“RECOVERING” FROM COVID-19: INSURING THE PANDEMIC

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Executive Summary

The full scale of COVID-19’s impact is not yet known, but it has already had devastating reverberating effects globally. All commercial enterprises, even those considered essential, are experiencing business interruptions as a result of the global pandemic. How commercial insurance policies respond to COVID-19 may determine whether certain businesses, and economies, weather the catastrophe. This article examines the anticipated commercial insurance response to policy claims stemming from the COVID-19 Pandemic. In particular, it examines four types of commercial insurance policies likely to be significantly impacted by COVID-19: liability, commercial property, cancellation, and business interruption insurance.

This article explores the ways in which commercial insurers and insurance policies have adapted in response to past pandemics and the impact that that evolution will have in responding to COVID-19. In general, policy amendments have taken the form of exclusionary provisions, stricter definitions, and higher evidentiary thresholds designed to reduce insurer exposure in a pandemic. Consequently, the more wide-spread the impacts of COVID-19, the narrower the circumstances in which commercial coverage will be sufficient. Speciality pandemic policies have emerged to fill the gap in coverage but remain uncommon in the Canadian insurance market.

Commercial liability and property insurance policies are not intended to cover the type of losses expected from an extended pandemic. Both policies include exclusionary provisions and require evidence of either bodily injury or physical property damage caused by an insured peril in order to trigger coverage. As COVID-19 becomes more pervasive, it will become difficult or impossible to demonstrate causality even if widespread disease is covered under the policy. Cases where both coverage and causality can be demonstrated will be exceedingly rare.

While claims under commercial event cancellation and dedicated business interruption policies are more likely to succeed, they will, at best, provide only partial compensation. Exclusionary provisions and precise evidentiary requirements also expose policy holders to a potential denial of coverage and claims under these policies will likely be decided on a case by case basis.

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Only dedicated pandemic policies provide full coverage for losses sustained as a result of an extended pandemic. However, insurers warn that these policies are likely to contain fine print limiting or excluding coverage in certain circumstances. As with other forms of commercial insurance, recovery is not certain due to variations in policy language, coverage, and evidentiary requirements.

Recovering from COVID-19

This article will examine the anticipated commercial insurance response to policy claims stemming from the COVID-19 pandemic. While insurers of personal and health-related policies such as life and accident and sickness will be particularly hard hit, widespread illness and quarantine of the scale experienced in response to COVID-19 will permeate all areas of the industry. From supply chain disruption to mandatory closures, commercial policy holders will face a significant number of ordinarily covered losses complicated by the fact that COVID-19 is an exceptional peril. In the wake of the COVID-19 pandemic, policy holders will want to know whether they are covered; claimants will want to know whether they can sue; and insurers will want to know how much this is going to cost.

The good news for commercial insurers, and the bad news for the majority of policy holders, is that pandemics like COVID-19 are not unanticipated. The 2002-2003 severe acute respiratory syndrome (SARS) epidemic gave insurers a window into what could have been.[1] In the years that followed, policies of all kinds were drafted with pandemics in mind to include exclusions for known widespread illnesses.[2] Other policies, which I will refer to as pandemic policies, anticipate the risk of widespread illness and have adjusted premiums accordingly.[3] At the same time, policy holders are not likely to have opted for the remarkably more expensive pandemic policies leaving insurers significantly more prepared for this disaster.[4] This article will demonstrate that the more wide-spread the impacts of COVID-19, the narrower the circumstances in which coverage will be sufficient due to express exclusions and an insufficiency of evidence. In particular, this article will examine four types of commercial insurance policies likely to be significantly impacted by the COVID-19 pandemic: liability, commercial property, cancellation, and business interruption insurance.

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[1] Michael Ha, "Will Insurance Cover SARS Cleanup?", *National Underwriter* 107:21 (26 May 2003) 14.

[2] See e.g. Greg Meckbach, "Interrupted by Disease", *Canadian Underwriter* 81:12 (December 2014) 30 at 32.

[3] Mark A Hofmann, "Colleges' insurance program developed to cover pandemics", *Business Insurance* 43:19 (11 May 2009) 21 [Hofmann, "Insurance Program Developed"].

[4] *Ibid* at 21.

