

Coronavirus & Insurance - Avoid the Causation Trap, Know Your Story

By

We won't know the full extent of the fallout from the **coronavirus** but we can confidently predict that insurance will play a prominent role in spreading the losses among all stakeholders and anticipated claimants. We also can predict with a degree of certainty that insurance coverage disputes will naturally develop. Events will move quickly. So, we suggest that policyholders remain vigilant and work with coverage counsel on the front end in order to position themselves to access coverage once the expected losses mature.

To that end, we identified the intersection of ***silent insurance and exclusions that purport to address viral outbreaks, epidemics or pandemics***. Your underlying contracts also may seek to address ***force majeure, timely delivery, and mitigation. Work stoppages and closures and event cancellations issues are all looming***.

Now, we know that, from an insurance perspective we have a clear tension between ***lack of foreseeability*** on the one hand—a building block for coverage—versus an allegedly ***uninsurable risk*** (i.e., a risk not subject to the normal rules of actuarial extrapolation).

Losses connected to coronavirus start but do not end the inquiry. We also know that business interruption coverage under first party property insurance, as one example, seeks to avoid actuarial problems by purporting to exclude coverage for supposed ***natural disasters and perhaps an above-referenced viral outbreak exclusion***. So, where might losses ***connected*** to the ***coronavirus*** fit in that tension? We likely can find some answers by scrutinizing and applying issues related to ***causation including notions of but for or efficient proximate cause***. If we identify a chain of events or multiple contributing causes we can limit, in whole or in part, attempts to make all losses ***connected to coronavirus per se outside the scope of coverage***.

An actual analogous case study. A business utilized a dam on its premises as part of its business operations. The locality experienced one of those 500 year rain events and the dam broke, flooding surrounding neighborhoods. The company is sued by the adjacent landowners and the company turns to its insurance for coverage. The policy purports to exclude damage arising from natural disasters or acts of God. The landowners' claims are more complex, however. They allege that the dam was defective and was improperly maintained. So, was the flood and ensuing damage to the property owners actually ***caused*** by the ***natural disaster or the company's negligence***? We now have some interesting issues of causation that tend to support coverage, at least in part, if not in whole.

Causation and the Coronavirus. Assume your supply chain shuts down or an event gets canceled. Is the coronavirus the sole cause of your loss? It likely is a contributing factor but not the sole factor. Perhaps the supplier mishandled reacting to the virus, and exasperated the loss. What if workers were exposed because a company failed to take adequate steps to protect them and avoid or mitigate the loss? The point is the loss may have occurred for a number of reasons. The virus is just part of the causation chain. Other intervening events may actually have contributed to, or enhanced the loss. Perhaps a company failed to put in place adequate safeguard ahead of some unforeseeable viral breakout that might have been prudent to implement.

Conclusion: Putting aside the politics, the administration's alleged mishandling of events proves the point. The ***mishandling allegations*** are part of the chain of events that make up the entire set of relevant circumstances. As each individual story is developed you will not be limited to characterizing or responding to a loss solely because of the virus.

We always say that every problem has a story. **Coronavirus** is no different. That's how we develop a dynamic coverage framework. As always, if you have questions regarding how to handle insurance recovery in the wake of Coronavirus, please contact an attorney in Paley Rothman's insurance recovery group.