

Pandemic Coverages: Where We Were, Where We Are, and Where We're Going

Andrea M. Palmer, JD
Director of Coverage & Litigation
Higginbotham, Fort Worth TX



DISCLAIMER

This presentation reviews generic policy language, provided as a specimen only. Your insurance policy may contain different language that changes coverage. You should always review your own policy language carefully.

COVID and Insurance - Overview

- As we continue to deal with the pandemic, stakeholders naturally have questions regarding whether there will be insurance coverage for potential claims.
- At this point, it appears that most insurance will not respond to most COVID-related claims at this time, due to several exclusions built into the policies that would have potentially provided coverage.
- This presentation covers typical insurance coverages held by aviation-related entities, potential COVID-related claims and the insurance that would have potentially responded, and the exclusions that prevent policies from covering these claims.
- Because insurance has not covered COVID-related claims, risk-management strategies are the key to help prevent claims, promote health and safety, and assist with defense if there are claims.

COVID and Insurance - Overview

- Insurance Coverages at Issue
- Potential COVID-Related Claims
- COVID Coverage Issues:
 - Pollution Exclusion
 - Virus or Bacteria
 - Pandemic Exclusion
 - Absolute Microorganism Exclusion
 - Communicable Disease Exclusion
 - WC and Occupational Disease
- What We Know About COVID Coverage
- The Importance of Risk Management
- Risk Management Measures
 - Limiting Liability
 - Increasing Awareness
 - WC and EPL

Insurance Coverages at Issue

- **Commercial General Liability (CGL or GL)** – Third-party claims for bodily injury or property damage.
- **Supplemental Medical Payments** – Medical expenses for Bodily Injury during your operations or at your premises, even if there is no fault.
- **Hangar Keepers/Property Coverage** – Damage to real property, and sometimes loss of use due to damage or inability to use the real property.
- **Business Interruption** – Loss of business arising out of inability to operate due to physical loss.
- **Employment Practices Liability (EPL)** – “Wrongful Acts” from an employment perspective, such as wrongful termination.
- **Errors and Omissions (E&O) and Directors and Officers (D&O)** – “Wrongful Acts” from performing Professional Services or decisions made by directors and officers.
- **Workers Compensation (WC)** – Injury/death from an occupational injury/disease.

Potential COVID-Related Claims

- Claims for sickness or death from employees.
 - For actual sickness or death, this could trigger WC coverage.
 - Claims of failing to provide a safe working environment could also trigger EPL or D&O.
- Claims for sickness or death from customers and the public.
 - This could trigger CGL coverage, and possibly med-pay.
- Claims for wrongful termination or cut hours for failure to work due to fear of contracting illness.
 - This could trigger EPL coverage.
- Claims for requiring vaccination.
 - For employee sickness or death arising out of the vaccine, this could trigger WC.
 - Claims of failing to provide accommodations could trigger EPL or D&O.
- Claims for not requiring vaccination.
 - Claims of failing to provide a safe working environment could trigger EPL or D&O.

COVID Coverage Issues – Pollution Exclusion

- Prior to COVID, many insurance policies (especially CGL and Property) had exclusions for bacteria/virus/microbe via a pollution exclusion.
- Thus, even before COVID, many policies did not provide coverage for claims arising out of bacteria, viruses, or microbes because they are considered “pollutants”.
- Sample Policy Language:

This Insurance does not apply to any Claim arising out of, or involving, directly or indirectly, the actual, alleged or threatened discharge, dispersal, presence, release or escape of pollutants, or any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. For the purpose of this exclusion, pollutants shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, mold, fungi, lead, bacteria, viruses or microbial matter.

COVID Coverage Issues – Virus or Bacteria

- Following outbreaks of SARS in 2003, carriers developed a new type of exclusion relating to viruses, bacteria, and microbes, above and beyond the pollution exclusion. This language is common in many policy forms.
- Thus, even before COVID, many policies did not provide coverage for claims arising out of bacteria, viruses, or microbes under this exclusion.
- Sample Policy Language:
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.
This exclusion supersedes any exclusion relating to “pollutants”.

COVID Coverage Issues – Pandemic Exclusion

- Another exclusion, for pandemics, has existed since SARS. Typically this exclusion is used in event-cancellation policies.
- Thus, even before COVID, certain policies did not provide coverage for claims arising out of a pandemic.

- Sample Policy Language:

This insurance does not cover loss arising directly or indirectly as a result of any communicable disease or the threat or fear of communicable disease (whether actual or perceived).

This exclusion shall not apply unless prior to or simultaneously with the loss arising, the communicable disease is declared an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency. However, any threat or fear of communicable disease, whether actual or perceived, is excluded.

COVID Coverage Issues – Absolute Microorganism Exclusion

- We are seeing a new type of exclusion, added as an endorsement and applying to the entire policy, for microorganisms.
- This appears to be in response to COVID claims and likely excludes any claim based on COVID.

- **Sample Policy Language:**

This Policy does not cover any loss, damage, claim, cost, or expense directly or indirectly arising out of or relating to:

Mold, mildew, fungus, spores or other microorganism of any type, including but not limited to any substance whose presence poses an actual or potential threat to human health.

This exclusion replaces and supersedes any provision in the Policy that provides insurance, in whole or in part, for these matters.

COVID Coverage Issues – Communicable Disease Exclusion

- We are seeing another new endorsement for Communicable Disease.
- Sample Policy Language:

This Insurance does not insure any loss, damage, claim, or expense arising out of a Communicable Disease or the fear or threat of a Communicable Disease.

