

The Coronavirus (COVID-19) is top of mind for companies and their employees and, understandably, we have been getting a lot of emails and calls from many of you asking about what options you have to deal with the aftermath of business slowing down, employees getting sick, supply chains getting interrupted. We have put together this email in order to shed light on the challenges this virus represents with respect to business loss.

The Courts:

- State and Federal Courts are starting to slow down, reducing staff, and handling only essential emergency matters. Plan for delays in your current pending court matters and suspension of filings for any new matters for the next 30 days or so.

Contractual Performance

- **The Main Challenge**
 - o The Pandemic is forcing companies to alter business plans, shut down projects, etc. Can a company suspend performance of a contract or even terminate the agreement altogether because of the impacts of COVID-19?
 - o Key Points to consider
 - Impossibility and Impracticability of Performance
 - Mere Delay in Performance
 - Foreseeability
 - Contract Terms are Key
 - Frustration of Purpose
 - o Key questions to consider
 - What law controls?
 - Is there a force majeure clause in the contract?
 - What does the termination clause allow?
 - How close is the nexus between the claimed performance and the pandemic?
 - Does the Pandemic (or government reaction to the Pandemic) make the contract more difficult to perform, or impossible to perform?
 - Is a delay in performance rather than a suspension of the entire contract merited?
 - What is the contractual dispute process? Are there any notices required?

Lien/Bond Claims

- **The Main Challenge**
 - o The Pandemic is forcing companies to alter business plans, conserve cash, and/or shut down projects. In addition, the courts are altering normal operations making lien filing more difficult.
 - o Key Points to consider
 - Rely on the earlier of your last date, or the project suspension or termination date, for purposes of calculating lien/bond deadlines.
 - Allow more time than normal to account for projected delays in the recording of lien process.

Insurance Coverage

The Main Challenges

- Pandemics, like “warfare” are among those universal exclusions one finds on most standard insurance policy.
- Loss of Income is a coverage that is directly linked to a property event such as a fire or flood.
- Employees must prove that their point of exposure to the virus occurred while working at, or on behalf of the business.

Explanation of Coverage by Line of Business:

Property Coverages

- o The Business Income coverage is triggered by a “direct physical loss of or damage to property at premises which are described in the Declarations.” The Business Income form also requires that the loss or damage be caused by or result from a Covered Cause of Loss. The Causes of Loss form defines Covered Cause of Loss as “risks of direct physical loss.” Because the governmental closure of a facility and an outbreak do not constitute a “direct physical loss of or damage to property,” the Business Income coverage **would not apply**.
- o The Business Income form contains an additional coverage for “civil authority.” The “civil authority” coverage is premised on an “action of a civil authority that prohibits access to the described premises due to direct physical loss of, or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.” As mentioned above, a governmental closure would not be due to a direct physical loss of or damage to property and would not be caused by or result from a covered cause of loss (which again is defined as direct physical loss).
- o Pandemics are not considered to be a cause of direct physical loss.

Liability Coverages

- o On the liability side, the normal analysis for coverage will apply (does the claim allege property damage or bodily injury). Some policies may have an exclusion (Exclusion – Communicable Disease, form NS 0019) which precludes coverage for bodily injury, property damage and medical expenses resulting from the transmission or exposure of a communicable disease by an insured. This form would preclude coverage if an insured employee with the virus transmits it to a customer, client or resident of the insured. The form would not preclude coverage for claims made against an insured where the disease was transmitted by someone other than the insured.
- o Should a claim be asserted against an insured claiming that the insured was negligent in allowing a disease to be transmitted at its facility, the liability policy would respond and provide a defense to the insured for the claim (assuming the disease was not transmitted by an insured as coverage would be denied if transmission was by an insured and exclusion NS 0019 is on the policy). In handling this type of liability claim, we would defend the insured and only pay damages if it was proven that the insured was negligent in allowing the transmission of the disease. Merely because someone contracts a disease at an insured facility does not mean the insured is responsible or negligent.

Workers Compensation

- o Workers Comp insurance is the one line of business that is almost entirely regulated by the state, which means that the aforementioned universal exclusion for pandemics doesn't necessarily apply to this line of coverage. As such, if you do have an employee who is sick with Coronavirus, and we can demonstrate that exposure originated from work-related operations, then this would fall under workers compensation insurance. The challenge is trying to prove that the employee was, indeed, exposed to the virus while working. Given the lengthy incubation period of this virus, and seemingly limitless ways in which it can be transmitted, isolating the actual point of exposure is challenging at best.

We appreciate this is uncertain times. In addition to the above information, we continue to aggregate resources to assist you. If there are new developments, we will update you. In the meantime, please do not hesitate to call/email us any time to discuss any additional questions you may have.