In 2003, an epidemic of severe acute respiratory syndrome – SARS – surged, ultimately killing almost 800 people. In 2005, the White House unveiled its National Strategy for Pandemic Influenza Preparedness and Response amid dire warnings of a global flu pandemic as the H5N1 virus propagated around the world. Closer to home, West Nile virus and Lyme disease have become household names and emerged as familiar illnesses. Less well-known is the epidemic of Valley fever raging in certain California state prisons. In freer environs, the hantavirus emerged in Yosemite National Park in 2012 and killed three. And just this January, Panama announced it was in the midst of a dengue fever epidemic.

What is Going On?

What is going on? Initially, climate change was deemed to be an insignificant contributor to the recent rise in disease-caused morbidity and mortality. As stated in the 2001 Third Assessment Report by the Intergovernmental Panel on Climate Change (“IPCC”): “To date, there is little evidence that climate change has played a significant role in the recent resurgence of infectious diseases.” But that view has been eroded. The 2007 IPCC Assessment Report stated:

Evidence has grown that climate change already contributes to the global burden of disease and premature deaths. Climate change plays an important role in the spatial and temporal distribution of malaria, dengue, tick-borne diseases, cholera and other diarrhoeal diseases; is affecting the seasonal distribution and concentrations of some allergenic pollen species; and has increased heat-related mortality.

The implications for human health of this expanding potpourri of germs, fungi, viruses, and other pathogens are self-evident. Less apparent, but just as significant, are the impacts on business. Nationally declared epidemics, lawsuits alleging responsibility for causing Valley fever, airports targeted by World Health Organization SARS travel advisories, websites soliciting for hantavirus cases, significant judgments in connection with illness caused by West Nile virus – all of these and more can interfere with business operations, or even eradicate the business.

Insurance: A Partial Solution

One partial solution is insurance. For example, the Mandarin Oriental Hotel recovered $16 million on its property policies in connection with the 2003 SARS outbreak. A spokesman for the hotel chain reported that they were “very satisfied.”

Coverage for loss caused by germs, fungi, viruses, and other pathogens is not always present. Insurance policies can have a wide variety of exclusions attached that can knock out these types of claims. However, if one is sensitive to the scope of the various exclusions, one can increase the chances that the protection one needs is included in the protection one bought, and that the protection one bought is fully applied to the incident at hand.

Samples of these types of exclusion are readily found. For example, on the liability side one may be subject to an Absolute Mold Exclusion, which reaches far more than mold. Among other things, it excludes coverage for:

“Bodily injury”, “property damage”, or personal and “advertising injury” related or attributed to, arising out of, resulting from, or in any way caused by any bacteria, virus, mycotoxin, “fungus(i)”, “spore(s)”, scent or byproducts.
Conventional wisdom holds that molds do not derive from viruses or bacteria, so this exclusion is much more than a mold exclusion.

In contrast, the ISO Fungi or Bacteria Exclusion does not reach viruses, but does reach fungi and bacteria. It excludes:

| “Bodily injury” or “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or with a building or structure, including its contents.... |

Thus, a claim for hantavirus injury (such as faced by the National Park Service and its contractor) should find coverage in a policy bearing a Fungi or Bacteria Exclusion.

A different path taken by some policies is to focus not on the cause, but on the result. A Communicable Disease Exclusion specifically captures many of the illnesses identified above. This exclusion excludes coverage for:

| “bodily injury”, “property damage”, “personal injury”, or “advertising injury” arising out of: |
| (1) transmission of a “communicable disease” by an insured or any person doing any service or work on behalf of the insured; or |
| (2) failure by an insured to perform services which were either intended to or assumed to prevent “communicable diseases” or their transmission to others. |

It defines “communicable disease” expansively as:

| a contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products which is transmitted or spread, directly or indirectly, to a person from an infected person, plant, animal or anthropoid, or through the agency of an intermediate animal, host or vector of the inanimate environment or transmitted or spread by instrument or any other method of transmission. “Communicable Disease” shall include, but not be limited to Acquired Immune Deficiency Syndrome (AIDS) or Human Immunodeficiency Syndrome (HIV), Severe Acute Respiratory Syndrome (SARS), West Nile Disease, chicken pox, any type or strain of influenza (including, but not limited to avian flu), legionella, hepatitis, measles, meningitis, mononucleosis, whooping cough, cholera, bubonic plagues and anthrax. |

The Communicable Disease Exclusion also applies to livestock, poultry, and crops.

Similarly, one can contrast exclusions available under a property policy. Another ISO exclusion is the Exclusion of Loss Due to Virus or Bacteria endorsement. The endorsement is used in a policy that also provides coverage for loss due to fungus:

| We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. |
| However, this exclusion does not apply to loss or damage caused by or resulting from “fungus,” wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy. |

More stringent is the Organic Pathogen Exclusion. This exclusion:

| will not pay for loss or damage caused directly or indirectly by an: |
| organic pathogen |

“Organic pathogen” means:

| any type of bacteria, virus, fungi, mold, mushroom, or mycotoxin, or their spores, scent, or byproducts, or any reproductive body they produce. |
Although the Organic Pathogen Exclusion does not contain a generic term such as the “other microorganism” language borne by the Virus or Bacteria endorsement, it does, without exception, reach fungi.

A comprehensive example of the variation available in actual purchased policies is shown in Orleans Parish School Board v. Lexington Insurance Co., where primary and excess property policies were invoked for mold damage arising in connection with Hurricane Katrina. The primary and excess carriers denied coverage based on exclusions that excluded loss from “fungus, mold(s), mildew, or yeast”, from “[m]old, fungus, organic pathogens, mycotoxin, virus, mildew, spores or other microorganisms of any type”, from “mold, spores, or fungus of any type” and from “Fungus, wet rot, dry rot and bacteria.” Should the pathogen at issue have been a virus or a bacteria, rather than mold (i.e., a fungus), the outcome of the case would have been substantially different.

Three Lessons

The lessons to be drawn from this discussion are three:

1. The exclusion, if present, can make coverage for a pathogen-related loss difficult, if not impossible. Still, competent professionals will be aware that coverage is possible depending on the specific facts and the specific wording.

2. If a pathogen-related loss arises, an insured should carefully review its policy. Viruses (hantavirus, West Nile Virus) are not excluded by exclusions for fungi and mold. Diseases caused by fungi (such as Valley fever) may find coverage in a policy that excludes viruses and bacteria but extends coverage to fungi.

3. If one is in the market for a new policy, recognize that not all pathogen-related exclusions are the same and, therefore, that it may pay to shop around.

Conclusion

But what if all of the available policies contain language like that found in the Communicable Disease Exclusion? In that case, one should be thinking of other methods to insulate oneself from loss. General contractors might seek indemnity from the developer or landowner from hazardous substances or pathogens found in the land. Better and faster responses to identified risks might protect airports from bad public relations, negative travel advisories, or worse. Adherence to separate corporate forms might isolate a liability. In short, insurance is just one of the means to mitigate a risk. In a world of increasing risk of disease, a prudent business will look to all available means for protection.

Some will say that the chances of a hantavirus outbreak affecting one’s business are vanishingly small. That is not disputed. What is not vanishingly small is the fact of climate change and that its effects are not vanishing.

About the Author

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