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COMMENTARY

Avoiding the Insurer Bite: Insurance Coverage for Zika Virus Losses

Named after the Ugandan forest in which it was first discovered, outbreaks of Zika virus have until recently been limited to tropical Africa, Southeast Asia, and the Pacific Islands. The past year, however, has witnessed the rapid spread of Zika virus throughout the Western Hemisphere, including most recently to the continental United States where active local transmission has been confirmed in parts of Miami-Dade County.

Zika virus is transmitted primarily through the bites of infected *Aedes* species mosquitoes. While Zika virus is not communicated through casual contact, transmission can occur through sexual contact and from a pregnant woman to her fetus. Although those who experience illness from Zika virus usually have only mild and short-lived symptoms, Zika virus infection during pregnancy can cause serious birth defects, including microcephaly, and has been linked to Guillain-Barré syndrome, a rare autoimmune disorder that can result in paralysis.

With the Centers for Disease Control and Prevention ("CDC") having issued travel advisories urging pregnant women and their partners to postpone all nonessential travel to any region where active local transmission of Zika virus has been confirmed, businesses across the Gulf Coast and beyond are understandably concerned about the potential financial impact the continued spread of Zika virus may have on their operations. This concern is most pronounced in the hospitality and travel industries, which are quickly approaching their peak tourist season.

Fortunately, businesses can proactively manage their Zika virus exposure now by carefully reviewing their existing insurance programs to determine whether adequate coverage is afforded for Zika- and other infectious disease-related losses. While the scope of coverage will depend upon the specific terms of each insurance policy, a number of coverages may respond with insurance for the types of Zika virus losses that may soon be experienced by commercial policyholders in the United States.

Business Interruption Insurance

As a consequence of the CDC's recent travel advisories and increasing public fear over potential contraction of Zika virus, businesses located in areas where the presence of Zika-infected mosquitoes has been confirmed may experience significant disruptions as expected patrons make alternative arrangements.

Business interruption insurance may respond with coverage for these income losses.

Typically purchased as part of a company's commercial property insurance policy, business interruption insurance is intended to protect businesses against income losses sustained as a result of disruptions to their operations. Contingent business interruption coverage similarly provides insurance for financial losses resulting from disruptions to a business's customers or suppliers, usually requiring that the underlying cause of damage to the customer or supplier be of a type covered with respect to the business's own property.

In many commercial property insurance policies, business interruption coverage is triggered when the policyholder sustains "direct physical loss of or damage to" insured property by a covered cause of loss. In the event of a claim for Zika-related business interruption, certain insurance carriers may dispute whether this "physical loss" requirement has been met. Policyholders should keep in mind, however, that courts across the country have not settled upon a uniform rule for when insured property has suffered a "physical loss." Courts in a number of jurisdictions have determined that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitute a "physical loss" sufficient to trigger business interruption coverage. The determination of whether "physical loss" has occurred will therefore continue to require a close examination of the particular facts of each case.

Other specialized insurance policies and extensions of coverage added to standard property insurance policies—including those sold to policyholders in the hospitality and health care industries—expressly provide insurance coverage for losses caused by "communicable or infectious diseases" without requiring physical damage to insured property. Notwithstanding the potential availability of coverage under standard business interruption insurance, businesses especially concerned about the risk of disruptions occasioned by communicable or infectious disease outbreaks should consider whether to also purchase "communicable or infectious diseases" coverage.

In addition, many commercial property insurance policies provide coverage for business income losses sustained when a "civil authority" prohibits or impairs access to the policyholder's premises. Depending upon its specific wording, a policy's "civil authority" coverage may or may not require that the access restriction result from "physical loss" by a covered cause of loss and, if so, often does not require that "physical loss" occur to the policyholder's own property. Accordingly, in the event that a federal, state, or local governmental authority limits access to areas where active transmission of an infectious disease has been identified, "civil authority" coverage may respond with insurance for the attendant income losses of affected businesses.

Liability Insurance: CGL, D&O, E&O, and Workers' Compensation Coverage

As the incidence of Zika virus illness increases, businesses—particularly those in the hospitality industry—could also face claims by infected guests that they allegedly failed to exercise reasonable care in guarding against, or warning of, the risk of exposure to Zika virus. Intended to protect businesses against third-party claims for bodily injury resulting from exposure to harmful conditions, commercial general liability ("CGL") insurance policies should respond with coverage for these claims.

