Insurance Coverage for COVID-19 Claims Under CGL Policies

SmithAmundsen Insurance Alert
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As businesses and offices begin to reopen to the public, there may be a spike in lawsuits brought against companies by their customers, clients, vendors and others who claim to have contracted COVID-19 on the companies' premises. While the retail, restaurant and hospitality industries may be the most frequent targets, any businesses where members of the public physically interact with the businesses' employees or each other may face such claims. For insurance coverage for those claims, companies will look to their commercial general liability (CGL) insurance policies.

A CGL policy typically contains two main coverage parts: Coverage A for "bodily injury" and "property damage" liability; and Coverage B for "personal and advertising injury" liability. This article will address coverage for "bodily injury" under Coverage A of a CGL policy, where claims arising from exposure to COVID-19 are most likely to fall, as well as policy exclusions that might operate to preclude coverage.

Is the Lawsuit Within the Scope of Coverage?

To be within the Insuring Agreement of Coverage A and potentially within the scope of coverage, a lawsuit must allege damages because of "bodily injury" caused by an "occurrence," which typically is defined as "an accident, including continuous or repeated exposure to the same general harmful conditions." We expect most courts to find an "occurrence" in regards to the earliest claims, which arose before there was a common understanding as to how the virus is transmitted and the precautions that should be taken to avoid infecting others. As to the claims that will emerge after stay at home orders are lifted, whether there is an "occurrence" will be more dependent on the particular facts of the claim. The more knowledge a business has, or perhaps should have, of its employees being infected or not adhering to protocols to prevent the dissemination of the virus, the less likely an accident or "occurrence" will be found.

Policy definitions of "bodily injury" vary, with many limiting "bodily injury" to injury, sickness or disease or death sustained by a person. "Mental anguish" may or may not be included. As the initial lawsuits against the cruise industry demonstrate, claims may not be brought solely by those who contracted

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COVID-19. For example, some claims are being asserted by those who believe they were placed at greater risk of contracting COVID-19 and/or were quarantined under stressful conditions, which they assert caused them to suffer emotional distress. There is no consensus among courts as to whether emotional injuries are "bodily injury," with or without physical manifestations.

Do Policy Exclusions Apply?

Most CGL policies do not contain "virus" exclusions as might be found in a first-party property policy. The following are some examples of exclusions that may be included in a CGL policy that could be raised by insurers as a basis for a denial of coverage.

- **Communicable Disease Exclusion**

The Communicable Disease exclusion precludes coverage for "bodily injury" arising out of the actual or alleged transmission of a communicable disease. The exclusion, by its express language, may apply even if the claims against an 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. Communicable disease is not defined by the exclusion and we do not expect it to be defined elsewhere in the policy. Given that the COVID-19 virus spreads through droplets of saliva or discharge from the nose when an infected person coughs or sneezes, or through droplets from speaking, we believe there will be no dispute that it is communicable. Even diseases, such as HIV, that are not as easily transmissible as the COVID-19 virus have been understood to be communicable. *See, e.g., Lambi v. Am. Family Mut. Ins. Co.*, 498 F. App'x 655, 656 (8th Cir. 2013) (infecting another with the HIV virus clearly falls within the plain and ordinary meaning of the transmission of a communicable disease).

One might question whether COVID-19 related "bodily injury" claims concern a virus, as opposed to a disease that may be subject to the exclusion. However, the World Health Organization officially identified and named the "disease" of concern as the coronavirus disease (COVID-19), and the "virus" that causes COVID-19 severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The distinction between COVID-19 and SARS-CoV-2 should be inconsequential in the coverage context if all claimants who allege physical injury in the traditional sense (as opposed to emotional distress) experienced severe symptoms that are indicators of COVID-19, the disease.

While no court has yet addressed the applicability of the Communicable Disease exclusion to COVID-19, some courts have applied communicable disease exclusions to bar coverage in various contexts. *See, e.g., Plaza v. Gen. Assur. Co.*, 664 N.Y.S.2d 444, 444 (N.Y. App. Div. 1997) (court applied a communicable disease exclusion, which it found to be neither ambiguous nor unduly broad, to

injuries sustained as a result of the transmission of the HIV infection); *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100, 101-03 (La. Ct. App. 2001), *writ denied*, 802 So. 2d 616 (La. 2001) (holding that a communicable disease exclusion, which applied to "'bodily injury'... arising out of the transmission of or alleged transmission of any communicable disease," precluded coverage where underlying plaintiffs contended they were exposed to sewage, which set the stage for possible disease transmission); *Koegler v. Liberty Mut. Ins. Co.*, 623 F. Supp. 2d 481, 484-85 (S.D.N.Y. 2009) (the communicable disease exclusion, which precluded coverage for bodily injuries arising out of the "transmission of a communicable disease, virus, or syndrome," would have precluded coverage for the policyholder who transmitted the HPV and herpes virus had there been a timely disclaimer of coverage, with the court noting that the exclusion was in plain English and not difficult to understand.)