Communicable Disease means any disease which can be transmitted by any substance from any organism to another organism where:

- the substance includes, but is not limited to, a virus, bacterium, or other organism or any variation, and
- the method of transmission includes airborne, bodily fluid, from or to any surface or object, or between organisms, and
- the disease can cause or threaten damage to human health or welfare or damage to, loss of value of, or loss of use of property.

This endorsement applies to all coverage extensions, exceptions to any exclusion and other coverage grant(s).

COVID Coverage Issues – WC and Occupational Disease

- Typically, Workers Compensation covers “occupational diseases”, those that arise out of the type of work.
- There may be push-back for coverage of COVID, as it is a disease the general population suffers from, and may not meet the criteria of an “occupational disease”.
- However, there may nonetheless be coverage for diseases suffered by the general public, if a certain occupation (such as aviation) puts a worker at higher risk than the general public.

Future Pandemic Coverages

- Coverage for future pandemics – but generally not for COVID.
- Coverage for specific areas; e.g. college football, concerts, etc.
- Captive options.

What We Know About COVID Coverage

- More likely than not, most claims involving COVID in any form (or future pandemics from bacteria, viruses, or microbes) will not be covered going forward – though each claim should be evaluated based on its own facts.
- Our underwriting contacts have confirmed these exclusions and endorsements are now ubiquitous.
- Our contacts further indicate specialized coverages may start to become available, but they are limited and expensive.
- Thus, the threat of loss due to COVID must be addressed through Risk Management measures.

The Importance of Risk Management

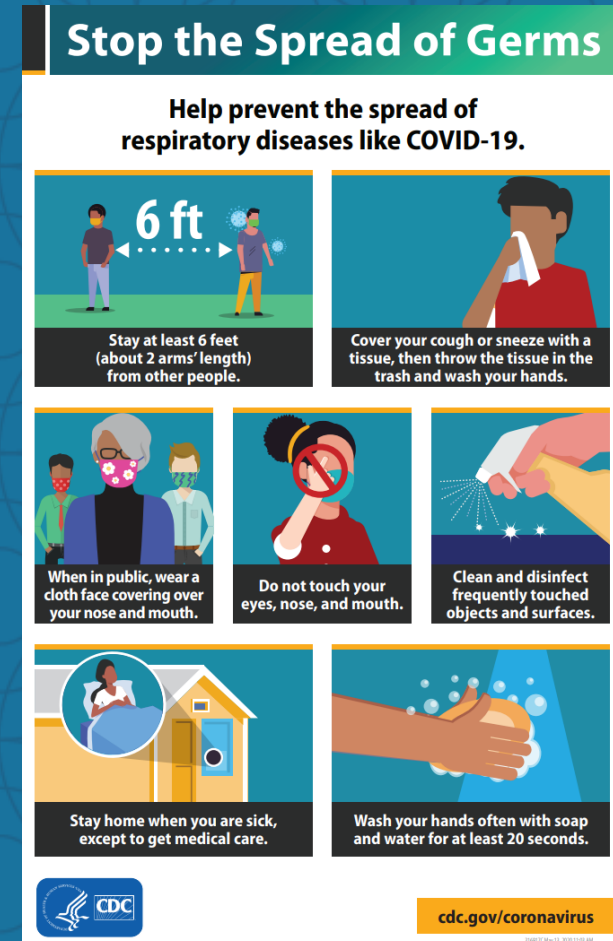
- Preventing outbreaks is necessary for the health and safety of employees, customers, and the public, for the ability of business to continue, and to meet the goal of operating safely.
- Risk management can also mitigate the consequences of lawsuits.
 - It's impossible to prevent every lawsuit.
 - It's difficult to show COVID was contracted at your business
 - Courts are unwilling to grant summary judgement early.
- Thus, the goal is policies and practices that will slow the spread of COVID, while also showing care taken by the business, assisting with a defensible position.

Risk Management Measures – Limiting Liability

- Limiting liability exposure through:
 - Waivers, releases, and attestation
 - Waivers are more effective if short, clear language, directly address potential risks
 - Attestations that outline risks and customer's agreement to accept risks
 - Parents/guardians (generally) cannot waive claims of minor children, so indemnification by parent/guardian may be required
 - Waivers are never a failsafe and should not be used alone
 - Internal policies and procedures
 - Clearly define required preventative measures (e.g. hand washing, masks, etc.)
 - Clearly define consequences for failure to comply
 - Documentation of enforcement efforts
 - Self-screen at home, and in-person at the business
 - Screening measures
 - Both self-screen at home, and in-person upon arrival
 - Questionnaires on travel and exposure

Risk Management Measures – Increasing Awareness

- Increasing awareness through:
 - Specific education regarding spread of COVID, safety measures, etc.
 - Consider incorporating wellness messaging into meetings
 - Document training and participation
 - Posted signage
 - Signs remind employees and customers of important safety standards and practices



Risk Management Measures – WC and EPL

- Limiting WC and EPL claims through:
 - Policies and procedures regarding self-quarantine
 - Put policies in place with input from employees
 - Ensure compliance with federal, state, and local rules
 - Providing adequate leave so employees self-quarantine
 - Create a culture that encourages those with symptoms to stay home
 - Determine level of contact with COVID-positive person that requires quarantine
 - Creating contingency staffing plans
 - Be ready for key team members to be quarantined or ill
 - Create redundancies in staffing, chain of command, and communication to ensure continuity

Questions?

Andrea M. Palmer
Director of Coverage & Litigation
apalmer@Higginbotham.net



HIGGINBOTHAM®
Global Reach. Local Touch. Single Source.