

NEWS & INSIGHTS FOR INSURANCE AGENTS AND BROKERS

COVID-19 EDITION

JANUARY 2022

Available exclusively to Aspen policyholders, you now have access to free, specific, and confidential risk management and mitigation strategies. Aspen has collaborated with the national law firm of Wilson Elser Moskowitz Edelman & Dicker LLP (“Wilson Elser”) to provide access to experienced attorneys for risk management consultations via phone or email. You are receiving this free quarterly newsletter as part of the risk management services. Also keep an eye out for webinars as well as access to a dedicated website for risk management resources coming soon!

In this issue:

Insurance Agents and Brokers Potential COVID-19 claims

[The reaction and arguments of potential claims against insurance agents and brokers.](#)

[Employer Risk Management in the Age of Coronavirus](#)

[A review of workplace safety in response to COVID-19](#)

[Ask the Underwriter](#)

[How to manage insurance agent E&O exposure from COVID-19](#)



INSURANCE AGENTS AND BROKERS POTENTIAL COVID-19 CLAIMS

Due to COVID-19, there has been a spike of insurance claims pertaining to business interruption losses. Insurers often deny coverage for these claims based on the argument that COVID-19 does not constitute to any physical damage, which is a typical requirement needed for coverage. With that said, there is the possibility of actions against agents and brokers, especially if the position of the insurers is successful in whole or in parts as to the lack of coverage for business interruption losses sustained due to COVID-19 shutdowns. Plaintiffs, therefore, may be inclined to sue their insurance brokers for breach of contract and negligence in failing to properly provide advice regarding the appropriate insurance to purchase.

Consequently, there are significant problems with the merits of arguments against the agents and brokers. It is important to note that even if the insurers are successful in whole or in part with their arguments as to the need for physical damage, such would support a defense that, as this requirement was standard in these types of policies, the type of

coverage the plaintiffs would contend should have been obtained, would not have been available or, if so, only available at much greater cost than insureds would have been willing to pay.

Additionally, the governmental action to close down businesses was unprecedented in recent history, so this would be akin to arguing either that it would be appropriate to recommend costly insurance against a one-hundred-year storm, or that the agent or broker should have foreseen an event that entire governments and experts did not foresee.

Thousands of business interruption claims have been filed with carriers across the country. While there are similarities to each, each also have their own nuances with distinct circumstances, different policy forms, different venues, and different legal precedence. It will take many more years for all of these disputes to work their way through.

During a global pandemic, it is to be expected that the transmission of such infectious disease can be anticipated not only in the healthcare settings but also in many types of workplaces. As we enter our third year facing COVID-19, every employer should now understand their obligations for workplace safety that has been imposed on them by federal and state occupational health and safety laws.

Employers that plan for and respond to these risks may experience fewer worker illnesses, lower absenteeism, less business disruption, fewer workers' compensation claims and better defenses to potential litigation arising from alleged negligent exposure to COVID-19.

EMPLOYER OBLIGATION TO ENSURE WORKPLACE SAFETY

COVID-19 is now considered a "recordable illness" under the Occupational Safety and Health Act (OSHA). It is crucial that every employer now develops an infectious disease preparedness and response plan to confront the pandemic. Things to take into consideration in the plan include:

- Where and how workers might be exposed, including from the general public, customers and coworkers.
- Workers' individual risk factors such as advanced age, underlying medical conditions and pregnancy.
- Addressing contingencies for increased rates of absenteeism, the need for social distancing, and other administrative controls.
- Developing policies and procedures for prompt identification and isolation of sick people.

RISING LIABILITY CLAIMS

Aside from the employment-related considerations, it should come as no surprise that businesses now face liability claims from members of the general public claiming to have been exposed to COVID-19 while on their premises and/or due to interactions with their employees or volunteer staff.

Such claims may include allegations of exposure resulting in bodily injury and property damage as well as claims of failure to implement an appropriate plan in response to the global health crisis and associated risks.

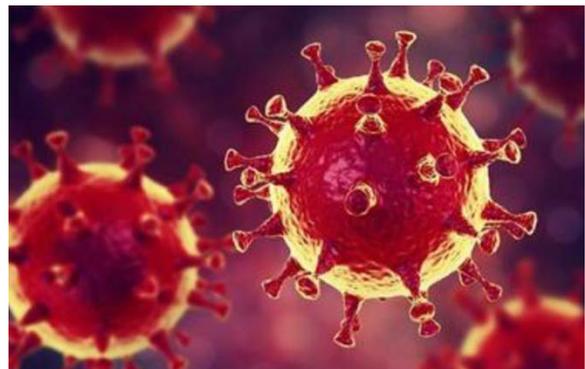
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Due to the high level of contagiousness of COVID-19, not only visitors but also members of their families may file such general liability claims.

