

Key Decisions and Strategies in Pursuit of Insurance for Losses from COVID-19

► **Finley Harckham, senior litigation shareholder with Anderson Kill, discusses tips on how policyholders can successfully bring claims to their resolutions.**

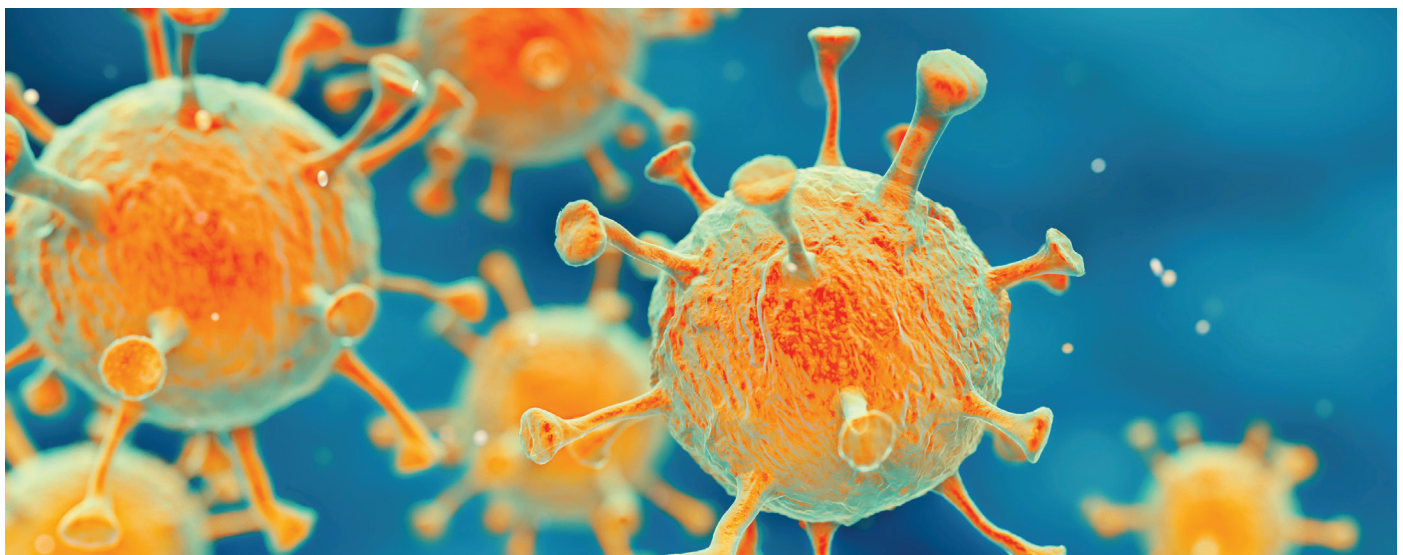
Many businesses and other entities have submitted insurance claims for business interruptions and extra expenses stemming from the disruption of their businesses by COVID-19. Whether these claims stem from the presence of the virus on the policyholder's own property or the property of customers or suppliers, or result from government orders impairing access to insured locations or other properties, the vast majority of policyholders have received either flat-out denials of coverage or requests for very specific and sometimes voluminous information. Those demands come even though in all likelihood the insurance company intends to deny coverage based on the simple argument that COVID-19 is not property damage, or that viruses are excluded under the policy in question. The lengthy information

requests and the effort required to comply with them likely serve no purpose other than to allow the insurance company to assert that it investigated the claim.

Either situation, a blanket denial or an information request, can leave the policyholder wondering how, if at all, to pursue the claim. The following tips can help policyholders bring a claim to resolution as quickly as possible and with the greatest chance of success.

1. Obtain an Expert Evaluation of Your Coverage

Pursuing coverage for COVID-19-related losses will likely be time-consuming and expensive. It is therefore fundamentally important for policyholders to obtain an expert evaluation of their coverage and the likelihood of prevailing. Many policyholders have so far avoided this step by submitting very simple and general statements to their insurance companies that they have suffered loss from COVID-19. That can be a prudent first step, particularly



because the scope and extent of most losses is not yet known. The response to such a notice might be a denial of coverage or, perhaps more likely, a request for information supporting the claim. In either event, the policyholder is not left with a clear idea of whether the claim is worth pursuing.

