

## Insights

### If Our Company Gets Sued Because of COVID-19, Will We be Covered by Insurance?

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There has been a steady stream of commentary about insurance coverage issues and COVID-19. Most of the commentary has appropriately focused on first-party coverages, in particular Business Interruption or Business Income coverages. First-party coverages and business interruption losses can and will remain an important issue with COVID-19. To be clear, it is not too late to look at your policies and submit a claim to your insurance company under your Business Interruption coverage. See our commentary [here](#) for a simple six-step action plan to maximize insurance recoveries for COVID-19. But with the easing of shelter-in-place restrictions and 'return to work' scenarios imminent, a new phase of COVID-19 may be underway: third-party lawsuits. For insurance coverage, this will shift the focus to third-party liability coverages.

The risks of third-party lawsuits arising from COVID-19 are broad and innumerable. But, many businesses are already pushing Congress and state legislatures to pass laws granting immunity from COVID-19 lawsuits. And, in April 2020, the American Tort Reform Association released a **white paper** titled "Responding to the Coming Lawsuit Surge: Policy Prescriptions for Addressing COVID-19 Tort Litigation." Re-opening the economy will only multiply these risks. Some businesses do not have the luxury of operating or continuing to operate in a virtual or semi-virtual environment. To survive and generate revenue, many businesses must be open and operating in a physical space for employees, customers or both. Even with guidance from federal and state governments, it may be a challenge to manage and mitigate the spread of COVID-19. The guidance inevitably leaves room for interpretation. This will lead to a diversity of approaches amongst businesses in different sectors creating an uncertain and evolving landscape of litigation risk.

Third-party lawsuits arising from COVID-19 are already underway and have been filed, and the potential for litigation is immense. Customers suing businesses. Passengers suing cruise lines. Patients suing doctors and hospitals. Residents suing nursing homes. Employees suing employers. Businesses suing other businesses. Students suing schools (see additional commentary [here](#)). The only limit to the types and variety of claims that are filed may be the creativity of the attorneys filing them. Negligence. Wrongful death. Malpractice. Failure to safeguard. Workplace safety claims. Wage claims. Employee benefit claims. Wrongful termination. Discrimination. Breach of contract. Supply chain claims. Force majeure. Unjust enrichment. Price gouging. Antitrust. Consumer refund claims. Even moving beyond the obvious and devastating human health risks of COVID-19, there is already ancillary litigation tangentially related to COVID-19. As an example, borrowers have filed class action lawsuits against banks for the manner in which COVID PPP loan programs have been administered.

In such an environment, businesses need to be vigilant in using every tool at their disposal to manage these risks. One important tool is insurance coverage. Appropriately used, insurance coverage can be a powerful tool for businesses that are facing unknown and evolving litigation risks. With third-party liability coverages, the insurance company has a duty to defend and indemnify the policyholder for covered claims. Often the duty to defend is more valuable to the policyholder than the duty to indemnify. In most jurisdictions, the duty to defend is broader than the duty to indemnify. The duty to defend is usually triggered by the mere potential for coverage. In Indiana, as an example, it "is the nature of the claim, not its merit, which establishes the insurer's duty to defend." *Knight v.*

*Ind. Ins. Co.*, 871 N.E.2d 357, 362 (Ind. Ct. App. 2007). The relative importance of the duty to defend will be amplified further with COVID-19 given the uncertainty of proving how and when a person contracted the disease. If plaintiffs resort to filing tenuous claims arising from COVID-19 as many commentators are predicting, the duty to defend may be a lifeline for a business facing mounting legal fees.

At this stage, policyholders should take a proactive and open-minded approach. Whether or not insurance coverage is available for COVID-19 related claims will be fact specific: both in terms of the particular claims asserted against your business and the specific terms and conditions of your policies. It is still relatively early in the COVID-19 pandemic, and the coverage landscape is undeveloped. All of the COVID-19 coverage developments so far involve first-party coverages, but soon we will see reported developments for third-party coverage as well.

In terms of the particular third-party liability coverages that could be implicated, the Commercial General Liability or "CGL" policy is the starting point. CGL policies are the backbone of most commercial insurance programs. It is very likely your business has CGL coverage. And there is a definite possibility that your CGL policy could cover COVID-19 related claims, although some CGL policies do contain a "Communicable Disease" or "Virus" exclusion. Insurers will almost certainly rely on such an exclusion to deny coverage. But just as many if not more CGL policies do not have a "Communicable Disease" exclusion. Likewise many Property and Business Interruption policies contain a "Virus Exclusion", but many CGL policies do not. In the absence of a specifically applicable exclusion, there may be coverage in a CGL policy when a third-party alleges bodily injury as a result of a policyholder's negligence. Importantly, CGL policies typically define "bodily injury" as: "physical harm, including sickness or disease, sustained by a person; or mental anguish, injury or illness, or emotional distress, resulting at any time from such physical harm, sickness or disease."

At this stage of COVID-19 and the coming wave of lawsuits, policyholders should consider all liability coverages: not just CGL, but also Professional Liability, Errors & Omissions, Product Liability, Directors & Officers, Pollution, Cyber, Employment Practices and Workers Compensation. We recommend the following action plan. Inventory and make sure you have copies of all of your policies. Get organized. Create a coverage chart. (Rely as much as possible on your insurance agent for these items.) Have a preliminary discussion with your insurance agent and coverage counsel to understand what coverages you have and how those coverages respond to COVID-19 claims. Identify with particularity the impact that COVID-19 is having on your business. Monitor for any claims asserted against your business (both written and verbal). Work with your agent and attorneys to identify when the impact of COVID-19 is sufficiently acute to "trigger" coverage. Once coverage is triggered, promptly (*i.e.* immediately) give written notification to your agent and carriers. Finally, do not assume coverage is not available. Do not accept at face value a statement from an agent or carrier there is no coverage. Have coverage determinations reviewed by coverage counsel.

Hopefully the worst models for easing of social distancing and 'return to work' scenarios do not materialize. Hopefully—as Senator Mitch McConnell put it—the "biggest trial lawyer bonanza in history" does not come to pass. But if it does, businesses should be ready. Businesses have many tools in their arsenal to manage and mitigate these myriad and evolving risks. Krieg DeVault's **COVID-19 Resource Center** is intended to provide information about these different tools. One important tool is insurance coverage. Our coverage attorneys are available to provide counsel and representation on these matters. Our coverage attorneys represent policyholders under all types of commercial coverages and handle all manner of coverage issues, from policy reviews and coverage opinions, to claims handling matters and interfacing with insurance companies, to coverage disputes and coverage litigation.

For more information regarding this alert, or other insurance litigation issues impacting your organization, please contact **Scott S. Morrisson, Matthew D. Neumann**, or any member of **Krieg DeVault's Litigation Practice Group**.