



BARCLAY DAMON ^{LLP}

***COVID-19's Impact
on Liability and
Coverage Claims in
New York State***

Anthony J. Piazza, Esq.

Barclay Damon— Rochester, NY

Larry Gilroy, ARM, AAI-m, CWCA

President, Gilroy Kernan & Gilroy Inc.

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COVID-19: Best Practices in

Risk & Liability and Insurance Coverage Claims

We'll Discuss...

- » Exposure to Risk
- » Workers' Compensation
- » General Liability
- » Legislative Proposals and Executive Orders
- » Insurance Coverage for COVID-19 Business Income Losses and Trending Litigation
- » Final thoughts

Employee actions & strategies

- » Similar to liability policies, if your operations have been closed or restricted you should consult with your WC carrier for **premium reductions**:
 - If **payroll** has been reduced
 - A **new class code** has been established for furloughed or “idle” workers and applies to employees not working or temporarily working at home, the rate matches the existing rate for clerical employees
 - Most carriers are receptive to **payment terms**
- » Aside from whether a claim qualifies under WC will be discussed later, however if it qualifies under WC, coverage will apply
- » Beyond WC, employers should be aware of a **variety of employment practice claims** that could result from COVID 19, with the current focus on forced return to work. The labor law issues involved are many and best left to a separate session, however having **Employment Practices Liability Coverage** in place, following **Best Practices** and **good documentation** should all be part of an employer’s strategy.

COVID-19: Workers' Compensation

- » Employers and WC insurers may face an influx of claims from workers claiming they contracted COVID-19 on the job.
 - › NY Workers' Compensation Law § 2(7) defines “injury” and “personal injury” as “**accidental injuries** arising out of and in the course of employment **and such disease or infection** as may naturally and unavoidably result therefrom.”
 - › Exposure alone, without contraction, is likely not enough to result in a compensable claim.
 - › **Causation** will be significant issue
 - Claimant's burden of proof



COVID-19: Workers' Compensation (cont'd.)

- » Occupational disease claims
 - › Derived from the nature of employment and result from generally recognized risks incident to a particular occupation
- » Case law from tuberculosis epidemic in 1970s:
 - › *Nathan v. Presbyterian Hospital*, 66 A.D.2d 933 (3d Dep't 1978): Affirming board's decision that a nurse contracted tuberculosis as a result of her exposure to a tubercular patient and concluding the work exposure to which all nurses are subjected is sufficient to meet the essential tests of occupational disease
- » Medical professionals may have stronger claim for "occupational disease,"
 - › Question: Other "essential" services being exposed to disease on an ongoing basis?



COVID-19: Workers' Compensation (cont'd.)

- » Contraction of communicable diseases in the course of employment
- » *Matter of Donato v. Taconic Corr. Facility*, 143 AD3d 1028 (3d Dep't 2016): Claimant failed to establish that acute bronchitis and a reactive airway disease resulted from an infection contracted while transporting a prisoner aboard a commercial flight; physician conceded the infection could have been contracted anywhere
- » *Matter of Spoerl v. Armstrong Pumps, Inc.*, 251 AD2d 915 (3d Dep't 1998): Claimant failed to establish the bacteria responsible for a staph infection was contracted on business trip to England, which is common in both countries, and the source of entry into the body was not established with any medical certainty

COVID-19: Workers' Compensation

- » Other potential workers' compensation issues
 - › Mental stress claims without diagnosis
 - A housekeeper at a nursing home was awarded benefits as the employee responsible for cleaning the isolation room and being subjected to stress “greater than normal work environment”
 - › Employer's compliance (or failure to comply) with government guidance regarding protective measures
 - › Work-at-home issues

Are we are at risk?

» “Can I be sued if....”

“Yes you can”

3rd party liability strategies

- » Liability insurance is normally priced based on exposure: sales, payroll, visits, etc.—if your business has been closed or restricted you should consult with your carrier to determine if they will **reduce the premium**.
- » Most carriers are also receptive to **payment options** where they is need.
- » If you are sued, you want to know that you have followed **”best practices”** and that you can **document** same.
- » While it seems logical that general liability insurance would provide coverage if you are sued, that may not always be true—policies should be reviewed for **specific exclusions**.

