

Are We Covered? Your Nonprofit's Insurance Policies and COVID-19 Claims

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The COVID-19 pandemic has caused many nonprofit leaders to assess whether and to what extent their commercial insurance policies are available as risk financing measures for emerging liabilities and risks. Whether your nonprofit's insurance policies afford coverage for a specific claim will depend on the language of the specific policy and the facts at issue. This article provides an overview of commonly purchased commercial insurance coverages and coverage issues and challenges that may arise with COVID-19 claims. As you consider whether insurance may respond to the losses your nonprofit may experience as a result of the pandemic, remember to review your insurance coverage portfolio for potentially relevant policies; keep in mind that commercial policies always contain notice and other obligations that require action in the short-term, in order to preserve and document a covered claim.

Business Interruption

Property insurance programs often include coverage for business interruptions and the loss of net income plus extra expenses during a period when the nonprofit cannot operate normally due to damage or destruction of property. A prototypical example is where, due to a fire at the headquarters building owned by a youth-serving entity, the organization is unable to host an after-school program that generates \$5,000 in net income each month. The nonprofit incurs additional expenses to notify the parents of participants as well as additional expenses to rent office space from which administrative operations can continue. Like other forms of coverage, business interruption coverage is based on the principle of indemnity, which provides that insurance should put the insured or damaged party in the same position as they were prior to the loss—no better and no worse. Business interruption claims rely on projections of future income streams and expenses. The insured nonprofit has the burden of substantiating its losses to the insurance carrier. The insurer has the burden of establishing exclusions or limitations to coverage.

The coronavirus has resulted in business interruptions, including mandatory or voluntary shutdowns, staffing and supply shortages, and declines in demand for goods or services. As virtually all nonprofits across our diverse sector are experiencing some form of interruption while the COVID-19 outbreak spreads, understanding whether and how business interruption coverage works has become a matter of heightened interest.

The business interruption coverage part of most property insurance policies requires that the business interruption result from a "direct physical loss of or damage to" the insured's property. Some policies provide *contingent business interruption coverage*, which covers disruptions to the policyholder's business that result from damage to the property of a supplier or customer. The direct physical loss or damage must also result from

a covered cause of the loss that is not otherwise excluded by the policy.

Insurers are expected to take the position that *standard form business interruption programs do not afford coverage available for COVID-19 losses*, on the theory that the presence of a virus on surfaces or in the air when people are present is not “physical” damage to property, and that virus exclusions (if contained in the policy) bar coverage.

But there are several scenarios in which business interruption coverage might still apply, depending on the policy language, the facts, and the applicable law.

- First, some policies include “civil authority” or “ingress/egress” coverage that potentially covers business interruption losses arising from orders of a civil authority or conditions that impair or prohibit access to or from an insured’s property. Importantly, the “civil authority” and “ingress/egress” provisions do not necessarily require predicate physical damage.
- Second, some policies also contain communicable disease coverage grants that do not require such *physical* damage. Such specific grants of coverage for losses due to communicable diseases are important to identify, as they can be a potential source of coverage irrespective of contamination exclusions in the same policy.
- Third, in addition, even without “physical damage” to property per se, there is some support in the case law for coverage arising out of the inability to use the property. Under this line of cases, if a policyholder suffers a loss due to, for example, a harmful substance rendering the property unusable or uninhabitable, that might be sufficient to satisfy the “physical damage” requirement.

When a nonprofit closes because of the actual presence of the coronavirus at the premises, there is an argument that the nonprofit has had to close due to physical damage. At least one suit has already been filed arguing this: *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al.*, Civil District Court for the Parish of Orleans, Louisiana. In *Cajun*, the policyholder, a restaurant, is arguing that the contamination of the premises caused by the virus is a direct physical loss triggering business interruption coverage.

The *Cajun* case is a good example of why policy language is important and why one must review policies carefully before determining that coverage is or is not afforded for coronavirus-related losses. In *Cajun*, the relevant policy does not contain the exclusion for infectious diseases, flu diseases, flu outbreaks and epidemics that some insurers began adopting in the mid-2000s. Even if your policy contains such an exclusion, considerable variations in the wording of these exclusions exist, and thus each exclusion should be examined carefully.

Notably, at least one state (New Jersey) has recently introduced legislation to possibly vitiate or overturn these virus exclusions in the wake of COVID-19 ([Bill A3844](#)). The insurance industry will likely challenge such legislation as unconstitutional, but the constitutionality of the legislation will depend on whether the insurance contracts are substantially impaired. We can certainly expect more legislative attempts and political pressures to find coverage under these programs.

As indicated above, the insurance industry has developed endorsements that specifically provide coverage for business interruption due to viruses or diseases, even absent evidence of direct physical damage. As your commercial coverages are coming up for renewal, consider these coverages if you do not have them already. However, be aware that new exclusions for COVID-19 are likely to be included on coverages bound after January 2020.

Directors’ & Officers’ Liability

A nonprofit organization and its directors, officers and staff may face lawsuits alleging that their unreasonable actions (or inaction) in response to the COVID-19 pandemic caused economic loss to stakeholders. For example, a contractor, donor, recipient of services or regulator may contend that management failed to observe protocols recommended or required by governmental authorities, failed to develop adequate contingency plans, or failed to properly manage the nonprofit’s investment portfolio. Directors’ and officers’ (D&O) liability insurance policies may provide coverage for the costs and liabilities arising from these stakeholder lawsuits.

