

Will general liability insurance respond to COVID-19 claims?

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Several factors, including policy definitions, exclusions and even the court of jurisdiction could influence whether coronavirus claims will be covered.

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About our COVID-19 coverage

In our ongoing coverage of the COVID-19 outbreak, experts from across Willis Towers Watson share insight into what you need to know to manage your business and employees and reduce your risk.

Although there may be numerous different ways claimants may try to make claims related to COVID-19 (coronavirus), we expect that most claimants will find it difficult to establish that a given entity is specifically liable for infecting them with the virus. There is a vast array of community exposures through which the virus may have been contracted. However, the scope of your potential exposure may in part depend on the creativity and entrepreneurial activity of the plaintiffs' bar.

About general liability insurance

General liability (GL) insurance is referred to as "third party" coverage because it is a contract between you and your insurer to protect against certain claims brought by a person or entity outside that relationship. Your GL policy addresses the risk that others (but not your employees) bring suit or file certain claims against you seeking damages for which they allege you are legally liable.

The GL policy is generally intended to pay covered damages up to a stated limit of liability. If suit is filed, and what is alleged is within the scope of coverage (not excluded), many GL policies may also pay reasonable and necessary defense costs in addition to the stated policy limits. GL coverage typically pays for defense costs until the policy limit is exhausted by payment of damages. The existence and details of an insurer's "duty to defend" can vary greatly from policy to policy. Deductible or self-insured retention provisions will affect how and when the GL policy "attaches" to a loss.

GL insurance and COVID-19 claims

Threshold question: Are allegations of causing people to contract COVID-19 an "occurrence" or accident?

The relevant terms of the GL insuring agreement promise to pay for harm caused by an occurrence. An occurrence is often defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Whether 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.

We normally would not expect claim facts to demonstrate that a policyholder chose to intentionally cause foreseeable harm. Rather, under normal circumstances, the key issue would likely be whether there was an element of fortuity supporting the position that there was, in fact, an accident. These, of course, are not normal times.

Some insurers will likely argue, given the many warnings about the need to take action to prevent exposure to COVID-19, that there is no occurrence. Of course, the specific facts involved in each particular claim will play a large role in determining whether a particular COVID-19 infection was caused by an occurrence.

Do any exclusions put the loss outside the scope of coverage?

- **Communicable disease exclusions.** A GL exclusion for communicable diseases exists in the marketplace. The wording of these exclusions varies, with some focusing on bacterial disease and others viral infections. Depending on the wording, the exclusion may bar coverage for coronavirus claims.
- **Organic pathogen/fungi/mold/mildew/yeast/microbe exclusions.** While these exclusions are often referred to as “mold” exclusions, they sometimes can be applied more broadly. These types of exclusions often exclude fungus, mold, mildew and yeast.

In some instances, they also include bacteria, microbes and viruses. Scientists debate whether a virus constitutes a living microbe. One of the indications of life is the ability to procreate. A virus lacks this ability. It must latch on to a living cell and use that cell’s processes to multiply. This distinction could prove important for coverage, depending on the wording of a given exclusion.

Even if COVID-19 were considered a microbe, some policies include an exception to the exclusion that restores coverage for microbes that were transmitted directly from person to person. This exception could bring person-to-person COVID-19 exposures back into the scope of coverage. Policyholders could still face challenges if person-to-surface-to-person transmittals are alleged in a complaint.

- **Pollution exclusions.** We expect policyholders to take the position that COVID-19 is not a pollutant because it occurs in nature and not as a consequence of traditional environmental pollution. There are also issues around whether viruses are discharged or released, terms of art incorporated within the pollution exclusion. Some states limit the definition of release to the definition found in environmental laws. Other jurisdictions give the term a very broad meaning.
- **“Expected or intended” exclusions.** For a claimant to establish liability, it might require an unusual set of facts that allege egregious behavior on the part of the policyholder. In such case, an insurer might reference the GL policy exclusion for injury “expected or intended” from the standpoint of the insured. Insurers, however, typically have a high factual burden to meet in order to successfully apply this exclusion.

How many occurrences are presented by claims?

If COVID-19 claims represent covered occurrences, how many different occurrences are presented by the claims? The number of occurrences involved in a matter can directly influence how deductibles and self-insured retentions apply and when policy limits have been exhausted. There generally are two tests that can be applied to determine the number of occurrences: the “cause test” or the “effects test.”

Most jurisdictions apply the cause test, which focuses on the underlying circumstances that resulted in harm, rather than the number of persons or properties ultimately harmed. The minority effects test focuses on the resulting harm, rather than proximate causation. Some GL policies will have “batch” wording that seeks to group certain losses into a single occurrence. It is possible that courts will apply a different test in regard to claims related to this virus.

Which will influence these issues?

Choice of law

The benefits provided under a given policy can vary greatly depending on which jurisdiction’s law is applied to its interpretation. Sometimes the policyholder and its insurer will “race to the courthouse” to try to obtain the most favorable forum.

If a policy contains a choice-of-law provision, that usually is the law that will apply. However, in the absence of such a clause, courts may apply other factors to determine the choice of law, including but not limited to the law of the place of contracting (e.g., where the policy was issued), the place the insurer’s underwriting department is located, the principal location of the insured risk during the term of the policy, or other states where there may be a more significant relationship regarding the particular issue.

What’s next?

With a national emergency declared over COVID-19, we have a serious public health threat to address. It is a threat that is rapidly changing, and it is not quite like anything the insurance industry has seen before. Decisions about how coverage will respond to claims relating to COVID-19 will be made by each insurer based on the facts of each claim, the policy at issue and applicable law. To be well prepared for coverage discussions with insurers, policyholders need to rely on experienced resources to help assess the policy terms and conditions, advocate on their behalf and work to frame the facts and circumstances surrounding any such claims in the most favorable light for insurance recovery.

Disclaimer

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage will vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication.

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