COVID-19: General Liability Claims

- » Businesses and other organizations may face an influx of personal injury and wrongful death third party claims arising from COVID-19.
- » Initial targets: Health care facilities, grocery stores, restaurants, and other “essential” companies operating during crisis.
- » All employers and companies interfacing with customers may have potential liability.
- » Reopening of businesses: new potential targets.

Negligence and Premises Liability

- » Plaintiff's burden of proof:
- » Duty owed
 - › New York standard: Keep premises “reasonably safe”
 - › Based on *Basso v. Miller*, 40 N.Y. 2d 233 (1976)
 - › Premises liability: Actual or constructive notice
- » Breach of duty
 - › Failure to adopt (or timely adopt) measures to prevent spread, such as installing glass shields at cash registers, requiring facemasks, taking employee temperatures, maintaining social distancing, proper sanitization, etc.
- » Proximate cause (significant issue)
 - › Difficult to prove due to widespread and easy transmission of COVID-19
- » Injury

Proximate Cause Issues

- » ***Petitt v. Celebrity Cruises***, 153 F. Supp. 2d 240 (SDNY March 28, 2001)
- » Class-action lawsuit brought by passengers who sustained food-borne illness during cruise
- » Cruise line granted summary judgment since no reasonable jury could conclude the illness was caused by the cruise line's negligence as opposed to another source
- » Plaintiffs could not demonstrate that, during the incubation period, the cruise line was the only potential source of illness
- » Defendant's evidence included an epidemiologist who discussed incubation periods and potential sources of illness

COVID-19: Product Liability Claims

- » Products: Diagnostic testing, experimental drugs, medical devices, health and hygiene products, PPE
- » Defendants: Product manufacturers, suppliers, distributors
- » Issues: Failure to properly warn, alleged breach of warranties, failure of device to prevent transmission
- » Possible governmental immunity/industry protections?

COVID-19: General Liability Defenses

Related Issues:

- » Plaintiff's comparative fault
 - › E.g., ignoring social-distancing rules and other health and safety guidelines
- » Third-party claims against other potentially responsible parties
 - › Places proximate cause burden on defendant

Early COVID-19 3d Party Suits

- » Illinois wrongful death action filed by a former Walmart employee alleging the store wasn't properly cleaned and employees weren't provided appropriate protective equipment
 - » Alleges “willful and wanton” misconduct as exception to workers’ compensation bar
- » Smithfield Foods, a large pork processor, was sued in federal court in Missouri by a worker advocacy group for allegedly failing to protect workers by having them work “shoulder to shoulder” during the pandemic.
- » Several suits against cruise lines for continuing to operate after positive tests on board, including some passengers who died
- » Suits in Washington and Georgia against nursing homes for failing to protect residents, several of whom died as a result of COVID-19



Liability Insurance for COVID Claims?

- » Expected claims: Premises liability/negligent exposure to coronavirus, products liability
- » Is this the “Next Wave” of COVID Insurance Issues?
 - › CGL: Policy triggers:
 - Occurrence, Bodily Injury
 - › Possibly relevant exclusions:
 - Bodily injury resulting directly or indirectly from the transmission of a communicable disease by an insured or employee of an insured
 - Pollution
 - Bodily injury expected or intended from standpoint of insured



COVID-19: Legislation and Executive Orders Impacting Liability Claims

- » NY Executive Order 202.10
- » Grants medical professionals immunity from civil liability arising out of COVID-19 treatment
- » Exception only where conduct constitutes “gross negligence”
- » Constitutionality could be challenged by plaintiff’s bar in future medical malpractice claims



COVID-19: Legislation and Executive Orders Impacting Liability Claims (cont'd.)

- » NY Executive Orders 202.8, 202.14 and 202.18
- » Tolls (freezes) statute of limitations period
- » Passed pursuant to Executive Law giving the governor the power to suspend or “issue any directive” in response to a disaster emergency (passed days before COVID-19 emergency declared)



COVID-19: Legislation and Executive Orders Impacting Liability Claims (cont'd.)

