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THE RETURN OF THE COMMUNICABLE DISEASE EXCLUSION

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In the time of COVID-19, many insurance carriers are seeking to clarify coverage for biologically-related liability risks on commercial insurance policies. There is a stark increase in carriers implementing or strongly considering applying communicable disease exclusions on general liability policies in response to the pandemic crisis. Although some policies already contained some communicable disease-related exclusionary wording, it was more prevalent with excess and surplus carriers (carriers not regulated by the state), but not anymore.

WHAT IS THE COMMUNICABLE DISEASE EXCLUSION?

Form CG2132 (05/09), communicable disease exclusion is an overt removal of general liability coverage for the transmission of communicable disease. Originally the exclusion was created by ISO (Insurance Services Organization) in response to diseases such as the avian flu, SARS, and those caused by rotaviruses. Although the exclusion does not explicitly name any viruses, it suggests that COVID-19 would fall under the umbrella of communicable disease. The actual exclusion wording is below:

“Bodily injury” or “property damage” arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if a claim against any insured alleges negligence or other wrongdoing in the:

1. Supervising, hiring, employing, training, or monitoring of others that may be infected with and spread a communicable disease;
2. Testing for a communicable disease;
3. Failure to prevent the spread of the disease; or
4. Failure to report the disease to authorities.

The application of this exclusion impacts coverage for insureds in all industries. The potential claims examples where this exclusion would come into play are vast. For example, a retail establishment or building owner could be sued by a client/customer who alleges contracting COVID-19 on their premises and that proper sanitation protocols were not followed to prevent it. This exclusion removes the insurance company from their obligation to defend the claim (incurring defense expense), investigate the alleged negligence/transmission, and indemnifies that customer (third party) who incurred the alleged bodily injury.

In the absence of a communicable disease exclusion, there is a question of whether the current commercial general liability form would cover a communicable disease-related claim. Would a claim of this nature qualify

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as an “occurrence” under the existing form definition? Can an insured be held legally liable for disease transmission per the conditions of the policy? How can one identify that a virus was contracted at a specific time, date, and place on an insured’s premises?

Many believe that an overt exclusion clearly relieves the insurance carrier from coverage, for either actual or alleged transmission. Ultimately, many believe that the exclusion shields the carrier’s duty to defend and incur defense expenses associated with communicable disease claims. With so many uncertainties surrounding COVID-19 insurance coverage, one thing is clear: the prevalence of the communicable disease exclusion will increase into 2021 in response to the pandemic.

POTENTIAL LEGISLATION

Outside of the exclusion, the current administration is exploring a proposal to provide legal immunity for businesses regarding their liabilities associated with COVID-19. This could help provide a legal barrier for COVID-19 third-party claims/allegations, supporting the insurance exclusion.

There is also dialogue on a federal level for a potential Pandemic Risk Insurance Act (PRIA), which is a similar response to the terrorism insurance act after 9/11. The PRIA could provide federal reinsurance for business interruption losses arising out of defined “pandemics.” Coverage would be optional as with TRIA and could potentially alleviate insurance carriers’ exposure to national crises such as pandemics via a federal backing. Overall, government and insurance carriers’ response to this pandemic is a work in progress and will continue to evolve.

Brokers and policyholders must be aware of the communicable disease exclusion and whether it applies under their specific insurance program to understand the risk to their clients or their operations. Ideally, the absence of an exclusion is always preferred. Please consult your broker advocate to discuss the impact and concerns further.

References and Resources

1. Coronavirus and the CGL, <https://www.insurancejournal.com/blogs/big-i-insights/2020/03/25/562354.htm>
2. The Coronavirus and the CGL Policy, <https://www.irmi.com/articles/expert-commentary/coronavirus-and-the-cgl-policy>
3. Businesses Want Virus Legal Protection. Workers Are Worried., <https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html>
4. Lawmaker Details Federal Reinsurance for Pandemic Business Interruption, Event Losses, <https://www.insurancejournal.com/news-national/2020/05/27/570002.htm>