Background

The World Health Organization (WHO) has defined "pandemic" as the "worldwide spread of a new disease".[5] On March 12th, 2020, WHO declared COVID-19 a pandemic. Historically, flu pandemics of this scale are not uncommon. In 1918, an H1N1 virus referred to as Spanish Flu killed an estimated 50 million people worldwide.[6] Forty years later, a mutant strain of H2N2 spread across the globe causing at least 1.1 million deaths.[7] Only ten years later, Hong Kong flu (H3N2) killed nearly half a million people.[8] In 2009, an H1N1 virus commonly known as Swine Flu infected roughly 700 million people and may have contributed to the deaths of up to 500 thousand. While the human cost of flu pandemics has decreased over the last century, the continued uncontrollable spread of novel diseases demonstrates the vulnerability of our society to pandemic threats. As the world becomes more interconnected through globalization, these pandemics begin to have reverberating economic effects the likes of which have never before been seen. Until COVID-19, Swine Flu was considered the last modern pandemic. However, only 18 thousand deaths were confirmed as attributable to Swine Flu and attempts to contain the spread of the virus were limited in comparison to COVID-19 and SARS.

Categorized as an epidemic, the SARS outbreak of 2003 narrowly avoided classification as a pandemic due to its successful containment. Barrett Hubbard, an insurer with MINT Canadian Specialty has said that, "there is a difference between insuring a pandemic and a contagion outbreak".[9] He defines a contagion outbreak as "a random, localized event for which it is easier to price and write specific coverage".[10] In contrast, Hubbard says that a pandemic is an inevitable occurrence affecting an entire economy.[11] SARS, which was successfully contained to the initial communities of infection, is more properly categorized as a contagion outbreak, and as such, did not pose as significant a threat to commercial insurers.

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[5] "What is a pandemic?" (24 February 2010), online: *World Health Organization* <www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/>.

[6] Marc Jones, "Global Warning: Reinsurers seek a realistic assessment of a pandemic's potential impact", *Best's Review* 109:7 (November 2008) 60.

[7] "1957-1958 Pandemic (H2N2 virus)" (02 January 2019), online: *Centre for Disease Control and Prevention* <www.cdc.gov/flu/pandemic-resources/1957-1958-pandemic.html>.

[8] "1968 Pandemic (H3N2 virus)" (02 January 2019), online: *Centre for Disease Control and Prevention* <www.cdc.gov/flu/pandemic-resources/1968-pandemic.html>.

[9] David Gambrill, "Pandemic Un-preparedness", *Canadian Underwriter* 76:6 (June 2009) 6.

[10] *Ibid*.

[11] *Ibid*.

In total, SARS infected approximately eight thousand people worldwide, killing just under 800 of those infected.[12] Its impacts, both financial and in terms of lives lost, pale in comparison to modern pandemics. However, the SARS outbreak provided the insurance industry with crucial insight into the potential costs of widespread illness. Although only twenty thousand Canadians were quarantined, Toronto Dominion Bank estimated the net cost of the SARS outbreak to the national economy at between $1.5 billion and $2.1 billion.[13] Many of those losses were sustained in the form of ordinarily covered perils such as event cancellations and business interruptions.

As settlement is common in the insurance industry, there are no concrete statistics as to the success of commercial insurance claims stemming from the 2003 SARS outbreak. In fact, no case law exists on the subject in Canada. While there were certainly claims made as a result of SARS, one can only speculate as to the nature of their settlement. However, we do know that insurers responded to the 2003 outbreak by adopting exclusionary policies and holding insureds to strict evidentiary demands. Between 2002 and 2004, it was not uncommon for a wide variety of standard form insurance policies to contain provisions expressly excluding coverage for losses related to SARS.[14] Many policies already contained inclusionary provisions covering only losses stemming from named illnesses. These exclusionary and inclusionary provisions were expanded to address a potential future pandemic. Since 2003, it has become standard for commercial insurance policies to contain some form of provision excluding coverage in the event that losses are the direct result of a pandemic.[15]

But some policy holders remained concerned in the wake of SARS and some insurers capitalized on the gap in coverage. By the time Swine Flu emerged in 2009, many specialty insurers had developed policies intended to address pandemics.[16] Some pandemic policies are general, covering any insured object in the event of an unknown pandemic. Other policies aim to address known outbreaks such as H1N1.[17] Despite the availability of these policies, they remain uncommon in commercial settings due to the prohibitive cost and rarity of pandemics.