- » US Dep't of Health & Human Services issued “PREP Act”: Preempts state laws
- » Provides immunity to certain individuals and entities arising from manufacturing, distributing, administering, or using “covered countermeasures”
- » Broadly defined to include any drug, diagnostic test, or device to treat, diagnose, cure or prevent COVID-19
- » Exception only for “willful misconduct”

COVID-19: Business Interruption

- » There are many unknowns and the landscape is fluid:
 - Federal solutions
 - State solutions
 - Court actions
- » Employers should consider/understand if a claim should be filed to meet the notice provision of their policy & or to meet requirements of a claim denial if a government solution emerges
- » Employers are encouraged to document expenses that would qualify under Business Income Coverage in the event a favorable outcome emerges

COVID-19: Business Interruption

- » Policyholders are making claims
 - › Insurance is a risk-management tool for businesses to help mitigate losses.
 - › Claiming that “Business interruption” (or “business income”) coverage should compensate their business for these losses (e.g., lost profits, rent) during pandemic
 - › Generally uphill battle for insureds



COVID-19: Contingent Business Interruption

- » Contingent business interruption coverage:
 - › “Supply chain” coverage
 - › Protects against losses by the insured as a result of disruption of the insured’s suppliers or customers
 - › E.g.: Shipment of a critical part delayed due to covered event overseas, causing interruption of the insured’s operations
 - › Generally requires that the supplier sustains a triggering event or loss (i.e., direct physical loss to its property)



COVID-19: Business Interruption (cont'd.)

- » Preliminary Position taken by Some Insurers:
 - › No business interruption coverage for lost revenue resulting from pandemic
 - › Policies categorically exclude coverage for loss based upon a virus exclusion



COVID-19: Business Interruption (cont'd.)



» However:

- › Insurance policies have different terms and should be examined.
 - Which insurer issued the policy?
 - Which coverages were selected?
- › Policyholders: Some policy endorsements have language which could support an argument for business interruption coverage.
- › If there is a possibility of coverage, businesses will consider submitting a claim, esp. if property exposed to COVID

COVID-19: Business Interruption (cont'd.)

» Sample insuring agreement language:

A. Coverage

We will pay for  direct physical loss of or damage to Covered Property at the premises described in the  Declarations caused by or resulting from any Covered Cause of Loss.

Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.



COVID-19: Business Interruption (cont'd.)

- » Business interruption coverage typically requires “direct physical loss” to property
 - › Term is usually not defined in policy
 - › Is a property’s exposure to coronavirus direct physical loss?
 - › What if there was no exposure?
 - › E.g., Louisiana lawsuit filed March 12: Restaurant seeking business interruption coverage argues **potential** contamination of property by virus is sufficient to trigger coverage



COVID-19: Business Interruption (cont'd.)

- » E.g.: Lawsuit by a group of theaters and restaurants in Chicago seeking BI coverage
 - › Filed on March 27 seeking coverage for losses caused by shutdowns due to COVID-19 **and** alleges bad faith for insurer's failure to investigate claims before denying coverage
 - › Insureds claim that, under Illinois law, presence of dangerous substance on property is sufficient to trigger coverage for “direct physical loss”
 - › To be determined ...

COVID-19: Business Interruption (cont'd.)

- » In the past, some courts have found that contamination of property **can be** “direct physical loss”
 - › *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014)) (building rendered uninhabitable due to ammonia)
 - › *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (asbestos)
 - › *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (Colo. 1968 (gasoline vapors); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), aff'd, 504 F.App'x 251 (4th Cir. 2013) (vapors from defective drywall)
 - › *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor)



COVID-19: Business Interruption (cont'd.)

- » Other courts have found that contamination of property is **not** “direct physical loss”
 - › *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 709-10 (E.D. Mich. 2010) (mold contamination)
 - › *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 40-41, 884 N.E. 2d 1130 (Oh. Ct. App. 2008) (mold damage)
 - › *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n*, No. 90-35654, 1992 WL 16749, at *1 (9th Cir. Jan. 31, 1992) (asbestos)

»» Emerging Case Law: New York

- » *Social Life Magazine, Inc. v. Sentinel Insurance Co. Ltd.*, No. 20-cv-3311 (VEC) (S.D.N.Y.)
- » Plaintiff filed emergency application for preliminary injunction seeking BI coverage related to COVID-19 damages
- » On May 14, 2020, S.D.N.Y. denied application:
 - » No direct physical loss
 - » COVID-19 does not cause physical damage to a property
 - » “New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going...this is not what’s covered under these insurance policies.”
 - » Relied on *Roundabout Theatre Co., Inc. v. Continental Casualty Co.*, 302 A.D.2d 1 (1st Dept. 2002)
 - » Awaiting written decision from Court



COVID-19: Business Interruption (cont'd.)

