Gaudette Insurance Agency

COVID-19 Response

Guidance for Commercial Insurance Clients as of March 19, 2020

1) Follow all orders from state health dept and the state agency with oversight for your business
2) Consider further guidance provided by CDC (max group size 10) www.cdc.gov
3) Take all prudent steps to minimize risk to staff
4) Document / Document / Document
   a) Date-stamped photographs or video of anything that must be discarded
   b) Maintain careful and detailed financial records
   c) Consider keeping a log of all actions taken alongside changes in #1 above
5) If you anticipate severe business consequences from the crisis, take immediate steps to reduce expenses and conserve cash
6) Coverage analysis
   a) GIA cannot address hypotheticals
   b) The primary insurance contracts do not provide clear & obvious coverage - if anything coverage is clearly denied (see related articles on each major line)
   c) This situation is highly fluid
   d) The insurance industry is unlikely to voluntarily pay uncovered claims absent government order or court decision
      i) Governmental authorities could order coverage expansion or invalidate exclusions retroactively
      ii) Court action will take substantial period of time to resolve. This may not help most businesses. For example, there is an emerging argument that the virus is actually a contaminant or pollutant. If successful, this could leave most insureds in same place due to their pollution exclusions - however it could help those with stand-alone pollution policies.
   e) Base your plans on having no first party insurance recovery
   f) GIA does not make the coverage decision, adjust or appraise losses - it is possible insurance companies will pay claims.
   g) The decision to make a claim is not urgent, as long as #4 is observed
   h) The decision to make a claim is the client's
7) One reason the Federal government is throwing together multi trillion-dollar crisis response legislation is due to the recognition that virtually all small and mid-size businesses are without insurance
   a) We will compile resources such as the SBA loan program and related disaster assistance as they become available
8) If you suspend operations, take steps to keep your coverage in force. Many carriers are offering forbearance, and we can assist with adjusting coverages that are based on sales and payroll.
9) We will assist our clients to satisfy any requirements to obtain government disaster assistance.

Gaudette Insurance Agency

COVID-19 Response

Additional Resources – Primary Coverage Analysis

The following resources are provided by our national trade association, Independent Insurance Agents & Brokers of America.

Coronavirus and Business Income Losses

Author: Chris Boggs

COVID-19, better known as the Coronavirus, originated in Wuhan, China. Latest theories point to bats and snakes as the origination points of the virus. Bats with a strain of the virus were hunted and eaten by snakes. The snakes were hunted, gathered and sold for food in markets within the Wuhan province. The disease-laden snakes were eaten by humans transmitting the virus to humans; at least this is the theory. (It's rather ironic that a mammal would transmit the virus to a reptile that transmitted the virus back to mammals.)

According to the Centers for Disease Control (CDC), the Coronavirus is thought to be transmitted person-to-person through “respiratory droplets produced when an infected person coughs or sneezes … these droplets can land in the mouths or noses of people … or possibly be inhaled into the lungs."

Major manufacturing operations in China have reportedly slowed or even ceased operations, travel into and out of China is at a bare minimum, and supply chains are severely disrupted in many industries. In reality, the ultimate global economic impact of this virus will remain unknown for many months after the danger and fear have passed. (Another irony of this virus is that some operations have enjoyed increased business. My neighbor teaches students in China online; since the outbreak of this virus, her student count has increased dramatically as kids are staying home to attend classes.)

The Virtual University continues to receive calls and emails nearly every day regarding the insurance implications of this virus, and the most common question relates to business income, specifically: “Is there business income coverage if a governmental authority (civil authority) requires businesses to close?"

No, there is no business income coverage. This is the short answer. Before business income responds there must be damage to property leading to the cessation of a business. This requirement applies to business income dependent property losses (supply chain) and civil authority losses covered by business income policies. Additionally, there is a specific property exclusion applicable to viruses that may (generally will) apply. This is true of “standard" business income forms; there may be some proprietary forms that respond, but these are rare.

Insurance Services Office (ISO) continually monitors emerging issues and trends that may affect the insurance industry, and the unknown ultimate result of this virus certainly qualifies as an emerging issue. In response to the Coronavirus, and because many if not most policies contain a virus exclusion, ISO created two business income endorsements as a specific response to the Coronavirus:

- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus – Edition February, 2020; and

- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus (Including Orders Restricting Some Modes Of Public Transportation) – Edition February, 2020

Note that neither endorsement is assigned a form number. Why? Because ISO did not file these endorsements on behalf of the industry. Rather, ISO made these advisory forms available for use by any member carrier. Any carrier that desires to use either or both endorsements must file them with the relevant regulatory authority. (On a side note, if ISO had filed these endorsements, both would have been assigned a CP 15 XX number because they are business income endorsements.)

