GREYLING
INSURANCE BROKERAGE I RISK CONSULTING
a division of EPIC

3780 Mansell Road
Suite 370
Alpharetta, GA, 30022
Phone 770.552.4225

Greyling Report:

Insurance Coverage Issues Related to Coronavirus Pandemic

This report outlines the insurance coverages applicable to various claims that could arise in connection with the global coronavirus pandemic and outlines the likelihood of recovery with respect to such claims and coverages. Our expectation, as outlined below, is that few damages directly incurred by a professional services firm are likely covered under the firm's typical business insurance policies. Nonetheless, we are in a fast changing situation and as a result we recommend the following actions:

- Track any occurrence of infection of an individual or reported viral contamination involving:
  - Your employee or a close relative to an employee
  - Your office and property locations
  - Clients with whom your employee has had close contact or who have visited your office recently
  - Project sites or other off-site locations to which your employee has visited recently
- Record any impact an occurrence above has on your operations, revenues, or expenses just as you would with a more traditional loss such as a fire
- Document circumstances caused by operational decisions, orders of relevant governmental authorities, and impacts from other businesses like vendors and transportation providers that relate to a firm's inability to productively and efficiently meet contract or project requirements and client expectations
- Provide blanket, or contract-specific if possible, notice to clients of disruptions to your operations caused by the coronavirus response

I. Business Interruption and Extra Expense

The coronavirus pandemic may cause several categories of extra expense for firms, including, but not limited to, the costs of additional cleaning of offices and property, staff and equipment expenses associated with increased remote working and office closures, costs and penalties related to cancelled trips or events, and salaries of employees who are absent because of infection or underutilized because of operational or project concerns. Firms may also encounter lost revenue and missed business opportunities due to delays, shutdowns, or other impacts caused by the virus and the governmental and business reactions to the pandemic. Many of these extra expenses and damages from business interruption are the types of costs often considered recoverable under a firm's first-party property insurance policy but only if the underlying cause is a covered peril. A loss caused by a viral pandemic may not be covered due to common exclusions for loss caused by a virus and the lack of "direct physical damage to property."

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Property insurance is typically structured with an insuring agreement granting coverage for "direct physical loss or damage" to covered property by a "covered peril" or "specified cause of loss," which is often further defined as any cause of loss unless otherwise excluded. Coverage extensions for items such as extra expense, business interruption or lost income, clean-up of contaminants, and denial of access by a civil authority are also usually tied to "direct physical loss or damage" by covered perils or losses, either directly to the insured's property or in close, specified proximity. The list of exclusions in a property policy both limit the definition of a "covered peril" and otherwise list excluded categories of damage. Virus is a common property insurance exclusion, whether specifically listed or reasonably interpreted under a broader definition related to biological material, pathogens, pollution, or contamination. Even if coronavirus is not excluded, there is a threshold issue of whether presence of a virus on property can be deemed "physical damage." Reported cases in the past involving mad cow disease and E. coli suggest that insurers will assuredly take the position that coronavirus does not cause physical damage to property and that courts may well support that view in coverage litigation.

Despite no expectation of recovery for these damages, it is advisable to collect records of your firm's expenses and losses. This will be much easier to do in real time as opposed to after the fact and will help you assess the magnitude and perhaps the viability of pursing a claim at a future point in time when the impacts from the coronavirus are better known and time is available to submit a report. For property insurance, the coverage is occurrence based and the claim reporting requirement is based on known loss or damage. Unlike a professional liability policy where you may submit a pre-claim notice based on circumstances that could lead to a claim in the future, duties under a property policy are determined by loss or damage occurring to property. As a result, we recommend submitting a claim only after accumulating the costs that can be directly traced to the coronavirus pandemic.

Note that as we are writing this report, laws are being proposed in certain states to mandate coverage by insurers (who may later be reimbursed by a state government) for certain sized businesses. In addition, coverage lawsuits have already been filed making the case that a viral infection is in fact a "physical" peril. We will keep you posted on these items.

