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Questions Clients Are Asking About COVID-19

US Outlook: Insurance Coverage Questions Amid COVID-19 Outbreak

The COVID-19 crisis presents a number of novel issues that policyholders and insurers will face in the coming months. As COVID-19 has spread around the world, businesses are facing significant disruptions to their operations and supply chains, including government-ordered shutdowns, cancellations of events, and lawsuits. The projected impact to the world economy is staggering and businesses have started to look to insurance carriers to cover their losses.

COVID-19 will raise coverage questions as to a variety of types of policies, including policies related to business interruptions, civil authority measures, event cancellation, workers' compensation, general liability, and directors' and officers' liability. This climate and its accompanying challenges elevates the importance of having a comprehensive understanding of a business's insurance portfolio, the scope of the coverage provided under those policies, and likely challenges to coverage.

While the question of whether a company has coverage will be specific to the policy language and the particular losses or injuries at issue, there are common issues likely to arise. This

memo provides context for and guidance on some of the most pressing insurance questions in the current climate, and looks at cases from analogous events like the September 11, 2001 terrorist attacks and the spread of other infectious diseases, and also examines potential market-changing events such as legislative efforts to mandate insurance coverage.

The scope and likelihood of coverage may be impacted by events and issues outside policy language. For example, there are several legislative efforts underway to address the scope of business interruption coverage, including three in the United States House of Representatives and one in the state of New Jersey.[1] Similarly, in light of the unprecedented and expected increase in COVID-19-related claims, AM Best is working to develop a new stress test to assess insurers' balance sheets, including risks factors like capital levels and reserve adequacy.[2]

We address the key questions related to each of these issues below.

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1) Do business interruption insurance policies provide coverage for lost profits as a result of COVID-19 related interruptions?

It is anticipated that an increasing number of business owners will look for coverage under business interruption policies in 2020 as companies across the world face unprecedented levels of supply chain disruptions and closures in the midst of the COVID-19 pandemic. Business interruption insurance is a specialized product that compensates a business for its lost profit and certain expenses when its operations are affected by damage to property that impairs or prevents normal operations. These policies may also provide contingent business interruption insurance that reimburses lost profits and extra expenses resulting from an interruption of business at the premises of a customer or supplier. Business interruption coverage can be sold as a standalone product or as part of a comprehensive property policy. These policies contain specific limitations to the scope of coverage that will be relevant to the current pandemic. Insurers and policyholders should therefore carefully consider the policy terms for COVID-19 related losses under such policies.

The first consideration is whether the business interruption policy contains a specific exclusion for losses related to a virus or illness. For example, in 2006, the ISO published form CP 01 40 07 06, titled "Exclusion for Loss Due To Virus Or Bacteria" (the "Virus Exclusion"). This Virus Exclusion excludes coverage for any "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." The Virus Exclusion is part of ISO's Standard Property Policy, and explicitly applies to "forms or endorsements that cover business income, extra expense or action of civil authority."

With respect to policies where the Virus Exclusion is not present or found not to apply, there may be other barriers to coverage. For example, business interruption policies only cover losses caused by, or occurring in connection with, "damage to or destruction of [the insured's] property."[3]

Courts are currently split as to whether the presence of a harmful substance constitutes damage or destruction to a property. For example, in 2017, a New Jersey federal court found that the release of ammonia into a facility constituted damage to the insured's property, as it "rendered the building temporarily unfit for occupancy and use" until the building could be cleaned.[4] Several other jurisdictions have made similar findings with the respect to businesses damaged by gasoline vapors and the bacterial contamination of a water source.[5] However, courts in other states have disagreed, finding in several instances, for example, that the presence of mold does not constitute physical damage.[6] Based on this split in authority, and the lack of clear precedent addressing the precise issue of widespread viral contamination, the question of whether COVID-19 contamination will constitute "physical damage" under a business interruption policy is likely to vary state-by-state and may depend on the insured's ability to show that the virus had a direct causal connection to the claimed physical damage and losses.

An additional consideration that is important to bear in mind is whether the business interruption policy coverage will extend to losses associated with government-enforced quarantines or travel restrictions. While many business interruption policies do include coverage for certain losses caused by the actions of civil authorities, policyholders are typically only entitled to coverage if the impact is sufficiently direct. For example, policies may require that access to the business be prohibited, often for a minimum period of 72 hours, rather than simply impeded.[7] Policies also generally require that the business disruption is the result of a specific order by civil authorities to cease operations, and therefore many policies may not cover circumstances where a business is interrupted or severely impacted by civil authority directives that that do not amount to an outright prohibition on operations.[8] Several courts have made it clear that the relevant order need not be formal, so long as it prohibits access to the insured premises.[9] As such, whether a business interruption policy covers losses associated with a COVID-19 quarantine order will depend heavily not only on the scope and terms of the policy, but also the terms of the relevant order issued by the government authority.

