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Commerical General Liability Insurance and COVID-19

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Commercial General Liability Insurance and COVID-19

Overview

Commercial general liability ("CGL") insurance provides coverage to businesses and individuals for third-party claims arising out of bodily injury, property damage, and personal and advertising injury to which that insurance applies. If coverage is in fact triggered, the standard CGL policy also obligates insurers to defend against such claims and to pay those sums the insureds become legally obligated to pay as damages.

CGL policies typically define "bodily injury" as bodily injury, sickness or disease sustained by a person, including death. "Property damage" is defined as physical injury to property, loss of use the property, or loss of use of tangible property that is not physically injured, and "personal and advertising injury" is defined as an injury, including consequential "bodily injury", arising out of an enumerated list of offenses. CGL policies also contain various standard/form terms, conditions, exclusions, and in many instances, form and/or manuscripted policy endorsements, any and all of which may apply as a limitation or bar to any potential coverage.

In addition to claims for business interruption and employer's liability, insurers can expect COVID-19-related claims made under CGL policies for bodily injury, property damage, and personal and advertising injury. Allegations that an insured caused a guest, customer or other third party harm by the insured's failure to exercise reasonable care in implementing, enforcing or warning of the risk of potential exposure to COVID-19 could be covered by a CGL policy. Moreover, lawsuits implicating CGL policies could be based on third parties' exposure to, and contracting of, COVID-19 allegedly due to an insured's failure to sanitize its premises, not close quickly enough upon learning of potential infection, and/or because the insured failed to prohibit infected employees from working. Indeed, there are a multitude of potential issues surrounding coverage for COVID-19-related claims, as well as scenarios under which such claims could be asserted.

Below is an analysis of authority governing insurers' duty to defend pursuant to the standard CGL policy, as well as potentially applicable policy terms, conditions, exclusions and endorsements that may apply to third-party COVID-19 claims.

The Coverage

As stated above, CGL policies normally provide that an insurer has a duty to defend any action brought against its insured that seeks damages for a covered claim. *Aerojet-General Corp. v. Transp. Indem. Co.* 948 P.2d 909, 919 (Cal. 1997). To determine whether a claim is covered pursuant to a CGL policy, courts first look to the coverage provisions contained within the insurance agreement. If the claim is potentially covered under the insuring agreement, a reviewing court will then look to the policy exclusions to determine if the claim is excluded by one or more of the policy exclusions. *See Waller v. Truck Ins. Exchange, Inc.* 900 P.2d 619, 625 (Cal. 1995).

Even in those circumstances where extrinsic evidence suggests that the claim may ultimately prove meritless or outside the policy's coverage, an insurer cannot avoid its commitment to provide a defense, because a complaint subject to defeat by debatable theories must nevertheless be defended by the insured. *See Fitzpatrick v. Am. Honda Motor Co.*, 575 N.E.2d 90, 92 (N.Y. 1991).

Further, courts generally construe CGL exclusions under a very narrow lens. An insurer is not relieved of its duty to defend and indemnify its insured unless it proves that the allegations in the underlying complaint are solely and entirely within specific and unambiguous exclusions from the policy's coverage. *Mount Vernon Fire Ins. Co. v. Future Tech Constr. Corp.,* 1997 U.S. Dist. LEXIS 10799 at *3 (S.D.N.Y. July 24, 1997). If the policy language is ambiguous, particularly the language of an exclusion provision, the ambiguity must be interpreted in favor of the insured. *Village of Sylvan Beach v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d. Cir. 2006).

Potentially Applicable Terms, Conditions, Exclusions/ Endorsements

The general CGL policy language discussed below may be applicable to serve as a limitation/bar to claims brought by third parties allegedly infected with COVID-19 while on an insured's premises, while working on a job site, and/or during an interaction with an insured or its employees. The referenced is by by no means exhaustive given the myriad ways in which third-party claims may be asserted, but addresses likely bases for evaluating coverage under the COVID-19 umbrella. We also note that many CGL policies contain manuscripted endorsements, some of which may directly (or more directly) address the COVID-19 pandemic.

Number of Occurrences/Long-Tail Exposure

If/when an insurer is faced with a COVID-19 claim that alleges exposure at an insured's premises, the insurer must determine whether such exposure would constitute a single "occurrence" or multiple "occurrences" – especially in the event that multiple claims arise out of the same alleged exposure. Looking back to past catastrophic events, we note that the Second Circuit Court of Appeals held that under three insurers' binder and a specific form, the two airliners which struck the twin towers seventeen minutes apart on September 11, 2001 constituted a single occurrence as a

matter of law, thereby limiting the insured's potential coverage. *See World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.,* 345 F.3d 154, 180 (2d Cir. 2003). Similarly, the Fifth Circuit Court of Appeals held that the condemnation and destruction of thousands of properties due to damage caused by Hurricane Katrina, despite the fact the properties were demolished at different times, in varying degrees, and at different locations, constituted one occurrence to which a single retained limit applied based on the definition of occurrence under the policies at issue. *Lexington Ins. Co. v. St. Bernard Par. Gov't,* 548 F.App'x 176, 180 (5th Cir. 2013). Accordingly it appears that, despite the number of alleged exposures, a court may treat any COVID-related claim as being a single "occurrence" under a CGL policy.