Notably, the Insurance Services Office (ISO) promulgated two new optional endorsements in February 2020 that, if adopted, would provide some limited coverage for coronavirus related civil authority claims. Neither of these endorsements has been filed with any State insurance regulatory agency or is currently being offered by any of our property underwriters. As a result, there is no current opportunity for adding such coverage enhancements to any of our clients' property insurance policies.

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II. Employee Infection

An employee testing positive for coronavirus implicates several issues and insurance coverages.

A. Workers' Compensation

If an employee contracts coronavirus arising out of or in the course of employment, then workers' compensation and employer's liability coverages respond with coverage for medical costs and lost wages in accordance with state statutory requirements. That said, viral diseases typically are not presumptively considered arising out of or contracted in the course of employment, and it would be the employee's burden to establish the causal connection between infection and employment by a preponderance of the evidence. For employees of professional services firms facing typical office and construction project environments, the likelihood of meeting this burden is extremely low. This analysis changes if one employee tests positive for coronavirus after exposure to another employee who has tested positive. As a result, we encourage all clients to follow CDC and OSHA guidance regarding maintenance of work environments, as well as any local, state, or Federal mandates:

- https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html
- https://www.osha.gov/Publications/OSHA3990.pdf

Notably, OSHA considers coronavirus to be an occupational disease – provided that contracting the virus can be proximately traced to work pursuant to an analysis similar to that of workers' compensation coverage outlined herein. Most firms engaged in architectural, engineering, or related services are partially exempt from keeping OSHA recording logs. If an employee's coronavirus infection leads to in-patient hospitalization or fatality, it may still need to be reported to OSHA. More information is available here: https://www.osha.gov/SLTC/covid-19/

B. Liability to Other Employees and Related Persons

Should one employee contract coronavirus and expose others, the firm faces greater likelihood of covered workers' compensation claims, as noted above. The firm could also face claims for bodily injury to third parties arising out of routine non-professional operations (e.g., operating the office premises), which could be covered by the firm's commercial general liability insurance. Commercial general liability insurance is generally not applicable to bodily injury of an employee unless liability is assumed under an "insured contract." Relatives or acquaintances of employees are not commonly included in the definition of insured employees and are thus "third parties." Unlike property policies, commercial general liability insurance often has no exclusion specifically related to "virus." More commonly, commercial general liability excludes coverage for pollution, which includes "contaminant" under the standard Insurance Services Office definition, but this only ambiguously encompasses a virus.

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As a result, a claim by a third party against the firm alleging resulting bodily injury in the form of coronavirus infection is much more likely to be covered by commercial general liability insurance.

C. Liability to Other Third Parties

If an infected employee spreads the virus to third parties such as clients and vendors or is present on a project site leading to infection concerns at such a location, the firm could face claims of bodily injury or property damage by third parties, which could be covered by commercial general liability insurance as outlined in Section II.B. above. With respect to direct clients, the firm must also analyze contractual liability related to such an event, including the scope of indemnity obligations and project-specific site safety requirements and liability. These issues are addressed further below.

III. Liability Exposure

One of the most significant exposures for professional services firms in the wake of the coronavirus pandemic is an inability to meet contractual requirements due to a combination of (a) travel restrictions, (b) office closures, remote working, and other productivity concerns, (c) client or contractor orders, delays, or illnesses, (d) governmental orders, and (e) infected employees. These circumstances could foreseeably lead to allegations of delays and consequential loss, negligent errors or omissions in deliverables, increased costs by clients and other consultants or contractors, and expenses incurred by third parties such as medical costs or government penalties, as well as the firm's own expense of lost productivity and potential rework. From a liability perspective, professional liability and perhaps commercial general liability insurance may provide mechanisms for risk transfer related to these exposures.

