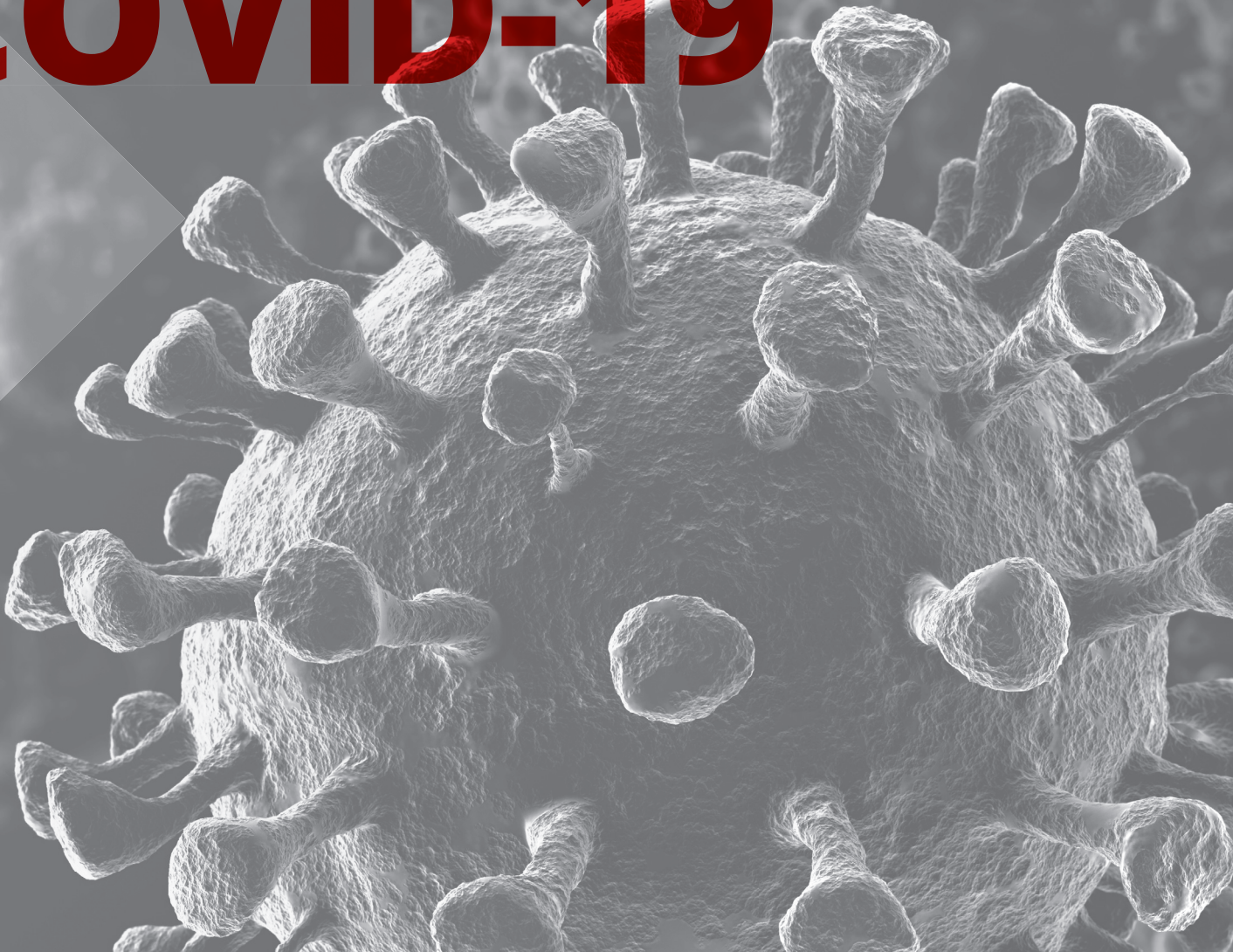


POLLUTION INSURANCE ALERT

COVID-19



A ROADMAP TO FINDING & NEGOTIATING POLLUTION COVERAGE FOR COVID-19

As we grapple with the human and personal effects of COVID-19, the pandemic is forcing companies to closely examine their corporate insurance programs to determine where, if at all, coverage can provide some relief to the economic losses that COVID-19 will cause. One of the best places to start is by reviewing your pollution legal liability (PLL) policies, which may have been placed recently, or as long as 10 years ago, but which may still provide coverage for some elements of loss related to COVID-19. One distinction of PLL coverage is that, unlike most property policies, there need not be physical damage to the structure or contents of the building for coverage to apply. We have already experienced PLL claims activity on behalf of our clients, the results of which will shed more light on how and where PLL coverage may be afforded to clients.



TO DETERMINE IF YOU HAVE COVERAGE UNDER YOUR PLL PROGRAM, WE HAVE OUTLINED SEVERAL KEY TERMS AND CONDITIONS TO HELP ANALYZE WHERE COVERAGE MAY BE AVAILABLE:

IS COVID-19 A RELEASE OF A POLLUTANT?

The threshold question is whether COVID-19 (or any virus) is a pollutant and/or pollution condition under PLL policies. The answer is: likely, but it will vary by policy form and coverage negotiated. At first blush it may seem as if a virus would not be a traditional “pollutant” in the sense that it does not derive from a man-made process that creates a product harmful to human health or the environment. But PLL policies have been designed and marketed as a product that will take on those contamination-related exposures that no other policies would cover. As a result, carriers take a very broad view of what constitutes a “pollutant.”

HOW IS THE CONCEPT OF POLLUTION ADDRESSED IN PLL POLICIES?

Diving into PLL policy language, you must ask two things to determine whether you have coverage for virus-related exposures: (i) does the policy language include a virus as a “pollutant,” and (ii) does transmission of a virus constitute that pollutant’s actual release (or “pollution condition,” as it’s commonly defined).

