

INSURANCE COVERAGE ISSUES IN CLAIMS ARISING OUT OF THE INFLUENZA A (H1N1) OUTBREAK

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The recent outbreak of influenza A (H1N1), also known as “swine flu,” raises many questions as to coverage for claims under commercial general liability, property, workers compensation, and even directors and officers insurance policies. Here are a few of our thoughts on some coverage issues that may arise.

Commercial General Liability

Most commercial general liability (“CGL”) policies are written on standard forms providing coverage for “bodily injury” and “property damage” resulting from the insured’s unintentional acts. Claims based upon the alleged failure to take proper precautions to keep the insured’s building free from the spread of flu could be made against insureds not only for actual bodily injury, but also for damages arising out of a claimant’s alleged emotional distress and/or mental anguish resulting from fear of exposure. In some jurisdictions, emotional injuries fall within the policy definition of bodily injury, while in others, express physical manifestation of bodily injury is required to bring a claim within coverage. Depending on the specific policy language and applicable state law, coverage may exist for emotional injuries and mental anguish claims. Insurers may assert that coverage for bodily injury claims is barred by

one or more of the policy’s exclusions, including the employer’s liability exclusion (barring coverage for claims arising out of and in the course of employment) and pollution exclusion (barring coverage for, among others, contaminants or irritants). They will also likely contest the insured’s liability based on the doubtful causal connection between the insured’s conduct and the alleged flu exposure.

Closure or evacuation of both residential and commercial buildings may result in claims against real estate owners. Standard CGL policies provide coverage for “personal and advertising injury,” which includes claims for wrongful eviction. Commercial and residential real estate owners may be successful in asserting that such claims are covered under a CGL policy’s wrongful eviction coverage, subject to applicability of the policy’s pollution exclusion.

Commercial Property

In the event that real property is contaminated, or a threat of contamination exists, as a result of exposure to influenza, such property may be quarantined or otherwise rendered inaccessible either voluntarily or by governmental order. In addition, the actual or perceived presence of the influenza virus at or

near such real property may cause decreased customer traffic for retail operations, as well as increased employee absences. Either of these scenarios may lead to claims under commercial property policies' business income/extra expense coverage for damages flowing from such business interruption. Under many commercial property policies, insurers first determine whether the insured property suffered any direct physical loss or damage. The threshold issue is whether the presence of the influenza virus is considered direct physical loss or damage. For example, when the virus is detected on a desk, water fountain, or gym equipment, is that direct physical loss?

Even if direct physical loss is demonstrated, the insurer will most likely invoke the policy's pollution or contamination exclusions, as well as other standard exclusions. Following the outbreak of SARS and Avian Flu in the 2004-2006 period, insurers bolstered the "contamination" exclusion to expressly exclude loss resulting from "...virus, disease causing or illness causing agent..." unless caused by otherwise insured physical damage. Given the volume of mold-related claims over the past decade, many insurers have also added specific mold exclusions which attempt to incorporate an exclusion for viruses. The application of the mold exclusion to airborne viruses, however, is inconsistent with the intent of the drafters and the representations made to

state insurance regulators in securing approval of the exclusion.

Even without direct physical damage or loss to the insured property, coverage may be available under the common commercial property policy's "civil authority" coverage extension, if the business interruption damages were caused by the order of a civil authority prohibiting access to the insured property, and the cessation of operations arises from actual damage to property other than the insured property. Given the increased volume of civil authority claims arising out of recent terrorist activity and catastrophic natural disasters, however, insurers have vigorously contested such claims.

Workers Compensation

Flu-exposed employees may assert claims for lost wages and alleged flu-caused disability under their employers' workers compensation policies. While most workers compensation policies provide coverage for claims arising out of or in the scope of employment, many jurisdictional workers compensation statutes do not treat illnesses resulting from exposure to fellow employees as a compensable claim. Thus, to the extent that claims are based on a workplace exposure to influenza, workers compensation coverage may be available. Because treatment of the definition of occupational disease varies widely from state to state, however, coverage for workers compensation claims will be jurisdiction-specific.

Directors and Officers

It is conceivable that investors and/or shareholders in corporations impacted by the influenza outbreak will make claims against such corporations or their officers and directors premised on allegations that the directors or officers breached their fiduciary duties in failing to take appropriate steps to protect the company's financial interests in responding or failing to respond to a flu outbreak. Most directors and officers ("D&O") policies contain exclusions for claims alleging bodily injury, or claims derived from pollution. Neither of those exclusions should apply to virus-related shareholder claims, but policyholders are well-advised to check their policies and to ensure that these exclusions are modified if needed.

From the enormous business interruption losses arising from the terrorist attacks in September 2001, to some of the largest environmental cleanup cases in the country, Pillsbury's insurance recovery and advisory attorneys are at the forefront of efforts to secure insurance coverage for its clients. To learn more about Pillsbury's insurance and recovery practice, visit <http://www.pillsbury-law.com/insurancerecovery>. Pillsbury has also issued a client advisory on legal concerns in a swine flu emergency which can be accessed via http://www.pillsburylaw.com/Swine_Flu_Emergency.