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[12] "SARS Basics Fact Sheet" (06 December 2017), online: *Centre for Disease Control and Prevention* <www.cdc.gov/sars/about/fs-sars.html>; Cliff Titcomb, "SARS Underscores The Limits Of Insurance Underwriting", *National Underwriter* 107:44 (3 November 2003) 12.

[13] Meckbach, *supra* note 2 at 32.

[14] Carolyn Aldred, "SARS Fears Spreading" *Business Insurance* 37:15 (14 April 2003) 1 at 1.

[15] *Ibid.*

[16] Louise Meeson, "Aon goes anti-viral with H1N1 business continuity offering", *Insurance Age (London)* (December 2009) 16; Hofmann, "Insurance Program Developed", *supra* note 3.

[17] Meeson, *supra* note 16.

Commercial Liability

With forced closures looming, and many already underway, a large number of employers fought to keep their doors open for as long as possible. Others closed initially but have reopened without any marked change in circumstances in an attempt to mitigate losses. However, this borrowed time comes at the cost of potential commercial liability. Employees, customers, venders, and contractors may all have claims against a commercial liability policy holder in the event that they contract COVID-19 as a result of the policy holder's decision to remain open during the pandemic. Additional liability may arise if the policy holder fails to take necessary precautions to prevent the spread of the virus in their place of business. With thousands of new confirmed cases of COVID-19 being announced each day, it is almost inevitable that businesses remaining open during the pandemic will be exposed to commercial liability. Unfortunately, many of those businesses will discover too late that their commercial liability insurance policies do not cover losses stemming from COVID-19.

While other forms of commercial insurance policies exclude specific viruses either by name or broadly, general liability policies do not typically include such express exclusions for widespread illness.[18] Instead, commercial insurers rely on pollution exclusion clauses excluding contaminants or irritants, arguing that such provisions capture pathogens, viruses and microorganisms.[19] This approach was taken in response to both SARS and Swine Flu with mixed success in the United States.[20] Again, due to the frequency of settlement, there is no precedent with which to determine the likelihood of pollution exclusions applying in the case of widespread illness in Canada. Nevertheless, whether or not pollution exclusions apply, they are merely the first line of defence against COVID-19 claims for commercial liability insurance providers.

Regardless of the applicability of exclusions, a policy holder must demonstrate causality between the occurrence and the impugned property damage or bodily injury.[21] This evidentiary requirement may be the biggest hurdle facing policy holders attempting to recover under a commercial liability policy post-pandemic. Demonstrating property loss as a result of an illness is no easy task and will be discussed in greater detail below. In contrast, losses resulting from a serious and life-threatening physical injury are more easily demonstrated. Where claimants will encounter difficulty is in establishing a causal connection between the actions of the policy holder and the impugned injury.

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[18] Mark A Hofmann, "Liability policies vary on coverage provisions for claims related to H1N1 virus: Experts", *Business Insurance (Chicago)* 43:19 (11 May 2009) 21 [Hofmann, "Liability Policies"].

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

By definition, pandemics involve worldwide spread of a new disease. Where the virus is pervasive, it will be difficult, if not impossible, to demonstrate causality. Mark Noonan, national workers compensation practice leader for Marsh Inc. in Boston said the following:

> If you look at swine flu where it's already indigenous in the United States, in several states it would be difficult to establish a workers comp claim beyond health care or public safety. […] When you go back a few years to avian flu, where it was in other countries but not in the United States, it would have been easier to track it back to a work exposure if a person was traveling.[22]

Although Noonan is clearly referring to workers compensation, his remarks are equally true for commercial liability insurance or any form of insurance for that matter. With liability insurance, the more opportunities a claimant has to be exposed to the insured peril, the more difficult it will be to provide evidence establishing a causal link between the policy holder's actions and the loss. In the case of a pandemic, there can be no causal apportionment. Infection has a single cause and the onus is on the claimant to provide evidence that the infection or bodily injury was caused by the policy holder's actions and could not have just as likely been caused by any other source.

