

COVID-19 Insurance Considerations for Healthcare Providers, Including Long-term Care Facilities – Tips for Identifying and Pursuing Coverage Claims

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The ongoing pandemic resulting from the coronavirus or COVID-19, has had a dramatic effect on healthcare providers, including long-term care facilities, resulting in significant financial losses and liability claims. Contrary to what insurers and many brokers may tell you, these COVID-19-related losses and liability exposures may be covered under standard property and casualty and liability insurance policies. You should therefore carefully review all potentially applicable insurance policies to determine whether a financial loss or actual or threatened claim may trigger coverage, and if so, take steps to properly notice, document and pursue the claim.

Pandemic-Related Exposures and Potentially Applicable Insurance Policies

COVID-19 has affected all aspects of healthcare and long-term care facilities, and poses risks running the gamut from direct financial losses to liability claims by employees, patients, residents and guests. Examples of these exposures and the insurance policies that may potentially cover them include:

- **Business Interruption Losses.** Many healthcare facilities have experienced significant financial losses as a result of executive orders preventing elective surgeries and other revenue generating activities. Financial losses from business interruption are covered under property insurance policies. Property coverage is triggered by "direct physical loss of or damage to" property. Insureds argue that the presence of the coronavirus constitutes property damage. Many property insurance policies were also issued with exclusions for losses arising from bacteria or a virus. Dozens of lawsuits have been filed across the country seeking recovery of business losses resulting from COVID-19. Decisions expected in the next six to 12 months may yield differing results, depending on which state's law the court applies in determining coverage. Legislation has also been proposed (but not yet passed) in several states to require insurers to cover COVID-19 business interruption claims. To pursue a claim, the insured is required to submit timely notice and fully document all aspects of the loss, consistent with the policy's conditions and requirements.
- **Employee Liability Claims.** Physicians, nurses and administrative staff at healthcare and long-term care facilities are at particularly high risk for COVID-19 exposure. Some employees who have contracted COVID-19 have already brought liability claims against their employers for failing to implement safety measures, provide adequate personal protective equipment or other allegedly negligence acts or

omissions. If the illness is work-related, as it would likely be for many healthcare and long-term care employees, the claim for medical bills and lost wages should be covered under worker's compensation insurance. Employer's liability insurance (usually but not always issued as part of a worker's compensation policy) applies to losses not covered by worker's compensation. Notice must be given to the worker's compensation insurer as soon as possible after the illness is reported, and of any claim or suit arising from the illness.

- Patient or Resident Liability Claims. Where the claim arises from alleged negligence in providing healthcare or other professional services, the professional liability (errors & omissions) insurance policy would likely apply. Professional liability policies are often written on a "claims made" basis, often requiring that claim both be made and reported during the policy period. Failure to timely report a claim can result in a denial of coverage. The term "claim" is variously defined to include a written (and in some cases, even an oral) demand for monetary or non-monetary relief, so careful attention must be paid to the exact policy wording. While some jurisdictions only allow a late notice defense where the insurer can show prejudice, many others rigidly apply notice requirements as a condition to coverage. It is therefore critical that the insured provide notice timely upon learning of a potential claim or suit.
- Guest or Vendor Liability Claims. While arguably less likely, guests, vendors or other invitees who contract COVID-19 may claim to have been negligently exposed while present at a long-term care or other healthcare facility. These claims fall within commercial general liability (CGL) policies, and are commonly triggered by an "occurrence," of bodily injury during the policy period. While terms can vary, most CGL policies require notice "as soon as practicable" of an "occurrence" that may result in a claim or a lawsuit.

Will You Be Able to Choose Your Own Defense Counsel?

The answer is, "maybe." First, if you have negotiated with your liability insurer to endorse the policy to name your law firm as approved counsel, they will be allowed to defend the claim or suit. Many insureds do not take advantage of this opportunity, and should consider doing so during the annual renewal process. Second, your liability insurer may agree to assign your legal counsel to defend the claim. This often inures to the benefit of both the insurer and the insured. The insured's normal counsel is well versed in the company's business and is much better positioned to efficiently and successfully defend the claim than "panel counsel" assigned by the insurer. Third, even if the insurer initially assigns panel counsel, the insured may be legally entitled to independent defense counsel of its choosing. This may be the case where (1) the insurer reserves a right to deny coverage or (2) the amount of the claim exceeds the policy's limit of coverage. In these situations, the insurer may have a conflict of interest preventing it from controlling the defense. The insured should therefore carefully review any reservation of rights letter issued by the insurer, and where appropriate, insist that it be allowed to appoint independent counsel at the insurer's expense.

What Should You Consider Prior to Renewing Your Coverage Program?

Many insurance carriers are now attempting to add virus exclusions to existing insurances policies upon renewal. The insured should work carefully with its broker to identify any proposed changes in coverage,



particularly those that would limit the insurer's exposure for potential claims.

Prior to renewing claims made policies, the insured should consider providing notice of a circumstance that may result in a future claim. The benefit of doing so is that where the insurer accepts the notice of circumstance, and the claim is asserted during a later policy year, the claim will be adjusted and paid under the policy in force at the time the notice of circumstance was submitted. This helps preserve future liability coverage limits for new claims and avoids coverage issues where the insurer added new exclusionary language (e.g., a virus exclusion) on renewal.

Finally, as noted above, you may wish to consider requesting that the insurer endorse the policy to identify your law firm as approved defense counsel. This will avoid any question about whether you will be entitled to have your regular legal counsel defend claims or suits that may arise under the policy.

For more information, please contact Rick Kubler or your regular Lathrop GPM contact.