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ISO Communicable Disease Exclusion – Drafting History

In 2008, the Insurance Service Office (“ISO”) introduced a “Communicable Disease Exclusion” endorsement (“CD Exclusion”) for inclusion in commercial general liability (“CGL”) policies, including Forms CG 21 32 05 09 and CG 33 76 05 09. Both versions of the CD Exclusion exclude coverage for bodily injury and property damage:

arising out of the actual or alleged transmission of a communicable disease . . . even if the claims against any insured allege negligence or other wrongdoing in the (a) supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease, (b) testing for a communicable disease, (c) failure to prevent the spread of the disease or (d) failure to report the disease to authorities.” (Emphasis supplied.)
(Note: The term “communicable disease” is not defined.)

In October 2008, ISO issued a circular to explain the reason for the CD Exclusion, echoing many of the concerns it had expressed two years earlier when introducing the ISO Virus Exclusion (Form CP 01 40 07 06) for commercial property policies. The 2008 ISO circular for the CD Exclusion includes the following pertinent statements:

Over the years, insurers have expressed **concerns regarding the potential effect of communicable diseases on general liability insurance**, specifically with respect to avian influenza (avian or bird flu), SARS and Rotavirus. **Generally, diseases are considered communicable due to their potential to be transmitted from one person or species to another.** A specific disease-causing agent may be transmitted many ways including: physical contact with infected individuals; transmission through liquids, food and body fluids; exposure to contaminated objects; via airborne inhalation or spread by insect or other organism.

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The possibility that the above-mentioned communicable diseases, and other disease-causing agents, may begin to spread more easily from animal to person, person-to-person, or from product-to-person **raises the concern that insureds may face products liability and/or premises/operations claims under general liability insurance . . .** Currently, the pollution exclusion in the [CGL] Coverage Form encompasses contamination by using the term contaminant in addition to other terminology. Although the pollution exclusion addresses contamination broadly, **communicable diseases now appear to warrant particular attention** since the pollution exclusion is at times narrowly construed by certain courts and may be found by courts to not apply to products liability. (Emphasis supplied.)

The 2008 ISO circular may assist insurers in (i) asking courts to apply a CD Exclusion to COVID-19 claims under CGL policies and (ii) responding to legislative efforts to help insureds bypass the CD Exclusion when seeking coverage under CGL policies for COVID-19 claims.

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