

Client Alert

March 2020

COVID-19, Business Losses and Risk Mitigation — Is Your Business Interruption Insurance Sufficient?

The COVID-19 pandemic already has had a dramatic impact on business travel, conferences and large-scale events. Major events in the United States, such as the New York International Auto Show, South by Southwest Conference and Festivals, and the HIMSS Global Health Conference & Exhibition, and around the world have been postponed or canceled. The National Basketball Association has suspended its season and Major League Baseball has delayed its season start. Without doubt, “social distancing” and travel restrictions imposed in response to the virus will have economic consequences across all industries.

Companies preparing their own emergency response plans should also be reviewing the insurance assets they have purchased to determine whether economic losses can be mitigated through risk transfer to an insurer. Not all policy forms are the same. Every company executive or risk manager should carefully review the specific terms and conditions of the policies purchased by the company to determine whether insurance assets can provide some relief from the impact of COVID-19. Policyholders are strongly advised to retain experienced coverage counsel to review their insurance programs.

Unfortunately, most companies will find that their basic insurance policies likely do not respond to the current COVID-19 risk and/or any associated quarantines. The most obvious place to look for coverage is a company’s “business interruption” (“BI”) and/or “contingent business interruption” (“CBI”) coverage. BI insurance protects a company’s revenue stream from being disrupted by a catastrophe that directly impacts that company, such as a hurricane. CBI insurance provides similar protection with respect to a catastrophe that impacts a third party that is critical to a policyholder’s business, such as a parts manufacturer or a shipping company. While these types of coverages contain robust protections in the event of a natural disaster, most policies are not designed to protect against viral outbreaks.

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Common policy provisions likely will preclude coverage. First, both BI and CBI policies typically require physical injury to tangible property as a

predicate for any claim. This means that there must be some damage to the policyholder or a third party before the other coverage provisions in the policy will respond. Second, many policies carry specific exclusions for virus and/or bacteria. Third, the widespread impact of the response to COVID-19 likely will result in insurers arguing that many policyholders have simply suffered an excluded “loss of market” rather than damages proximately caused by direct damage. Fourth, some BI and CBI provisions require “total” cessation of business before coverage incepts, meaning that a company’s well-intended efforts to continue business at a reduced rate might also serve to limit available insurance coverage.

However, other specialized insurance assets may be more responsive to the developing crisis. For instance, many insurers underwrite “event cancellation” coverage with terms that are less restrictive than traditional BI and CBI coverages. Any risk manager for a company planning a large-scale event that is an important part of the company’s strategic plan should carefully review the options available to protect from losses should the event be canceled because of government restrictions on travel or large gatherings. Careful work with a knowledgeable insurance broker will make the company better prepared for the uncertain future with respect to COVID-19 response. Further, specific scenarios may trigger insurance coverage even if a company’s insurance program does not respond to the outbreak as a general matter. For example, costs associated with decontamination of a building require a different analysis than losses suffered because of an interruption in business.

Consultation with experienced insurance professionals and counsel can maximize a company’s recovery from its insurance assets. Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you would like to discuss further or have questions.

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