COVID-19: INSURANCE POLICY CONSIDERATIONS FOR HIGHER EDUCATION INSTITUTIONS

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U.S. Insurance Recovery & Counseling and Higher Education Institutions Alert

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Colleges and universities across the country have been hit hard by the coronavirus ("COVID-19") pandemic. In an effort to stop the spread of the virus, many higher education institutions have moved classes online, closed campuses, halted study abroad programs, and canceled events. [1] While health and safety issues are certainly paramount, U.S. schools also face the prospect of heavy economic losses. [2] Among other losses, the coronavirus will likely lead to decreased revenues, diminished donor activity, and significant added expenses. Additionally, schools should consider the possibility that they will be subject to COVID-19 related liability claims in the near future. Earlier today, U.S. lawmakers agreed in principle to an unprecedented $2 trillion stimulus package, although it is not clear yet how much, if any, of these funds will be allocated to schools to offset their financial losses. [3]

Higher education policyholders should carefully review their existing insurance policies to determine whether such policies can be used to mitigate their financial losses and, in the event of potential coverage, place their insurers on notice so as to preserve these important assets. Some of the potentially applicable coverages are discussed below.

BUSINESS INTERRUPTION INSURANCE

Business interruption insurance is commonly included as part of commercial property insurance policies. The coverage is intended to protect policyholders, including colleges and universities, against income losses caused by business disruptions. College revenues collected from tuition, room and board, sporting events, and the like, will likely suffer substantial drops due to the coronavirus. Business interruption insurance may be available for some of this lost income.

To trigger business interruption coverage, insurers will argue that there must be proof of a "direct physical loss" to the insured property. A COVID-19 contamination of a college campus or dormitory, perhaps through an infected employee or student, may qualify as such a direct physical loss. If a school is able to establish a direct physical loss, the school should also be mindful of any additional policy conditions and exclusions. For example, many business interruption policies exclude coverage for losses caused by "pollution," and define "pollution" in a wide variety of ways, sometimes expressly including "viruses" and sometimes not. Each policy needs to be reviewed carefully in the context of a particular loss or threat of loss.

Commercial property insurance policies also may include supplemental coverages or extensions that colleges should carefully consider. For example, a school may have purchased contingent business interruption coverage, which would generally cover business interruptions caused by direct physical losses to the school's suppliers or vendors. Such coverage could apply, for instance, in a situation where a university is unable to continue providing

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on-campus meal plans because its food services provider, or others in the food supply chain, have shut down due to a COVID-19 contamination condition.

As another example of a potentially applicable business interruption coverage extension, some colleges may have coverage that is triggered when their campuses cannot be accessed due to an order from a "civil authority." This type of coverage may not require the access restriction to result from a physical loss. State and local governments, as well as the federal government, have recently imposed increasingly stringent restrictions on travel and public gatherings. Higher education institutions should review their policies to determine if such restrictions trigger coverage. Additional information regarding civil authority coverage can be found here.

PREMISES POLLUTION LIABILITY INSURANCE

Premises pollution liability ("PPL") insurance policies provide coverage for pollution related losses that are typically excluded by standard property and liability policies. Pollution related losses covered by PPL policies can include losses for business interruption, property damage, or an insured's liability for bodily harm. Whether a PPL policy will cover losses related to a virus, such as COVID-19, will largely depend on how the policy defines "pollutant." Some policy definitions of "pollutant" may be broad enough to encompass pathogens, diseases, or viruses, while other policies may specifically exclude such items from coverage.

Universities with large laboratories, hospitals, and research facilities that present pollution risks are likely to have such coverage. Others may as well. Any PPL policies purchased by a school should be carefully reviewed for coverage for COVID-19 related losses.

EVENT CANCELLATION INSURANCE

Many high-profile events around the world, including large music festivals, sporting events, and conferences, have been canceled due to COVID-19. In the higher education area, the NCAA canceled the men's and women's Division I basketball tournaments. If they have not already done so, schools will likely be forced to cancel a wide range of events in the near future, including public lectures, fundraising activities, and graduations.