Additionally, business interruption policies can differ with regard to the language used to describe the extent and scope of covered losses. Although business interruption insurance is generally regarded as a means of replacing lost income, business interruption claims often arise in situations, where the economic impact can stretch well beyond the policyholder's own business. To address this, courts have taken two approaches: (1) an "economy ignored" approach, which looks backward and measures the policyholder's loss only against pre-catastrophe business levels and does not take into consideration the impact of actual post-catastrophe conditions on the economy, market, or demand, and (2) an "economy considered" approach, which seeks to place the policyholder in the position that it would have occupied in the actual post-catastrophe environment had it been able to continue its operations.

On this issue, the determination of which approach a court will use most often depends on the language of the policy, as opposed to the forum interpreting the policy. For example, the United States Court of Appeals for the Fifth Circuit has employed both "economy ignored" and "economy considered" calculations, depending on the particular policy language at issue.[10]

2) <u>Are there any government efforts to address coverage issues related to loss of business income from COVID-19?</u>

Another rapidly evolving area is the development of new legislation seeking to address the significant business losses already occurring, and likely to intensify, as a result of the COVID-19 pandemic. We understand that three committees in the U.S. House of Representatives are drafting legislation to provide coverage for business interruption losses that would otherwise be excluded by the policies. Drafts of the bills under consideration are not yet available. We will provide an update once we learn more on these efforts.

In addition, at least one state legislature has considered a bill that will preclude insurers from asserting exclusions in their business interruption policies in certain circumstances. Specifically, on March 16, 2020, the New Jersey state legislature introduced bill A3844, which seeks to extend business interruption coverage to the specific peril of COVID-19, notwithstanding the Virus Exclusion included under the standard ISO business interruption policy form that is used in the vast majority of policies in place. The bill would apply to all business interruption policies in place as of March 9, 2020, but would be limited to policyholders with fewer than 100 full-time employees who keep those employees on the payroll. In its current form, the bill also seeks to establish a framework whereby insurers who are forced to cover COVID-19 business interruption claims could seek "relief and reimbursement" from the New Jersey Commissioner of Banking and Insurance. To provide the necessary funding, the bill would authorize a special purpose assessment, but would also authorize the Commissioner to collect additional funds from a special levy on insurance companies operating in New Jersey.

The bill in its current form did not pass in the most recent legislative session, and it is expected to be revised and reintroduced. If enacted in a form similar to the current draft, the bill could be subject to constitutional challenges by insurers.

Although New Jersey is the first state to propose new legislation, it is unlikely to be the only state to consider legislative measures aimed at compelling insurers to reimburse policyholders for COVID-19 related claims.[11] Indeed, in the past, we have seen state legislatures make similar efforts to extend coverage to new and widespread perils that were previously excluded under the existing policies. For example, in the mid-2010s, numerous homeowners in Connecticut began to notice cracks appearing in the concrete foundations of their homes. It was eventually determined that these defects were caused by faulty concrete from a single quarry that had been used in the construction of hundreds, if not thousands, of homes beginning in the 1980s. The nature of the defective concrete meant that the foundations would eventually fail, requiring homes to be abandoned or repaired at substantial cost. Affected homeowners filed a flood of claims under their homeowners' policies, which were largely denied based on standard ISO language that excluded "collapse" losses affecting foundations. In response, the Connecticut Insurance Department issued a directive prohibiting insurers from cancelling or refusing to renew homeowners' policies due to deteriorating foundations. The Connecticut legislature also introduced a bill that would have required homeowners' insurers to cover structural impairment to homes caused by defective materials. Although this bill was not enacted, the legislature eventually established a captive insurance company to assist homeowners in the payment of costs to repair defective foundations. This captive insurance company could serve as a model for state legislatures or the federal government as these government bodies explore various options for addressing the COVID-19 pandemic, and provides a less extreme alternative than overriding policy exclusions.

3) Will workers' compensation apply if one of my employees becomes ill due to COVID-19?

If an employee becomes sick on the job due to COVID-19, workers' compensation insurance can pay for the worker's medical expenses and rehabilitation costs only where the employee contracted the virus in the course of employment due to the nature of his or her job. There is generally no coverage available where the worker had the same risk of becoming ill as a member of the general public. Thus, the vast majority of workers who contract the virus will not be covered by workers' compensation insurance. Coverage will likely be available for health care workers and first responders responsible for managing the pandemic in local communities because their job responsibilities clearly put them at risk of exposure. It may also cover workers in industries that are required to remain open to the public, such as pharmacies and supermarkets, which have thus far been exempted from the work-at-home requirements that are being enacted in several jurisdictions hard hit by the virus.

Worker's compensation insurance is regulated by the states, each of which has its own statute. In general, most state workers' compensation statutes provide that an employee is entitled to benefits for an "occupational disease."[12] In general, to qualify as an "occupational disease," three conditions must be met: (1) the illness or disease must arise out of, and be contracted in the course and scope of, employment; (2) the illness or disease must be the result of an exposure that occurred within the workplace; and (3) the illness or disease must be specific to the employee's work, meaning that it is must be found exclusively among the workers associated with a specific occupation, or the occupation itself must involve a risk of contracting the disease that is of a greater magnitude and of a different nature than that experienced by the general public. Many states impose a high bar in terms of the causal connection that must be shown to establish coverage. Thus, establishing coverage will depend on which state law applies, and it is important to keep abreast of the applicable state laws and any pending changes made by a state's legislature.

