TRAUB LIEBERMAN

COVID-19 BLOG

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Commercial General Liability Insurance

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While the media focuses on business interruption claims, in the coming months many business owners will be faced with claims by and on behalf of those who contracted, or were potentially exposed to, the COVID-19 virus in the workplace and other venues. In fact, claims have already made their way into courthouses across the nation. For example, several federal lawsuits have been filed against Carnival Corp. and its subsidiary, Princess Cruise Lines, arising out of the cruise lines' alleged decision to set sail or continue on with its voyage despite knowing passengers had symptoms of coronavirus. In those lawsuits, the passengers contend that the cruise line did not have adequate screening protocols and did not adequately warn cruisegoers about the potential exposure prior to boarding. Similarly, the family of a Walmart employee who died from COVID-19 complications recently filed a wrongful death action against the retail giant, alleging, among other things, that the store did not do enough to protect its employees from the virus.

The foregoing lawsuits are likely the tip of the iceberg. Independent contractors and/or employees who continued to work during these times may file suit against business owners or general contractors based upon lack of due care, lack of protective equipment, failure to train, negligent training and/or negligent instructions. Customers may assert claims against business owners alleging negligent exposure to the virus while on the business premises. Patients may file suit against hospitals and healthcare workers as a result of allegedly negligent medical care received while being treated for the coronavirus. The list of potential claims goes on. Liability claims will be diverse and give rise to complex and novel coverage issues that insurers will need to address based upon its unique facts, circumstances and allegations. This will require analysis under the law of the applicable jurisdiction(s).

With respect to commercial general liability insurance, we anticipate that coverage issues will include the following:

- Trigger of coverage and determining which occurrence-based policy or policies are implicated.
- Whether a claim alleges an "occurrence"
- Whether coverage may be barred by exclusions for communicable diseases, viruses and/or mold, fungus and bacteria
- Whether coverage may be barred by a policy's exclusion for pollution

TRIGGER OF COVERAGE AND DETERMINING WHICH OCCURRENCE-BASED POLICY OR POLICIES ARE IMPLICATED

Whether a policy affords coverage in the first instance depends upon the "trigger" of coverage theory applicable to the relevant jurisdiction, these include: (1) the continuous injury theory; (2) manifestation; (3) the exposure theory; and (4) injury in fact. Determining which trigger theory applies in a given case may require a choice of law analysis.

Courts that have applied a continuous injury trigger of coverage have found that coverage is triggered during the continuous period from the first exposure to manifestation of the injury in the occurrence. *See Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1125 (Kan. 2003) (applying continuous injury trigger for latent disease claims); *Keene Corp. v. Ins. Co. of North America*, 667 F. 2d 1034 (D.C. Cir. 1981) (noting that inhalation exposure, exposure in residence and manifestation all trigger coverage under policies). Under the manifestation theory, coverage is not triggered until the injury manifests. The exposure theory places the time of the occurrence at the time the injury-producing agent first contacts the claimant's body. *See Maryland Cas. Co. v. Lloyd E. Mitchell*, 595 A.2d 469 (Md. 1991) (adopting "exposure" trigger for asbestos personal injury cases); *Chantel Associates v. Mt. Vernon Fire Ins. Co.*, 656 A.2d 779 (Md. 1995) (exposure to lead paint during the insurer's policy is a "trigger" of coverage); *Shook and Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.*, 909 A.2d 125 (Del. 2006) (applying Alabama law and adopting exposure theory for asbestos bodily injury claims). Lastly, other courts have found that policy language requiring an occurrence during the policy period mandates application of an "injury in fact" trigger of coverage, requiring that the injury claimed occur during the relevant policy period. *Aetna Cas. & Sur. Co. v. Abbott Laboratories, Inc.*, 636 F. Supp. 546 (D. Conn. 1986); *Am. Home Products Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984) (involving products liability claims arising from manufacture and sale of several pharmaceuticals).