Coverage provided by both endorsements:

- Begins immediately upon suspension of the insured's operations (there is no waiting period).
- Extends for the time period specified in the schedule.
- Is provided on an annual aggregate basis limited to the amount stated in the Schedule.

Both endorsements:

- Provide limited coverage when/if there is a suspension of operations due to closure or quarantine at the insured location ordered by a civil authority attempting to avoid or limit the spread of infection by a Coronavirus.
- Extend dependent property coverage (contingent business income) for named locations, if the policy includes dependent property coverage, when there is an interruption in the insured's business due to closure or quarantine to avoid or limit the spread of infection by a Coronavirus ordered by a civil authority at the dependent property.
- Apply to income loss suffered by insureds operating from a vehicle or mobile equipment, if the policy is endorsed to recognize such vehicle-based operation.

The Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus (Including Orders Restricting Some Modes Of Public Transportation) – Edition February, 2020, contains one additional feature not found in the other endorsement. This endorsement adds coverage if the insured suffers a suspension of operations due to mandated closure or restricted usage of public bus, rail or ferry lines or related stations or terminals serving the area where the insured's business is located.

Lastly, both endorsements specifically exclude:

- Intentional action by any person, group, organization or sovereign state to introduce or spread the virus;
- Costs to clean, disinfect, dispose of or replace any property;
- Costs to disinfect or dispose of any bodily fluids or waste materials;

- Costs of testing for or monitoring the presence or absence of the virus;
- Loss or expense due to fear of contagion, e.g., when customers, tenants or vendors avoid a part of the insured's premises not under quarantine;
- Loss or expense related to absence of infected workers or those suspected of being infected; and
- Any fines or penalties.

ISO specifically states in this filing that it has not developed policy-writing or rating rules. Each company is responsible for assessing the exposure for the classes of business written under these endorsements, developing its own rules and filing the forms as required by the regulatory authority.

Whether these will be the model for future “pandemic" endorsements from ISO is not clear. For now, it is up to the individual carrier to decide whether to use these endorsements or not.

FOR MORE CORONAVIRUS RESOURCES:

- Click here to access the Big "I" Coronavirus Resources page.
- You can also attend a free 25-minute "Coronavirus (COVID-19): Does Business Income Respond?" webinar available daily and on-demand Click here to watch immediately, or register for a date that fits best with your schedule.

Last Updated: March 5, 2020

Coronavirus (COVID-19): Does Business Income Respond? Webinar Transcript

Over the past two weeks, the VU has received countless questions concerning COVID-19 (the coronavirus) and the business income policy. As authorities require businesses to limit activities or shut down completely, the fear and reality of the loss of income looms large.

Insureds call their agents to ask about business income coverage and agents call us. Or, the agents contact us to get ahead of their clients. Either way, business income is a major topic right now.

Every agent asks essentially the same question, "Is there coverage in the business income policy for business closure or slow down as a result of the coronavirus?"

I'm sorry to tell you up front, but the short simple answer is, no, there is no coverage. The longer answer is a bit more complicated, even though the ultimate answer is the same – no coverage.

In this short piece, three business income coverages are reviewed:

- The business income coverage itself;
- The additional coverage for civil authority; and
- Dependent property coverage.

Business Income

We will begin with the insuring agreement from the business income coverage. The form reads:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Within this insuring agreement, there are three key coverage triggers to consider, “suspension of…operations,” “direct physical loss or damage” and “covered cause of loss.” Let’s review each trigger.

Suspension of operations. Given the local, state or federal requirements, this condition may apply as the business may be shut down by a regulatory authority. As of this writing, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have all shut down restaurants and bars. The debate may be the necessity, but government made it necessary. So, regardless of the abuse of power and intrusion into our lives by the government, this requirement is met.

Direct physical loss or damage: Here is the first question that causes a bit of problem for whether coverage exists. Does or can a virus cause physical damage?

Physical or property damage as understood and applied in the courts requires physical harm generally evidenced by changes in the physical characteristics that require repair.

Consider an invisible virus **on** any property or even **in** the property, does the presence of a virus on a surface or in the air change the physical characteristics such that repair is required? Given the everyday application and meaning of those terms, no, the virus does not result in property damage.

So, there is no property damage as required by the form, and without property damage, business income coverage does not respond.

Covered Cause of Loss: Even if the presence of a virus can be “forced” by the courts to be considered property damage; is the mere presence of the virus a covered cause of loss? This is a longer discussion than the other two triggers discussed above; let’s detail this trigger.