For example, under the applicable South Carolina statutory framework for workers' compensation, "[n]o disease shall be considered an occupational disease when it: is a contagious disease resulting from exposure to fellow employees or from a hazard to which the worker would have been equally exposed outside of their employment."[13] As such, a workers' compensation claim based on exposure to COVID-19 in South Carolina would face considerable difficulties. As another example, in the state of Washington, the applicable laws require that the occupational disease be directly linked to the scope of employment.[14] Consequently, an employee making a workers' compensation claim in certain states may face challenges showing that: (1) there is a causal link between the disease and the person's employment, or (2) the individual was exposed to the disease at work in a way that exceeded that of another member of the community.[15]

There is limited precedent to provide meaningful guidance as to how workers' compensation insurers will respond to the COVID-19 pandemic, mainly because all individuals, regardless of occupation, are likely to be exposed. In contrast, the typical workers' compensation claim has historically arisen out of epidemics specific to a particular place of work or specific occupation. For example, with respect to the Valley Fever outbreak that occurred between 2018 and 2019 and primarily affected farm workers, the California's Workers' Compensation Board held that "industrial causation" of the disease for a claimant "was established if the employee's risk of contract[ing] (the infection) from employment was medically probably or materially greater than from the general public or more common at the place of employment than among the public."[16] In other situations,

occupational diseases have been deemed covered by workers' compensation where it could be shown that the disease was uniquely connected to the type of work the employee was engaged in. Black lung disease in the coal mining industry is an example of the type disease considered unique to a specific occupation, as coal miners have prolonged exposure to higher-than-normal concentrations of coal dust.

Because COVID-19 is a newly emerging disease, health officials are still collecting information about its manner and mode of transmission.[17] However, the currently available information indicates that the virus is spreading easily and rapidly, has a two- to fourteen-day incubation period,[18] and may spread through human contact before an infected person even begins showing symptoms.[19] The combination of these factors can greatly complicate an individual's ability to prove that his or her exposure specifically occurred in the workplace as opposed to resulting from community contact outside of the workplace. Overall, these factors—such as a long incubation period and rapid spread among a diverse population–make COVID-19 distinguishable from epidemics such as black lung disease. However, it is nevertheless conceivable that some employees may be able to establish a causal link between their occupational duties and a COVID-19 infection, particularly if the worker was exempt from a shelter-in-place order as a result of his or her employment duties and therefore was in contact with infected patients at a frequency and intensity that far exceeded the exposure levels of average members of the public.

Recognizing that there are limitations on how workers' compensation insurance will apply to workers on the front lines in containing and combating the disease, Washington Governor Jay Inslee recently directed his Department of Labor to ensure workers' compensation protections for health care workers and first responders claiming COVID-19 related injuries.[20] It is important to note, however, that Washington's plan is government-operated insurance, and Washington does not allow private workers' compensation.[21] Thus, the actions by Gov. Inslee will not be subject to the types of challenges discussed above in connection with proposals to retroactively change the terms of business insurance policies in respond to the pandemic. It is thus unclear whether Gov. Inslee's actions will be adopted in states that have private workers' compensation insurance.

4) Will insurance cover my losses because an event we had scheduled has been cancelled?

With respect to sports and entertainment industries, the COVID-19 pandemic has already had a significant impact, as efforts to curb community spread of the disease have caused numerous events and large gatherings to be significantly delayed or cancelled altogether. For example, by mid-March, national sporting events such as the NCAA Men and Women's Basketball Tournament, the Masters Tournament, and the Kentucky Derby were all cancelled or postponed. Similarly, the South by Southwest music and media conference and the E3 gaming convention have also been cancelled or postponed. Entities in industries outside sports and entertainment have also had to cancel long-planned events.

Coverage for the damages resulting from such cancellations depends upon the type of coverage in place. Some insurers provide a specialized insurance product that might provide coverage for the damages resulting from the necessary cancellation or curtailment of an event. These types of policies are often purchased by performing artists, professional sports teams, or entertainment companies on an annual basis or on a one-off basis to provide coverage for specific large events. Event cancellation policies generally do not require a specific type of event to trigger a

covered loss, provided that the claimed loss is beyond the policyholder's control. If a covered loss occurs, these policies generally indemnify the policyholder for any expenses incurred as well as any lost revenues caused by the necessary cancellation, although this is not always the case. In the context of the COVID-19 pandemic, it is important to note that many existing policies specifically exclude losses caused by pandemics or government-ordered quarantines.

