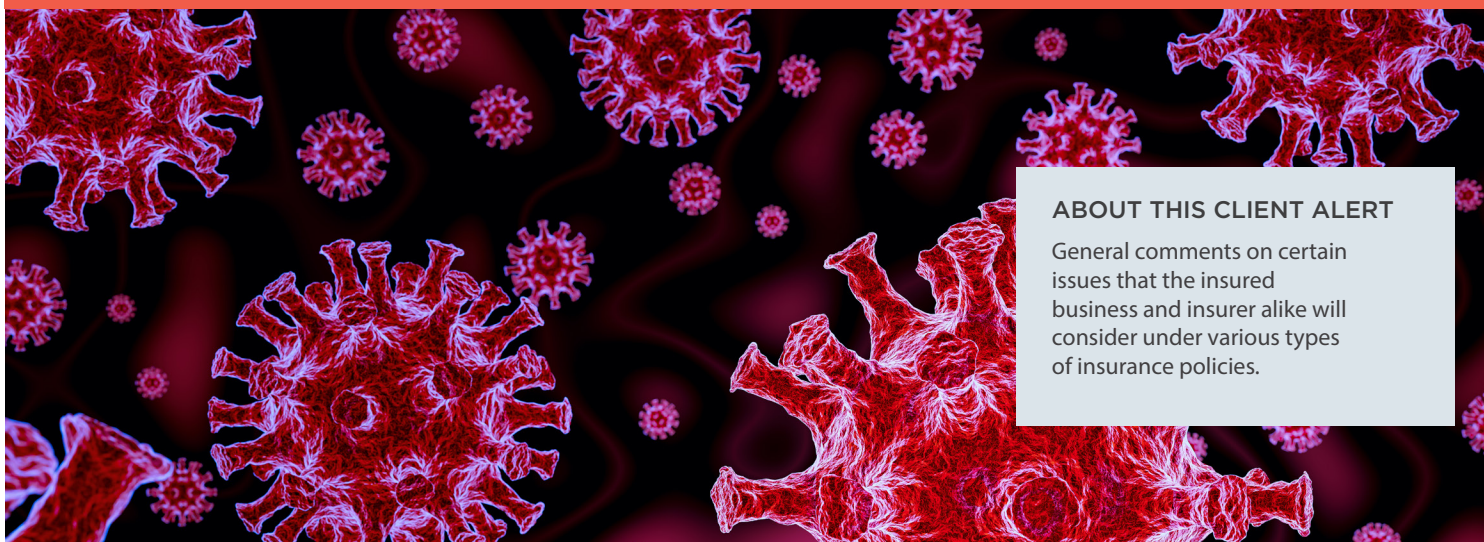


Insurance Coverage for COVID-19 Loss and Liabilities

by Patrick Frye

A FREEBORN & PETERS LLP CLIENT ALERT



ABOUT THIS CLIENT ALERT

General comments on certain issues that the insured business and insurer alike will consider under various types of insurance policies.

In the past several weeks, the threat of coronavirus disease 2019 (COVID-19) has significantly disrupted most aspects of American life. Businesses will surely seek recoveries from their insurers to reimburse them for loss resulting from these disruptions. The precise terms of each insurance policy must be considered, along with the law of the state governing that policy, in assessing the validity and viability of each business's claim for insurance coverage.

With that caution, we offer the following general comments on certain issues that the insured business and insurer alike will consider under various types of insurance policies:

1. Property and Business Interruption Insurance

Many businesses maintain property policies insuring specific covered property – real and/or personal. These

policies often include supplemental coverage for business interruption loss incurred by the insured business. But mere interruption of business generally is not enough to trigger coverage. Being a type of property insurance, business interruption coverage provides a business with its lost profit during the restoration of covered property that was physically lost or damaged.