Is a Virus a Covered Cause of Loss

Is the presence of the virus a covered cause of loss? Of course, whether it’s a covered cause of loss or not matters only if presence of the virus can cause property damage according to the courts.

There is a specific exclusion within the policy that may apply in addition to a mandatory exclusionary endorsement. Let's look at both exclusions.

Within ISO's business income policy written on a special cause of loss form, the following is excluded:

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss".

A "pollutant" is defined in the form to mean: "*any solid, liquid, gaseous or thermal irritant or* ***contaminant****, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."* A contaminate, particularly a biological "contaminant," is defined as a contamination of food or environment with microorganisms such as bacteria, **VIRUSES**, fungi or parasites.

Based on the policy wording and the applicable meaning of "contaminant," the unendorsed policy excludes coverage for the presence of a virus via the pollution exclusion. But even this isn't going to stop some attorneys from grasping at straws and any possibility of coverage. On March 16, the first business income suit was filed in Louisiana (Cajun Conti, LLC et al DBA Oceana Grill v. Certain Underwriters at Lloyd's (and others including the governor and state)).

But even if the virus is considered property damage AND the pollution exclusion is ignored, how long will the "damage" be present?

- Surface can be disinfected in one day.
- If not taken care of and disinfected by the owner – according to recent scientific research, the virus can live for only a short time:
    - Up to four hours in the air depending on the consistency (mist vs. droplets); and
    - One to three days on surfaces – depending on the surface

Most Business Income policies have a 72-hour "deductible" or waiting period; so unless the waiting period has been reduced by endorsement (CP 15 56), there won't be qualifying property damage after a maximum of three days for there to be a qualifying loss. But what about recontamination? Every new contamination is a new event and a new waiting period begins.

If the pollution exclusion is ignored, there is a mandatory endorsement attached to ISO property policies that removes all doubts, the CP 01 40. ISO Released the CP 01 40-Exclusion of Loss Due to Virus or Bacteria in 2006 as a mandatory endorsement to specifically exclude loss resulting from a Virus or bacteria.

ISO stated in the initial filing that the presence of viruses was NEVER intended to be covered due to the pollution exclusion, but they anticipated that some would torture the policy. The CP 01 40 was introduced to negate "*efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent*." (ISO wording in the release.)

Business Income Result

So, what's the result? There is no business income coverage.

- There is no property damage – thus there is no coverage.
- If courts disagree about property damage AND ignore the pollution exclusion, what is the period of damage? According to scientist, a maximum of three days without human intervention. (Remember, there is generally a 72-hour deductible.)
- If CP 01 40 attached, there is no question that there is no coverage.

Ultimately and overall, there is no Business Income Coverage.

Civil Authority

Let's go to the policy and look at the wording in regard to civil authority (slightly abridged):

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain…caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends;

whichever is later.

What are the requirements for there to be coverage? Some look very familiar:

- There must be a covered "cause of loss." The damage, if there is any, is excluded by either the pollution exclusion or the CP 01 40.
- Access to the area must be prohibited by the civil authority. You can still get into the area you just can't go into the building (maybe).
- The property damage must have occurred within 1 mile of insured's premises.
- The civil authority must prohibit access due to dangerous physical conditions. Is it the property or the people that might lead to a civil authority decree? This is a biological condition not a physical condition.
- There is a 72-Hour "deductible."

What is the result of these requirements? There is likely no coverage.

Dependent Property Coverage

Before we look at the coverage, let's first define what qualifies as a dependent property. Dependent properties eligible for coverage in the business income form include:

- Buyers (ISO terminology - Recipient Locations);
- Suppliers (ISO - Contributing Locations);
- Providers (ISO - Manufacturing Locations); and
- Drivers (ISO - Leader Locations).

Let's review the language from one of the four endorsements:

A. We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to "dependent property" at the premises described in the Schedule caused by or resulting from a Covered Cause of Loss.

Note the common requirements found in this language. There must be direct physical loss or damage and the damage must be from a covered cause of loss. Given the similarities, how does this coverage respond? Applying the same reasoning as that found in the other two sections, there is no coverage.

The Moral of the Story

In the business income policy, with or without the CP 01 40, there is no coverage – unless:

- Courts ignore the meaning and reality of property damage;
- Courts ignore the pollution exclusion (in the absence of the CP 01 40); or
- Governmental authorities intervene.

Even if coverage is found – there is generally a 72-hour deductible. The virus doesn't live in the air on surfaces beyond that amount of time.

Here is the final reality, is it the property or the people that is the problem? Is this a biological issue or a property damage issue? The commercial property policy is not designed to cover biological issues, it is for property issues.

