Henderson Brothers, Inc. White Paper

COVID-19 Claim and Insurance Policy Considerations for Senior Care Providers

The novel coronavirus (COVID-19) has and continues to impact different industries in different ways. Perhaps the most significant is the healthcare sector. Within the sector, nursing homes, assisted living facilities, and other congregate care communities have experienced their own epicenters of COVID-19 developments. These entities have their own set of risks and issues related to the pandemic. Many readers may be familiar with these topics from recent news headlines. This article, however, examines aspects of some of those same issues, plus others, from a liability, risk management, and insurance program perspective. The insurance landscape is rapidly changing for senior care organizations, and this has far-reaching effects for not only entities' respective balance sheets, but also how they manage patient/client care, staff and support employees, as well as how they formulate their risk management practices. That landscape is mostly influenced by claim activity, coverage forms, and general market forces, and thus, this article addresses each of those, in turn, as they are currently evolving almost as fast as the virus spreads.

Third-Party Illness Claims and Wrongful Death Lawsuits under the CGL (bodily injury, not property damage)

COVID-19 is unique in certain ways for insurance claims because it alters how Claims Departments are evaluating causation and the length of claims (e.g. extended quarantine periods even after symptoms subside). Henderson Brothers previously published a white paper focusing on causation in terms of "direct physical loss" as it concerns first-party property and business interruptions losses. Third-party (i.e. patients, clients, and visitors) claims are different, but they also include a causation element, similar to that of a "direct physical loss," that poses its own set of questions.

Causation with COVID-19 is challenging. The medical science is not settled, and we are only left with the manifestation of symptoms when reporting an insurance claim. A precise contamination time is still a mystery to most. The first sign, perhaps of mild symptoms, versus more severe aspects requiring medical care, raises questions about timing and when and how the claim occurred. For senior care facilities where clients/residents live on the premises full-time, the uncertainty of how the claim occurred is mostly eliminated; there is a foregone conclusion that the client/resident must have contracted COVID-19 at the facility. The "when" question, however, may require more legal scrutiny.

Coverage trigger theories provide the answers to the "when" question. The "first manifestation" theory triggers a claim when the illness first presents itself to the claimant. The "exposure" theory triggers a claim based on the presence (typically supported with scientific/medical evidence) of the harmful condition—i.e. the virus is detected at the facility (e.g. perhaps someone has a positive test, but no symptoms). The "continuous trigger" theory recognizes a claim in both manifestation and exposure scenarios, and, especially in the case of latent diseases/delayed incubation periods, likely will implicate multiple general liability insurance policies.

The application of these theories is not conducted in a vacuum. The second piece to this trigger inquiry is how the claim is presented. Third-party claims typically are asserted in the form of a written demand, most commonly a legal complaint. The style and wording of the complaint may or may not accurately reflect how the claim actually arose, but it is the content of the complaint that controls whether coverage is triggered. This is the so-called "four corners rule."

What do we know thus far with respect to coverage trigger theory and the four corners rule for COVID-19 liability claims filed against healthcare facilities? We know the plaintiffs' bar is skilled in crafting complaints that set forth allegations that the facility failed to take the necessary measures to prevent the entry and/or spread of COVID-19 to the injured plaintiff. This generally activates the four corners rule. Second, we know, for wrongful death lawsuits in particular, the allegations describing symptoms and illness will stir the manifestation trigger.

The lifecycle of these COVID-19 claims is new. While some entities have renewed their CGL insurance policies since March of 2020, when COVID-19 began its rapid spread in the U.S., no entity has sustained an entire policy period yet with "legacy" COVID-19 claims being filed alleging virus manifestations in the past and potentially being submitted under a policy in a future policy year. This latency or legacy may present an opportunity for the continuous trigger theory to arise. The continuous trigger is often applied in asbestos lawsuits and for other conditions with elongated incubation periods. However, insurance carriers, as discussed below, are changing coverage forms from occurrence-based to claims-made and various exclusion are being added. This may cut short the submission of claims with latent diseases, which could possibly be COVID-19, as we

learn more about the virus's long-term effects.

While these questions may remain unanswered for quite some time, we know now that COVID-19-related bodily injury claims are being covered. This may not be permanent, but while it lasts, it is creating a large flow of claim volume for the insurance carriers to process. A large claim volume typically translates into premium hikes to pay for those claims. This is the primary takeaway from what we know at the moment for the healthcare industry's insurance landscape. COVID-19's spread presents an immense supply of injured parties; plaintiffs' lawyers are adept in triggering coverage, and this combination projects an explosion of lawsuits and insurance claims moving forward. Especially because carrier underwriters could not/did not incorporate this rise in claims in past policy years, costs are proliferating throughout the system. Insurance companies did not price for pandemic related claims and as a result, the rise in notifications and claims and the rise in expenses to the carriers were unexpected and not considered in the pricing of the policies.