When evaluating event cancellation claims related to COVID-19, several factors that might affect the existence of coverage or the amount of damages need to be considered. In order for a cancellation or postponement of an event to constitute a covered event, policies generally require that the policyholder show that it is unable to commence or keep open the event. For events that were scheduled to begin in early 2020, this may require an investigation as to whether the cancellation or curtailment was required by COVID-19, was an opportunistic decision, or was caused by another cause that may otherwise be excluded under the policy. For cancelled events that were scheduled to take place later in the year, the policyholder may have to show that it was infeasible to make alternative arrangements for the event. For example, in *HDMG Entertainment, LLC v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. L009082*, the providers of an event cancellation policy moved for summary judgment on the issue of coverage, arguing that the policyholder failed to seek alternative dates or locations for a "biker bash" that was cancelled when the installation of a communication system at the venue was delayed.[22] The court denied summary judgment on the grounds that material disputes of fact existed that necessitated resolution through trial.[23] Similar factual questions may arise during the initial handling and consideration of a claim prompted by COVID-19 and the *HDMG* case suggests that early resolution of such claims through summary judgment may be difficult.

Another factor to consider is whether there are any policy exclusions applicable to a COVID-19 claim. For example, many event cancellation policies specifically exclude losses caused by pandemics or quarantines. However, some insurers offer endorsements to policies that will provide cover in the case of a pandemic. As is always the case with insurance, the specific wording of the policy must be scrutinized.

Event cancellation policies generally also exclude pre-existing circumstances, which may preclude coverage under policies issued in 2020—after the outbreak was first reported in Wuhan, China—even if COVID-19 is not identified as a specifically excluded risk. Additionally, the policy may contain an exclusion for pollution or contamination, which may apply to COVID-19 based on the particular policy wording.

Calculating the amount of covered damages from a cancelled or curtailed event is likely to present difficult questions of fact and may require detailed investigation. Event cancellation policies generally require that any covered damage be caused directly by the cancellation or curtailment, requiring a fact-specific determination if claimed damages are too remote to be covered. In addition, depending on the policy language, lost profits may or may not be covered. For example, in *Defeat the Beat, Inc. v. Underwriters at Lloyd's London*, the insurer paid the policyholder for its expenses, but refused to cover the policyholder's lost profits because they were not specifically listed in a schedule, as required by the policy.[24] The court applied the policy as written and affirmed the trial court's grant of summary judgment in favor of the insurer. If lost profits are covered, calculating those profits may require production of documentation by the insured, and possibly the retention of an expert to assist in the adjustment.

5) If lawsuits are filed as a result in the drop in the price of a company's stock, will there be directors' and officers' coverage available?

Following the COVID-19 outbreak, markets around the world have experienced unprecedented levels of volatility. Thousands of publicly-traded companies have already experienced stock drops caused in part by COVID-19, and thousands of private companies have lost existing business, as well as potential business opportunities, that may not be replaceable. Such market volatility and the accompanying decrease in stock prices and business opportunities will lead to litigation that challenges the decisions and actions of many directors and officers. Whether those claims gain traction in the context of a worldwide market collapse remains to be seen.

The most obvious D&O risks are allegations that directors and officers failed to: (a) disclose risks posed by the virus to the business' financial performance, (b) observe protocols recommended by authorities, or (c) develop adequate contingency plans. Already, there have been two securities lawsuits filed in the United States regarding disclosures related to COVID-19. The first, *Douglas v. Norwegian Cruise Lines*, alleges that Norwegian Cruise Lines and its CEO and CFO falsely portrayed the company's abilities to handle risks associated with the virus, and failed to disclose that the company had instructed its sales employees to downplay the risks in order to increase sales.[25] The complaint alleges that Norwegian's share price was negatively impacted when information regarding its directions to sales employees became public. The second case, *McDermid v. Inovio Pharmaceuticals*, was filed against Inovio Pharmaceuticals and its CEO J. Joseph Kim, alleging that Mr. Kim falsely claimed that Inovio had developed a COVID-19 vaccine, which caused the share price to artificially increase in value.[26]

In addition to those already-filed claims, the SEC has made clear that it is paying close attention to corporate disclosures concerning COVID-19. For example, on March 4, 2020, SEC Chairman Jay Clayton issued a statement urging "companies to provide investors with insight regarding the assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus *to the fullest extent practicable* to keep investors and markets informed of material developments."[27] Other federal and state regulators have begun to make statements concerning appropriate disclosures as well, and litigation concerning the correct level of disclosures is probable, if not inevitable.

Beyond disclosure risks related directly to COVID-19, the lack of liquidity caused by current market conditions will likely lead to claims concerning other alleged problems within companies—even if those claims might never have been brought had the company remained healthy. In bad economic environments, there is inevitably a rise in derivative litigation, securities class actions, and other claims against directors and officers.

D&O policies will likely cover most COVID-19 related complaints just as they would any other litigation regarding the scope of corporate disclosures. Companies, however, should be cognizant of the scope and terms of their insurance policies, particularly the extent of coverage for public enforcement actions. As containment efforts increase in scope, certain companies may face enforcement actions by government regulators related to an alleged failure to respond appropriately to COVID-19. D&O policies typically provide coverage for legal expenses associated with an enforcement action taken against an individual director or officer (Side A and B Coverage) or the Company (as long as the policy provides Side C coverage), but they will often not extend coverage to, or will significantly narrow the scope of coverage for, regulatory investigations that solely target

the corporate entity. For a private company, whether such expenses are covered would depend on the specific policy language at issue. Companies should review their policies to understand the full extent of their coverage.