To end this article, given the policy wording and requirements, there is no coverage for a business income loss resulting from the coronavirus. But let me give you this final warning – if the insured wants to make a claim, do it and let the carrier decide. However, if the insured is just asking your opinion as to whether coverage exists, you can give it. But don't advise against filing a claim, simply say you don't think it's covered based on policy wording, but that you will still file a claim if the insured wants you to do so.

Coronavirus and Workers' Compensation

Author: Chris Boggs

A pandemic is defined as, an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population." Although the media lives by the motto, If it bleeds, it leads," declaring a pandemic anytime more than a few people contract a virus, this time even the World Health Organization (WHO) is warning of a possible Coronavirus (COVID-19) pandemic. One Coronavirus expert, Professor Gabriel Leung, Chair of Public Health at Hong Kong University, says that **unchecked**, the virus could infect 60 percent of the global population meeting the definition of a pandemic.

My intent is not to accuse the media of sensationalism, nor to intimate that WHO is overreacting (I don't think they are); my purpose is to answer the question, what makes an illness an occupational illness" and thus compensable under workers' compensation? More specifically, how does or might workers' compensation respond to the Coronavirus?

Two tests must be satisfied before any illness or disease, including the Coronavirus, qualifies as occupational and thus compensable under workers' compensation:

1. The illness or disease must be occupational," meaning that it arose out of and was in the course and scope of the employment; and
2. The illness or disease must arise out of or be caused by conditions **peculiar**" to the work.

Whether an illness arises out of and in the course and scope of employment is a function of the employee's activities. The simplest test toward determining whether an injury arises out of and in the course and scope of employment" is to ask: Was the employ**ee** benefiting the employ**er** when exposed to the illness or disease? Be warned, this test" is subject to the interpretations and intricacies of various state laws.

Qualifying as occupational" is the relatively low hurdle. The higher hurdle is whether the illness or disease is peculiar" to the work. If the illness or disease is not **peculiar** to the work, it is not occupational and thus not compensable under workers' compensation. An illness or disease is peculiar" to the work when such a disease is found almost exclusively to workers in a certain field or there is an increased exposure to the illness or disease because of the employee's working conditions.

For example, black lung disease in the coal mining industry is a disease that is **peculiar** to the work of a miner. Coal miners are subject to prolonged exposure to higher-than-normal concentrations of coal dust leading to black lung disease. This makes the disease peculiar to the coal mining industry.

Another example of an exposure peculiar" to the work is a healthcare worker contracting an infectious disease such as HIV or hepatitis as a result of contact with infected blood. The worker's unusual or peculiar" exposure to such diseases results in an illness that is occupational and compensable.

Qualifying an illness or disease as occupational and, more importantly, peculiar to the work (and thus compensable) may ultimately require industrial commission or court intervention to sort medical opinion from legal facts. No one test" is available to declare an illness or disease compensable or non-compensable; each case is judged on its own merits and surrounding circumstances.

Concluding that an illness is occupational, peculiar to the work and ultimately compensable is not necessarily based on the disease in question but on the facts surrounding the worker's illness. Factors investigated and considered by medical professionals and the court include:

- The timing of the symptoms in relation to work: Do symptoms worsen at work and improve following prolonged absence from work (in the evening and on weekends);
- Whether co-workers show or have experienced similar symptoms;
- The commonality of such illness to workers in that particular industry;
- An employee's predisposition to the illness (an allergy or other medical issue); and
- The worker's personal habits and medical history. Patients in poor medical condition (overweight, smokers, unrelated heart disease, etc.) and/or with poor family medical histories may be more likely to contract a disease or illness than others in similar circumstances. Bad habits and poor medical history (and heredity) cloud the relationship between the occupation and the illness. For example, smokers may be ill-equipped to fight off the effects of illnesses to which others may have no problem being exposed.

What About Coronavirus?

Judged against the qualifying factors presented, does **any** disease or virus declared a pandemic create a true workers' compensation exposures? Does the Coronavirus crate a workers' compensation exposure? The short answer is, not likely." Other than the fact that the Coronavirus is currently garnering intense attention, in most cases it is no more occupational than the flu.

Unless!

Only if it is proven that the employee has an increased risk of contracting the virus due to the peculiarity of his or her job might the Coronavirus be considered occupational and thus compensable. Remember, compensability as an occupational illness requires something about the job that increases the risk of exposure and illness.

As intimated earlier, healthcare workers may be able to prove the necessary peculiarity being face-to-face with sick people ALL day to assert a compensable injury.

Which Policy Responds to Qualifying Occupation Illnesses and Diseases?

