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Insurance and COVID-19: Do Business Insurance Policies Cover COVID-19 Losses?

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Recent events with COVID-19 present a strange time in our history in which the overwhelming majority of businesses will suffer losses of some kind, whether from closure of business, cancellation of an event or from bodily injury claims arising out of customer's or client's exposure to the coronavirus on a business premises. Can businesses which sustain a loss or claim recover under their existing property or comprehensive general liability ("CGL") policies? The short answer is maybe, but there will inevitably be a battle. All too often, insureds take NO for an answer all too quickly, but in certain circumstances, access to coverage may be available. This update provides a summary of coverage under property, event, and CGL policies and certain issues and exclusions that may be an impediment to coverage if included in the respective policy.

PROPERTY INSURANCE COVERAGE

Companies that have purchased property insurance for their premises are wondering whether they have coverage for losses sustained as a result of the government-forced closure pertaining to non-essential or non-life sustaining businesses. To analyze this issue, you need to better understand the make up of a property insurance policy.

The basics: A property insurance policy provides coverage to the insured for losses that are sustained to the property itself, both real and personal property. There is a subset of coverages that may be, but are not always, included in a property policy. Those coverages may include business interruption insurance, contingent business interruption coverage, and civil authority coverage. Each of these will be summarized below.

BUSINESS INTERRUPTION COVERAGE

Business interruption insurance, also known as business income insurance, is a type of insurance that covers losses that a business suffers after a disaster of some sort that shuts down the business. In essence, its primary purpose is to replace lost income which would be a direct loss, but it also provides coverage for indirect losses such as rent, taxes, utilities, etc.

For example, the commercial property business income form authored by the Insurance Services Office's ("ISO") (the entity which authors much of the standardized language in insurance policies), generally states:

> *We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations…*

Based on this language, a key issue in determining coverage for coronavirus-related claims is whether the insured sustained a "direct physical loss or damage." For entities that were forced to close due to COVID-19, the issue will be whether the presence or threat of the virus satisfies the requirement, or whether a government forced closure, without the threat of the virus on the premises, will suffice.

With respect to entities that were forced to close as a result of the virus on the premises, their chances of accessing coverage, absent any other notable exclusion precluding coverage, are obviously much higher than entities which were forced to close without the virus on the premises.

Not surprisingly, there has literally been decades worth of litigation on the meaning of "direct physical loss or damage." With a new wave of "COVID-19 cases" that inevitably will come (some have already been filed), courts will likely be reviewing past cases which have considered the presence of a substance which makes the premises uninhabitable as satisfying the physical damage or loss requirement. Policyholder counsel frequently cite to a Third Circuit case, *Port Authority v. Affiliated FM Ins. Co.*, 311 F.3d 22 (3d Cir. 2002), which held that "sources unnoticeable to the naked eye," such as asbestos in the air, can satisfy the direct physical loss requirement if it renders the building "uninhabitable and unusable." The court went on to state, however, that the "mere presence of asbestos or the threat of its future release" was not sufficient. Following the *Port Authority* case, another court found that a release of ammonia in a facility was a direct physical loss or damage despite no damage to the physical premises itself. "The ammonia release physically transformed the air within . . . the facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." *Gregory Pkg, Inc. v. Travelers Prop. Cas. Co*., 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2004).

Clearly, the courts have determined that the presence of something toxic in an atmosphere is not sufficient to access business interruption coverage, but rather, that toxic "something" must have rendered the premises uninhabitable.

Unsurprisingly, there are numerous courts which still require that the structural integrity of a premises be altered to satisfy the physical damage or loss requirement, cautioning that this phrase should not be construed too broadly to alter the contractual language of the policy.

Several business interruption insurance cases have already been filed, and they will inevitably be challenging the direct physical loss requirement of the policy.

For those companies closed due to a government mandate, the question is whether those forced closures are sufficient to satisfy the "direct physical loss or damage" to property requirement. This is an even harder battle due to certain cases which will be relied on heavily by the insurance industry. For example, the New Jersey appellate court in *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009), held that a temporary inability to operate an electrical grid, thus shutting down a physical premise, was deemed to be physical damage or loss, but that it would "reach a different result if, for example, a governmental agency had ordered that the power be shut off to conserve electricity." Further, in *Easy Sportswear, Inc. v. Am Econ. Ins. Co*., 2008 U.S. Dist. LEXIS 51402 (W.D. Pa. July 1, 2008), an insured asked the court to take judicial notice of a government proclamation that a storm had "caused extensive damage to homes, roads and businesses in Allegheny County," but the court disagreed, stating that a court could take notice of a governmental emergency notice, but not the facts identified in that emergency notice.

