COVID-19: NAVIGATING THE PATH TO RECOVERY - A CHECKLIST OF KEY INSURANCE CONSIDERATIONS

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Insurance Recovery and Counseling Alert

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Policyholders, the insurance industry, and the media have focused substantial attention on potential business interruption coverage for lost profits and revenues arising from COVID-19. Such coverage, often found in standard property policies, might be very valuable, and it is not too late to consider pursuing a business interruption claim. However, in the coming weeks and months, businesses will encounter a wide variety of losses and potential liabilities related to COVID-19, reaching far beyond the ongoing interruptions to their operations. Such risks range from lawsuits alleging liability for an individual's COVID-19 illness, to shareholder litigation, to cybercrimes seeking to exploit work-from-home arrangements. Therefore, time spent assessing the next “round” of COVID-19 risks and taking appropriate steps to maximize potential coverage might prove to be extremely well spent.

OTHER RELEVANT INSURANCE PROGRAMS

Businesses that face COVID-19-related lawsuits might find valuable coverage for defense costs, settlements, and judgments under a host of liability policies, and some less-obvious COVID-19 risks (cyber losses, crime) might be covered by various specialty policies. The following is a nonexhaustive list of policies—beyond standard property insurance—that might warrant consideration.

Directors and Officers Liability (D&O)

A drop in stock price in the midst of COVID-19 might prompt a shareholder class action, alleging violations such as misrepresentations or omissions in a company's public statements related to its exposure to pandemic-related risks. Shareholders might pursue derivative lawsuits against D&O's, alleging, for example, that insufficient management or oversight left the company vulnerable to pandemic losses. Governmental bodies will surely investigate and, in some instances, pursue enforcement actions related to many aspects of the COVID-19 crisis, from the spread of the disease itself to business conduct related to, for example, applying for and making appropriate use of government stimulus funds. D&O policies might provide coverage for such matters.

An insurer might argue, aggressively, that “bodily injury” exclusions that are common in D&O policies preclude coverage for matters related to COVID-19. However, such exclusions are not usually understood to apply to stockholder and derivative claims, especially when the exclusion is drafted to preclude liability “for” bodily injury. Various specific “management”-related coverages might be issued in conjunction with or separately from D&O insurance. For example, employment practices liability insurance might be relevant as companies consider altering their compensation policies and make other employment-related decisions. Fiduciary insurance might

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provide coverage in the event that a company faces claims from participants in employee investment programs related to market volatility in the COVID-19 crisis.

Commercial General Liability (CGL)

These policies typically provide coverage—including for defense costs—for nonemployee lawsuits alleging liability for bodily injury, including sickness or disease. If customers or other third parties allege that a business caused them to contract COVID-19, CGL insurance will be an obvious source of potential coverage. Although insurers might be expected to explore all possibilities for avoiding coverage depending on particular facts and policy wording—including arguments that the insured "expected or intended" the injury or that the spread of COVID-19 triggers a pollution exclusion—CGL policies do not typically contain "virus" exclusions.

Worker's Compensation / Employers Liability

These policies are the front line of liability insurance for alleged work-related diseases suffered by employees. Questions might arise regarding whether a particular COVID-19 case was contracted in the course of employment such that these coverages are triggered. Official guidance regarding COVID-19 is a developing issue, as some state workers' compensation commissions have considered or adopted rules specific to COVID-19.

Environmental Liability

Many companies carry specialty environmental/pollution liability insurance that might be relevant to COVID-19 related claims, including bodily injury claims. Whether the novel coronavirus constitutes a covered "pollutant" might be a question of the interpretation of specific policy wording. Moreover, other terms of coverage might warrant consideration, including any requirement of a nexus to an insured location, and possibly "communicable disease" exclusions.

Errors and Omissions (E&O)

Medical enterprises—including hospitals, nursing homes, and doctor's offices—might face malpractice claims alleging faulty treatment of COVID-19 patients or responsibility for the virus's spread. E&O or malpractice insurance might provide coverage for such claims.