The 'bodily injury' exclusion found in most D&O policies is one that warrants careful consideration. Most D&O policies exclude coverage "for" bodily injuries, but they do not exclude coverage for securities claims that "arise from" a bodily injury. Thus, if a company's stock value drops due to a failure to make a disclosure regarding bodily injuries, the D&O policy would likely cover any related securities claims. Some bespoke policies, however, have more permissive language regarding the nexus between the underlying injury and suit. In such policies, it is possible that the bodily injury exclusion would extend to securities actions that are merely related to a bodily injury, even if the suit itself is not seeking compensation for such injury. Companies that run businesses such as cruise lines should carefully review the terms of their policies to ensure that they are in fact covered in the event that they face securities claims related to COVID-19 injuries.

6) If we get sued by a third party who claims we caused their exposure to COVID-19, will we have coverage?

Plaintiffs' lawyers will inevitably look for ways to bring claims on behalf of individuals and businesses seeking redress for alleged bodily injury and property damage related to exposure to COVID-19. These types of claims are likely to focus on a company's failure to properly sanitize a building or property, or to implement other security measures that would have minimized or prevented viral exposure and community spread. Although it is difficult to capture all of the potential theories that may be pursued, and the types of businesses who may be vulnerable to such claims, the various possibilities include: (a) claims asserted against a hotel owner for providing shelter to an infected guest, which resulted in transmission of the coronavirus to uninfected guests; (b) claims asserted against a seminar host for proceeding with an in-person conference despite warnings about the importance of social distancing; (c) claims against a food delivery company following the transmission of the coronavirus from an employee to a customer; or (d) claims against a car rental company for failure to adequately sanitize cars between rentals, thereby facilitating the transmission of the coronavirus between customers renting the same vehicle. Regardless of the merits of these claims and the inherent difficulties the plaintiffs will face in proving the actual source of the infection, the businesses that are sued will inevitably turn to their insurance carriers for defense and indemnification under their existing Commercial General Liability ("CGL") policies.

Most commercial enterprises have CGL policies that provide coverage for claims by third parties for bodily injury and property damage. However, it is not apparent that many of the existing policies will provide coverage for COVID-19 related claims. For example, in order for policies to apply to an injury arising from COVID-19, the injury must constitute an "occurrence," as that term is defined in the policy. A standard CGL policy typically defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general conditions." Thus, the first hurdle for the policyholder will be whether it can show that the claimed injury resulting from the COVID-19 infection actually constitutes an "occurrence" under the policy. Assuming this hurdle can be overcome, certain exclusions in the policy may present additional barriers to a successful claim. For example, many CGL policies exclude bodily injury arising out of the transmission of a communicable disease, which would seemingly bar coverage Moreover, even when this specific communicable disease exclusion is absent from a policy, the policy may contain what is commonly known as a "pollution exclusion," which precludes coverage for the "actual, alleged or threatened

discharge, dispersal, seepage, migration, release or escape" of a "pollutant." In some policies, a virus is specifically identified as an excluded pollutant. Given the existence of these exclusions to coverage, policyholders should not automatically assume that a COVID-19 related claim will fall under their CGL policy, and should carefully examine the terms of their existing policy and stay abreast of any developments that could bear on the interpretation of the communicable disease and pollution exclusions in the context of this new pandemic.

7) With employees working from home, my IT infrastructure may be more vulnerable. Does my cyber insurance provide coverage?

The number of cyberattacks on businesses and their most sensitive data is expected to intensify as a result of the COVID-19 pandemic, as the ever-increasing number of employees working remotely strains existing IT resources and provides increased opportunities for cybercriminals to infiltrate a company's system.[28] In recent months, there has been a significant uptick in phishing and spoofing attacks intended to exploit people anxious for news on the rapidly developing global pandemic.[29] These cyberattacks have already started to significantly impact the IT infrastructures of businesses and institutions, resulting in business interruptions and the loss of data. In early March, for example, the Brno University Hospital in the Czech Republic, the second-largest hospital and one of the key testing centers in the nation for COVID-19, was forced to shut down its IT network as a result of a cyberattack, requiring it to shift acute patients to an alternate facility.[30]

Business losses stemming from a cyberattack can be immediate, extensive, and diverse. The economic repercussions of such an attack may include a significant loss of data, serious business disruption, privacy violations affecting multiple customers and affiliates, and even the need to pay extortion money (associated with ransomware).[31] Because the COVID-19 pandemic is expected to increase the rate and prevalence of cyberattacks, businesses across various industries have come to recognize the importance of having a cyber insurance policy in place to help mitigate these losses.

A cyber insurance policy generally covers expenses incurred by a company after a cybersecurity attack. Reimbursable expenses can include the cost of forensic investigation, recovery for monetary losses resulting from network downtime or business disruption, the cost of system repair and data recovery, the cost of notifying affected customers, the cost of repairing reputational damage, and the payment of extortion money.[32] Some policies may also cover expenses associated with the defense of lawsuits or regulatory actions related to a breach, including legal fees and regulatory fines.[33] Each policy is unique, however, and it is important to consider the specific wording of the policy at issue.