While the Coronavirus has a relatively short gestation period, other occupational illnesses and diseases often have long gestation" periods. Employees may be exposed to the harmful condition for many

years before the illness manifests. It is also possible that the employee doesn't contract the disease until years after the exposure ends.

The workers' compensation policy specifically states that the policy in effect at the employee's *last* exposure responds to the illness even if the employee is working for another employer or even retired at the time the disease manifests itself.

The Coronavirus Isn't Special

Coronavirus may be a humankind exposure rather than one peculiar to most employments. Contracting the virus at work is not enough to trigger the assertion that it is a compensable occupational illness. To be occupational and compensable requires something peculiar about the work that increases the likelihood of getting sick. It is unlikely that both the occupational" and peculiar" thresholds can be satisfied to make most illnesses compensable" for the vast majority of individuals; the same is true of the new Coronavirus.

Last Updated: February 28, 2020

Coronavirus and the CGL

Author: Chris Boggs

Because of the fears (warranted or not) stemming from the Coronavirus, questions and answers regarding insurance policy response to the virus appear almost daily in various publications. To date, two articles have been published by the VU in relation to insurance and the virus:

- Coronavirus and Workers' Compensation
- Coronavirus and Business Income Losses

Although the VU has not yet received questions regarding how the commercial general liability (CGL) policy will respond, the CGL's response must still be understood. Various publications have addressed the CGL's response to the coronavirus with varying degrees of accuracy (be careful and don't depend on other sources of information).

Legal Liability Required

To lead into the CGL's response to the coronavirus, one key fact must be understood. If there is no legal liability, coverage is not triggered in the CGL and the policy will not respond. Legal liability exists when:

- The wrongdoer is found guilty of "Negligent Conduct" (meaning they breached a duty owed to the injured party);
- The injured party suffers actual damages; and
- The wrongdoer's "Negligent conduct" is the proximate cause of the injury or damage.

Far more than these triggers are required to ultimately establish legal liability, but such detail is not the focus of this article. For more detail on what is required to establish legal liability see, Are You Applying the MOST Basic CGL Coverage Rule and How Does a 'Person' Become Legally Liable.

Because the insured must be legally liable before the CGL responds, what actions or inactions could possibly lead to the insured being found legally liable for an injury from the coronavirus? To answer this question requires some imagination considering the requirements that must be met to be held legally liable. Following are a few ideas (but not all the possibilities):

- Allowing an employee who is **known** to be infected with the virus to continue working;
- Failure to adhere to required health and prevention guidelines;
- Remaining open following an order by a civil authority to close;
- Maybe (but not likely) selling a product from China on which the virus can live for long periods;

- Not screening and refusing service to customers with the virus; or
- Other weird actions or events.

To be direct, the likelihood a business owner may be held legally liable for injury to a third party who contracted the coronavirus on the insured's premises is very low to almost non-existent. Thus, it is unlikely the CGL will be called upon the respond. But the lack of legal liability doesn't stop people from trying to sue to prove negligence and legal liability – especially in the face of irrationally.

But if the insured does breach a duty owed and is held legally liable (although unlikely, nothing is impossible), will the CGL respond? Review the unendorsed CGL and no exclusion is found within Coverage Part A, Bodily Injury and Property Damage.

Was There an "Occurrence"?

A second requirement contained within the insuring agreement plays a role in the CGL's response to any injury supposedly arising from the coronavirus - the injury must qualify as an "occurrence" before the policy responds. The CGL form reads:
b. This insurance applies to "bodily injury" and "property damage" only if:

*(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" that takes place in the "coverage territory"*

Within the CGL an occurrence is defined as *an accident, including continuous or repeated exposure to substantially the same general harmful conditions.* Is contracting a virus an occurrence within the policy form?

To decide if this qualifies as an "occurrence" the question must be asked, is passing along a virus an accident? Maybe, but there are too many variables are involved to provide a definitive answer. As part of the question of an "occurrence," the injured party has to prove that the virus was contacted at the insured's premises or arising from its operations. Given the specifics, this might be almost impossible.

For sake of the overall discussion, assume making another person sick qualifies as an "occurrence" in the CGL, and that the person is able to prove that his/her only exposure was at the insured's locations or a result of the insured's operations.

If the insured is legally liable, if there is an occurrence as defined in the CGL and if the exposure can be narrowed down to the insured, the next step is to look for exclusions within the CGL.

Are There Any Exclusions?

Review the exclusions in the unendorsed CGL and only one exclusion could possibly negate coverage for spreading the coronavirus to members of the public, exclusion **2.a. Expected or Intended Injury**. For example, if the insured requires an employee to continue working or come to work who is known

to be infected, spreading the virus should be expected (even if not intended). No coverage due to the exclusion.