Notwithstanding, because COVID-19 is a novel virus, the potential long-term health effects associated with the virus are unknown. Symptoms or associated side effects may manifest long after contraction of the disease. As with claims for asbestos-related diseases or noise-induced hearing loss, it is possible insurers may face long-tail liability for COVID-19 claims long after expiration of their policy. To that end, we note that in certain jurisdictions, courts apply the "all-sums-with-stacking" principle, which calls for the stacking of coverage from different policy periods with coverage limits equal to the sum of all purchased insurance policies. *See e.g., State of Cal. v. Cont'l Ins. Co.,* 55 Cal. 4th 186, 201, (Cal. 2012). As such, insurers should look to the underlying jurisdiction of the claim so as to determine what, if any, approach the courts take in terms of long-tail exposure, in the event that COVID-19 exposure falls within that category.

Expected or Intended Injury

With respect to exclusions, CGL policies typically exclude coverage for bodily injury or property damage expected or intended from the standpoint of the insured. Whether a loss is the result of an accident as opposed to an expected occurrence must be determined from the point of view of the insured. Courts look to whether the insured would view the loss as unexpected, unusual, and unforeseen. *See Jewish Cmty. Ctr. of Staten Island v. Trumbull Ins. Co.*, 957 F.Supp.2d 215, 233 (E.D.N.Y. 2013); *Agoado Realty Corp. v. United Int'l Ins. Co.,* 733 N.E.2d 213, 215 (N.Y. 2000).

To the extent an insured continues operations knowing it could expose third parties to COVID-19, those claims would arguably not be unexpected, unusual, and/or unforeseen, and thus potentially subject to the expected or intended injury exclusion.

Workers' Compensation and Employer Liability

The standard CGL policy also excludes coverage for any obligation of the insured under laws related to Workers' Compensation, disability benefits, unemployment compensation, or any similar law. Similarly, CGL policies contain exclusions for bodily injury of employees or insureds injured performing duties related to the conduct of the insured's business.

Indeed, CGL polices usually do not cover injuries to a business's workers. *See generally Certain Interested Underwriters at Lloyd's, London v. Stolberg,* 680 F.3d 61, 66-69 (1st Cir. 2012). Unlike Workers' Compensation insurance or employers' liability insurance, which exist to provide employers with coverage for injuries that occur to employees during the scope of employment, the sole purpose of CGL insurance is to provide coverage for injuries that occur to the public-at-large. *See W. World Ins. Co. v. Hoey,* 773 F.3d 755, 763 (6th Cir. 2014) (*citing to Amerisure Ins. Co. v. Orange and Blue Const., Inc.*, 545 F. App'x 851, 855 (11th Cir. 2013)).

Thus, if an insured's employee is exposed to COVID-19 while on the job, Workers' Compensation, and not CGL, coverage would be the employees' available remedy to address the injury. Accordingly, the Workers' Compensation exclusion would likely bar coverage for any claim made by an insured's employee for exposure to COVID-19 while on the job.

Pollution and Organic Pathogens

Some CGL policies contain pollution exclusions which exclude coverage for bodily injury, property damage, and personal and advertising injury due to, arising out of, or in any way related to any form of "organic pathogens," whether or not such actual, alleged or threatened existence, discharge, dispersal, release or escape is intentionally caused, or whether or not such injury, damage, devaluation, cost or expense is expected or intended from the standpoint of the insured.

Courts have found the CGL pollution exclusion referencing organic pathogens enforceable. *See, e.g., Endurance Am. Specialty Ins. Co. v. Savits-Daniel Travel Ctrs., Inc.*, 26 F.Supp.3d 1296, 1299 (S.D. Fla. 2014)(insurer had no duty to defend an underlying wrongful death action arising out of patron's death due to exposure to pepper spray); *Canal Indem. Co. v. Adair Homes, Inc.,* 737 F.Supp.2d 1294, 1303 (W.D. Wash. 2010) (claims for bodily injury excluded from coverage by a mold and organic pathogen exclusion which included "virus" within the definition of the exclusion).

Communicable Disease

Coverage under CGL policies can also be modified by the inclusion of "Communicable Disease Exclusion" endorsements. Generally, these endorsements exclude coverage for claims involving bodily injury or property damage arising out of the actual or alleged transmission of a communicable disease. *See Alexis v. Southwood Ltd. P'ship*, 792 So.2d 100, 101 (holding Communicable Disease Exclusion barred claims alleging illnesses caused by windblown contaminated soil, contaminated air, water, and raw sewage exposed during insured's work).

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Conclusion and Take Away

Insurers can expect to receive CGL claims arising out of third parties' exposure to COVID-19 to the extent they have not already begun to receive them. Although COVID-19 presents new issues insurers must consider, while the long-term effects of the disease are unknown, insurers can still assess potential exposure based on analysis of the subject CGL policy' terms, as well as the courts' prior treatment of catastrophic events such as 9/11 and Hurricane Katrina, and/or later-manifesting injuries litigation such as asbestos, silica, and noise-induced hearing loss.

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