- » Virus and bacteria exclusions
 - › Even if coverage in the first instance, many policies have an exclusion for loss caused by an outbreak such as COVID-19
 - › Response by insurers following outbreak of SARS in 2000s
 - › E.g.: *Sentinel Ins. Co. v Monarch Med Spa, Inc.*, 105 F. Supp. 3d 464, 465 (ED Pa 2015) (exclusion enforced in third-party liability case where cause of injury was bacteria)



COVID-19: Business Interruption (cont'd.)

- » Virus and bacteria exclusions – example:
 - › ISO form CP 01 40 07 06 “Exclusion for Loss Due to Virus or Bacteria”
 - “We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease.”
 - Question: Does the exclusion apply if a virus didn’t cause the loss, but a government-mandated shutdown did?

COVID-19: Alternative Coverages

- » Potentially relevant policy endorsements
- » For business interruption and related expenses caused by:
 - › Fungus
 - › Pollutant cleanup
 - › “Communicable disease” endorsement
 - › Civil-authority shutdown (e.g., city, county, state)
 - › Contingent business interruption



COVID-19: Communicable Disease Coverage

- » Communicable disease endorsement sample:
 - › Typically purchased as an add-on coverage

COMMUNICABLE DISEASE COVERAGE

Subject to the Annual Aggregate for Communicable Disease, we will pay actual **business income** loss sustained by you and **communicable disease extra expense** and **crisis response expenses** incurred by you, during the **period of indemnity** due to an **order of the health authority** during the policy period that results in a partial or total suspension of your business operations at your **covered location**.



COVID-19: Civil-Authority Shutdown Coverage/Exclusions

- » Coverage generally only triggered where civil authority:
 - › Prohibits access to the insured premises
 - › Caused by physical damage to property **other than the insured premises**
 - › Damage to other property must be caused by covered peril
- » Thus, unlikely to provide coverage
- » Exclusions may also exist that specifically prohibit coverage for “acts or decisions ... of any person, group, organization, or governmental body”



COVID-19: Legislative Proposals Impacting Coverage

- » Proposed legislation:
 - › NJ, OH, NY, MA, and LA introduced bills since the outbreak seeking to compel insurance companies to cover claims by business owners for damages resulting from interruption of their operations due to the COVID-19 emergency
 - › Tabled in most states (no federal bill yet)
 - › Raises constitutional issues such as due process, violation of “takings clause” of Fifth Amendment, and violation of “contracts clause” of Article I

»» Other areas of concern

- » Sophisticated cyber **attacks have risen** during the outbreak
- » Large corporations have become much tougher to penetrate, attacks are beginning to be much more focused on small and mid-sized employers—**yes that means your size and in our region**
- » Employers may also have an increased exposure if they have increased or added remote work
- » Now is the time to review cyber security with experts in the field
- » Cyber insurance **remains relatively inexpensive** and brings both **pre & post lost advantages** well beyond the coverage limits.

COVID-19: Best Practices

- » Anyone can be sued, yet a successful action will in part be dependent on your "fault or negligence".
Businesses need to:
 - Be aware of **Best Practices** and adopt to your situation
 - **Document** same
- » **Insurance carriers** have generally been receptive to **mid-term adjustments** when business operations have changed or cash flow is an issue--applies to **health insurance as well** as what has been discussed.

COVID-19: Best Practices

- » Review all potentially relevant insurance policies
 - › First-party property policies such as property, pollution, etc.
 - › Liability policies such as CGL, business owners, excess/umbrella, etc.
- » Identify relevant policy language
 - › Insuring agreement
 - › Exclusions? Conditions?
 - › Policy endorsements

COVID-19: Best Practices (cont'd.)

» Investigate claims

> For first-party claims:

- Identify type of loss or expense and which policy may apply
- Obtain financial documentation pertaining to damages

> For third-party claims:

- Identify which policy coverages may apply
- Investigate source of exposure – timelines are key

Questions?



Tony Piazza

Insurance Coverage & Regulation
Practice Area Chair

apiazza@barclaydamon.com

585.295.4420



Larry Gilroy

President
Gilroy Kernan & Gilroy Inc.

ltg@gkgrisk.com

315.624.7813