One example of the definition from a leading PLL carrier reads: “Pollutants’ means any solid, liquid, gaseous, biological or thermal irritants or contaminants...” With respect to indoor air quality, the U.S. Environmental Protection Agency (“EPA”) defines “biological contaminants” to include bacteria and viruses. This strongly suggests viruses, including COVID-19, would be considered a “pollutant.”

However, keep in mind that not all policies include the term “biological” in their definition of “pollutants” and “pollution condition.” While the lack of such language might make it harder to argue that COVID-19 is a “pollutant,” it is not unreasonable to interpret COVID-19’s transmission from one human to another as a liquid or gaseous contaminant;

contaminant is a broadly-used and relatively-broadly interpreted word in the environmental space. A handful of PLL carriers do expressly exclude “communicable diseases” from the definition of “pollutant” or from coverage altogether, in which case the insured would be out of luck.

“Pollution condition” is almost universally defined as the “discharge, dispersal, seepage, migration, release or escape of ‘pollutants’...” Does the transmission of COVID-19 from one human to another or the viral contamination of a building, vessel, or other property fall within that definition? While this does not appear to be the subject of much, if any, case law, there is a similarly strong argument that the transmission of COVID-19 is a “release” or an “escape,” especially considering the airborne nature of COVID-19.

It is also worth noting that there has been recent discussion among some PLL carriers whether to expressly exclude viruses from their policies. Such an express exclusion would, if anything, bolster the argument that the policies without such an exclusion have the coverage.

IF COVID-19 IS A RELEASE OF A POLLUTANT, WHAT COULD BE COVERED?

PLL policies cover many liabilities, including remediation expenses, third-party bodily injury and property damage claims, transportation and disposal-related exposures. However, for many clients, the biggest virus-related exposures to a company's balance sheet due to a pollution condition are (i) an interruption of operations at their facilities (business interruption) or (ii) events occurring away from your clients' property that negatively affect their ability to conduct business on their properties (contingent business interruption).