- **Fungi or Bacteria Exclusion**

Many CGL policies are endorsed with a fungi or bacteria exclusion that typically excludes coverage for "bodily injury" "which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any bacteria on or within a building or structure...." We expect the exclusion not to apply here because COVID-19 is a viral, not bacterial, infection.

- **Pollution Exclusion**

CGL policies typically include a pollution exclusion. While the language of pollution exclusions vary, one frequently used is commonly referred to as the "total" pollution exclusion, which bars coverage for "bodily injury" that would not have occurred but for "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutants" may be defined by CGL policies as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Therefore, among the issues surrounding the application of the "total" pollution exclusion to COVID-19 related injuries are whether the virus responsible for COVID-19 is a "pollutant," and if so, whether the virus migrated or was discharged, dispersed or released.

Whether the virus responsible for COVID-19 it is a "pollutant" depends, in large part, on the state's law the court is applying. Some states, including Arizona, California, Illinois, New Jersey and New York, limit the application of the pollution exclusion to what is referred to as "traditional environmental contamination." *See, e.g., American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (accidental release of carbon monoxide from a broken furnace was not "traditional environmental contamination" addressed by the pollution exclusion); *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 936-37 (N.J. 2005) (the pollution exclusion did not apply to bodily injury claims arising out of exposure to toxic fumes that emanated from a floor coating/sealant operation performed by the insured).

Therefore, in these states, it will not likely bar coverage for COVID-19 related injuries. *See, e.g., Johnson v. Clarendon Nat'l Ins. Co.*, No. G039659, 2009 WL 252619, at **2, 13 (Cal. Ct. App. Feb. 4, 2009) (unpublished/noncitable) (in holding the pollution exclusion did not apply to mold because it was unclear and therefore had to be interpreted in favor of coverage, the court stated that a layperson would not reasonably interpret the exclusion to apply where a policyholder sneezes and passes a virus to its neighbor).

Indiana applies the pollution exclusion extremely narrowly, requiring the particular "pollutant" at issue to be expressly referenced in the exclusion for the exclusion to bar coverage. COVID-19 would not be referenced by name in any exclusion, and we do not expect a pollution exclusion to reference viruses.

Other states, including Florida, Georgia, Michigan, Minnesota, Missouri, Nebraska, Texas, Wisconsin and Vermont, interpret the pollution exclusion more broadly. Some courts have held that microscopic substances can be a "pollutant," suggesting that they might be willing to apply a pollution exclusion to preclude coverage for COVID-19 related illnesses. *See, e.g., First Specialty Ins. Corp. v. GRS Management Assocs., Inc.*, No. 08-81356-CIV, 2009 WL 2524613, at **3, 5 (S.D. Fla. 2009) (contaminants within the water of a pool maintained by the insured that resulted in a guest contracting the Coxsackie virus were viral contaminants and harmful microbes, so the pollution exclusion applied to preclude coverage); *Larson v. Composting Concepts, Inc.*, No. A07-976, 2008 WL 2020489, at *4 (Minn. Ct. App. 2008) (pollution exclusion barred coverage for injuries caused by mold, bacteria, and bioaerosols generated by compost materials, as there was no basis in policy language for distinguishing organic from inorganic contaminant); *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325, 1329 (S.D. Fla. 2006) (pollution exclusion precluded coverage for injuries sustained while working in an office building, which were caused by exposure to "living organisms," "microbial populations," "airborne and microbial contaminants," and "indoor allergens"); *U.S. Fire Ins. Co. v. City of Warren*, 87 Fed.Appx. 485, 487-90 (6th Cir. 2003) (Michigan law) (pollution exclusion precluded coverage for health problems caused by sewage containing "pathogens, carcinogens and disease carrying organisms including but not limited to HIV viruses, *e. coli* bacteria, hepatitis (all strains), [and] other bacteria" infiltrating homes.) However, we caution that decisions regarding bacteria may be distinguishable on account of the dissimilarities between bacteria and viruses.

- **Employer's Liability Exclusion**

Not only does the employer's liability exclusion in a CGL policy apply to "bodily injury" to an employee of the insured arising out of or in the course of employment, it also typically applies to "bodily injury" to an employee's spouse, child, parent, brother or sister that is a consequence of excluded "bodily injury" to the employee. If an employee contracts COVID-19 at work and spreads the virus to a family member due to the employer's alleged negligence, the claim is one that may be covered as a consequential injury under an employer's liability

policy, not a CGL policy.

- **Miscellaneous Other Exclusions**

There are a number of additional exclusions in CGL policies that might preclude coverage for bodily injury claims related to COVID-19, depending on the factual circumstances of the claim. They could include, for example, an exclusion for expected or intended injury, or for employment-related practices, policies, acts or omissions, such as discipline, defamation, harassment or discrimination.

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Coverage determinations regarding bodily injury claims relating to COVID-19 will be made by courts based on the facts of each claim, the policy at issue and the applicable state's law. Therefore, in determining whether there is coverage for a particular lawsuit, the policy's definitions of "occurrence" and "bodily injury," and the applicability of the policy's exclusions, should be closely analyzed under the applicable state's law in the context of the injuries claimed.