Here, the insurance issue will be whether any allegations of wrongdoing come within D&O exclusions excluding claims for bodily injury or, alternatively, claims “based on, directly or indirectly arising out of, or relating to

actual or alleged bodily injury”. A negligence lawsuit against the nonprofit for failure to take adequate protective measures is not a lawsuit “for bodily injury,” but whether and to what extent the broader exclusions may bar coverage for stakeholder claims with any connection to the virus will likely come down to the specific facts in each claim.

Nonprofit leaders should also construct their coronavirus response measures with other D&O “conduct exclusions” in mind. Many D&O insurance policies exclude coverage for certain misconduct by the insured, which can include deliberate fraud, dishonesty and willful violations of the law. Typically, such conduct must be proved by a final adjudication in an underlying matter that is adverse to the insured. The particular language of these “conduct exclusions” can become significant if an organization’s pandemic response becomes the subject of litigation.

Workers’ Compensation

Workers’ compensation policies generally afford coverage for injuries “arising out of or in the course of employment.” Such injuries could include certain illnesses. For coverage to be afforded by a workers’ compensation policy, the employee generally must demonstrate that his or her illness was caused by the employment. This should include employees in human services and health care nonprofits, or employees who became ill after working alongside an employee diagnosed with COVID-19. In other work environments, it might be more difficult for an employee to prove that their illness resulted from occupational exposure to the virus.

Workers’ compensation claims, like all others, should be reviewed on a state-by-state, case-by-case basis. Coverage and scope questions may differ from state to state and may also change over time as the crisis evolves. For example, earlier this month, the Washington State Department of Labor and Industries issued an order to pay wage-loss and medical treatment expenses for any health care worker or first responder who is quarantined because of coronavirus exposure. Washington operates a monopoly workers’ compensation system; *the new policy applies to every employee in the state who is covered by the state system*. In Kentucky, the Kentucky Employers Mutual Insurance Co. announced that it will pay wage-replacement benefits for any first responder or employee in the medical field who is quarantined because of direct exposure to a person diagnosed with COVID-19.

Other Liability Policies: CGL, E&O

As the incidence of illness increases, nonprofits—particularly those in human services and healthcare—could face claims by clients, consumers and service recipients that the organization failed to exercise reasonable care in guarding against, or warning of, the risk of exposure to the virus. Commercial General Liability (CGL) insurance policies protect organizations against third-party claims for bodily injury resulting from exposure to harmful conditions, and these should respond with coverage for COVID-19 bodily injury claims.

With respect to claims for bodily injury brought against a nonprofit by its own employees, CGL coverage will generally exclude such claims. In addition to CGL insurance, many nonprofits that provide professional services—such as counseling, legal aid, therapy and health care organizations—also purchase professional liability insurance, often referred to as malpractice or errors and omissions (E&O) insurance. These policies protect against damages for bodily injury arising out of the provision of, or failure to provide, professional services. These policies also typically exclude coverage for bodily injury to employees occurring during the course of their employment (which might be covered under workers’ compensation insurance policies in certain cases). Nevertheless, all employee-related claims arising from the pandemic warrant case-specific analysis.

Event Cancellation

Many nonprofits and associations rely on in-person events to generate net income to fund year-round educational offerings. During the early weeks of COVID-19, many conferences and large meetings were held as originally planned. By the end of February, the adoption of business travel restrictions by industry and nonprofit employers led to hundreds of cancellations. Event cancellation insurance is tailored to and purchased for specific events. Typically, larger nonprofits are more likely than smaller organizations to purchase event cancellation insurance to offset the costs of unexpected cancellations. But you should check to see if your nonprofit has purchased this form of insurance for any of its events.

While event cancellation insurance can be very beneficial—including the ability to recover lost profits along with losses—it has limitations, according to nonprofit attorney Jeff Tenenbaum, managing partner of the DC-based Tenenbaum Law Group. It is critical to analyze all of the definitions, exclusions, and limitations to the coverage. This is especially true as it relates to communicable disease coverage. As of mid-January 2020, the four leading event cancellation insurance policies in the U.S. specifically excluded COVID-19-related claims from coverage for all new policies “bound” after that time. But for policies issued before then, for the two most-commonly purchased policies, since 2003, *communicable diseases were already excluded* unless the insured purchased an endorsement/rider to *include* such coverage. One of the other leading policies did not include an exclusion for communicable diseases—presuming the insured paid a higher premium to “buy back” the exclusion—but it includes a narrower definition of “cancellation” than the other policies.

It remains unclear how these insurance carriers will be responding to claims in the current crisis. But what has become clear already is that they are focused on the same sort of analysis that event venues are undergoing with respect to force majeure claims—including what governmental bans existed at the time of cancellation, how long such bans are likely to extend (where cancellation has not yet occurred), whether other factors make it impossible to hold the event, and similar considerations. For additional information on event cancellation insurance and COVID-19, see [this additional resource](#) from the Tenenbaum Law Group.

Cyber Liability Insurance

With a far greater number of employees working remotely during the COVID-19 outbreak, cybercriminals are ramping up their efforts to infiltrate IT infrastructures and steal or encrypt sensitive organization data, extort funds, or outright steal funds through social engineering fraud and other schemes. Many insurers offer cyber or crime coverage to respond to these first-party risks and the third-party claims that may arise following unauthorized access to or exfiltration of sensitive customer data. If your organization does not yet have such insurance, contact your agent or broker to inquire about adding this coverage to your insurance portfolio.

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