



INSURANCE COVERAGE

ALERT

DICKSTEINSHAPIRO_{LLP}

Minimizing Losses from an Influenza Pandemic: Insurance Coverage Considerations

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Recent reports that numerous human cases of Influenza A H1N1 infection (a/k/a “swine flu”) have been confirmed in the United States and internationally are receiving increasing media attention and are causing increasing levels of concern. Indeed, President Obama has referred to the swine flu outbreak as a “serious situation” that is “serious enough to take the utmost precautions.”¹ The swine flu, which is reported to have originated in Mexico, has now been detected in countries around the globe, including the United States, Austria, Canada, China, Germany, Israel, Netherlands, New Zealand, Spain, Switzerland, and the United Kingdom.² The swine flu already has caused at least one death in the United States and nine in Mexico.

The World Health Organization (“WHO”) has raised the influenza pandemic alert level to level five (the highest level is six), thereby reflecting widespread human-to-human transmission and signaling that a global outbreak, or pandemic, is imminent. WHO accordingly has urged countries to implement their pandemic plans.

As Dr. Margaret Chan, Director-General of WHO, has warned, an influenza pandemic could produce *both* severe health consequences *and* economic crises.³ Naturally, the most important concern in any situation like this is human health and well-being. Prudence, however, also dictates that businesses take steps to protect themselves against losses that could result from the recent outbreak, regardless of whether it reaches pandemic proportions.

As the outbreak of the influenza progresses, businesses in the air travel, tourism, entertainment, hotel, and food services industries may be most severely and most immediately affected. Indeed, in Mexico City, the epicenter of the swine flu outbreak, authorities already

Because of the many variations in policy language, this alert does not address all of the issues. It also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured’s particular situation. However, it does provide a starting point and is intended to be an aid in considering what sometimes is a maze of factual and legal issues regarding insurance. This alert may be considered advertising in some states.

¹ Barack Obama, President, Remarks (Apr. 29, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-the-Vice-President-and-Senator-Arlen-Specter/.

² See WHO, Influenza A (H1N1) Update 8, May 1, 2009, http://www.who.int/csr/don/2009_05_01a/en/index.html.

³ Dr. Margaret Chan, Director-General, WHO, Address at the Pacific Health Summit, Pandemics: Working Together for an Effective and Equitable Response (June 13, 2007), www.who.int/dg/speeches/2007/20070613_seattle/en/index.html.

have ordered about 35,000 public venues to close or to serve only take-out meals as health officials try to contain the virus.⁴ Officials in Mexico City also ordered the closing of bars, clubs, movie theaters, pool halls, theaters, gyms, sport centers, and convention halls until May 6.

In just the second week of the crisis, schools in more than a dozen U.S. states already have closed in response to the influenza threat.⁵ Thus far, more than 100 school systems have closed at least one school. Officials in Texas have announced that the entire Fort Worth school system will be closed through at least May 8 as a precaution.

As a result of the influenza outbreak, businesses may face a number of problems or losses, including:

- personnel may be unavailable for long periods of time because they may be sick or may need to care for ill family members, or simply because of fear;
- offices may be closed either voluntarily or by governmental entities;
- companies may incur costs to clean their facilities as a precautionary measure, or to decontaminate buildings in which the virus already exists;
- transportation may be disrupted, thereby preventing employees from getting to work and preventing products from getting to market;
- suppliers may be closed or their production may be severely disrupted—even if a company is not immediately impacted by an influenza outbreak, its supply chain may be;
- customer bases may decline as sales opportunities decrease; for example, companies may see cancellations of

existing sales orders and reservations, as consumers become increasingly concerned about travel and certain products, such as pork products;

- businesses may be faced with litigation brought by employees or third parties claiming inadequate protection from spread of disease; and
- businesses and corporate executives may face litigation brought by shareholders claiming inadequate preparation.

As the Risk and Insurance Management Society (“RIMS”) very recently reported, these concerns and exposures underscore the importance of companies undertaking adequate risk management measures now in an effort to avoid or reduce potential losses that may be substantial.⁶ One critical component of any risk management plan includes assessing whether there is insurance coverage to pay both for amounts expended to prevent or mitigate future influenza-related losses, as well as for actual losses suffered.