Employee Claims and Pending Legislation for Workers' Comp Coverage

Developments for workers' compensation claims parallel those of third-party CGL claims. The causation and coverage trigger questions still exist, but they also include the twist for healthcare workers, who come and go from the facility, of whether the employee contracted COVID-19 through the course of his/her employment or somewhere else. The answer to this question again is dictated through the four corners rule and how plaintiffs' lawyers frame their pleadings. The takeaway for the workers' compensation market, however, remains the same as above: claims volume is expected to increase, costs are proliferating, and premiums will likely be rising.

In addition to the natural course of COVID-19 claims affecting employees and workers' compensation coverage, many states are also taking legislative steps to enact presumptions regarding where and how a healthcare worker contracts the virus. At least 14 states have proposed or enacted laws or issued executive orders, mostly directed to "frontline workers", where an employee who contracts COVID-19 is presumed to have contracted it at work. From May 19th through January 1, 2023 California enacted a presumption that applied to all workers. While an exact state-by-state survey of these laws and executive orders is not the focus of this article, the impact of those laws and orders are increasing the possibility of more claims and more costs in the system. Many carrier underwriters may already be incorporating these types of legislative changes into their pricing models for future premiums. Thus, we see this legislative trend as just another factor pushing premiums higher for insureds.

Occurrence Policies Expiring and Claims-Made Policies Offered for Renewal

As claims volume continues to increase for the reasons set forth above, carrier underwriters are developing new insurance products and coverage forms to react to the current market conditions. One recent trend for underwriters to offer healthcare insureds at renewal is for the occurrence-based CGL policy to expire, and the underwriter seeks to replace it with a claims-made CGL policy. This is a fundamental change in the policy, and it is a direct response from carriers to reduce their claims load. An occurrence-based policy would likely cover any COVID-19-related claim based on the coverage trigger, which would probably be the first manifestation of any symptom. This is true, regardless of when the claim is reported. Thus, for an occurrence-based policy, a patient/client could contract COVID-19 in 2020, experience symptoms in 2020, but file a lawsuit against the healthcare entity in 2022.

This sequence, in theory, would implicate the CGL policy in place from 2020. Therefore, if this claim scenario is repeated thousands of times over with different claimants, carrier underwriters are highly-motivated to reduce this long-tail exposure. The technique to reduce this long-tail exposure is to convert insureds' programs to a claims-made policies.

Under a claims-made policy, COVID-19-related claims are time sensitive. The claim must occur and be reported within the same policy period. This means that when an insured renews its CGL policy with a claims-made coverage form, it is creating a breakpoint for all claims moving forward to have a limited tail. Looking forward, this limited tail relieves the insurance carrier of a certain percentage of COVID-19 claims being submitted. This obviously is not directly beneficial to the healthcare entity insured, but it is a trend in the marketplace that is seemingly becoming the new standard renewal offering from most carriers to minimize long-term profitability challenges. On the surface, this may appear like a carrier's technique to manage premium increases, but it is also a way for carriers to manage their capacity and expected future claims costs. Of course, these are all related and lay the groundwork for what an individual healthcare insured is offering for renewal terms.

Retroactive Dates

In addition to a conversion from occurrence-based forms over to claims-made, another 2020 trend from carriers is the introduction of retroactive (retro) dates on the CGL policy. A retro date serves to eliminate the possibility of any claims that arise before the specified retro date. Carriers are employing these retro dates with a similar motivation as the claims-made adjustment. While the claims-made change will reduce the future tail of a string of claims, the retro date cuts off the possibility of claims which manifest/occur before a certain period from triggering the policy. By decree, the carrier writes into the contract, via the retro date, that it will not cover claims before that date.

