

Environmental Insurance – Is Ebola an Insured Pollution Event?

Introduction

With the Ebola virus and its dire consequences in the news, and now that Ebola has been diagnosed in the United States, many companies are grappling with the immediate need to develop practical strategies to protect employees, customers and the general public, and create workable continuity plans if the virus becomes more widespread. Media outlets have saturated the viewing public with sobering accounts of the Ebola virus outbreak in the various countries of West Africa and beyond, and the recent announcement by the Center for Disease Control (CDC) about enhanced screening of travelers at area airports has reinforced fears about an outbreak.¹

While the CDC maintains the threat of an extended Ebola outbreak is unlikely, organizations need to prepare for contingencies including the financial consequences should there be an outbreak, for example, an exposure in a hospital or other medical services facility, or the workplace, a school or hotel, among others. An exposure may require evacuation, disinfection, and a consequent need to restore public confidence in the affected space as well considerations for work force, supply, transportation and infrastructure interruptions. At Aon our specialists have fielded many inquiries about whether exposure to Ebola would be considered insurable “pollution” and what, if any coverage there might be in place under a pollution liability policy in the event of exposure at an insured property – principally in health care facilities, but also from risks within offices, school or hotels. This alert is intended to offer some guidance on the likely challenges for coverage.

What is Ebola and how is it Transmitted

According to the World Health Organization (WHO), transmission of the virus is believed to originate from fruit bats of the Pteropodidae family which are natural Ebola virus hosts. Ebola is introduced into the human population through close contact with the blood, secretions, organs or other bodily fluids of infected animals such as chimpanzees, gorillas, fruit bats, monkeys, forest antelope and porcupines found ill or dead or in the rainforest. Ebola then spreads through human-to-human transmission via direct contact (through broken skin or mucous membranes) with the blood, secretions, organs or other bodily fluids of infected people, and with surfaces and materials (e.g. bedding, clothing) contaminated with these fluids.²

Liability Protection including Disinfection/Decontamination

Exposures in Hospitals/Health Care Facilities

The most recently diagnosed cases of Ebola was two health care workers at Texas Presbyterian Hospital. These health care workers provided care to the first U.S. diagnosed Ebola patient and underscores the point that despite protective measures, the possibility of infection remains – especially within hospitals and other medical treatment facilities. Because of this, health care facilities are particularly vulnerable to hosting exposed individuals. For these types of health care facility risks, many pollution liability insurers do offer environmental insurance products designed specifically for health care facilities and often include affirmative cleanup, disinfection and decontamination coverage as a result of, among other things, a discharge, dispersal, release or escape of bacteria and viruses.

However, there are two examples (contained in many policy forms) that *may* effectively preclude coverage. The first example involves language which provides an affirmative grant of coverage for disinfection or decontamination costs from a “facility-borne illness, virus or bacteria”. Since Ebola is not a virus that can be considered “facility-borne” by the CDC, this policy wording may not provide coverage. The

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second example involves policies which contain a specific exclusion for communicable diseases (i.e. – diseases transmitted via human to human contact). This policy language may also preclude coverage for Ebola. The preferred approach would be for coverage that affirmatively provides for disinfection or decontamination costs arising from viruses irrespective of how those viruses are communicated.

Even in those circumstances where such disinfection/decontamination coverage may be available, policyholders should be aware that there may be unique and specific triggers including particular written reporting to the local regulatory authorities as well as to the insurance company - often within a defined period of time (often 72 hours or less) of the discovery and/or reporting to regulatory authorities. And often the disinfection costs must be incurred within a prescribed period of time and usually only those performed under the written direction of the CDC or a local health department. In addition, the coverage may have a higher deductible and/or provide a limited amount of coverage. Even for those pollution liability policies that do not have a specific communicability exclusion, *there is typically no coverage whatsoever for any claims for bodily injury or property damage arising from a facility borne illness or exposure to viruses or bacteria.* The availability of other coverage such as crisis management (to restore reputational injury as well as evacuation expenses) or business interruption expenses will depend upon the breadth (or limitation) of what falls within a triggering pollution condition or other defined term.

Exposure in Schools, Workplaces and Hotels

Although hospitals are at the forefront of a likely exposure, it is possible that contact could occur with an asymptomatic infected person in the course of attending school, at work or at a hotel or similar type of insured commercial property. For these exposure risks, the primary question is whether there has been a triggering pollution event. As noted above with respect to health care risks, the definitions vary from carrier to carrier and whether a virus such as Ebola is a pollutant, irritant or contaminant for the purposes of triggering coverage under a pollution liability policy (or a corollary exclusion under a pollution exclusion in a commercial general liability insurance policy) may not be clear from the coverage itself. Absent an express communicable disease exclusion, whether there is affirmative coverage may therefore depend upon an interpretation based upon existing case law regarding whether certain substances are “pollutants, irritants or contaminants”³. If there is a triggering pollution event, whether and to what extent coverage for disinfection, crisis management as well as business interruption will depend upon the language of the policy and potentially subject to sub-limits of liability as well as time limitations for discovery and reporting.

One thing is certain. There is much uncertainty regarding what is currently or may in the future be available to address exposures from Ebola in the environmental insurance marketplace. Consequently, it is critical that companies consult with insurance professionals who have expertise in understanding these risks as well as a thorough understanding of insurance solutions that may be available to address a client’s particular risks.

¹ <http://www.cdc.gov/vhf/ebola/pdf/screening-of-travelers-at-airports.pdf>

² <http://www.who.int/mediacentre/factsheets/fs103/en/>

³ See, e.g., *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43 (Ariz. Ct. App. 2000) (Holding that fecal coliform bacteria in the water system at a mixed-use development was not a “pollutant” for the purpose of the policy’s pollution exclusion); but see, *Larson v. Composting Concepts, Inc.*, 2008 Minn. App. Unpub. LEXIS 551 (Minn. Ct. App. 2008) (Holding that policy’s pollution exclusion applied to claims for bodily injury and property damage arising from homes infiltrated with the living organisms, mold, bacteria, and bioaerosols dispersed from the composting site as excluded “contaminants”).