Several types of insurance might respond to pay for losses stemming from an influenza pandemic, including insurance policies for: Event Cancellation; Trade Disruption; First-Party Property (including Business Interruption coverage); Commercial General Liability; Directors and Officers; and Workers’ Compensation/Employers’ Liability.

Event Cancellation policies are designed to compensate insureds for losses arising out of the cancellation, interruption, or postponement of specified events. These policies typically specify that coverage is triggered if the cancellation, interruption, or postponement is caused by factors that are beyond the insured’s control. They typically insure a wide range of events, including concerts, sporting events, conventions, conferences, exhibitions, and trade

⁴ *Earliest Case of Swine Flu Tucked Away in Mexico, Officials Say*, Apr. 29, 2009, <http://www.cnn.com/2009/HEALTH/04/28/swine.flu/index.html>.

⁵ Dan Childs, et al., *More U.S. Schools Close in Swine Flu Scare, Mexicans Told to “Stay Home,”* Apr. 30, 2009, <http://abcnews.go.com/Health/SwineFlu/story> (last visited Apr., 30, 2009).

⁶ RIMS is the leading organization of risk management professionals.

shows. These policies have provided coverage, for example, when an insured incurred losses arising out of the cancellation of music concerts in the aftermath of the September 11, 2001 terrorist attacks.

Trade Disruption policies are designed to protect against loss of earnings and extra expenses caused by disruption in the supply chain, even when there is no physical loss or damage to the insured's assets. This coverage was developed specifically for businesses that depend on global supply chains.

Business Travel policies cover lost deposits or other costs if travelers have to cancel a trip because either they or their close relatives are ill. This type of coverage may be particularly beneficial for insureds with global operations.

First-Party Property policies provide insurance for direct losses to or affecting the insured's property. These policies protect a business's place of operations and inventory, and cover for loss of, or damage to, property—which may include contamination by a virus. In addition to covering property damage, many property policies also provide some or all of the following “time element” coverages:

- *Business Interruption coverage* reimburses the insured for the amount of gross earnings minus normal expenses, i.e., its profits, that the insured would have earned but for the interruption of the insured's business. Business interruption coverage generally requires that an “interruption” result from damage to covered real or personal property. Insureds, for example, have obtained reimbursement under such coverage when other widespread disasters such as Hurricane Katrina and the September 11, 2001 terrorist attacks caused business interruption.
- *Civil Authority coverage* protects the insured from losses caused by the inability to access its premises when a

civil authority denies such access because of covered damage to or destruction of property belonging to others. Some civil authority coverages require physical damage to the insured's own premises; others do not. A “civil authority” for purposes of this coverage may extend beyond federal and state governments. For example, after the September 11, 2001 terrorist attacks, some insureds successfully argued that the baseball commissioner's cancellation of games constituted an order of a civil authority. Similarly, directives from the WHO, for example, also may constitute orders of civil authority.

- *Ingress/Egress coverage* protects the insured against lost business income and extra expense when the insured's premises are inaccessible for reasons other than an order of civil authority. This type of coverage typically requires that the property damage be located within a certain number of miles of the insured's premises. Such coverage may be implicated if, for example, roads or public transit systems providing access to a business are closed and there is also property damage in the business's immediate area.
- *Contingent Business Interruption coverage* protects against economic losses caused by the inability to get a supplier's goods or services to the insured, or the insured's goods or services to customers, thereby preventing the insured from producing and/or selling its product in the marketplace.
- *Extra Expense coverage* indemnifies the insured for the reasonable and necessary increased costs of conducting its business operations due to property damage caused by an insured peril. One example of such expense would be costs incurred in the installation and maintenance of computers in

employees' homes in order that the employees can continue to work on company business from home.

Commercial General Liability (“CGL”) policies may provide coverage for defense costs and judgments or settlements that the insured pays due to “bodily injury” or “property damage” alleged by customers or other third parties. Individuals may allege that they became sick or suffered other damage because the insured failed to take necessary precautions to prevent exposure to infected individuals. Businesses in the medical, hotel, travel, and entertainment industries, for example, may be more vulnerable to such claims. Individuals may allege that businesses in such industries had an obligation to have prepared for the possibility of an influenza pandemic and to have proper procedures and plans in place to help protect third parties, such as patients and customers, from unreasonable risk or exposure.