Claims established earlier in the pandemic are more likely to be successful due to the comparatively low rate of infection. Evidence of causality is more easily collected if the infection can be tracked to a specific individual. However, as infection becomes more pervasive and sources of infection become less certain, circumstances in which causality, and ultimately, coverage can be demonstrated become narrower. Noonan said in 2009 that, "It's going to be a harder proof of claim for HlNl because it's already here in the United States-not impossible, but harder to establish causality".[23] SARS, as a contained contagion outbreak could be more easily tracked to a specific individual who had travelled outside of the country, whereas sources of Swine Flu were too numerous to ascertain.[24]

At the time of writing, there are confirmed cases of COVID-19 on every continent and in every Canadian province and territory with the exception of Nunavut. A lack of testing kits early on has made tracking community infection with certainty an impossibility. Making matters worse, individuals infected with COVID-19 are commonly asymptomatic, carrying the virus and infecting others without leaving evidence.[25] While early liability claims may succeed if they are not caught by pollution

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[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*

[25] "Information on Novel Coronavirus (COVID-19) for Physician and Health Care Professionals" (20 March 2020), online: *Ottawa Public Health* <www.ottawapublichealth.ca/en/professionals-and-partners/hcp-ncov.aspx>.

exclusion clauses, except in rare circumstances, the window for meeting the necessary evidentiary burden has long been closed.

Commercial Property

Many commercial property insurance policies cover not only direct losses incurred as a result of damage to an insured property, but those losses which result from the closure of the facility during renovation and repairs. While closed under a mandatory order, policy holders may attempt recovery under a commercial property insurance policy for losses related to the disruption. Viruses are not a covered cause of loss under standard commercial property insurance policies.[26] In fact, many insurers have shored up policy definitions in the wake of recent modern pandemics to exclude coverage.[27] Typically, property insurance policies trigger only where direct physical damage to or loss of an insured's property can be demonstrated to be the result of a covered peril.[28] Healthcare facilities or specialty businesses may already have policies specifically designed to address communicable disease contamination based on their needs. However, those policies may require the order of an authorized governmental agency before the policy is triggered.[29] A mandatory closure order such as those resulting from a pandemic would not be sufficient to trigger the policy as it still requires confirmation of property contamination resulting in losses.

Blanket closure orders, such as those ordered in response to the COVID-19 pandemic, are not responding to confirmed contamination, but are preventative measures designed to slow the spread of disease. Consequently, policy holders will not receive confirmation that their commercial properties have experienced contamination, nor will they be able to demonstrate that the mandatory closure was related to a presumed contamination. As with commercial liability insurance, the insured's evidentiary burden cannot be met regardless of exclusionary provisions.

You will recall that insurer Barrett Hubbard described a pandemic as "an inevitable occurrence affecting an entire economy".[30] You will also recall that the primary difference between a contagion outbreak and a pandemic is containment. Commercial property insurance policies which include coverage for communicable

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[26] Dominic Anthony, "How to Protect Your Members and Your Fitness Business during the Coronavirus Pandemic", *Club Industry* (12 March 2020), online: <www.clubindustry.com/trends/how-to-protect-your-members-and-your-fitness-business-during-coronavirus-pandemic>.

[27] Mark A, Hofmann & Sarah Veysey, "Buyers Expected to Face Tough Fight on Flu Claims." (2009) 43:19 *Business Insurance*, 21.

[28] AHC Media, "Insurers respond: New Ebola coverage, exclusions", *Healthcare Risk Management (Atlanta)* 36:12 (1 December 2014).

[29] *Ibid*.

[30] Gambrill, *supra* note 9.

disease contamination often address issues related to containment of a contagion outbreak while leaving the policy holder to shoulder the primary costs of an extended pandemic.[31] Where triggered, such policies cover additional expenses such as decontamination and additional staff to ensure a business is capable of reopening after a closure order is lifted.[32] These policies are not aimed at addressing widespread illness, but rather, localized contamination. Decontamination, in the event of a pandemic such as COVID-19, would not be sufficient to reopen a non-essential business closed by a governmental authority. That property would remain closed, incurring losses not covered under a standard commercial property insurance policy. Consequently, recovery under a commercial property insurance policy is likely to be extremely limited in the event of losses stemming from COVID-19.

While limited recovery may be possible under specialized policies, these sums will likely be minimal and insufficient to cover extended losses. The traditional property market is not intending to cover such losses.[33] Costs of that nature are more appropriately addressed through dedicated business interruption policies which, as we will see, have their own shortcomings in addressing widespread illness.

Cancellation

Another major area of commercial insurance likely to be impacted by the COVID-19 pandemic is cancellation. As stated above, this article will address strictly commercial policies. While personal cancellation policies such as travel cancellation will be greatly impacted by COVID-19, these claims will also be inseparably linked to secondary events such as flight cancellations and travel bans. For that reason, this section will focus primarily on commercial event cancellation.