Look back at the earlier examples that could trigger a liability claim and many of those questionable actions may fall under the expected or intended injury exclusion. If a reasonable person could or should expect the virus to spread because of actions taken or decisions made, this exclusion is likely to apply.

If, however, the expected or intended injury exclusion does not apply, there do not appear to be any other exclusions applicable to the spreading of the coronavirus. Although some enterprising claims person would surely try to use the pollution exclusion.

This leaves us with the impression that the CGL may provide coverage for infecting a third in certain circumstances. But this is not necessarily true.

A Common (Ubiquitous) Exclusionary Endorsement

Even if an incident leading to bodily injury from coronavirus clears all the required hurdles (the insured is legally liable, the incident qualifies as an occurrence, the injured party can prove the exposure is the from the insured's actions, and the claim is not hindered by the expected or intended injury exclusion), there is still one roadblock – an exclusion common to most CGL policies – the CG 21 32 05 09 - Communicable Disease Exclusion.

If and when this endorsement is attached, coverage for injury from the coronavirus appears to disappear. The form reads (in part):

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;

b. Testing for a communicable disease;

c. Failure to prevent the spread of the disease; or

d. Failure to report the disease to authorities.

Undoubtedly the question to be answered is, does a virus qualify as a disease? In a “roundabout" way, yes. It's not the virus that causes harm, it's the disease that results from the virus. The immune system destroys some viruses before they can cause any harm, but some viruses overpower the immune system and lead to sickness (disease).

When the CG 21 32 is attached, there is no coverage for the transmission of the coronavirus and the resulting sickness (disease).

How is the CGL Going to Respond to the Coronavirus?

Without overstating the reality, it seems rather unlikely that a CGL policy will ever pay a claim arising from the coronavirus. The facts may negate any possibility that the insured is legally liable for spreading the virus/disease. And even if the insured is legally liable, does spreading a virus actually qualify as an occurrence as defined in the policy? If these two insuring agreement conditions aren't met, there is no need to go any further into the coverage form because there is no coverage.

If the loss meets all the conditions contained within the insuring agreement, might the actions of the insured fall within the scope of the expected or intended injury exclusion? If the exclusion does not apply, then there may be coverage.

However, the CG 21 32 is a ubiquitous exclusion attached to most commercial general liability policies.

We have gone the long way around to answer the question, “how will the CGL respond to a coronavirus claim," but the trip was necessary. Based on the requirements within the insuring agreement, the need to prove the insured was the source of any exposure, the application of the expected or intended injury exclusion, and the usual attachment an exclusionary endorsement, in most cases, the bodily injury coverage available in Coverage Part A of the CGL will never respond to pay a coronavirus claim.

Don't expect the coronavirus to be a factor in CGL loss ratios.

Last Updated: March 13, 2020

Coronavirus and the Auto Exposure

Author: Chris Boggs

Over the last several days the VU has fielded several auto insurance related questions. These questions cannot be classed simply as personal auto or business auto questions because the most common question involves both polices.

As of this writing, 21 states (California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont and Washington) have shut down restaurants and bars to in-house dining. Restaurants in these states are limited to take out or delivery.

Delivery is a new concept for most of the restaurants effected by this regulatory action. So, the new most-common question agents receive, “Am I covered for delivery?"

What appears to be such a simple question “simply" isn't.

The simple answer is, yes, the restaurant is covered for its auto liability exposure – well, maybe there is coverage. The more complicated answer is, yes, the restaurant is covered, but is coverage adequate for the insured and the employee?

Let's begin by looking at the reality of coverage when the employee is using his or her personal auto to make deliveries for the restaurant. The questions that must be answered include:

- Is there liability coverage in the personal auto policy (PAP) for food delivery?
- Is coverage provided by the business auto policy (BAP) for employees using their personally-owned autos for food delivery?
- Who is covered by the BAP, if coverage is provided?
- Which policy is primary?
- Which policy is excess?
- What key endorsement is needed?

Coverage in the PAP

Decades ago pizza and maybe Chinese food delivery began the PAP's delivery coverage debate. Does the personal auto policy cover pizza delivery or delivery of any kind of food? Note that as we answer this question in light of the current “pandemic panic" situation, we are completely ignoring Grub Hub, Uber Eats and every other such app-based food delivery service. The focus here is solely on food delivery by the employee of a restaurant.

PAP Exclusions of Interest

Whether the PAP provides liability coverage for food delivery is a function of two exclusions: the business use exclusion and/or the public or livery conveyance exclusion.