A. Professional Liability

Unless relieved by contractual protections or a client's agreement, a professional service firm generally must meet contractual deadlines and work requirements despite interruptions or limitations due to coronavirus. Liability to a client or another project participant related to such a failure is dependent on professional and contractual liability. With respect to professional liability, the firm should only be liable if its actions or inactions do not comply with the applicable standard of professional care, which is generally to perform services consistent with the professional skill and care ordinarily provided by other professional services firms practicing in the same or similar locality under the same or similar circumstances. All firms in a particular locality are facing similar circumstances with respect to the coronavirus, and it could be argued that all firms in the country face such similar circumstances. As a result, the threshold question for professional liability for firms will be whether other firms would also have been unable to meet a deadline or work

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requirement because of similar operational issues related to coronavirus. In the event liability is imposed because of a failure to meet the standard of care, professional liability insurance should respond to transfer that risk. The professional liability exposure, however, must also be considered in the context of specific contractual requirements and associated liability, which is addressed next under "force majeure."

B. Force Majeure

Many firms may be unable to meet contractual requirements because of coronavirus-related restrictions. For example, a construction administration site visit cannot take place if an employee is unable to travel due to the employer's restriction on taking a trip or unavailable modes of transportation due to government or other business limitation or shutdown. Some localities, such as San Francisco and Boston, are implementing wide-scale construction project stoppages. Similarly, timelines for submitting deliverables may be impacted by employee illness or inefficiencies and lost productivity due to office closures and remote working. Supply chain disruption, additional need for assessing proposed substitutions, construction labor availability, and the realities of construction economics and payment mechanisms in this changed environment are all likely to impact ongoing projects and the work of professional services firms. Without contractual relief, these deadlines and requirements could cause the imposition of contractual liability, for which there could be no insurance coverage if the failure to meet the deadline or requirement is not also a violation of the standard of care, as described above in Section III.A.

Most contracts address time and work requirements with reasonable allowances related to circumstances outside of the contracting party's control – generally referred to as "force majeure." The AIA B103, for example, states that "[t]he Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project and "[o]nce the Owner and the Architect agree to the time limits established by the Project schedule, the Owner and the Architect shall not exceed them, except for reasonable cause." Taken together these clauses should be interpreted by design firms and owners alike to require (a) meeting contract requirements only to extent consistent with the standard of care and how other firms are able to meet deadlines considering the local and national circumstances of the coronavirus and (b) extension of time limits because the circumstances caused by the pandemic constitute "reasonable cause." Other contractual force majeure clauses may specifically call out circumstances such as illness, disease, epidemic, pandemic, an "act of God," government action or inaction, and more generally any "factor outside the party's control" as a basis for extending contract time, and perhaps entitling the contracting party to additional compensation. By contrast, some contracts may state that time is "of the essence," which absent some other provision softening that requirement could result in legal liability for not meeting a contractual deadline, regardless of the coronavirus pandemic and its effects.

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The scope of common force majeure clauses vary from contract to contract and may be difficult to assess, particularly in the timeframe dictated now where all projects suddenly face similar circumstances. In addition, contracts frequently require prompt notice of an event that may cause a delay and routinely have specific time deadlines to provide those notices, such as 5 or 10 days after the start of the event giving rise to the inability to meet a deadline or submit a deliverable. As such, **Greyling recommends that a firm notify every client for which there is an ongoing contract or project that the circumstances of the coronavirus pandemic may delay the firm's ability to perform** in accordance with the timeframe envisioned under the contract or the client's expectations. Below is an example of such a notice.

> Dear [Client],
>
> In light of the unprecedented coronavirus pandemic, we want to assure you that we are taking every reasonable measure to mitigate any disruption in our ability to serve your needs on the [name] project. Nonetheless, it seems likely that forces beyond our control will result in some delays in our ability to perform our services. [State any firm- or project-specific circumstances such as office closure, travel restrictions, or client or government shutdowns.] At this point with the situation changing daily we are not able to estimate the impact, including our need for schedule extensions or additional compensation. We will, of course, provide you with a clearer assessment as information becomes available.
>
> [Please consider this communication related and responsive to any applicable notice, schedule, or force majeure provisions in our contract.]
>
> Sincerely,
> [Firm]

While this notice may certainly be expanded based on specific contract terms or circumstances, Greyling believes it is imperative to provide at least a basic form of notification such as the above on all projects in order to preserve arguments and avoid potential waiver.