In the specific context of COVID-19 claims, even if a clear trigger of coverage theory applies, there may be issues regarding when and where an individual was exposed. Issues may also arise as to the number of occurrences, particularly when dealing with multiple exposures, multiple claimants and/or policies that cover multiple locations. These issues are not amenable to a "one-size-fits-all" analysis, and will need to be determined on a case-by-case basis under the law of the applicable jurisdiction.

WHETHER THE CLAIM ALLEGES AN "OCCURRENCE"

The insuring agreement under most commercial general liability policies requires the existence of "bodily injury" caused by an "occurrence", which is usually defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." This raises the question of whether injury on account of an insured's failure to prevent exposure to COVID-19 is caused by an accident.

In this regard, courts in some jurisdictions will focus on the foreseeability of the injury and alleged conduct (i.e. intentional or negligent), while courts in other jurisdictions will focus on whether the insured intended the resulting damage—*i.e.*, if the resulting damage was unintended, the damage is accidental, even when the original acts were intentional.

Arguments regarding foreseeability are expected and may vary based upon each state's response and the timing of same.

WHETHER THE FUNGI OR BACTERIA EXCLUSION, COMMUNICABLE DISEASE EXCLUSION OR SIMILAR POLICY EXCLUSIONS APPLY TO BAR COVERAGE

By now, most commercial general liability policies contain a fungi or bacteria exclusion. These exclusions typically exclude coverage for "'bodily injury' which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any 'fungi', bacteria or mold on or within a building or structure…" Although courts generally agree that this exclusion is not ambiguous, COVID-19 is a viral infection and not bacterial. Thus, unless a fungi or bacteria exclusion specifically lists viruses or broadly refers to other microorganisms or microbial agents, courts may be hard pressed to find that this exclusion applies to claims arising out of exposure to COVID-19.

More specific communicable disease exclusions are sometimes included in liability policies and may potentially apply. In *Fe-Ma Enterprises v. James River Insurance Company*, 2009 WL 10693571 (S.D. Tex. 2009), the Court examined a communicable disease exclusion that precluded coverage for any claim arising out of or resulting from any communicable disease or the insured's failure "to perform services which were either intended to or assumed to prevent communicable diseases or their transmission to others." The underlying plaintiff alleged that the insured failed to properly maintain its premises to prevent an infestation of typhus-infected rodents that eventually infected the surrounding neighbors. Although the insured was not the initial cause of the infected rodents, the Court found that the language was broad enough to encompass the insured's conduct in failing to prevent transmission to others.

WHETHER COVERAGE MAY BE BARRED BY A POLICY'S POLLUTION EXCLUSION?

Absent a policy exclusion that specifically applies to communicable diseases, viruses or exposure to other similar pathogenic microorganisms, issues will arise as to whether the pollution exclusion may apply to COVID-19 claims. These exclusions must be carefully reviewed to determine whether COVID-19 claims are analogous to excluded pollution claims and application of any given pollution exclusion will undoubtedly vary by jurisdiction. Nevertheless, there are two key inquires that have guided courts' analyses of the issues and may shed further light on whether COVID-19 claims are within the ambit of a typical pollution exclusion: (1) whether the COVID-19 virus fall within the meaning of the term "pollutant" and (2) whether the pollution exclusion apply if the contamination is caused by something other than traditional/natural environmental factors.

The scope of pollution exclusion clauses has been litigated extensively across jurisdictions. In general, there are two approaches that courts nationwide have taken when applying (or declining to apply) pollution exclusions. Generally speaking, courts in some jurisdictions limit the pollution exclusion as applying to a narrow category of "pollutants" and only traditional industrial and environmental pollution, while others do not. Issues regarding whether the COVID-19 virus fits within the meaning of the term "pollutant" and whether the pollution exclusion applies under the circumstances will depend on the specific policy language and vary by jurisdiction.

CONCLUSION

Although third-party liability insurers may not yet be in the spotlight, they should prepare and be aware of the myriad of issues raised by this global pandemic. Toward this end, the coverage attorneys at Traub Lieberman stand ready to help.