

COVID-19: The First and Third Party Claims Are On The Way

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As states are beginning to see a decline in COVID-19 hospitalizations and deaths, insurance carriers are starting to see a strong uptick in business interruption claims allegedly due to COVID-19. With the “re-opening” of states still very much up in the air, and the potential “re-closing” of states if COVID-19 cases increase at a later date, the exposure to the insurance industry remains uncapped; but it will certainly be in the billions, with few to no options to stop these claims from being made.

Many have heard of the claims for first-party insurance coverage related to COVID-19 stemming from Oceana Grill in New Orleans and the famed French Laundry in Napa Valley California. To date, these and other claims have been denied, with insurers citing policy provisions that either require “physical damage” or exclude losses due to “viruses” or “civil authority.” One class action lawsuit for insurance coverage has been filed in Arizona and with many more likely to come, both insurers and policyholders are ramping up what is likely to be an extended and expensive fight regarding the meaning of the provisions in an atmosphere likely to be very favorable and sympathetic to policyholders. The following is a brief run-down of the types of insurance claims we have seen and expect to see in the future related to COVID-19.

FIRST PARTY CLAIMS

1. With few exceptions, most businesses have lost and continue to lose significant income as a result of closing or cutting back core business practices. Restaurants, movie theaters, event planners, and transportation companies have all been impacted as a result of “shut down” or “stay at home” orders. The typical first-party claim for COVID-19 business interruption coverage asserts that the virus’s contamination of the business qualifies as a direct physical loss because the virus, and its ability to infect others, remains on the surface of objects or materials for up to several weeks. As claims and cases begin working their way through the adjusting phase and eventually litigation, consider the following key points.
2. Always start with the policy coverage and exclusions. What policy language form is being analyzed? Is the form post-2006 when the ISO virus and bacteria exclusion was added? How does the policy define key terms such as “property damage”?
3. Continue to comply with the state’s claim handling duties and Unfair Claims Settlement Practices Act. Even though insurers are being flooded with claims, it is essential to be mindful of the implied duties of the insurance policy, including the duty to adequately investigate and timely respond to requests for information. While the denial of the claim might be legally correct under the law and insurance policy, policyholders will nonetheless allege that insurers engaged in bad faith handling of claims if decisions are rushed and not based on reasonable investigations.
4. Analyze the local government’s specific shut-down orders. There is no “standard” shutdown order, and there could even be conflicts between the shutdown orders of a county, state, and municipality. The order’s language is critical because governments are using language that could potentially trigger coverage under an insurance policy.

5. In Arizona, it is always important to understand an insured's "reasonable expectations" of coverage, and what representations were made to the insured prior to the purchase of the policy. In certain circumstances, the "reasonable expectations" of an insured can modify the interpretation of an insurance policy, almost always to the benefit of the insured.
6. How are other jurisdictions interpreting similar policy provisions? For example, at least one court in California pre-COVID-19 found that infusion of property with E-Coli bacteria amounted to direct physical loss to that property. Most likely, we will see judicial opinions on the interpretation of insurance policies from states like California and Louisiana, where courts remain open and litigants have already filed suit.
7. Review the current and proposed legislation regarding COVID-19. States such as New Jersey and Pennsylvania have already discussed legislation forcing insurers to cover business losses due to COVID-19. Although it may not be the law yet, those discussions could provide key insight into the jurisdiction's temperament on these claims. At this time, there has been no public discussion of any proposed legislation in Arizona to change the impact of COVID-19 claims.
8. Do not go at it alone. While working from home may feel routine and monotonous, the world is rapidly changing on a daily basis. It is important to keep up to speed on what the insurance industry is fighting or conceding on coverage issues. Fortunately, numerous webinars and articles address these issues.

THIRD PARTY CLAIMS

Although the "re-opening" of business will likely decrease the size and scope of first-party claims, it will also probably increase significantly the potential for third-party claims. The most likely scenario will be a claim of negligence for failing to protect a customer from being exposed to the virus. In Arizona, the businesses at risk for these claims are locations where the virus easily can be passed from person to person within the same facility, i.e. gyms and restaurants. Unlike the most heavily impacted areas, Arizona has not changed any statutes of limitations for third-party claims. Therefore, we are unlikely to see an increase in third-party claims from COVID-19 for at least several months.

Coverage issues will not be as prevalent in third-party general liability claims as first-party claims. Regardless, careful review of the policy language again is critical to determining whether the insurer has a duty to defend and/or indemnify. Since most policies require an "occurrence" to trigger coverage, whether the harm from the alleged failure to prevent exposure to COVID-19 is caused by an accident may depend on whether the insured foresaw the claimant's injury. Therefore, an exclusion for "expected or intended" injury could be relevant. Exclusions for "pollution" or "communicable disease" should also be considered.

Given the significant consequence of a wrongful denial of the duty to defend in Arizona, including a stipulated judgment in excess of the policy limits, insurers should be vigilant in consulting coverage counsel and bad faith counsel before denying claims on third-party claims. Even if an insurer is certain that no coverage is provided on a third-party claim, it is important to understand the consequences of a potential denial if the third-party claim is further pursued.

Jones, Skelton & Hochuli, P.L.C. has established a COVID-19 team to advise on all coverage and bad faith issues during this global pandemic. The entire team remains vigilant in following cases filed across the country and the arguments made by both the policyholders and the insurers regarding coverage. Should you have any questions or comments regarding COVID-19 coverage issues in Arizona, please do not hesitate to contact us.

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PATRICK GORMAN concentrates his practice in the areas of bad faith and extra-contractual liability, insurance coverage, professional liability and other general civil litigation matters. In his practice, he represents large insurers in bad faith and breach of contract claims, often with allegations of punitive damages, through all phases of litigation in state and federal court. Patrick also represents attorneys, insurance brokers, and accountants in professional malpractice claims.

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