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COVID-19 And Business Interruption Insurance

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Jonathan J. Boustani
Partner

As the coronavirus pandemic wreaks havoc on nearly every sector of the economy, businesses across the country look to their commercial property insurance policies for desperately needed coverage. To date, however, insurers have staked out a hardline position: Standard commercial property policies do not cover any losses related to the pandemic. In response, many policyholders hit hardest by the pandemic – e.g., restaurants, bars, hotels and casinos – are filing lawsuits against their insurers to secure coverage for their lost revenue.

Though each policy is different, the coverage disputes arising from the coronavirus pandemic generally involve three hotly contested issues: the availability of coverage for "business interruption" losses; the availability of "civil authority" coverage; and the applicability of so-called pollution, contamination, and/or virus exclusions.

Business Interruption Coverage

The "business interruption" (BI) coverage grant is a key source of coverage for coronavirus-related business losses because it reimburses policyholders for income lost as a result of "direct physical loss or damage to" covered property. Insurers claim that policyholders are not entitled to BI coverage because the presence of the coronavirus on covered property does not constitute "direct physical loss or damage." They also contend that "direct physical loss or damage" requires physical alteration of covered property and

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that coronavirus does not change the physical structure of property.

Courts across the country, however, have found that policyholders are entitled to BI coverage in the absence of changes to the physical structure of covered property. For example, courts have ruled that the presence of asbestos, E. coli, gas, smoke, or even unpleasant odors at covered property may constitute "direct physical loss or damage" sufficient to trigger BI coverage. [1] Other courts have found that policyholders are entitled to BI coverage even when an outside threat, such as a potential rockslide, endangers the property or renders it unusable, but does not involve the presence of a foreign substance on the property. [2]

Based on these legal authorities, policyholders have compelling arguments about whether they are entitled to BI coverage due to the presence or threat of contamination. In light of scientific evidence that the virus may survive for days on certain surfaces, policyholders can bolster their coverage arguments by establishing that a person with COVID-19 visited the covered property.

Civil Authority Coverage

"Civil authority" coverage is another potentially viable source of recovery for coronavirus losses related to government-imposed closures. A standard provision generally provides coverage for business income losses when a government order prohibits access to covered property as a result of "direct physical loss or damage to" nearby property that is not covered under the policy. Following the outbreak of the coronavirus, local authorities have issued a multitude of stay-at- home orders, most of which compel the closure of what they deem to be non-essential businesses. These are exactly the kind of closure orders contemplated by civil authority coverage. [3]

Once more, however, insurers argue that coverage is not available because the required physical loss or damage to property is not present. Thus, as with standard business interruption coverage, policyholders should rely on the authorities cited here to demonstrate that an actual structural change to property is not a prerequisite to coverage for this type of loss. Rather, by demonstrating that the property has become adversely impacted, or that the property is no longer capable of being used, policyholders have viable arguments to support their claims for civil authority coverage.

Moreover, many of the stay-at-home or other government shutdown orders explicitly provide that they have been issued to address existing property damage. [4] The existence of this type of language in an order can only bolster a claim for coverage.

Pollution and Virus Exclusions

A policyholder must do more than demonstrate that its BI coverage claim falls within the scope of one or more insuring agreements – it has to be prepared to negate insurers' attempts to prove that any policy exclusions bar coverage.

To avoid their coverage obligations for coronavirus-related losses, insurers are relying on pollution and virus exclusions in their policies. It should come as no surprise that insurers are steadfast in their belief that these types of exclusions present significant obstacles to coverage.

A typical pollution exclusion bars coverage for losses arising out of the "discharge, dispersal, seepage, migration, release or escape" of "pollutants,"

which are often defined to include any “solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” Insurers argue that the definition of “pollutants” is broad enough to encompass the coronavirus and, thus, the exclusion should apply to bar coverage. However, many courts have held that such exclusions apply only to traditional environmental pollution. [5] Under no reasonable interpretation can the coronavirus be considered the type of traditional environmental pollution contemplated by a pollution or contamination exclusion. Thus, the cited authorities provide support for the position that exclusions for pollution or contamination cannot apply to preclude coverage for coronavirus-related losses.

Many policies also include an exclusion that bars coverage for damages caused by or resulting from “any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” To avoid application of this exclusion, policyholders contend that their losses were caused by government shutdown orders, not by the coronavirus itself. Restaurants owners have raised this argument in recently filed coverage lawsuits in the U.S. District Court for the Eastern District of Pennsylvania and Washington D.C. Superior Court. [6] Furthermore, this virus exclusion does not explicitly bar coverage for loss of use of property or denial of access to property as a result of the pandemic. Absent such language, policyholders should argue that standard principles of policy interpretation require courts to narrowly construe the exclusion against the insurers and in favor of coverage. [7] Based on the foregoing, policyholders may still obtain coverage even when their policies include exclusions related to viruses.

Proposed State and Federal Legislation

In addition to coverage based on the language of the policy itself, proposed state and federal insurance legislation may also facilitate recovery. At this writing, the following states are considering laws that would require insurers to cover pandemic-related losses under business interruption policy provisions:

- Louisiana (SB477; SB495; HB858)
- Massachusetts (SD2888)
- Michigan (HB5739)
- New Jersey (A-3844)
- New York (A10226B; S8211A)
- Ohio (HB589)
- Pennsylvania (HB2372; HB2386; HB2759; SB1114)
- Rhode Island (H8064)
- South Carolina (SB1188)

Pennsylvania SB1114 and Louisiana SB477 would apply to all companies with business interruption coverage regardless of their size, but the other proposed laws would only apply to companies with a limited number of employees. With the exception of the Louisiana and Michigan bills, these

proposed laws would permit insurers to obtain reimbursement for such coverage payouts from proposed insurer-funded pools.