In the event of a loss, and as is the case with any insurance claim, prompt notice by the policyholder and ongoing communication with the insurer are essential. This is particularly important when the loss involves ransomware or other attacks likely to involve substantial and immediate remediation costs.

Companies should also bear in mind that it is equally critical to maintain stringent IT standards, especially in this turbulent economic climate, in order to avoid an attack in the first place. A policyholder should ensure that its IT policies and practices are up to date, and that employees are kept informed of them, as it only takes one vulnerable employee to allow a cybercriminal into a company's IT system. Preventative measures should also include adherence to the guidance issued by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (DHS

CISA), which very recently issued a Security Alert associated with the anticipated impacts of COVID-19 on Enterprise VPN Security, [34] as well as a Risk Management Bulletin for Novel Coronavirus (COVID-19).[35]

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These are only some of the insurance issues implicated by the spread of the novel coronavirus. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

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[1] *See, e.g.*, An Act Concerning Certain Covered Perils Under Business Interruption Insurance and Supplementing Title 17 of the Revised Statutes, A3844, 219th Leg. (N.J. 2020), *available at* https://www.njleg.state.nj.us/2020/Bills/A4000/3844_I1.PDF.

[2] *See, e.g.*, Ryan Smith, *New AM Best Stress Test Will Assess Impact of COVID-19 on Insurers*, Insurance Business America (Mar. 20, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/new-am-best-stress-test-will-assess-impact-of-covid19-on-insurers-217424.aspx.

[3] *See, e.g., Adelman Laundry & Cleaners, Inc. v. Factory Ins. Ass'n*, 59 Wis. 2d 145, 147–148, 207 N.W.2d 646, 647 (1973); *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 613 (D.C. 1970).

[4] *Gregory Packing, Inc. v. Travelers Property Cas. Co. of Am.*, D.N.J. Case No. 2:12-cv-04418 (unpublished) (Nov. 25, 2017) (examining Georgia and New Jersey law and noting that "[w]hile structural alteration provide[d] the most obvious sign of physical damage," such alteration was not required).

[5] *See Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (under Colorado law, building saturated with gasoline vapors had suffered "direct physical loss"); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. App'x 823, 825-27 (3d Cir. 2005) (bacterial contamination of home's water supply constituted a "direct physical loss" under Pennsylvania law); *Westport Ins. Corp. v. VN Hotel Grp., LLC,* 761 F. Supp. 2d 1337, 1344 (M.D. Fla. 2010), *aff'd,* 513 F. App'x 927 (11th Cir. 2013) (finding bacteria contamination causing Legionnaire's Disease constituted physical damage); *Farmers Ins. Co. v. Trutanich,* 123 Or.App. 6, 11, 858 P.2d 1332 (1993) (finding "the odor produced by the methamphetamine lab had infiltrated the house. The cost of removing the odor is a direct physical loss."); *Matzner v. Seaco Ins. Co.,* No. 96–0498–B, 1998 WL 566658, *3 (Mass. Super. Aug. 12, 1998) (finding "carbon-monoxide contamination constitutes 'direct physical loss of or damage to' property, namely the insured Building").

[6] *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (under Michigan law, mold not considered physical damage); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (under Ohio law, mold not considered physical damage as it did not affect building's structural integrity).

[7] *See, e.g., S. Hosp., Inc. v. Zurich Am. Ins. Co.,* 393 F.3d 1137, 1141 (10th Cir. 2004) (noting "the policy requires a direct nexus between the civil authority order and the suspension of the insured's business" and finding no such nexus because "the FAA's order [post-9/11] grounding flights did not itself prevent, bar, or hinder access to Southern Hospitality's hotels in a manner contemplated by the policies"); *By Development, Inc. v. United Fire & Cas. Co,* 2006 WL 694991 (D.S.D. 2006), *judgment aff'd*, 206 Fed. App'x 609 (8th Cir. 2006) (finding that road closures near the property made access to the insured's property more difficult but did not equal a denial of access, as required under the terms of the policy); *Borah Goldstein v. Trumbull Insurance Company*, N.Y. Sup. Ct., No. 652633/2013 (April 6, 2016) (finding that business interruption coverage was not triggered where plaintiff's offices were "mere[ly] difficult[to] access[]" and not inaccessible, because offices were not within the mandatory evacuation zones decreed for certain parts of New York City after Superstorm Sandy).

[8] *54th Street Ltd. Partners, L.P. v. Fidelity and Guar. Ins. Co.*, 306 A.D.2d 67, 67, 763 N.Y.S.2d 243, 244 (1st Dep't 2003) ("the language of the subject policy clearly and unambiguously provides that for business interruption coverage to be triggered, there must be a 'necessary suspension,' i.e., a total interruption or cessation"); *Assurance Co. of Am. v. BBB Serv. Co.,* 265 Ga.App. 35, 593 S.E.2d 7, 7–9 (2003) (finding coverage for business losses due to action of civil authority based on the fact plaintiff's restaurant was required to close due to county order to evacuate as Hurricane Floyd approached).