Hence, the threshold issue is whether the business's covered property was physically lost or damaged. In some states, contamination or uninhabitable conditions can qualify as property loss or damage. Insured businesses and insurers will grapple over whether these conditions include the presence of infected people or of the virus on various surfaces. Because the financial loss also must be a result of physical damage to covered property, the parties will need to consider whether the business

experienced a downturn in profit because its property was in fact unusable, or instead because consumers avoided the business out of a generalized fear of COVID-19.

Variations in business interruption insurance will determine the scope of coverage, if any, for COVID-19 losses. On the one hand, the insurance policy might specifically exclude coverage of losses caused by contamination, pathogens or disease. On the other, in coverage often offered to hospitality or retail businesses, a policy might expressly provide coverage for business closure ordered by a public authority due to disease that is notifiable by law. This coverage could be particularly noteworthy to businesses – such as restaurants, bars, and theaters – that have partially or entirely closed by order of a state or municipal government. Disease caused by the virus SARS-CoV has been notifiable since 2003.

(<https://www.cdc.gov/nndss/conditions/severe-acute-respiratory-syndrome-associated-coronavirus-disease/>) It is unclear if the obligation to report SARS-CoV disease encompasses the current disease, which is caused by a “novel” virus designated as SARS-CoV-2.

2. Contingent Business Interruption and Supply Chain Insurance

Under contingent business interruption insurance or supply chain insurance, coverage might be triggered when a supplier fails to deliver materials to the insured business. This coverage is of particular interest to businesses with suppliers located in China, Italy, or even now the United States – or in any other country that has seen a significant disruption of agricultural, commercial, or industrial production.

Contingent business interruption and supply chain insurance usually protect a business against financial loss to it due to the property damage of unspecified “direct” suppliers (or customers) in a specified area or due to property damage affecting those products or suppliers that are specified in the policy. These policies can be subject to the same issues pertinent to property and business interruption insurance, namely, the necessity of physical property loss or damage leading to the insured loss.

3. Event Cancellation Insurance

An organizer can purchase event cancellation insurance to protect itself against the financial ramifications of canceling a specified event. These events can include festivals – e.g., SXSW, which has been canceled but has no such coverage. They can include athletic events – e.g., the Tokyo Olympics, which has not been canceled, but is covered by an event cancellation insurance policy.

The cancellation must be for reasons beyond the organizer’s control. Fear of the disease alone may not be sufficient to

trigger insurance coverage. Indeed, these policies can exclude coverage for cancellation due to certain specific past diseases and any variation thereof. It is unclear if COVID-19 will be deemed a variation of SARS, which is one disease commonly specified in these exclusions. These exclusions may expressly bar coverage for any cancellation due to the threat or fear of those diseases. In addition, these policies often exclude coverage for cancellation due to a civil authority having restricted movement on account of a communicable disease.

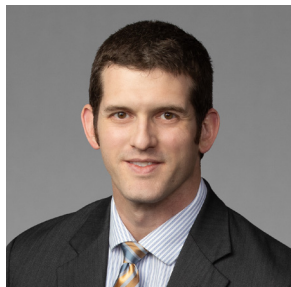
4. Liability Insurance

Liability insurance comes in many forms, such as commercial general liability insurance, directors and officers insurance, errors and omissions insurance, and professional liability insurance. Unlike the policies detailed above, liability insurance is so-called third-party insurance because it provides coverage for the business’s liabilities to third parties, as opposed to coverage for direct loss to the insured business. Liability insurance also covers the attorney fees and other costs the business must incur to defend itself against a lawsuit brought by that third party.

People may accuse businesses of having negligently spread COVID-19 or making other missteps in responding to the risks presented by the virus. Commercial general liability policies provide coverage for claims asserted against the business based on bodily injury to the claimant, but exclude coverage for liability arising out of the insured’s professional services. Meanwhile, directors and officers, errors and omissions, and professional liability policies often exclude claims based on bodily injury.

Some insured businesses, such as doctor’s offices, might seek coverage under multiple insurance policies, depending on the type of claim against it. Coverage might be available under all of the policies, under some of them, or under none.

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