Business Use Exclusion: The business use exclusion is a non-factor in this discussion. The PAP excludes the use of an auto when being used in an auto-related business (sales, service, repair, etc.), unless the car is owned by the named insured, a family member or others provided the car is listed on the PAP. So this exclusion can be ignored.

Public or Livery Conveyance Exclusions: This exclusion may have more teeth. The applicable part of this exclusion reads:

EXCLUSIONS

A. We do not provide Liability Coverage for any "insured":

5. For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance.

Does an employee delivering food qualify as either public or livery conveyance? If it does, the PAP provides no coverage. Although generally phrased as one concept, public conveyance and livery conveyance are actually two different threshold requirements (notice the “or" between the terms). Let's define both terms to clarify coverage (or the lack thereof).

- ***Public conveyance***: Making the vehicle available for public use (like a common carrier);
- ***Livery conveyance***: Carrying persons or property for a fee.

Is food delivery “public conveyance"? No, the vehicle is not available for public use; it is being used by the employee on behalf of his/her employer only, and only for a single purpose – food delivery. Making the vehicle available for public use is what the ride sharing apps do (as well as the food delivery apps). The vehicle is not available to others.

However, does food delivery trigger the “livery conveyance" exclusion? The employee is carrying property (namely food), but is the cost of the food considered a fee? And considering fees, does charging a separate delivery “fee" make a difference?

Courts seem to agree that an employee delivering food for an employer is not livery conveyance even if a separate delivery fee is charged. In a livery conveyance, the fee is charged by the carrier as their remuneration for providing the service. In pizza delivery or food delivery, the fee is charged by the employer for its own purposes (probably a charge for convenience) and is not necessarily for the benefit of the driver.

Remember, the public or livery conveyance is intended to exclude coverage for those who are in a common-carrier-like business, not the person using their personal auto to delivering property for their employer.

This discussion is a long way around to answering the question of coverage in the PAP. Yes, there is coverage for food delivery in the PAP. But this doesn't mean carriers won't try to utilize the public or livery conveyance exclusion if the injury is bad enough.

BAP and Employee Use of a Personally Owned Auto

If, and this may be a big if, the employer/restaurant has a business auto policy, does that policy extend coverage for the employee's use of their personal auto for any reason, particularly to deliver food? Secondly, who is covered?

Is Coverage Provided?

Whether liability coverage is provided by the BAP for an employee's use of his/her personal auto on behalf of the employer is a function of the coverage symbol or symbols used.

- If Symbol 1 – Any Auto is used, yes, there is coverage. If any other primary symbol is used (2, 3, 4 or 7), no, there is no coverage.
- If the primary liability symbol is 2, 3, 4, or 7, the only way there is coverage for use of the employee-owned auto is if Symbol 9 – Non-Owned Auto is also used within the liability coverage.

If either of these requirements is met (Symbol 1 or Symbol 9), then the BAP provides coverage for the employee's use of their personal auto. But that is only part of the issue. Who is covered by the BAP?

Who is Covered by the Unendorsed BAP?

When the employee is using his or her personal auto on behalf of the named insured only the **named insured** is protected by the unendorsed BAP. The exclusion for the employee is clearly stated within the Who is an Insured provision:

1. Who Is An Insured

The following are "insureds":

a. You for any covered "auto".

*b. Anyone else while using with your permission a covered "auto" you own, hire or borrow **except** (this means they are excluded from coverage):*

(1) The owner or anyone else from whom you hire or borrow a covered "auto".

This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

Again, this means the BAP protects only the named insured when the employee uses his/her personal vehicle to deliver food. Worse still, because the employee is not an insured in this situation, the employer's business auto carrier can actually subrogate against the employee.

But remember, this is how the unendorsed BAP responds, there is an endorsement that solves this problem. But before we get to the solution, we need to understand how the PAP and BAP dovetail.

Which Policy is Primary and Which is Excess?

Even though the business is benefiting from the employee's use of his/her personal auto, the employee's **personal auto policy** provides primary coverage in the event of a claim. This primary protection extends to both the employee and the employer.

Don't believe me? Here is the policy language:

PART A - LIABILITY COVERAGE

INSURING AGREEMENT

B. "Insured" as used in this Part means:

3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

As is seen in this language, the employee's personal auto policy extends coverage to the employer for its vicarious liability for the actions of the employee. Although this wording doesn't specifically state that the PAP is primary, we need only to review the BAP for proof.