The invocation of force majeure usually gives both parties to a contract relief from obligations, such as meeting time requirements. Without other contractual entitlement, however, additional compensation associated with a delay, disruption, shutdown, lost productivity, or remobilization is not automatically granted.

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There are a number of arguments that may be available to turn a non-compensable force majeure claim into one entitling a party to additional compensation:

- Prior delays the fault of others that push the project into the period of time impacted by the coronavirus pandemic
- Construction acceleration after the conclusion of the force majeure event by not agreeing to equitable extensions of time
- Changes in project design, operation, or construction activities caused by the force majeure event (e.g., redesign to add space to a hospital in response to what occurred during the pandemic, more stringent worker safety and illness prevention requirements, or limitations on numbers of workers that may be present on a work site upon restart)
- Failure of another party to take reasonable mitigation actions

C. Commercial General Liability

As noted above in Section II.C., commercial general liability insurance does not pose the same exclusionary hurdles present with property policies and may provide protection to firms who face third party claims of damages related to coronavirus impacts. Commercial general liability insurance is based on losses "because of bodily injury or property damage." If liability to a third party is caused by transmission of the virus, then commercial general liability should be analyzed for risk transfer. The most likely scenario for recovery under this insurance would be an instance where a project is delayed or shutdown specifically in response to a firm's infected employee. The issue of coverage for delay and consequential damage is outside the scope of this memorandum but is something to be considered with respect to potential coverage under circumstances otherwise triggering commercial general liability insurance.

IV. Other Avenues of Recovery

As a firm is assessing insurance recovery of various categories of costs related to the coronavirus pandemic, the firm should also consider the availability of insurance maintained by others. To the extent that a firm's employee is exposed and tests positive for coronavirus, the company or individual who creates that exposure – if that can be clearly determined – may have tort liability to the employee and ultimately the firm. While such liability may seem tenuous, if a claim could be maintained, then the company's or individual's general liability insurance may well apply, as outlined above in Section II.C. In the case of professionals like doctors, hospitals, or elder care facilities, professional liability insurance may also apply.

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Below are examples of third parties to considering pursuing based on specific circumstances:

- Contractor, subcontractor, supplier, design professional, owner's representative, owner, client, or other personnel on a project site where your employee is also infected
- Vendors or service providers invited on office premises where there is later an outbreak
- Healthcare or elder care providers directly related to an employee's infection

Tracing infection to any such third party will likely be extremely complex and remote. Nonetheless, consideration must be given based on individual circumstances.

It is also notable that builder's risk insurance coverage could also apply in the event of an active construction project's delay associated with the virus; however, direct physical damage is often a fundamental triggering event for builder's risk coverage, as with property coverage analyzed above in Section I.

V. Executive and Cyber Liability

Directors, officers, and other managers could face liability in the wake of the coronavirus pandemic in connection with decisions made regarding the operation, cleanliness, and working conditions of the office environment, project sites, and associated travel (note that a publicly held Cruise line is already facing a shareholder lawsuit). Greyling's advice is to closely follow CDC and other governmental recommendations regarding work environment. Directors and officers or management liability insurance could respond to a claim related to these firm management and operational decisions; however, common exclusions for bodily injury may present some coverage hurdles. Finally, as some firms shift to temporary and more widespread remote working, cyber attacks and exposures may increase. This possible reality emphasizes the need for first-party cyber insurance with appropriate coverage limits and terms.

Please contact us with any questions

EMAIL: info@greyling.com | **PHONE:** 770.552.4225 | **WEBSITE:** www.greyling.com

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