Cancellation insurance generally covers all unforeseen perils. Consequently, it is one of the few areas of commercial insurance that may expressly include widespread illness.[34] During the 2003 SARS outbreak, many cancellation policies did provide coverage for events cancelled due to the illness.[35] Although not universally accepted, SARS was typically covered until it became a known, recognized peril and exclusions were introduced.[36] Early event cancellations due to COVID-19 may lead to successful claims for this same reason. Standard form policies covering widespread illness will not yet expressly exclude coverage for COVID-19 while policies excluding "mysterious disease outbreaks" will no longer apply following COVID's recognition

[31] Meeson, *supra* note 16.

[32] *Ibid*.

[33] Hofmann & Veysey, *supra* note 27.

[34] Aldred, *supra* note 14.

[35] *Ibid*.

[36] *Ibid*.

and designation as a pandemic.[37] Unless expressly excluding widespread illness or disease, the policy will likely pay out for early cancellations owing to the COVID-19 pandemic, though later cancellations will not fare as well. This is one of few areas of insurance law where COVID-19’s designation as a pandemic helps, rather than hinders, policy holder claims.

Despite coverage, widespread illness or even the declaration of a pandemic may not be sufficient to ensure recovery in the event that a policy holder chooses to cancel their event. Event organizers must pay close attention to advisories from WHO or the appropriate authorized governmental agency and wait for announcements recommending the cancellation of events. Cancellations prior to such advisories may be considered premature and lead to denial of coverage by insurers.[38] Danny Burns, contingency underwriter for Lloyd's of London syndicate 102, explains that, "[f]ear of a peril is not covered”, adding that coverage of losses in anticipation of a pandemic would lead to systemic exposure for insurers.[39] Consequently, it is a public policy argument that may prevent an event organizer from recovering losses due to cancellation where cancellation is, itself, in the public interest.

Nevertheless, event cancellation insurance remains the silver lining for commercial policy holders looking to recover losses sustained during the COVID-19 pandemic. Unlike other commercial policies, designation of COVID-19 as a pandemic does not prevent recovery of cancellation insurance and provincial and federal lockdown and social distancing orders meet the policy holder’s evidentiary burden. While these policies will not come close to covering the total commercial losses of policy holders, high costs to insurers stemming from commercial event cancellation policies should be expected.

Business Interruption

With a significant portion of the Canadian population quarantined or self-isolated and many businesses closed or operating remotely in a limited capacity, there is no doubt that insurers will see a remarkable number of business interruption claims resulting from the COVID-19 pandemic. Anticipating future flu pandemics, Nick Beecroft, emerging risks and research manager at Lloyd's stated that “disruption [resulting from a pandemic] will cascade throughout the economy and could generate some very challenging exposures for carriers and the potential for widespread business

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[37] Margo McCall, “SARS Raises Cancellation Insurance Questions”, *Tradeshow Week (Los Angeles)* 33:19 (12 May 2003) 8.

[38] Aldred, *supra* note 14.

[39] *Ibid*.

interruption".[40] He added that "global disease outbreaks-can dampen demand for goods and services, thereby disrupting supply chains".[41] Beecroft's remarks were made in 2015 but underscore the mindset of insurance underwriters in the years following SARS, Swine Flu, and the escalation of Ebola.[42] For the past two decades, underwriters have been anticipating and preparing for the next modern pandemic and the prevalence of dedicated business interruption policies in the Canadian insurance market demonstrates that the same is true for policy holders.

As with other standard commercial policies, infectious diseases are often expressly, impliedly, or conditionally excluded from coverage.[43] However, for commercial enterprises seeking business interruption insurance, epidemics like SARS and Swine Flu may be a primary concern. As a result, insurers began to include provisions providing coverage only for "notifiable diseases".[44] The Public Health Agency of Canada defines "nationally notifiable diseases" as "infectious diseases that have been identified by the federal government and provinces and territories as priorities for monitoring and control.[45] In the early months of the COVID-19 outbreak, insurers grappled with the issue of whether or not the then unnamed virus constituted a notifiable disease within the intended meaning of the policy.[46] While policies covering nationally notifiable diseases are not the norm, they are common enough for insurers to be concerned. The 2003 SARS outbreak demonstrated how a relatively contained contagion outbreak could quickly cause substantial financial losses.