[9] *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.,* 2002 WL 31247972, at *4 (E.D.Pa. Sept. 30, 2002) (unpublished) (finding coverage for business losses on one plant where order of town authorities directed Plaintiff to suspend plant operations due to Hurricane Floyd despite there being no formal order because "[t]he Civil Authority Clause does not, however,

require a formal order"); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, No. CIV.A. 06-770-C, 2007 WL 2489711, at *3 (M.D. La. Aug. 29, 2007) (finding "evidence indicating that Governor Kathleen Blanco declared a state of emergency in Louisiana on August 26, 2005 as a result of the hurricane [Katrina], and both the Louisiana State Police and local government officials were "asking" and "encouraging" residents to stay off the streets" constituted an "action of civil authority," but that it did not trigger coverage because it did not "prohibit access" to insured premises).

[10] *Compare Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*, 600 F.3d 511, 514 (5th Cir. 2010) (holding that "the proper method for determining loss under the business-interruption provision was to look at sales before the interruption rather than sales after the interruption") *with Berk-Cohen Assocs., L.L.C. v. Landmark Am. Ins. Co.*, 433 F. App'x 268, 270 (5th Cir. 2011) (holding that "any increase in customers' demand or reduction in competitors' supply due to [catastrophe-induced losses] at other properties is a permissible factor in calculating lost business income.").

[11] Legislative proposals will likely increase as disputes over business interruption claims mount. Although most businesses have not yet filed claims, a lawsuit regarding business interruption coverage was recently filed in Louisiana. *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, Pet'n for Decl. Judgment (La. Civ. Dist. Ct., Orleans Parish Mar. 16, 2020). In the complaint, the plaintiff, Oceana Grill, a restaurant in New Orleans, alleges that it has an all-risk property policy which provides for business interruption coverage and "does not provide any exclusion due to losses, business or property, from a virus or global pandemic." Oceana Grill does not allege in the complaint, however, that it has filed a claim for coverage, or been denied coverage by its insurer. Nonetheless, Oceana Grill seeks a declaratory judgment that "because the policy provided by Lloyd's does not contain an exclusion for a viral pandemic, the policy provides coverage to plaintiffs for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination."

[12] *See, e.g.*, 820 ILCS 310/7 ("If any employee sustains any disablement, impairment, or disfigurement, or dies and his or her disability, impairment, disfigurement or death is caused by a disease aggravated by an exposure of the employment or by an occupational disease arising out of and in the course of his or her employment, such employee or such employee's dependents, as the case may be, shall be entitled to compensation . . ."); NY WORK COMP § 39 ("If an employee is disabled or dies and his disability or death is caused by one of the diseases mentioned in subdivision two of section three [defining "occupational diseases"], and the disease is due to the nature of the corresponding employment as described in such subdivision in which such employee was engaged and was contracted therein, he or his dependents shall be entitled to compensation . . ."); Cal. Lab. Code § 5500.6 (discussing liability for "occupational disease").

[13] SC Code 42-11-10 (B)(3).

[14] Wash. Rev. Code Ann. § 51.08.140 ("'Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."); *see also, e.g.*, *Potter v. Dep't of Labor & Indus.*, 172 Wash. App. 301, 311, 289 P.3d 727, 732-34 (2012) ("To establish an occupational disease, Potter had to show her disorder arose both (1) 'naturally' and (2) 'proximately' out of her employment. To meet the 'proximately' prong, Potter had to establish 'by competent medical testimony' that her claimed condition was 'probably, as opposed to possibly, caused by the employment.' The causal link must be removed 'from the field of speculation and surmise.' Indeed, if there is no evidence of causation beyond a possibility, it is error to submit the case to the jury. . . . [T]he 'arising naturally' prong of the occupational disease test requires Potter to prove her condition came about 'as a matter of course as a natural consequence or incident of distinctive conditions' of her particular employment. The focus is on the conditions giving rise to the occupational disease, not on whether the disease itself is common to that particular employment. . . . [Claimant] must show her 'particular work conditions' more probably caused her disability than conditions in everyday life or all employments in general. [Claimant]'s 'particular work conditions' must be conditions of her particular occupation as opposed to conditions coincidentally occurring in her workplace. ") (internal citations omitted); Wash. Pattern Jury Instr. Civ. WPI 155.30 (7th ed.) ("A disease does not arise naturally out of employment if it is caused by conditions of everyday life or of all employments in general.").