POSSIBILITIES OF MEMBERS PUTTING THEMSELVES AT RISK

Organizations also may encounter situations when members of the general public voluntarily expose themselves to risk such as, ignoring the social distancing recommendations and advice to stay indoors. While one may expect that the doctrine of assumption of risk will bar recovery of such individuals against an organization, this is not always the case. Many states like New York, have abolished the doctrine of assumption of risk (with limited exceptions) and instead look at the parties' comparative fault when it comes to establishing a defendant's liability and exposure.

As a result, an organization may be sued by an individual that may have acted unreasonably and exposed themselves to risk by their own actions. Bottom line, know the local, state and federal requirements and suggestions on how best to limit employees and staff exposure to Covid 19



HOW TO REDUCE/MITIGATE E&O “PROFESSIONAL LIABILITY” CLAIMS AMIDST COVID-19?

Insurance agents and brokers should demonstrate a clear understanding of the importance of the implementation of loss control measures to combat the rising E&O claims as a result of the COVID-19 environment.

Proactive risk management will help prevent the high costs arising from E&O lawsuits such as: legal costs and expenses, and judgement/settlement fees etc. Keep in mind that the amount of time consumed will also be ample... time required to report such claims, meet with the defense counsel, and to gather all relevant information and documents to prepare for the depositions and trial.

Two important key factors to keep in mind that will significantly reduce and prevent future E&O claims:

Document Actions and Communications Consistently

Agents and brokers need to be consistently documenting each action taken on client files and taking the time to save all records of communication with insureds to their appropriate account files. Think about remote working and how documentation procedures might need to be refined.

Identify and Avoid Problematic Business

Agents need to be extra cautious and avoid potential red flag clients that possess the following traits: late premium payments, failure to disclose of prior losses, constant bad-mouthing of former brokers, refuses to take advice, has sued in past. Now that in person meetings are significantly reduced, it may be more difficult to determine these tough clients. Similarly, it may be more difficult to ascertain exposure changes that might normally be readily visible with a visit to the client. Without diligence, our inability to meet in person can result in uncovered or underinsured claims and eventually an E&O claim.

WHAT SHOULD AGENTS CONSIDER WITH CLIENT'S COVID-19 RELATED CLAIMS?

Extra caution should be taken to ensure proper claims reporting procedures in this COVID-19 environment. Review claims reporting forms with clients before submitting to their insurers, such claims should be reported promptly. Do not ever make any claims decisions or advise clients whether COVID-19 related claims are covered as that is the insurance carrier's job. Do not participate in any kind of “self-help” by advocating for coverage on behalf of clients as that is likely to create evidence against agents and brokers in E&O claims. Always report claims to all carriers to ensure all possibility of coverage is considered and be cautious giving written/recorded statements without contacting the E&O carriers first.

WHAT IMPACT HAS WORKING FROM HOME HAD ON INSURANCE AGENTS?

Many insurance agents and brokers have been forced to move to a remote work environment. The quick shift could result in a wave of E&O claims that can be linked to this pandemic response. Without sufficient technology or appropriate processes and procedures in place to handle business tasks from home, insureds may not be able to adhere to best practices in properly reviewing coverage or handling client claims. Lacking the day-to-day management oversight, agents could be putting themselves in a position for errors to occur and be missed.

WHAT CHANGES ARE UNDERWRITERS MAKING AS A RESULT OF THE PANDEMIC?

Underwriters are reviewing insured's exposure to industries that have been severely impacted by the pandemic and with uncertain futures. Agents placing business for these industries (hospitality, healthcare, restaurants, entertainment, etc.) should be taking extra steps to manage their exposure. Underwriters are reviewing procedures in place and claims exposure from an insured's clients. The insured's remote operations to ensure adequate infrastructure is also being taken into consideration.

If you have any risk management questions,

please contact the **Insurance Agents Risk Management Hotline**.

To access the hotline, call Wilson Elser toll-free at 888-910-0047 or email at aspenrisk@wilsonelser.com

Please have agency name and Aspen policy number available when you call or email.

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