Many insurers received their answer on March 11th, 2020 when WHO declared COVID-19 a pandemic. Some countries, including the United Kingdom, declared COVID-19 a notifiable disease prior to that declaration.[47] However, at the time of writing, COVID-19 has not yet been added to the register of nationally notifiable diseases in Canada.[48] SARS, similarly, was not added to the register of nationally notifiable diseases in Canada until after the outbreak had ended. While it is certain that COVID-19 will be added to the list eventually, a delay in that

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[40] Lori Chordas, "Fever Rising: Infectious disease outbreaks and epidemics have carriers and reinsurers on high alert.", *Best's Review (Oldwick)* 116:3 (July 2015) 28 at 30.

[41] *Ibid*.

[42] See e.g. Douglas McLeod, "Ebola Spread Triggers Insurance Concerns: Ace Ltd issues exclusion for some policies", *Business Insurance (Chicago)* 48:22 (27 October 2014) 1.

[43] Alex Newman, "How much trouble lies ahead for insurers?", *Investors Chronicle (London)* (18 March 2020) 11, online: <www.investorschronicle.co.uk/shares/2020/03/18/how-much-trouble-lies-ahead-for-insurers/>.

[44] *Ibid*.

[45] Public Health Agency of Canada, "Notifiable diseases online" (11 August 2020), online: *Government of Canada* <diseases.canada.ca/notifiable/>.

[46] Newman*, supra* note 43.

[47] *Ibid*.

[48] Public Health Agency of Canada "Case definitions: Nationally notifiable diseases" (August 11, 2020), online: *Government of Canada* <diseases.canada.ca/notifiable/diseases-list>.

announcement could cause some smaller insured companies to go out of business before business interruption policies are triggered.

While some business interruption policies expressly exclude infectious diseases and others require classification as a notifiable disease in order to trigger coverage, all business interruption policies will require evidence linking the interruption to an insured peril. Unlike other forms of insurance such as commercial property or liability, business interruption policies will not require that the policy holder demonstrate damage to property or bodily injury in order to trigger.[49] Since these policies are intended to support the policy holder through disruptions to the ordinary course of business, coverage is triggered once the policy holder is able to demonstrate that a covered peril has caused business interruption. Evidence of financial loss is not required at the time that a claim for business interruption is submitted. Anticipated losses are sufficient provided that the policy holder is able to demonstrate disruption.

The bright side for business interruption policy holders is that the evidentiary threshold for demonstrating a business interruption in the event of a pandemic after coverage of an insured peril has been shown is quite low. In nearly all cases, an order from an authorized governmental agency in response to the pandemic and impacting the insured business will be sufficient.[50] However, as with cancellation insurance, businesses may encounter difficulties recovering for business interruption losses if they close their doors prematurely or choose to remain closed after orders have been lifted. Interruptions caused by other businesses, such as suppliers or independent contractors, may be covered prior to a governmental declaration if evidence can be deduced demonstrating a link to the covered infectious disease or pandemic. In that case, coverage would depend largely on the language used when drafting the provision.

Pandemic Policies

As demonstrated, it can be difficult to recover damages stemming from pandemics under traditional commercial policies. Consequently, some businesses in recent years have begun to seek insurance for these specific circumstances. Opportunistic insurers have rose to the occasion and developed policies designed to cover business interruption and other losses in the event of a pandemic. For the purposes of this article, I will refer to the totality of these policies, regardless of the scope of coverage, as pandemic policies.

[49] Hofmann, “Liability Policies”*,* *supra* note 18.

[50] AHC Media*, supra* note 28.

At the time of the Swine Flu pandemic in 2009, many insurers noted the failure of the traditional market to provide coverage for widespread infectious disease.[51] Dave Finnis, national property practice leader for Willis HRH in Atlanta noted that the marketplace had not significantly changed in this regard post-SARS.[52] This is not strictly true as post-SARS exclusionary provisions have made standard coverage for infectious diseases even less common. However, even in 2009, specialty policies covering damages related to widespread disease were available at a cost.[53] Many of these policies were requested by and underwritten for specific employers rather than being a standard offering.[54] Despite the availability of custom-tailored policies, post-Swine Flu, the majority of commercial policies continued to exclude coverage for losses stemming from serious infectious disease.