[15] *See, e.g.*, *Currier v. Manpower Inc. of New York*, 280 A.D.2d 790, 791, 721 N.Y.S.2d 137, 138 (2001) ("To establish an occupational disease, a claimant must show a 'recognizable link between the disease from which she allegedly suffers and some distinctive feature of her employment'"); *Engler v. United Parcel Serv.,* 1 A.D.3d 854, 856, 767 N.Y.S.2d 496, 498 (2003) ("Absent any link between claimant's condition and a distinctive feature of the job itself, as opposed to the vehicle out of which he worked or the places to which he made deliveries, we find that substantial evidence supporting a case for occupational disease was not established"); *Bethlehem Steel Co. v. Indus. Acc. Comm'n*, 21 Cal. 2d 742, 744, 135 P.2d 153, 154 (1943) ("It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true

that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment.") (internal citations omitted); *S. Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal. 4th 291, 301, 349 P.3d 141, 148 (2015) (citing *Bethlehem Steel* for same proposition); *McCarthy v. State Dep't of Soc. & Health Servs.*, 46 Wash. App. 125, 130, 730 P.2d 681, 685 (1986*), aff'd sub nom. McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wash. 2d 812, 759 P.2d 351 (1988) ("[N]aturally means that a disease must be "peculiar to, or inherent in, his particular occupation. A disease need not be unique to be peculiar to the employment, but the claimant must show that the job requirements exposed the claimant to a greater risk of contracting the disease than would other types of employment or nonemployment life.") (internal citations omitted).

[16] *See Cruz v. Hall Management*, 2019 Cal.Wrk.Comp. P.D. LEXIS 29; *Abernathy v. Harris Wolf California Almonds*, 2015 Cal.Wrk.Comp. P.D. LEXIS 547.

[17] *Interim Guidance: Public Health Communicators Get Your Community Ready for Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-communicators-get-your-community-ready.html (last reviewed Mar. 1, 2020).

[18] *Symptoms*, *Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL & PREVENTION (Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fsymptoms.html (last reviewed Mar. 20, 2020).

[19] *How It Spreads*, *Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Ftransmission.html (last reviewed Mar. 4, 2020).

[20] *Inslee Announces Workers' Compensation Coverage to Include Quarantined Health Workers/First Responders*, THE OFFICE OF THE GOVERNOR OF THE STATE OF WASHINGTON (Mar. 5, 2020), https://www.governor.wa.gov/news-media/inslee-announces-workers-compensation-coverage-include-quarantined-health-workersfirst.

[21] *Do I Need a Workers' Comp Account?*, WASHINGTON STATE DEP'T OF LABOR & INDUSTRIES, https://lni.wa.gov/insurance/insurance-requirements/do-i-need-a-workers-comp-account/ (last visited Mar. 20, 2020).

[22] *HDMG Entertainment, LLC v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. L009082*, 355 F. Supp. 3d 373 (D.S.C. 2018)

[23] *Id.* at 381-82.

[24] *Defeat the Beat, Inc. v. Underwriters at Lloyd's London*, 669 S.E.2d 48 (N.C. Ct. App. 2008),

[25] *Douglas v. Norwegian Cruise Lines*, Case No. 1:20-cv-21107 (S.D. Fla.).

[26] *McDermid v. Inovio Pharmaceuticals*, Case No. 2:20-cv-01402 (E.D. Pa.),

[27] Press Release, U.S. Securities and Exchange Commission, SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19) (Mar. 4, 2020), *available at* https://www.sec.gov/news/press-release/2020-53 (emphasis added).

[28] Alert (AA20-073A), U.S. Dep't of Homeland Security, Enterprise VPN Security (Mar. 13, 2020), *available at* https://www.us-cert.gov/ncas/alerts/aa20-073a.

[29] *See* Brenda R. Sharton, *Will Coronavirus Lead to More Cyber Attacks?*, HARVARD BUS. REV. (Mar. 16, 2020), https://hbr.org/2020/03/will-coronavirus-lead-to-more-cyber-attacks; *Cyber Criminals Taking Advantage of COVID-19 Coronavirus*, RADIO NEW ZEALAND (Mar. 10, 2020), https://www.rnz.co.nz/news/national/411356/cyber-criminals-taking-advantage-of-covid-19-coronavirus; Colleen Tressler*, Coronavirus: Scammers Follow the Headlines*, FED. TRADE COMM'N (Feb. 10, 2020), https://www.consumer.ftc.gov/blog/2020/02/coronavirus-scammers-follow-headlines.

[30] *Brno University Hospital in Czech Republic Suffers Cyberattack During COVID-19 Outbreak*, SECURITY MAGAZINE (Mar. 17, 2020), https://www.securitymagazine.com/articles/91921-brno-university-hospital-in-czech-republic-suffers-cyberattack-during-covid-19-outbreak.

[31] "James Lewis, *Economic Impact of Cybercrime—No Slowing Down*, MCAFEE (FEB. 2018), *available at* https://www.mcafee.com/enterprise/en-us/solutions/lp/economics-cybercrime.html.

[32] *See, e.g.*, *Cyber Liability Insurance for Businesses*, NATIONWIDE, https://www.nationwide.com/business/insurance/cyber-liability/ (last visited Mar. 20, 2020); *How Does Cyber Insurance Work?*, TRAVELERS, https://www.travelers.com/cyber-insurance/how-does-cyber-insurance-work(last visited Mar. 20, 2020).

[33] *See supra* note 15.

[34] *See supra* note 14.

[35] *CISA Insights: Risk Management for Novel Coronavirus (COVID-19)*, U.S. DEP'T OF HOMELAND SECURITY (Mar. 6, 2020), https://www.cisa.gov/sites/default/files/publications/20_0306_cisa_insights_risk_management_for_novel_coronavirus_0.pdf.