower the immune system and lead to sickness (disease).

When the CG 21 32 is attached, there is no coverage for the transmission of the coronavirus and the resulting sickness (disease).

How is the CGL Going to Respond to the Coronavirus?

Without overstating the reality, it seems rather unlikely that a CGL policy will ever pay a claim arising from the coronavirus. The facts may negate any possibility that the insured is legally liable for spreading the virus/disease. And even if the insured is legally liable, does spreading a virus actually qualify as an occurrence as defined in the policy? If these two insuring agreement conditions aren't met, there is no need to go any further into the coverage form because there is no coverage.

If the loss meets all the conditions contained within the insuring agreement, might the actions of the insured fall within the scope of the expected or intended injury exclusion? If the exclusion does not apply, then there may be coverage.

However, the CG 21 32 is a ubiquitous exclusion attached to most commercial general liability policies.

We have gone the long way around to answer the question, "how will the CGL respond to a coronavirus claim," but the trip was necessary. Based on the requirements within the insuring agreement, the need to prove the insured was the source of any exposure, the application of the expected or intended injury exclusion, and the usual attachment an exclusionary endorsement, in most cases, the bodily injury coverage available in Coverage Part A of the CGL will never respond to pay a coronavirus claim.

Don't expect the coronavirus to be a factor in CGL loss ratios.

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Coronavirus and Workers' Compensation

Author: Chris Boggs

A pandemic is defined as, an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population." Although the media lives by the motto, "If it bleeds, it leads," declaring a pandemic anytime more than a few people contract a virus, this time even the World Health Organization (WHO) is warning of a possible Coronavirus (COVID-19) pandemic. One Coronavirus expert, Professor Gabriel Leung, Chair of Public Health at Hong Kong University, says that **unchecked**, the virus could infect 60 percent of the global population meeting the definition of a pandemic.

My intent is not to accuse the media of sensationalism, nor to intimate that WHO is overreacting (I don't think they are); my purpose is to answer the question, what makes an illness an occupational illness" and thus compensable under workers' compensation? More specifically, how does or might workers' compensation respond to the Coronavirus?

Two tests must be satisfied before any illness or disease, including the Coronavirus, qualifies as occupational and thus compensable under workers' compensation:

1. The illness or disease must be occupational," meaning that it arose out of and was in the course and scope of the employment; and
2. The illness or disease must arise out of or be caused by conditions **peculiar**" to the work.

Whether an illness arises out of and in the course and scope of employment is a function of the employee's activities. The simplest test toward determining whether an injury arises out of and in the course and scope of employment" is to ask: Was the employee benefiting the employer when exposed to the illness or disease? Be warned, this test" is subject to the interpretations and intricacies of various state laws.

Qualifying as occupational" is the relatively low hurdle. The higher hurdle is whether the illness or disease is peculiar" to the work. If the illness or disease is not peculiar to the work, it is not occupational and thus not compensable under workers' compensation. An illness or disease is peculiar" to the work when such a disease is found almost exclusively to workers in a certain field or there is an increased exposure to the illness or disease because of the employee's working conditions.

For example, black lung disease in the coal mining industry is a disease that is peculiar to the work of a miner. Coal miners are subject to prolonged exposure to higher-than-normal concentrations of coal dust leading to black lung disease. This makes the disease peculiar to the coal mining industry.

Another example of an exposure peculiar" to the work is a healthcare worker contracting an infectious disease such as HIV or hepatitis as a result of contact with infected blood. The worker's unusual or peculiar" exposure to such diseases results in an illness that is occupational and compensable.

Qualifying an illness or disease as occupational and, more importantly, peculiar to the work (and thus compensable) may ultimately require industrial commission or court intervention to sort medical opinion from legal facts. No one test" is available to declare an illness or disease compensable or non-compensable; each case is judged on its own merits and surrounding circumstances.

Concluding that an illness is occupational, peculiar to the work and ultimately compensable is not necessarily based on the disease in question but on the facts surrounding the worker's illness. Factors investigated and considered by medical professionals and the court include:

- The timing of the symptoms in relation to work: Do symptoms worsen at work and improve following prolonged absence from work (in the evening and on weekends);
- Whether co-workers show or have experienced similar symptoms;

- The commonality of such illness to workers in that particular industry;
- An employee's predisposition to the illness (an allergy or other medical issue); and
- The worker's personal habits and medical history. Patients in poor medical condition (overweight, smokers, unrelated heart disease, etc.) and/or with poor family medical histories may be more likely to contract a disease or illness than others in similar circumstances. Bad habits and poor medical history (and heredity) cloud the relationship between the occupation and the illness. For example, smokers may be ill-equipped to fight off the effects of illnesses to which others may have no problem being exposed.

What About Coronavirus?

Judged against the qualifying factors presented, does any disease or virus declared a pandemic create a true workers' compensation exposures? Does the Coronavirus create a workers' compensation exposure? The short answer is, not likely." Other than the fact that the Coronavirus is currently garnering intense attention, in most cases it is no more occupational than the flu.

Unless!

Only if it is proven that the employee has an increased risk of contracting the virus due to the peculiarity of his or her job might the Coronavirus be considered occupational and thus compensable. Remember, compensability as an occupational illness requires something about the job that increases the risk of exposure and illness.

As intimated earlier, healthcare workers may be able to prove the necessary peculiarity being face-to-face with sick people ALL day to assert a compensable injury.

Which Policy Responds to Qualifying Occupation Illnesses and Diseases?

While the Coronavirus has a relatively short gestation period, other occupational illnesses and diseases often have long gestation" periods. Employees may be exposed to the harmful condition for many years before the illness manifests. It is also possible that the employee doesn't contract the disease until years after the exposure ends.

The workers' compensation policy specifically states that the policy in effect at the employee's *last* exposure responds to the illness even if the employee is working for another employer or even retired at the time the disease manifests itself.

The Coronavirus Isn't Special

Coronavirus may be a humankind exposure rather than one peculiar to most employments. Contracting the virus at work is not enough to trigger the assertion that it is a compensable occupational illness. To be occupational and compensable requires something peculiar about the work that increases the likelihood of getting sick. It is unlikely that both the occupational" and peculiar" thresholds can be satisfied to make most illnesses compensable" for the vast majority of individuals; the same is true of the new Coronavirus.

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