Directors & Officers policies may provide defense and indemnity coverage for companies and their directors and officers, who may face claims regarding alleged wrongful acts arising from their responses to the outbreak. As with possible claims related to CGL policies mentioned above, claims may be made against directors and officers for failure to properly prepare for an influenza pandemic and to have proper procedures and plans in place for dealing with the crisis.

Workers’ Compensation/Employers’ Liability policies may pay benefits, depending on the laws of the pertinent state, if employees are able to show that they contracted the pandemic flu while performing job-related activities. Certain companies have higher exposure in this area than others. Employees in medical facilities, for example, have increased risk of contracting the disease in connection with possible workplace exposure.

Even if the swine flu outbreak does not reach or approach pandemic levels and thus does not

cause large actual losses, insurance policies nevertheless might provide coverage for mitigation costs—i.e., costs that the insured incurs to prevent or mitigate imminent or actual losses. Many companies already have expended, or soon may expend, substantial sums to minimize their risk of loss associated with the swine flu. For example, companies may purchase personal protective equipment such as face masks and gloves for employees, install hand-sanitizing equipment, or endeavor to clean and decontaminate their business locations. Insurers may be obligated to pay for these measures to help prevent further transmission of the virus, just as they often must pay for the costs of boarding up a building’s windows when a hurricane is approaching. The legal theory is simple: insureds should take reasonable steps to minimize or reduce their losses, thus saving themselves and their insurers’ money, and their insurers should pay for these steps. These costs might be covered even if the insured never actually incurs swine flu-related losses.

Insurers likely will raise challenges to the availability of coverage for losses related to swine flu. These challenges may include disputes regarding: (a) whether physical damage to insured property is required to trigger time element coverage such as business interruption coverage, and, if so, what may qualify as property damage; (b) whether there is coverage for amounts spent to prevent or mitigate damages, even if a pandemic never occurs; and (c) whether coverage for claims related to an influenza pandemic are barred by any policy exclusions, such as the “pollution,” “mold,” “bacteria,” “virus,” or “quarantinable disease” exclusions.

Companies should not assume that insurer defenses necessarily will defeat coverage. For example, in order to trigger coverage under a property policy, an insured may be able to argue that contamination of its facilities constitutes property damage. The Centers for Disease Control and Prevention, for example, reports that some viruses and bacteria can live two

hours or longer on surfaces like cafeteria tables, doorknobs, and desks.⁷ Additionally, courts have recognized that the airspace inside of buildings constitutes “property” that may be damaged by contamination by a virus.⁸ Further, amounts spent to mitigate damages may be recoverable if the insured can demonstrate that it incurred these costs in a reasonable effort to protect against a covered loss and that the threat of loss was sufficiently imminent. Many policies contain clauses specifically covering such “loss prevention” or “sue and labor” expenses, and the common law in many jurisdictions also obligates insurers to reimburse these expenses. Similarly, depending on the language in the specific exclusion(s) invoked, an insured may be able to argue that a policy’s pollution, mold, or bacteria exclusions do not apply to viruses. Each of these issues requires a careful analysis of the specific policy language involved, the facts of a company’s particular losses, and the law of the applicable jurisdiction.

Our Firm

Dickstein Shapiro exclusively represents insureds in coverage disputes. The Firm has assembled a team of attorneys that already is looking into the insurance coverage issues implicated by a potential influenza pandemic. Firm attorneys have successfully resolved some of the most significant coverage cases in the country. The Firm’s Insurance Coverage Practice was the sole recipient of *Chambers USA*’s prestigious 2008 Award for Excellence in the Insurance Coverage: Policyholder Category.

Contact Information

We would be happy to further discuss with you the insurance implications of an influenza pandemic. For more information, please contact:

- Kirk A. Pasich
(pasichk@dicksteinshapiro.com or (310) 772-8305), chair of the Firm’s Insurance Coverage Practice; or
- Kenneth B. Trotter
(trotterk@dicksteinshapiro.com or (202) 420-2912), associate in the Firm’s Insurance Coverage Practice.

⁷ Questions & Answers, *Swine Influenza and You*, Apr. 30, 2009, http://www.cdc.gov/swineflu/swineflu_you.htm.

⁸ Kirk Pasich, et al., *Insurance Coverage for Hazardous Substances in the Airspace of Buildings*, 10-1 Mealey’s Litig. Rep. Ins. 1 (Nov. 1, 1995).