KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

DEALING WITH INSURANCE COMPANIES ON CLAIMS RELATED TO COVID-19 PANDEMIC

Categories of Claims

The current public health emergency will likely present numerous issues regarding insurance coverage. In addition to business interruption claims, claims will arise with vendors under contracts to host meetings and events, as well as third party liability claims alleging negligent acts or failures to act in meeting the unprecedented challenges of the pandemic. In each instance, nonprofits and companies seeking to protect their interests under various categories of insurance coverage will need to act proactively to achieve this goal.

Potential for Changes in Governing Law

While many of the issues related to insurance claims will be resolved based on the current state of the law, there is a possibility that Massachusetts will adopt legislation that will change the law regarding losses due to the COVID-19 pandemic.

SD 2888 (introduced by Senator Jamie Eldridge), would prohibit Massachusetts insurers from denying claims for business interruption due to COVID-19, even if the insured's policy excludes losses resulting from viruses. The legislation would also bar insurers from denying such claims on the grounds that there is a lack of physical damage to the insured's property. This legislation might also allow carriers to apply for state funding to cover the cost of certain claims.

In addition, Governor Baker has introduced legislation that would provide protection against civil liability for health care workers and certain categories of health care institutions in connection with their care for individuals suffering from COVID-19.

With the prospect of a rapidly changing legal landscape, it is prudent to take an expansive view of the potential coverage offered by your insurance policies and to provide prompt notice of potential claims. This includes third party liability claims as well as claims for lost revenue arising from business interruptions attributable to the pandemic and associated "stay at home" or business closure orders.

Importance of Timely Notice of Claim

Because business interruption insurance policies frequently include a specific exclusion for losses caused by a virus, your broker may discourage you from filing a notice of claim. However, both

potential legislative mandates and litigation over the meaning of the virus exclusion argues for erring on the side of caution, and submitting a prompt notice of claim under business interruption, and, if applicable, liability insurance policies. The risk of not giving notice is denial of a claim on the grounds of late notice, or disclaimer of losses arising prior to the date of the notice. Likewise, because renewal policies following the pandemic will likely include more restrictive terms, if your business has been interrupted due to COVID-19, or you are facing a potential third party claim, you should consider submitting a claim under your current business interruption or liability policy.

Protecting Your Interests After Filing a Claim

It is increasingly common that clients with liability insurance find themselves battling not only the party suing them, but also their own insurer. Compelling a carrier to defend a claim can seem complex and expensive, but there are a few key points that, if remembered and followed at the outset, will help you receive the coverage to which you are entitled.

Always submit notice of a potentially covered claim to your insurer **immediately** upon becoming aware of such claim. Notice should be submitted to all carriers who may be liable, including those who provide coverage for the specific claim as well as providers of general liability or umbrella coverage. Once an insured submits a claim on a covered lawsuit, the insurance company has three options:

(1) <u>Acknowledgement of Coverage</u>.

Where the insurer acknowledges coverage and agrees to defend the claim (without a reservation of rights), the insured is covered up to the limits of its policy and the insurer is free to appoint counsel of its choice.

(2) <u>Deny coverage of the claim</u>.

Some insurance companies will deny coverage and a defense at the outset regardless of the merits of the claim. This denial is usually communicated in one of two ways: either formally, by a letter setting forth the insurer's coverage position; or informally, through the insured's insurance broker. In neither case should the insured necessarily accept the decision as final. When communicating with the insurance company through a broker, it is particularly important to remember that the insurance broker is not necessarily the insured's ally.

Therefore, you should not hesitate to dispute – in writing – an initial denial of coverage, explaining which parts of the policy provide coverage and why. If the carrier continues to refuse to defend the case, the insured is left to defend itself in the underlying lawsuit. However, if the carrier's position is unfounded, the insured may pursue an action to enforce the right to coverage. Under the Massachusetts Consumer Protection Statute, a prevailing insured will not only receive the coverage benefits to which it is entitled in the underlying lawsuit, but it will also recover its attorneys' fees in the lawsuit against the insurance company, interest, and potentially double or treble damages if the insurance company's denial is found to be in bad faith.

Alternatively, the insured or the insurance company may initiate a declaratory judgment action to resolve whether there exists a duty to defend and/or to cover the claim. In such a case, a prevailing

insured is entitled to recover its legal fees, regardless of whether the insurance company or the insured initiated the lawsuit.

(3) Agree to defend the claim, subject to a reservation of rights.

In most cases insurance companies will agree to defend the claim subject to a "reservation of rights." This means that the insurance company is agreeing to provide a defense to the lawsuit, while reserving its rights to later disclaim coverage depending on the facts that emerge. **Under Massachusetts law, once an insurance company issues a reservation of rights, the insured is entitled to select its own counsel and control its own defense rather than accept whatever counsel is appointed by the insurance company.** This is because counsel selected by the insurance company may have an opportunity to steer the litigation towards uncovered claims, thus enabling the insurance company to escape liability.

Not only is the insured entitled to select its own counsel, but the insurance company is obligated to reimburse the insured for the reasonable legal fees and costs incurred. Insurance companies, however, will often attempt to place an artificial cap on the hourly rates they will pay or otherwise attempt to limit their reimbursement to "panel rates" – i.e., the discounted rate they pay their own lawyers.

Again, the insurance company and broker's word on this is not final, and any attempt by an insurance company to avoid paying the insured's counsel's reasonable fees can be challenged. Contesting the insurance company's artificial cap on attorneys' fees is likely to have one of two desirable effects: it can cause the insurance company to fully reimburse the insured for the cost of defending the case; or it can induce the insurance company to relinquish its reservation of rights and acknowledge that the claim is covered.

In sum, it is important to know your rights when dealing with insurance coverage issues arising from the COVID-19 pandemic. It is often worth the effort to get advice up front in order to be sure that you get the full value of the insurance coverage you have paid for.

Krokidas & Bluestein regularly counsels clients regarding insurance and how best to enforce their rights to a defense and coverage for claims. For examples of our success stories including a victory in the Massachusetts Appeals Court on behalf of a client who overcame an insurance company's initial denial of coverage, click here.

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