

## 4 Key Coronavirus Insurance Coverage Battlegrounds

By Jeff Sistrunk

*Law360 (March 13, 2020, 3:43 PM EDT)* -- Property and liability insurers are bracing for an uptick in claims across virtually every line of coverage due to the outbreak of the novel coronavirus, as companies lose money by shutting down large-scale events and businesses face supply chain troubles.

Here, Law360 looks at four types of coverage that are especially ripe for disputes.

### Event Cancellation

As the number of confirmed cases of COVID-19 continues to rise in the U.S., high-profile event cancellations have become a near-daily occurrence. In the past week alone, the NBA, NHL and MLB all suspended their seasons, the NCAA cancelled its March Madness basketball tournament, and Disneyland shuttered its doors indefinitely.

Attorneys who spoke with Law360 said that since late last month, they have been inundated with inquiries from insurers and event organizers seeking guidance on disputes over coverage under event cancellation policies, which generally cover at least some of the policyholder's lost revenues and out-of-pocket expenses.

These specialized policies almost always contain a list of covered causes, and attorneys said coverage for coronavirus-related cancellations may be available if the list includes communicable diseases or, even more specifically, pandemics. However, a policy won't kick in if an organizer cancels merely due to the fear of coronavirus in the community, according to attorneys.

"These policies cannot respond to voluntary decisions not to go forward with an event or a disinclination to gather a group," said Laura Foggan, chair of Crowell & Moring LLP's insurance and reinsurance group, who represents insurers. "They are designed to respond in a case where there is a legal or physical impossibility of holding an event."

Therefore, if an organizer cancels an event due to an official ban on large public gatherings, such as those recently announced by New York and California, they are more likely to be eligible for coverage. But most cancellation policies also require the policyholder to attempt to mitigate losses by, for instance, making a good-faith effort to reschedule the event before calling it off.

"Organizers have to be prudent businesspeople and do what they would do if they were not getting reimbursed," said Lathrop GPM LLP partner Alexandra A. Roje, who represents policyholders. "Depending on the facts of the situation, you may be able to negotiate with your vendors or seek to reschedule. However, I can guarantee that if you're not attempting to reschedule and you're just throwing up your hands and saying 'Okay, I'm going to refund everyone and then go chase my carrier,' that is going to be a problem."

Pillsbury Winthrop Shaw Pittman LLP partner David Klein said he has been in contact with conference organizers who reported they had recently purchased event cancellation policies with express communicable disease coverage for an additional premium. But according to Klein, upon receiving the policies, the organizers discovered they contained exclusions specifically for coronavirus — with no reduction in premium.

"That is a violation of state insurance regulations in every jurisdiction I know of," said Klein, who counsels policyholders. "That is likely to be a litigated issue. It speaks of panic in the insurance industry that they've tried such a bait-and-switch."

### **Business Interruption**

The COVID-19 outbreak has dealt a significant blow to the global economy, as many companies have had to temporarily shutter their own properties or experienced breaks in their supply chains.

Attorneys told Law360 that these economic woes have generated disputes over two types of commercial property insurance: business interruption coverage, which covers a policyholder's losses from having to shut down abruptly, and contingent business interruption, which kicks in when losses result from the closure of a policyholder's supplier.

For either type of insurance to apply, there must be proof of a "direct physical loss" to a property — in the case of business interruption coverage, the policyholder's property, or in the case of contingent business interruption, the supplier's property.

If a property has been shuttered merely due to fears of the coronavirus, but the building remains habitable, the direct physical loss requirement won't be met, according to attorneys.

"We're shutting down as a global community not because property is impaired but because people are impaired," said Wilson Elser Moskowitz Edelman & Dicker LLP partner Paul S. White, who represents insurers. "The practical nature is that there may be some direct physical damage or physical loss to some property, but it is probably going to be the exception to have a direct physical loss rather than the rule."

If, however, an infected person has been inside of a property and physically contaminated it, that may be enough to meet the direct physical loss requirement, attorneys said.

"The ongoing research on COVID-19 indicates it may last longer in environments that are not hospitable, so it is possible that this will be a livelier coverage issue than it has been in the past," said Klein.

Even if the initial threshold for a direct physical loss is met, though, the policyholder could run into other problems depending on the wording of their policy. Some commercial property policies with business interruption coverage contain exclusions for property damage arising from pathogens, bacteria, viruses and other disease-causing agents.

"Those may very well come into play in a scenario in which an infected person has been inside of a property, if that could somehow otherwise trigger coverage," Foggan said.

### **Workers' Compensation**

Workers' compensation insurers could soon face an influx of claims from workers who say they contracted COVID-19 while on the job.

A recent report by Michel Leonard of the nonprofit Insurance Information Institute predicted that workers' comp providers would be one of two categories of insurers to experience the greatest impact from the coronavirus pandemic, along with health insurers. According to the report, the brunt of that impact will be felt by carriers providing workers' comp coverage to hospital workers, EMTs, police officers and firefighters, as well as workers in "high-risk" sectors such as entertainment, manufacturing, transportation and retail.

Attorneys told Law360 that the success of these workers' comp claims will depend on whether the employees' exposure to the virus was sufficiently tied to their work. That test is known as "work relatedness."

"Generally speaking, cases in which an employee is exposed to coronavirus onsite likely wouldn't be considered workers' comp cases, unless the exposure was sufficiently intertwined with the job," Foggan said. "This is already true of situations in which an employee catches a cold or the flu."

In the case of first responders, it should be fairly easy to demonstrate work relatedness, given that they regularly deal with populations that are more vulnerable to infection, according to attorneys. But for other workers, even those in customer-facing roles, it may be more of an uphill battle for them to prove that their exposure to the coronavirus occurred at work.

"In this situation, it may be difficult to trace the origin of the illness," Klein said.

### **General Liability**

General liability insurance carriers will likely be pulled into the fray as companies face lawsuits over allegedly failing to protect customers from the coronavirus.

On March 9, Princess Cruise Lines Ltd. was hit with a **first-of-its-kind suit** by a South Florida couple who claimed the cruise company acted with gross negligence by failing to take precautions to prevent a coronavirus outbreak on one of its ships after two passengers on the previous sailing disembarked with symptoms. According to attorneys, similar litigation is almost certain to follow as the pandemic unfolds.

"All companies I know of are thinking about protocols to minimize harm, and a failure to do so may give rise to liability," said Klein. "For example, now that many colleges and universities have decided to end classroom instruction, any college that is a laggard in adopting that approach could later be viewed as negligent."

Claims of negligence resulting in bodily injury typically fall under "Coverage A" of standard general liability policies. However, one of the prerequisites for coverage under that prong is that there be an accidental "occurrence," and some plaintiffs may say that companies deliberately ignored critical information that could have prevented the spread of coronavirus.

"You will definitely see a debate around whether there was an accident in these types of cases," said McCarter & English LLP partner Sheri Pastor, who is president-elect of the American College of Coverage Counsel, an association of insurance attorneys.

Pastor said that, depending on the circumstances, companies may also be able to turn to "Coverage B" of their general liability policies, which includes coverage for the personal injury offenses of false detention and imprisonment.

"If a person alleges they were improperly detained and quarantined, that coverage could definitely apply," Pastor said.

Even if a company succeeds in triggering coverage under one or both prongs of a general liability policy, some insurers may invoke standard exclusions for claims of property damage or bodily injury stemming from exposure to a "pollutant" or "contaminant," as courts could read those terms broadly enough to encompass the coronavirus.

"The premises liability situation could be one in which a pollution or contamination exclusion could be implicated," Foggan said.

--Editing by Adam LoBelia.