If these laws are enacted, insurers will likely assert challenges under the Takings Clause, the Contracts Clause, and/or the Due Process Clauses of the U.S. Constitution and corresponding provisions of state constitutions on grounds that these laws retroactively rewrite or modify insurance policies. These arguments may not be effective, as courts have upheld other insurance laws enacted during states of emergency to promote public welfare. [8] Moreover, liberalization policy provisions (like "the terms of this policy are automatically changed to conform to the statutes of the state in which you live") and conformity or elasticity clauses (like "terms of this policy which are in conflict with the statutes of the state in which this policy is issued are changed to conform to those statutes") may help ensure coverage under these new laws. [9] One court has held that the inclusion of such a policy provision is a waiver of the insurer's right to challenge the constitutionality of a new law that retroactively expanded coverage under existing policies [10].

Congress is considering legislation to address insurance coverage for business losses resulting from the pandemic. Various drafts of a Pandemic Risk Insurance Act (PRIA) call for property insurers to provide coverage for losses arising out of the coronavirus pandemic, paid for by a federally funded reinsurance program similar to the Terrorism Risk Insurance Act. To the extent federal legislation would retroactively apply to existing policies, it would be susceptible to constitutional challenges for many of the same reasons as the proposed state laws unless the reinsurance facility shifts the obligation to pay these losses to the taxpayers. While such legislation may fill a potential gap in insurance policies in connection with pandemic-related losses, however, it may have unintended consequences down the road. Any insurance solution that is heavily reliant on federal spending may create implied assurances to the insurance industry that taxpayer-funded bailouts may become the norm for future large-scale crises.

Recommendations and Best Practices

Policyholders must closely examine the specific language of all coverages and exclusions and analyze how those provisions will be interpreted under the applicable law. Even if a policy contains exclusions, policyholders should not accept insurers' denials of pandemic-related claims at face value. The legal authorities cited above demonstrate that courts often interpret the relevant coverages broadly while construing related exclusions narrowly. The coverage landscape is changing on a daily basis as policyholders file new lawsuits and lawmakers consider legislative proposals to address business losses resulting from the pandemic and/or orders from relevant authorities.

Only a few trial courts have ruled on dispositive motions in coronavirus coverage cases so far and their decisions were dependent on policy-specific coverages and exclusions, case-specific facts and allegations, and the applicable state law. [11] The public policy question of whether taxpayers should shoulder the burden of paying business insurance claims by bailing out the property insurance industry has yet to be fully debated. Policyholders should consider working with coverage counsel to monitor these developments so that they may put themselves in the best possible position to obtain an insurance recovery.

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[1] *Bd. of Educ. v. Int'l Ins. Co., 308 Ill.App.3d 597 (1999); Cooper v. Travelers Indem. Co., 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4 2002); Gregory Packaging Inc. v. Travelers Property Casualty Co. of America, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (unpublished); Oregon Shakespeare Festival Association v. Great American Insurance Company, 2016 WL 3267247 (D. Or. June 7, 2016); Essex v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009).*

[2] *Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477 (W. Va. App. 1998)); Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349 (8th Cir. 1986).*

[3] *See, e.g., Houston Cas. Co. v. Lexington Ins. Co., 2006 WL 7348102, *6-7 (S.D. Tex. Jun. 15, 2006) ("civil authority" clause provided coverage for theme park's losses as a result of hurricane evacuation order absent physical damage to insured premises); US Airways, Inc. v. Commonwealth Ins. Co., 65 Va. Cir. 238, 245 (Va. Cir. July 23, 2004); Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434, 436-37 (Mich. Ct. App. 1973).*

[4] *See, e.g., New York March 15, 2020 Emergency Executive Order ("this order is given . . . because the virus physically is causing property loss and damage"); Los Angeles Revised April 1, 2020 "Safer at Home" Order ("the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time…").*

[5] *MacKinnon v. Truck Ins. Exch. 73 P.3d 1205 (Cal. 2003); American States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997); Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15 (N.Y. 2003).*

[6] *See LH Dining LLC v. Admiral Indemnity Company, E.D. Penn. Case No. 2:20-cv-01869 (filed April 10, 2020); Property Ventures LLC dba Property Twenty-One v. Seneca Insurance Company, Inc., et al., D.C. Superior Court (filed April 8, 2020).*

[7] *See, e.g., MacKinnon., supra, 73 P.3d at 1213; Seaboard Sur. Co. v. Gillette Co., 476 N.E.2d 272 (N.Y. 1984).*

[8] *Vesta Fire Ins. Corp. v. State of Fla., 141 F.3d 1427, 1434 (11th Cir. 1998); State v. All Property & Casualty Insurance Carriers Authorized & Licensed To Do Business In State, 937 So.2d 313, 324-27 (La. 2006).*

[9] *See, e.g., Prudential Prop. & Cas. Ins. Co. v. Scott, 514 N.E.2d 595, 601 (Ill. App. Ct. 1987); Wolf v. Am. Family Mut. Ins. Co., 865 N.W.2d 186, 188 (Wis. Ct. App. 2015).*

[10] *Scott, supra, 514 N.E.2d at 601; see also Davis v. Erie Ins. Grp., 583 A.2d 819, 823 (Pa. Super. Ct. 1990).*