Insurance Coverage for Financial Institution COVID-19 Claims and Losses

Walter J. Andrews
Sergio F. Oehninger
Hunton Andrews Kurth LLP

March 26, 2020
Topics We’ll Address

First-Party Insurance
- Commercial Property Insurance
- Business Interruption and Other Time Element Coverages
- Event Cancellation Coverage
- Trade Credit, Trade Disruption, and Political Risk Insurance

Government Actions

Third-Party/Liability Insurance
- Commercial General Liability (CGL)
- Directors & Officers Liability (D&O)
- Employment-Related Insurance (WC, EL, EPLI)

Cyber Insurance Considerations

Key Takeaways
Commercial Property Insurance – Covers physical damage to insured buildings and contents due to a covered cause of loss, and provides other time element coverages.
Business Interruption - Covers loss of income suffered by an insured when damages to its premises cause a slowdown or suspension of operations.
Commercial Property Insurance

- Extra Expense - Covers costs necessary to mitigate business-interruption loss
- Preservation of Property
- Contingent Business Interruption (CBI) - Covers losses resulting from an interruption of business at the premises of a customer or supplier (supply chain interruption)
- Civil Authority - Covers loss resulting from governmental orders due to property damage elsewhere
- Ingress/Egress - Covers loss due to blocked ingress to or egress from insured property
- Service Interruption - Covers loss due to lack of utilities, such as power, caused by damage from a covered cause of loss to property away from the insured’s premises
Commercial Property Insurance

Key coverage question – Is there physical damage?

Key exclusions

Recent Lawsuits to Enforce Business-Interruption Coverage for COVID-19:

- Chickasaw Nation v. Lexington Ins. Co. et al. (Pontotoc Cty, OK, 3/24/20)
- Choctaw Nation v. Lexington Ins. Co., et al. (Bryan Cty, OK, 3/24/20)
Commercial Property Insurance

V Other Features of Commercial Property Coverage
- Claim Preparation Costs
- Extended Period of Indemnity

V Other Specialized Coverages
- Rent Loss Insurance
- Communicable Disease Coverage/Endorsement
Key Considerations for Business Interruption Coverage

- Have government orders shut down your business (or part of it) due to the virus?
- Has there been a confirmed infection at your premises?
- Have your customers’ properties shut down and impacted your business as a result?
- Has you or your customers’ supply chain been disrupted because of COVID-19?

Notice

- Documenting your loss
- Analyze your policies’ terms, conditions, and exclusions
Government Action

- U.S. Congress
- New Jersey
- New York
- California
- Texas
- Florida
Event Cancellation Insurance

- Covers financial losses arising out of the cancellation, curtailment, or postponement of specified events
- Caused by factors that are beyond the insured’s control

Exclusions

Notice
Sample Policy Language:

**Insuring Agreement:** This insurance indemnifies **Named Insured** against any loss occurring subsequent to the **Insurance Effective Date** and causing the unavoidable:

- Cancellation, Curtailment, Postponement, Removal to Alternative Premises, or Abandonment of the **Event**; and/or . . .
- Enforced Reduced Attendance.

due to any unexpected cause beyond Named Insured’s or event organizer’s control.

**Definitions:**

- **Cancellation**... means the inability of the **Named Insured** to open or commence, keep open, or otherwise maintain the **Event** in whole or in part for its original published duration or scope.

- **Enforced Reduced Attendance** means the enforced inability of **Participants** to attend the **Event** solely or directly as a result of the same specific cause....

**Exclusions:**

- Government shutdown
- Communicable Disease
- Coverage Buy-back Options
Other First Party Coverages

- Trade Credit Insurance
- Trade Disruption Insurance
- Political Risk Insurance
CGL policies generally cover liability for bodily injury and property damage caused to third parties on insured premises.

Examples of COVID-19-related allegations:

- Sickness caused by insured’s failure to take necessary precautions to prevent exposure to infected individuals
- Insured’s failure to have proper procedures and plans in place
- *Weissberger v. Princess Cruise Lines* (C.D. Cal. 3/12/20)
  - Individuals quarantined on Grand Princess off CA coast allege company’s failure to take precautions to prevent a coronavirus outbreak on the ship after two passengers on the previous sailing disembarked with symptoms.

To the extent that a customer, guest, or other third party alleges bodily injury or property damage as a result of an insured’s negligence, there should be coverage absent an applicable exclusion.
Pollution exclusion

Westport Ins. Corp. v. VN Hotel Group, LLC, 761 F. Supp. 2d 1337, 1343–44 (M.D. Fla. 2010), aff'd, 513 Fed. Appx. 927 (11th Cir. 2013) (finding pollution exclusion inapplicable, as Legionella bacteria is not a pollutant)

Virus/bacteria exclusion

Post-2003 (SARs outbreak) exclusion for loss caused by any “virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness or disease.”

Analyze policy for such exclusions and any endorsements that can change or add coverage and are specific to each policy

Consider policy construction rules in applicable jurisdiction

Broad Duty to Defend – Potentiality and Eight-Corners Rule

Significance of “because of” language in GL insurance policies
Directors & Officers (D&O) Liability Insurance

D&O Coverage

- Defense and indemnity coverage for companies and their directors and officers
- Wrongful acts arising from responses or lack of response to COVID-19 outbreak
- Allegations of failure to properly prepare for COVID-19 and failure to have proper procedures and plans
- Ask: Are there concerns that business-interruption losses and related claims by counterparties, shareholders, or others could lead to claims against the company or its officers and directors?
- Norwegian Cruise Line Class Action: Shareholder Litigation for violations of statutes and policies.
- Bodily injury exclusion?
- Crisis Management Coverage: Covers public relations costs, travel and other expenses that the insured incurs as a result of a triggering event, which can include announcement of widespread layoffs, notice of claims against insured, or sickness or disease that the insured was alleged to have caused.
Employment-Related Coverages

- Workers’ Compensation (WC)
- Employer’s Liability (EL) Insurance
- Employment Practices Liability Insurance (EPLI)
Increased cyber risks faced by businesses during COVID-19 crisis:

- Social Engineering and Phishing Schemes
- Ransomware Attacks and Cyber Extortion
- Internal and External System Vulnerabilities
- Network Interruption and Dependent Business Interruption
- Rogue Employees
- Lost Hardware
Insurance Coverages for Cyber Risks

- Financial Institution Bond / Commercial Crime Insurance
  - Computer Fraud
  - Social Engineering
  - Employee Dishonesty
  - Computer Systems/Funds Transfer Fraud
  - Fax, Email, and Voice Instruction Fraud
  - Social Engineering
  - Ransom/Extortion

- Cyber Insurance
  - Incident Response Costs
  - Legal and Regulatory Costs
  - Crisis Management Costs
  - Extortion
  - Reputational Harm
  - Damage to Hardware
  - Loss of Income
Key Takeaways

✓ Take inventory of your bank’s policies
✓ Gather the facts and other details of your claim
✓ Analyze the specific terms and conditions of your policies in view of the facts of your claim
✓ Notify your insurers – analyze timing and other notice requirements in all applicable policies.
✓ Other People’s Insurance (OPI)
✓ Assignment of insurance rights and claims
Questions and Contact Information

v Walter J. Andrews
Hunton Andrews Kurth LLP
1111 Brickell Avenue, Suite 2500
Miami, FL 33131
305-810-6407 – direct dial
wandrews@huntonAK.com

v Sergio F. Oehninger
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC  20037
202-955-1854 – direct dial
soehninger@huntonAK.com