

Litigation Alert

November 2020

COVID-19 Insurance and Litigation Update

The COVID-19 pandemic continues to pose substantial challenges to businesses—most live entertainment events are still on hold, many commercial tenants are struggling to pay rent, and restaurants, retail and other businesses in major metropolitan areas continue to operate at reduced capacity. Businesses face a great deal of uncertainty, especially with COVID-19 cases once again rising nationwide, and insurance coverage remains a critical component of risk mitigation strategies moving forward.

This alert provides an update regarding COVID-19 insurance and related litigation.

Members of the insurance industry universally are rejecting attempts by businesses to find insurance for economic losses resulting from the pandemic and government shutdown orders.

One of the largest worldwide syndicates of insurers has reported losses of \$3 billion for the first half of 2020 compared to a like amount of profits for the same period a year ago. Other insurers claim they are having to dip into reserves and are reconsidering the future of their traditional business models. Employment-related claims are widespread and include those involving workplace safety, wrongful termination, discriminatory layoffs, disability bias, and family and sick leave. Costly product recalls and entertainment industry shutdowns also are giving insurers headaches.

The Judicial Panel on Multidistrict Litigation has rejected petitions from insurers in Illinois and Pennsylvania to centralize hundreds of cases seeking coverage for losses related to COVID-19, finding that language in various policies was not sufficiently similar to raise common issues of fact, even where standard virus exclusions did not exist. The panel did leave open the possibility of combining cases where policy language was substantially similar and specific insurers were facing a high volume of cases.



One haven for policyholders appears to be business interruption coverage. Decisions, including a number from England involving London insurance market companies, have found businesses are entitled to recover under these provisions, even across a variety of policy language.

The dispute continues over whether the existence of the virus on business premises—in the air, on hands, on surfaces—is sufficient to establish “direct physical loss or damage,” a typical requirement in property policies. An insurer has advanced the argument in a Texas case that the body of cases rejecting this proposition is “growing daily.” Some California courts agree—one decision found that the direct physical loss or damage requirement was not met and that the fact that businesses are under government shutdown orders is not enough to change that result. At least one case, from Missouri, has found in favor of the argument, concluding that the existence of the virus on business premises alone constituted direct physical damage to an insured’s property. And in a case brought by a group of shuttered restaurants, a North Carolina court has ruled that governmental shutdown orders can cause direct physical loss to property.

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An interesting question has arisen, but not yet been answered, as to whether insurers can deduct the value of federal relief from their payouts to claimants.

With the onset of COVID-19 exposure lawsuits, businesses are looking to state and federal governments for immunity from liability. Legislative action has varied, resulting in a patchwork of civil immunity laws. A dozen state legislatures have passed legislation protecting businesses, health care providers, schools and other entities from civil liability for virus-related claims unless a claimant can prove intentional, reckless or grossly negligent misconduct. The laws vary in terms of what other protections they provide, with some imposing a rebuttable presumption of assumption of risk and others imposing heightened pleading requirements for claimants. Other states, including California, New York and Illinois, have not yet passed immunity legislation. California has passed laws that provide more benefits and protections to employees who have been affected by the virus. Federal legislation has been introduced that aims to discourage the pursuit of "insubstantial" virus-related lawsuits. While the proposed legislation contains

similar protections to various state laws, it goes further in several respects, including by imposing limitations on damages available to claimants. Whether the legislation will ultimately be enacted remains to be seen.

We stand ready to assist in evaluating existing coverage, what might be available to supplement current insurance programs, how to deal with claims, and what laws and principles might be available to assist in those areas.

Related Professionals

Jerry S. Phillips jphillips@loeb.com
Frank D. D'Angelo fdangelo@loeb.com

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