However, some insurers have made pandemic policies a standalone offering.[55] These insurers, many of whom offered business interruption and continuity policies prior to SARS, Swine Flu, and COVID-19, have adapted their standard policies to include coverage specifically for pandemics. These insurers have looked at modern pandemics and contagion outbreaks, studying the way other countries responded to widespread illness and the steps taken to contain an outbreak and establishing an estimated cost of pandemic related disruptions.[56] Underwriters then consider their findings in determining the necessary cost of risk transfer. As stated above, pandemic policies are significantly more costly than standard market policies due to the increase in risk being transferred and are not pervasive in Canada.

Although pandemic policies are designed to cover damages stemming from widespread infectious disease, recovery is not guaranteed. As with any insurance policy, coverage is dependent on the language used in the policy and interpretation of provisions will require significant attention to fine print.[57] Since, in theory, all of these policies triggered as soon as WHO declared COVID-19 to be a pandemic, insurers offering pandemic policies can expect significant costs in the months ahead. With all of the pandemic policy holders attempting to recover at once, it is likely that insurers will be resistant and turn to definitions, exclusions, and evidentiary thresholds for assistance. Ultimately, coverage for these policies will depend on a case by case analysis, and even where coverage is triggered, it may not be sufficient to compensate policy holders for the totality of their losses.[58]

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[51] Hofmann & Veysey, *supra* note 27.

[52] *Ibid*.

[53] Hofmann & Veysey, *supra* note 27.

[54] James Fernyhough, "Coronavirus an Insurance Catastrophe", *The Australian Financial Review* (12 March 2020) 23.

[55] Meeson, *supra* note 16.

[56] *Ibid.*

[57] Anthony, *supra* note 26.

[58] Hofmann & Veysey, *supra* note 27.

Insurance Response

The full scale of COVID-19’s impact is not yet known, but it has already had devastating reverberating effects globally. Nearly all developed nations have declared a state of emergency and most have shuttered non-essential businesses and government services. All commercial enterprises, even those considered essential, are experiencing business interruptions as a result of the global pandemic. There is worldwide concern that markets will collapse, and insurers are not immune. How commercial insurance policies respond to COVID-19 may determine whether certain businesses, and economies, weather this catastrophe.

Commercial liability insurance policies are unlikely to protect policy holders from costs stemming from COVID-19. Where policies do not include an express exclusion for infectious disease, insurers will turn to pollution exclusions to deny coverage. Policy holders will also experience difficulty demonstrating the required physical property damage or bodily injury due to evidentiary shortcomings. The more widespread the virus, the more difficult it will be to show causation, and ultimately, to recover.

Commercial property is not intended to cover losses related to widespread infectious disease. Policy holders will be required to demonstrate both that COVID-19 is an insured peril and that it caused physical damage to the insured property. Some policies may cover the costs of decontamination but will not cover business interruption costs if the business cannot be immediately reopened. Nevertheless, policy holders are unlikely to meet the evidentiary threshold required to trigger coverage.

Commercial event cancellation policies are more likely to pay out than liability or commercial property insurance. With the exception of pandemic policies, it is the only area of commercial insurance where designation as a pandemic will help policy holders recover on standard market policies. However, event organizers must be careful not to cancel prematurely.

Dedicated business interruption policies could cover losses related to a pandemic. However, standard policies exclude infectious diseases and many modified policies require the virus to be declared a notifiable disease. COVID-19 has not yet been designated a nationally notifiable disease in Canada. If this declaration is made, business interruption policies with this inclusion may provide coverage, but the majority of standard market policies will not.

Companies with the forethought to insure their commercial interests with pandemic policies will be best protected from the impacts of COVID-19. However, insurers offering these policies will be at the highest risk. Pandemic policies contain the lowest evidentiary burden for policy holders, but coverage is still not guaranteed due to variations in policy language and coverage.

With the majority of pandemic policies insured by a minority of insurers, widespread claims could cause these insurers to go out of business before their financial obligations are met. There are no publicly available statistics indicating the prevalence of these policies or their distribution amongst insurers. Premiums collected, even if collected since the 2009 pandemic, may not be sufficient to cover business continuity costs for larger corporations for the length of the pandemic and recovery period.

However, the outlook for commercial insurers remains positive despite dark clouds on the horizon. Although claims on personal insurance policies, such as life and accident and sickness, will cost insurers a remarkable sum of money, commercial policies, on the whole, are unlikely to provide coverage for the most significant losses as the virus becomes more pervasive. In fact, collected and ongoing premiums on commercial insurance policies may provide larger insurance companies with the capital needed to weather the storm.