The Other Insurance provision in the BAP reads:

5. Other Insurance

a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" ***you don't own****, the insurance provided by this Coverage Form is excess over any other collectible insurance.*

Remember, the PAP is **always** primary when the policy's named insured owns the vehicle and it is listed on the personal auto policy. The BAP is excess, but only for the employer's benefit (unless the policy is endorsed otherwise).

Because the PAP is primary, the first issue for the employee **and** the employer is coverage limits. Are the employee's PAP limits adequate in the event of an at-fault incident? Remember, both the employee and employer are covered.

Consider this scenario, the employee, while delivering food for his/her employer, is involved in an at-fault accident – hitting a surgeon on her way to the hospital. In the accident, the surgeon severely injures her right hand and can no longer perform her surgical duties.

Will the insured (the employee) have adequate limits? Probably not (regardless of the amount). If the employee's limits are exhausted, then the BAP responds on an excess basis – but only for the employer (in an unendorsed BAP).

Let's throw in another “but" or “what if;" what if the employer doesn't have a BAP? Let's end the suspense, this is a very bad situation – for the employer.

If the employer is held to be vicariously liable for the actions of the employee, the employer is financially responsible for damages caused by the employee over and above what the PAP pays. This is true even if there is no business auto policy in place. The lack of insurance does not relieve a legally liable party of its responsibility to the injured party. Legal liability can be direct or vicarious (see the article “How Does a Person Become Legally Liable").

To avoid this out-of-pocket expense, the employer **needs** a business auto policy to protect its financial assets – at least to the level of coverage.

Lest you get jaded and say, “But Boggs, what is the likelihood the employee will hit a surgeon?" Fair question. The victim doesn't have to be a surgeon, nearly any accident can be financially devastating under the right circumstances.

Two recommendations so far:

- Require the employee to carry relatively high liability limits. At minimum 100/300/50. I recommend higher with an umbrella/excess policy, but there are certain financial realities that may make higher limits too expensive. But remember, don't limit the insured's options by not letting them know that higher limits are available.
- If the business doesn't have a BAP, explain the dangers of not having one; namely that the insured can still be required to pay because of their vicarious liability for the actions of the employee. Recent anecdotal reports are that carriers are not as willing to provide hired and non-owned liability coverage only at this point; but you have to try to find it (even in the E&S market). Some other reports are that certain carriers are going to automatically extend this coverage if the insured restaurant did not provide delivery service previously (if the insured did provide delivery but never bought the coverage, they are on their own, which is OK because they should have had the coverage

A Key Endorsement

Throughout this article, the fact has been highlighted that the unendorsed BAP does not extend protection to the employee when he/she is using his/her personal auto on behalf of the employer. This lack of employee protection can be detrimental to the employee. As was previously discussed, the BAP insurer can subrogate against (seek recovery from) the employee if the BAP has to pay to cover the business owner's vicarious liability for the actions of the employee.

Whether the BAP carrier would want the PR storm that comes with this is irrelevant; they can do it, and if the loss is bad enough, they may. But there is a remedy.

To fix this gap and keep relations between the employer and employee intact, attach the **CA 99 33 10 13 - Employees as Insureds** endorsement. As the title suggests, the endorsement extends insured status to employees when driving their personally-owned vehicles for the benefit of the employer/insured. But this endorsement does NOT change the order of response.

Even with the CA 99 33 attached, the employee's PAP still responds as the primary coverage. The BAP remains excess. The difference is that with this endorsement the employee is also protected by the BAP's excess coverage. Further, as an insured, the carrier no longer has the ability to subrogate against the employer if the loss requires the BAP to respond as excess.

Always attach the CA 99 33 anytime an employee is using his or her personal auto on behalf of the employer, even in non-delivery situations such as are addressed in this article.

Takeaways

In these weird times, unusual measures are being taken by governments, employers and the general public. This reality (or unreality) of this pandemic panic has required us to review the insurance implications of certain situations more closely than in the past – which ultimately may be a good thing.

Keys to remember from this article:

- The PAP is always primary for an employee-owned auto;
- The public or livery conveyance exclusion is intended for those in common carrier type businesses, not food delivery for their employer;
- Don't put it past an insurance carrier to try to use the public or livery conveyance exclusion;
- An employer can be held vicariously liable for the actions of its employees, especially when the employee is using his/her personally-owned auto for the benefit of the employer;
- Because the employer can be held vicariously liable for the actions of the employee's use of the employee-owned auto, the employee should carry relatively high PAP limits;
- Because the employer can be held vicariously liable for the actions of the employee's use of the employee-owned auto, the employer should have a BAP; and
- Because there is no coverage for the employee in the unendorsed BAP, the CA 99 33 should be attached.

Last Updated: March 18, 2020