BUSINESS INTERRUPTION

Business interruption coverage should be included on most PLL policies, although it's not typically covered as an off-the-shelf coverage. To the extent an Insured owns or operates a property that had to be closed or was in some way limited from operation as a result of COVID-19, the PLL policy could cover resulting loss of business income and extra expenses incurred, during that period of closure or limited activity. Keep in mind a couple of things:

- The business interruption exposure must be site-based. That is, PLL policies would not respond to interruption in a business as a result of its employees contracting COVID-19, whether or not it was contracted on-site.
- It is imperative that business interruption coverage stand on its own as a coverage grant and not be dependent upon the triggering of other coverage sections, so that if there is an exclusion applicable to, for example, remediation expenses incurred by the insured, that insured would still maintain its business interruption coverage.

CONTINGENT BUSINESS INTERRUPTION

An often-overlooked coverage add-on is what PLL carriers refer to as "contingent business interruption," but which operates differently than what you might see in a typical property (i.e., non-pollution) policy. In the PLL context, contingent business interruption operates similarly to business interruption coverage discussed above, except that the pollution condition occurs on another property (i.e., not your covered location). The coverage varies greatly from carrier to carrier; below are some examples, each with different triggers, requirements, and restrictions:

- Coverage for the suspension of your operations at a covered location as a result of an order by a governmental authority denying access to that covered location (again, because of a release that occurs away from your property).
- Coverage for an interruption of your business operations, if such interruption is (i) mandated by a government agency, (ii) caused solely by a pollution condition at another location, and (iii) poses an imminent and substantial threat to human health or the environment at your location.
- Coverage for an interruption of your business that results from a pollution condition at another property which (i) occurs after the PLL inception date, (ii) is located within five (5) miles of the covered location, and (iii) did not result from your operations.

This is a potentially important piece of coverage for anyone who operates a facility that is forced to close as a result of COVID-19 issues in the general area of, but not on, the covered location. Schools, day care facilities, shopping malls, recreational facilities are some of many examples of insureds who may have such coverage – again, so long as they have a PLL policy that contemplates COVID-19 as a "pollution condition."



WHAT ABOUT OTHER COSTS LIKE DISINFECTION AND EVACUATION OF YOUR PROPERTY?

THE GOOD

The good news is that even if COVID-19 does not fall within the definition of “pollutant” or “pollution condition,” or if it’s separately excluded under a “communicable disease” exclusion, some carriers provide a separate coverage grant for the costs associated with disinfecting and sometimes evacuating a covered location.

One leading healthcare form provides coverage for: any case or series of cases... [a] facility-borne infectious virus, bacteria or disease that requires reporting of such case or series of cases to any local, state or federal governmental or healthcare oversight agency or entity.

THE BAD

The bad news is that (i) the coverage is limited only to those costs directly for disinfection and/or evacuation (and not, for example, related bodily injury claims or business interruption losses), (ii) there are only perhaps a half-dozen or so carriers that provide this explicit coverage, and (iii) such coverage is often subject to a lower limit of liability. Nevertheless, if you are in the position of having to disinfect, for example, an entire cruise ship because of a COVID-19 outbreak, this coverage can be a much-needed salve to a most unfortunate event.

CONCLUSION

If your existing insurance portfolio includes PLL coverage, it should be analyzed in conjunction with your other corporate insurance program to determine what you can do to protect yourself from the economic effects of COVID-19.

If PLL is not part of your current risk management program, you should conduct a top-to-bottom review of your operations to determine if you have exposures and whether those exposures warrant the procurement of a PLL program.

Please Note this article is not intended to provide legal or coverage advice to you or with respect to your PLL policy, but rather to provide a framework for you to evaluate whether you might have PLL coverage for COVID-19-related losses. You should not rely on this document as a basis to conclude that you do or do not have coverage. If you have any questions about your coverage status, we are available to help assist you in your analysis, which will depend upon the nature of your loss and the language of your policy.



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