With respect to similar claims for bodily injury brought against a company by its own employees, most states' workers' compensation statutes provide that an employee is entitled to benefits for "occupational diseases." While "ordinary diseases of life" (i.e., those to which the general public is equally exposed) are generally excluded from workers' compensation insurance programs, if an employee can establish a direct causation connection to the workplace, there may be a valid argument for workers' compensation insurance coverage. Although Zika virus is transmitted primarily through mosquito bite (and thus arguably constitutes an "ordinary disease"), there has been at least one reported case of laboratory-acquired Zika virus illness, which could conceivably qualify for workers' compensation coverage. Nevertheless, to the extent that other claims for employee-related Zika virus illness do not qualify for workers' compensation benefits, coverage might be still afforded under certain CGL insurance policies.

In addition to CGL insurance, many health care providers also purchase errors and omissions ("E&O") insurance, commonly referred to as hospital professional liability coverage. These specialized insurance policies protect against damages that the health care provider is required to pay for bodily injury arising out of the provision of, or failure to provide, medical services. Although they typically exclude coverage for bodily injury to employees occurring during the course of their employment (which can be covered under workers' compensation insurance policies), hospital professional liability policies should respond with insurance for Zika virus-related bodily injury claims of non-employees.

For example, the CDC has warned of the strong possibility that Zika virus can be spread through blood transfusions. Because of the high rate of asymptomatic infection, the Food and Drug Administration has also recently issued a revised guidance to prevent the spread of Zika virus through the nation's blood supply, which calls for blood collection centers to perform laboratory screening of all donated blood. Liability for bodily injury arising out of the failure to adequately screen donated blood, or warn of the potential risk of Zika virus transmission through blood transfusion, may thus be covered under a health care provider's professional liability insurance policy.

In addition to third-party claims brought against businesses themselves, a company's directors and officers may be subjected to shareholder lawsuits alleging that their unreasonable actions (or inaction) in response to Zika virus or other infectious disease epidemics caused the company economic loss. In particular, a company's shareholders may contend that management allegedly failed to develop adequate contingency plans, allegedly failed to observe protocols recommended or required by governmental authorities, and/or allegedly failed to properly disclose the risks Zika virus posed to the company's business and financial performance. Directors and Officers ("D&O") insurance policies may provide coverage for the costs and liabilities arising from these shareholder lawsuits.

Although the majority of D&O insurance policies exclude claims for bodily injury (with some exclusions worded more broadly than others), when afforded a "strict and narrow construction," as they must be under the laws of most states, such exclusions should not preclude insurance coverage for shareholders' economic loss claims. Nevertheless, policyholders should be mindful of the fact that insurers may attempt to invoke certain D&O policies' so-called "absolute" bodily injury exclusions (e.g., excluding coverage for any claim "*based on, directly or indirectly arising out of*, or *relating to* actual or alleged bodily injury") to deny coverage for shareholder claims with any connection to a Zika virus-related bodily injury, no matter how attenuated. At the time of purchase or renewal, policyholders should therefore consider negotiating the removal of this "absolute" language or the addition of carve-outs to the exclusion that expressly preserve coverage for shareholder claims.

Along the same lines, policyholders should also examine the scope of their D&O insurance policies' "conduct exclusions." Many D&O insurance policies exclude coverage for certain misconduct by the insured, which can include deliberate fraud, dishonesty, and willful violations of the law. The particular language of these "conduct exclusions" can become significant if company management's response to the Zika virus risk becomes the subject of shareholder litigation. Certain D&O policies require only that the proscribed conduct occur "in fact," while others provide that the exclusion applies only if the insured's misconduct is established by "final adjudication." Neither formulation of the exclusion is ideal from a policyholder perspective, as insurers may attempt to take the position that they themselves can determine the exclusion's application (under the "in fact" trigger) or have the exclusion's application determined through insurance coverage proceedings (under the "final adjudication" trigger). Where possible, policyholders should accordingly seek to have any conduct exclusions in their D&O insurance policies expressly worded to apply only if the insured's misconduct is determined through a "final, non-appealable adjudication in the underlying action," which should foreclose an insurer from attempting to trigger the exclusion absent a conclusive determination in the *underlying* litigation.

Conclusion

While the foregoing has surveyed the various types of insurance that may respond with coverage for Zika virus and other infectious disease losses, the scope of coverage will ultimately depend upon the specific language of each insurance policy. Businesses interested in proactively managing their Zika virus exposure will accordingly be well-served to evaluate the adequacy of the coverage provided under their existing insurance programs before the potential onset of such losses.

Lawyer Contacts

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