Event cancelation coverage may be an avenue for colleges to recoup some of their losses for larger events. These policies normally provide coverage for the cancellation or postponement of a "covered event." Whether a cancellation caused by COVID-19 is a "covered event" will depend on the specific language in the policy. Coverage is more likely to be triggered if an event venue suffers a COVID-19 contamination or cannot be accessed due to a governmental order, and less likely to be triggered when an event has been canceled due to the threat or fear of infection. Like business interruption coverage, event cancellation coverage frequently contains a number of exclusions, which may or may not include exclusions for viruses or epidemics.

In addition to reviewing any applicable event cancelation policies, schools should also be cognizant of any force majeure provisions in their contracts with suppliers, vendors, or other business partners. Broadly speaking, a force majeure clause is a provision in a contract that excuses a party from performance if an extraordinary event prevents one or both parties from performing their obligations. Both the language of a force majeure clause and the surrounding circumstances are important, and the current pandemic could trigger force majeure clauses in many college contracts. Additional information regarding force majeure clauses can be found here and here.

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LIABILITY INSURANCE

In the upcoming weeks and months, higher education institutions may face lawsuits from students and other individuals claiming, among other things, that they became sick while on the schools' campuses or that the schools failed to take adequate measures to prevent the coronavirus from spreading. Because many colleges have canceled in-person classes and closed their campuses, plaintiffs may argue that schools that have failed to implement preventative measures have acted negligently. Even for schools that have proactively taken preventative measures, plaintiffs may argue that such measures were insufficient or implemented too late. Schools could also potentially face claims asserting that (1) they put students at risk by requiring them to travel home, (2) they inappropriately reduced student health services for students who cannot leave campus, and (3) online courses are not an adequate replacement for in-person classes.

Commercial general liability ("CGL") insurance, which provides coverage for third-party claims of bodily injury or property damage, may provide some protection for these types of claims. For most CGL policies, coverage is normally triggered by an "occurrence," which is commonly defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Whether exposure to COVID-19 qualifies as an "occurrence" is subject to debate and will likely be a source of dispute. If the threshold requirement of an "occurrence" can be met, however, it is important to consider any exclusions in CGL policies, which may include exclusions for "pollution" or "contamination." How a policy defines these terms will be important to assessing the availability of coverage for COVID-19 related claims.

In addition to CGL insurance, higher education institutions should review their educators legal liability ("ELL") policies and any other liability policies they purchased that protect trustees, governing board directors, and officers. ELL policies protect a college's trustees and officers from personal liability resulting from serving in their official capacities and typically provide "Educational Organization" coverage for the school as well. These policies provide protection for claims arising out of alleged wrongful acts or breaches of duty in the provision of educational services. Depending on the nature of a COVID-19 related claim, ELL and other professional liability policies could potentially be applicable.

CONCLUSION

There are a variety of different insurance policies that colleges and universities may be able to access for COVID-19 related losses. Schools should identify any potentially applicable policies, carefully review the terms of such policies, and then provide their insurers with timely notification of any potentially covered losses. For more information regarding coronavirus losses and insurance coverage, please read this previously published alert.

NOTES

[1] A Georgetown University education technology specialist has compiled a list of COVID-19 related higher education closures. *See* Anya Kamenetz, *A Growing Number of U.S. Colleges Cancel Classes Amid Coronavirus Fears*, NPR (Mar. 9, 2020), https://www.npr.org/2020/03/09/813750481/more-than-20-colleges-cancel-in-person-classes-in-response-to-coronavirus (providing link to list of school closures at https://docs.google.com/spreadsheets/d/19wJZekxpewDQmApULkvZRBpBwcnd5gZlZF2SEU2WQD8/edit#gid=0)
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[2] *See* Rick Seltzer, *Coronavirus Upends Colleges' Financial State*, Inside Higher Ed (Mar. 20, 2020), https://www.insidehighered.com/news/2020/03/20/coronavirus-outbreak-piles-short-term-costs-and-long-term-uncertainty-college-and. Due to the heavy financial toll they are facing, colleges recently asked Congress for a $50 billion stimulus package. *See* Deirdre Fernandes, *Colleges Plead for Bailout Amid Coronavirus Losses*, BOSTON GLOBE (Mar. 19, 2020), https://www.bostonglobe.com/2020/03/20/metro/colleges-plead-bailout-amid-coronavirus-losses/.

[3] *See* Emily Cochrane and Nicholas Fandos, *Congress and White House Strike Deal for $2 Trillion Stimulus Package*, THE NEW YORK TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html.

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