Cyber Insurance

The COVID-19 pandemic might present or heighten a variety of cyber-related risks. Widespread work-from-home conditions can present challenges to defending against cyberattacks on a company's systems, possibly leading to data breaches and lawsuits. The Federal Trade Commission has warned against "phishing" scams targeting businesses with phony e-mails purporting to contain information about COVID-19 financial relief programs. An unintentional network interruption might have a greater impact at a time when many employees are working remotely. Cyber insurance policies might provide valuable coverage to mitigate against the possibility of a costly cyber incident during a time when many businesses can afford it the least.

Crime Insurance

This insurance might cover losses resulting from certain cybercrimes, such as social engineering schemes seeking to trick work-from-home employees into transferring company funds to the criminal. Dormant or lightly staffed facilities might be susceptible to "traditional" crimes during the COVID-19 pandemic, such as theft or robbery, which might be covered by crime policies.

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CHECKLIST: NEXT STEPS FOR COVID-19 INSURANCE

While individual businesses face unique challenges and risks related to COVID-19, companies may wish to consider following these steps as they seek to maximize potential coverage for a variety of potential liabilities and losses.

Review Notice Requirements—and Opportunities

Insurers are likely to assert that delays in providing notice of a COVID-19-related loss or claim result in a waiver of coverage, so the wording of a policy's notice provisions can be significant. For example, some occurrence-based liability policies require that the policyholder provide notice of an “occurrence reasonably likely to involve this policy.” Determining whether and when to provide notice, pursuant to such wording, with respect to the developing circumstances related to COVID-19 may warrant careful consideration.

Certain liability policies—including many D&O policies and some CGL policies—cover claims that are “first made” during the policy period and require notice of a claim during the policy period or shortly thereafter. Many courts strictly construe the notice requirements of such “claims made” policies, so prompt attention to notice might be necessary upon receipt of a lawsuit or other claim.

At the same time, some “claims made” liability policies allow the insured to submit a “notice of circumstances” during the policy period, even before a claim has been made against the policyholder. If a business is aware of circumstances that are likely to give rise to a COVID-19-related claim, such policies might provide an opportunity to “lock in” coverage based on current policy terms, which might be favorable, particularly given the possibility that insurers could seek to impose COVID-19 exclusions in upcoming policy renewals.

Note Key Exclusions

Most of the policy types listed above have not, traditionally, contained broad “virus” exclusions. But the only way to be certain is to review each policy. Depending on the type of policy and the nature of a company's risks, various other exclusions might be relevant, and familiarity with the wording of key policy provisions might be valuable as this situation continues to develop.

Prepare for Renewal Negotiations

These unprecedented times might bring new challenges in the placement and renewal of all lines of insurance. Insurance underwriters might seek to introduce COVID-19 or “virus” exclusions into various policies. It might be possible to negotiate away from such exclusions, or at least to obtain relatively favorable wording in order to preserve coverage for many losses.

Obtaining appropriate limits of insurance, at acceptable premiums, also might become more difficult. Policyholders might consider strategies to negotiate for the most favorable coverage available or to seek coverage through an alternative source. Policyholders also should be aware that questions raised by insurers in the renewal process regarding exposures to COVID-19 risks can, if answered inaccurately in the insurer's view, give rise to coverage issues based on alleged “misrepresentation” or similar principles.

Cooperate with Insurers

Insurers typically contend that policyholders have an obligation to cooperate with insurers in the investigation, settlement, and defense of claims, and that a breach of that obligation can result in a loss of coverage. Although a

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COVID-19-related claim might implicate certain sensitive or confidential information, a policyholder will wish to consider whether its cooperation duties require providing access to such information.

Develop an Integrated Strategy

COVID-19 presents challenges on multiple levels going beyond insurance—legal, regulatory, operational, financial, technological—and the positions and interests of the company may at times vary with respect to particular challenges. A prudent policyholder may wish to consider the insurance-related implications with respect to its positions, particularly its public positions, in formulating its overall strategic approach to COVID-19 in coordination with key stakeholders and decision makers.

CONCLUSION

As the COVID-19 situation continues to develop, businesses should remain aware of potential insurance issues and take any actions that might be warranted to maximize coverage. K&L Gates maintains one of the world's largest insurance recovery and counseling groups, and its attorneys have counseled policyholders from many industries in connection with the COVID-19 crisis and other high-stakes insurance challenges.

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