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**WILL THERE BE INSURANCE  
COVERAGE FOR TUITION-REFUND  
AND OTHER COVID-19 RELATED CLAIMS?**

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our insurance blog – Between the Lines*

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## WILL THERE BE INSURANCE COVERAGE FOR COVID-19 LOSSES?

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Two types of coverages

- Third party – claims against an insured institution
  - EPLI
  - D&O / Educator's Liability / Professional Liability
  - General Liability
  - Pollution (hybrid)
- First party – insured institution suffers a loss (no claim against insured)
  - Property
  - Pollution (hybrid)

## THIRD PARTY CLAIMS – by Students / Employees / Visitors / Vendors

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Two types of third party liability insurance coverages

- Occurrence based - policy in effect at time of the event/injury not the later assertion of a claim
  - ◆ Bodily Injury (may include “personal injury”)
- Claims made - policy in effect at time of assertion of a claim not the occurrence earlier event governs

What is the significance of the difference?

## THIRD PARTY CLAIMS – by Students / Employees / Visitors / Vendors

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Most of third party activity so far has been for financial loss

- so less likely to implicate “occurrence” coverages
- insurance to be implicated is ELL, pollution, and possibly EPLI, which are claims-made

### Claims-Made

- Most policies require claim against the insured and reporting of claim to the insurer during the policy period
- Claim is usually defined as a demand for monetary or non-monetary relief – it does not need to be a lawsuit
- Policies cover “Wrongful Acts,” which is broadly defined
- Need to focus on notice provisions

### III. HAVING A BROAD DEFINITION OF “CLAIM” IS GOOD – EXCEPT WHEN IT ISN’T

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- Insureds may get inquiries from individual students or parents and they could be addressed to various individuals
  - ◆ In-house counsel and department heads may not be sensitized to report demands or claims short of a lawsuit to risk management
  - ◆ Policy requires that Insured report the claim to the insurer during the policy period
  - ◆ Notice - prejudice rule does not apply – late notice not excused the way it is under occurrence policies
  - ◆ Many (but not all) policies say claims don’t need to be reported until CEO, CFO, legal, or risk management becomes aware

### III. HAVING A BROAD DEFINITION OF “CLAIM” IS GOOD – EXCEPT WHEN IT ISN’T

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- ◆ Big deductibles can be a trap for the unwary
  - Small claims can become big ones overnight
  - Insurers do not pay for defense costs incurred prior to notice

## KEY TAKEAWAYS:

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- Policies differ, so starting point is always policy language
  - ◆ Brokers don't always get it right – need to double-check against policies
- An email asking for a refund is a “claim”
- The fact that a demand is “small” (below deductible) does not matter
  - ◆ It needs to be reported to insurer
  - ◆ Institution does not want to give insurer opportunity to disclaim coverage for a class action on the basis that there were prior claims made before the policy that “relate” to the one during the policy period, so no coverage

## KEY TAKEAWAYS:

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- You should be giving notice now under claims made policies for covid-related claims



# WILL REFUND CLAIMS BE COVERED?

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## 1. Educators' Liability

- Straight forward claim of breach of contract may not be covered
  - ◆ Need an allegation of Wrongful Act
- There will likely be breach of contract exclusion that will have to be addressed
- c. 93A claims will imply or state that defendant engaged in unfair or deceptive acts and that should be enough to establish Wrongful Act and may be enough to get around exclusions

## WILL REFUND CLAIMS BE COVERED?

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- Goal should be to trigger a duty to defend/reimburse defense costs under a reservation of rights
- Insured will be able to designate counsel, if the insurer sends a reservation of rights

### Key takeaways:

- When an insurer reserves right [to disclaim coverage], it cedes control of the defense to its insured
- Panel counsel lists likely don't apply
- Set rates in policy may not apply

## POLICIES THAT MAY BE IMPLICATED

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### General Liability (Third Party)

1. "Bodily Injury" (coverage usually does not include emotional distress, unless as the result of bodily injury)
  - But some primary policies are broader and some umbrella policies do include emotional distress (even when the primary does not)
  
2. "Property Damage"
  - Physical injury to tangible property
  - Loss of use of that injured property
  - And loss of use of tangible property that has not been physically injured (may apply to student claims of lost property / access to dorm rooms)

## POLICIES THAT MAY BE IMPLICATED

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### 3. “Personal Injury” coverage

- ◆ Wrongful eviction

#### Takeaways:

- Emotional distress is sometimes covered under bodily injury definition
- Look for emotional distress under umbrella policies
- If room and board is at issue, it may implicate “personal injury”

## POLLUTION

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- Hybrid first party and third party coverage
- Site specific
- Covers third party claims for bodily injury (which likely includes emotional distress)
- Cover "Pollution Event" or "Pollution Condition"

## POLLUTION

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- Definition of "Pollutant Event" requires "discharge, dispersal, release, or escape" of a pollutant
  - ◆ Definition of pollutant is broad – includes "contaminant" and "irritant", and these are usually not defined
  - ◆ Some even specifically include "viruses"
- Some contain "communicable disease" coverage for clean-up costs [so maybe not business interruption]
  - ◆ Usually with sublimit (so not full policy)
- Must require actual (not just "suspected") presence of pollutant
- Some specifically contain "virus" exclusions (wording differs)

# POLLUTION

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## Takeaway

- Pollution policy may be another route for third party claim
- Claims made, so give notice now

## IV. UNEXPLORED TERRITORY

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- If an educational institution is forced to pay a refund claim because of Covid-19, does that then make it a First Party Claim possibly covered by first party policies?

### Takeaway

- Notice of third party refund claims to first party property insurer