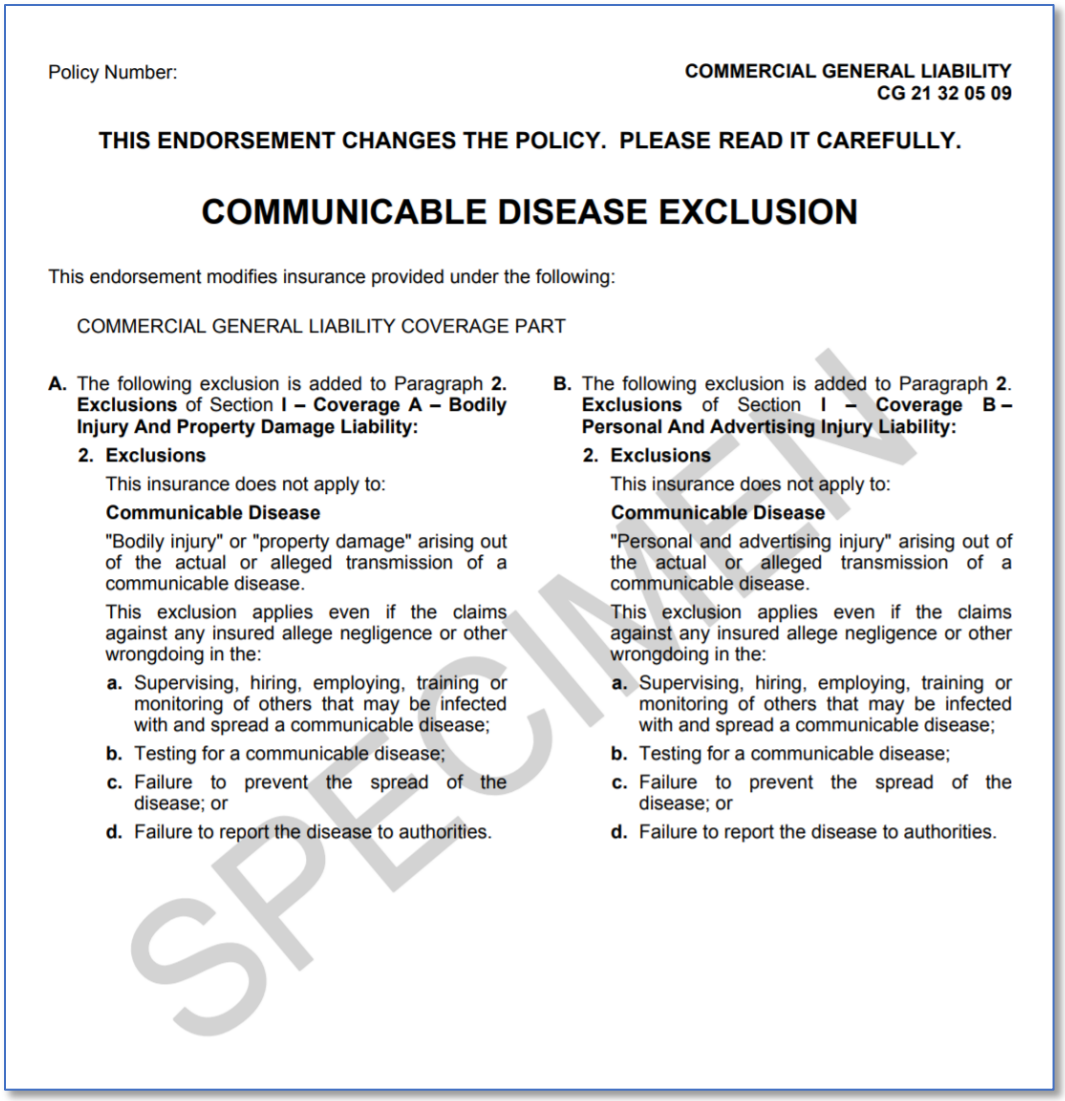
While this is not beneficial to the healthcare entity insured, this trend makes it even more important to manage and report incidents to your insurance carrier on a timely basis. Carriers are forecasting a tremendous claims volume in the future, and they are utilizing all of the tools available to them to try to manage an expected claims tidal wave.

COVID-19 Claim Exclusionary Endorsements on General Liability and Property Policies for Virus Exclusions

Many carriers are also taking a lasered approach to exclude COVID-19 claims. Carriers are aggressively seeking to change their coverage forms and endorse policies to have a broad exclusion for claims arising out of the actual or alleged transmission of a communicable disease—a so-called virus exclusion. See below for specimen policy language.

This endorsement on your policy is not an actuarial technique designed to limit the carrier's expected future claims. Instead, it is a method to shift the risk of COVID-19 claims from the insurance market, back to the insured. All healthcare insureds should be working with their brokers to review their CGL policies (and Property policies) for the presence of any virus exclusion.

GL coverage forms have included virus exclusions dating back to the origin of SARS in 2002-2004. COVID-19 simply presents another application for the exclusion to the corona- category of virus. New developments, however, are pandemic exclusions and class action lawsuit exclusions. Insurers developed these exclusions in 2020 to specifically target claims arising from COVID-19. Many carriers are presenting these at 2020 and 2021 renewals. Identifying the existence of these exclusions, especially as forms convert to claims-made policies, is critical to



Policy Number:

COMMERCIAL GENERAL LIABILITY
CG 21 32 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMMUNICABLE DISEASE EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2. Exclusions** of Section **I – Coverage A – Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;

b. Testing for a communicable disease;

c. Failure to prevent the spread of the disease; or

d. Failure to report the disease to authorities.

B. The following exclusion is added to Paragraph **2. Exclusions** of Section **I – Coverage B – Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Personal and advertising injury" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;

b. Testing for a communicable disease;

c. Failure to prevent the spread of the disease; or

d. Failure to report the disease to authorities.

understanding whether a healthcare facility can obtain coverage for third party bodily injuries arising from COVID-19.

Market Commentary and Conclusion

In conclusion, nursing homes, assisted living facilities, and other congregate care communities are facing further challenges in today's COVID-19 environment. The insurance carriers that are providing coverage to these facilities are also facing challenges and will look to address and adapt their policies accordingly.

Proposed legislation could provide some protections but even with passage of potential favorable legislation and executive orders, facilities must understand the language contained within their insurance policies and how the changes to the policies will affect coverage availability and expectations in the event a lawsuit is filed and a claim is reported.