There is no single correct answer for every claim. Numerous policy forms, some with relevant manuscript provisions, have been issued, providing different coverages and containing different potentially relevant exclusions. No one can tell most policyholders with confidence they are entitled to coverage for COVID losses, because the courts will have to decide a threshold issue of whether COVID-19 constitutes, or causes, property damage needed to trigger business interruption and extra expense coverage under most property policies.

However, an experienced coverage counsel, broker or insurance advisor can help identify potentially applicable insurance grants in some policies, including:

- Damage to the policyholder’s own property and resulting business income loss.
- Extended business income loss, for loss from government orders.
- Loss from supply chain disruption or property damage to “attraction” or “leader” properties.

Counsel can also identify potential pitfalls – or advantageous policy provisions – that may be dispositive.

2. Cooperate with Insurance Company Requests for Information, but Demand Prompt Coverage Determinations

Responding to detailed and seemingly irrelevant requests for information may seem like a waste of time, particularly since the insurance industry has signaled it will deny

the vast majority of claims. Nonetheless, if the insurance company has not denied coverage and is at least going through the motions of investigating a claim, cooperating with the investigation is generally a condition to coverage. So, policyholders should provide all requested information that bears upon their claim.

While the insurance company is entitled to investigate the claim, the policyholder is entitled to a reasonably prompt determination of coverage. Policyholders should feel free to ask insurance companies the pointed questions that could quickly bring the claim investigation to a head. For example, “Do you concede that there are circumstances under which a COVID-19-related claim could be covered under my policy? If so, what are those circumstances?”

3. Do Not Accept Reservations of Rights That Do Not Clearly Articulate the Possible Grounds for Coverage

Insurance companies often issue purported reservations of rights that provide no clear indication of the basis for denying coverage. These letters briefly recite the insurance company’s understanding of the facts relevant to the claim and draw the policyholder’s attention to various policy provisions, quoted one after another without any context or explanation of how they supposedly support a defense to coverage.



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Then, the letters state that “for the foregoing reasons” – when in fact no reasons have been given – the insurance company reserves all of its rights to deny coverage.

If the insurance company reserves its rights, the policyholder should demand to know on what grounds. In many jurisdictions, insurance companies are required to state the specific grounds for reserving their rights, and a failure to do so may result in a waiver of coverage defenses. Moreover, fully understanding the insurance company’s position is important for evaluating coverage and whether the claim should be pursued.

4. If the Claim Is Denied but May Be Worth Pursuing, the Policyholder Must Decide Where and When to Commence Legal Action

If a claim is denied, the policyholder has a certain amount of time to commence a coverage action or arbitration, based either on state statutes of limitations or contractual limitations. Also, many policies require sworn proofs of loss submitted within a specified period of time. Fortunately, insurance companies will typically agree to toll statutes of limitation and the deadlines for sworn proofs of loss. Such agreements should be obtained in writing because failure to comply with time limitations can result in forfeiture of coverage.

Some policyholders will have no choice but to pursue their claims immediately and aggressively in court in order to recover funds necessary for their survival. Others might decide to put off their own suits while other policyholders incur the expense of obtaining court rulings on the key issues – e.g., whether the presence of COVID-19 is sufficient to satisfy the requirement of property damage needed to trigger coverage. Waiting may be a sound strategy, but policyholders with the luxury of time should still bear in mind the potential downsides of sitting on the sidelines while others make relevant laws.

First, insurance policies are interpreted under state law, which means that each state will interpret key policy provisions, even if they are standard in policies used throughout the country. It is not uncommon for multiple trial and appellate courts within a state to reach different conclusions on identical policy interpretation issues. So it may take several years before an issue is settled under the law of the state applicable to a particular insurance policy.

Second, some policies present better opportunities than others for policyholders to prevail on the key threshold coverage issues. For example, policies that provide some coverage for virus or communicable disease, or only partially exclude such causes of loss, give policyholders arguments not available under other policies to the effect that COVID-19 is property damage, because the policy itself acknowledges that viruses are not excluded in all instances. Policyholders with better than typical policy language would be well served to try to move their claims quickly.

Third, most claims present unique facts that will not be resolved in other policyholders’ claims, such as whether the requirements of order of civil authority coverage have been met, including whether the virus was present within a specified distance of insured premises; and whether the order was entered because of the actual presence of the disease or simply as a prophylactic measure. These will be important issues for many policyholders, because the massive disruption of the economy is largely the result of government orders prohibiting or limiting access to premises.

Conclusion

It is in the interests of most policyholders to take a proactive role in evaluating and pursuing their claims – and not let the insurance company dictate the claim adjustment process and timing. ■