In sum, as the law currently stands, in order to hurdle the physical damage or loss requirement, a contaminant must be present on the premises AND the contaminant must render the property unusable or uninhabitable. While this may change based on cases that are being filed and judicial rulings related thereto, it does not seem likely that a government-ordered closure, without the presence of a contaminant, will suffice to meet the physical damage or loss requirement.

Virus Exclusion OR Endorsement

If an insured is able to satisfy the requirement of physical damage or loss, there is a possibility that an exclusion related to viruses exists. In 2006, ISO introduced the CP 01 40 07 06 – Exclusion Of Loss Due To Virus Or Bacteria endorsement, which states that the exclusion would "not pay for losses or damages caused directly or indirectly by . . . bacteria or virus." It is noteworthy that some policies contain a bacteria exclusion, and some may contain a bacteria *and* virus (combined) exclusion. COVID-19 is not bacteria related. As such, if an exclusion relates only to bacteria, there may still be coverage for property damage claims arising from coronavirus.

Alternatively, some (much more limited) insureds may have actually paid for coverage related to viruses. There is coverage available for "interruption by communicable disease." If such coverage exists, limits of liability are modest, and coverage is narrowly defined. However, if the insured has an all risk policy, or a specified peril policy, a virus-related loss very well might be identified as a known peril, or it could be identified in an endorsement to a policy identifying that such coverage is afforded.

The lesson learned about the virus exclusion or the covered peril endorsement is that each policy must be reviewed carefully to determine what is afforded to the insured.

CONTINGENT BUSINESS INTERRUPTION COVERAGE

Property insurance policies also frequently provide contingent business interruption ("CBI") coverage that theoretically covers damage to or disruption of a business's suppliers or customers.

CBI provisions vary considerably, with some policies applying only to specified suppliers or featuring various exclusions. However, CBI provisions do not typically require the policyholder to have directly suffered "physical damage" as discussed above. Although this may make CBI coverage a more promising avenue for policyholders, many provisions simply pass the "physical damage" requirement onto the suppliers or customers, requiring that the suppliers or customers suffer the same type of limited damages covered in the insured's own first-party policy.

These obstacles to coverage may not be ironclad, depending on a particular policy, but they do require consultation with a coverage expert to evaluate.

CIVIL AUTHORITY COVERAGE

In evaluating the availability of insurance coverage for COVID-19-related interruptions and closures, businesses should also consider "civil authority" coverage that appears in some standard property policies. While, as with all policy provisions, "civil authority" coverage provisions vary greatly, broadly speaking, these provisions can apply under certain circumstances when a government authority limits or prohibits insureds' access to and operation of their businesses.

For example, common language in a "civil authority" provision might state*: "This policy is extended to insure against the actual loss sustained by the Insured when, as a direct result of damage of the type insured against, access to the Insured's premises is prohibited by order of civil authority."* Depending on a particular policy's terms, this could include coverage for harm caused by federal, state, or local stay-at-home, closure, or postponement orders related to COVID-19.

Many of those hurdles discussed above regarding non-coverage due to a lack of physical damage to property may also apply to a "civil authority" coverage situation. However, the specifics of the policy must be examined to evaluate the merits of such a defense to coverage. In certain policies, the explicit terms of the "civil authority" coverage may contain a reference to "physical damage," which would strengthen the insurer's position, but case law provides room for argument that

virus-related losses have a sufficient nexus to property such that they constitute "physical damage."

Furthermore, at least some civil authority coverage provisions are written without any requirement for "physical damage." Under these policies, insureds have very strong arguments that governmental actions related to COVID-19 provides coverage for damage related to a government entity restricting access to business property.

The unprecedented nature of the COVID-19 pandemic complicates an already diverse and sometimes inconsistent area of case law. However, case law supports coverage under "civil authority" clauses in the context of government orders related to natural disasters, especially when policies lack an express "physical damage requirement." *See, e.g.*, *Hous. Cas. Co. v. Lexington Ins. Co.*, No. H-05-1804, 2006 U.S. Dist. LEXIS 45027 (S.D. Tex. June 15, 2006) (holding that the losses of Universal Studios theme park in Orlando, Florida caused by the state-ordered evacuation fell within the amusement park's civil authority coverage despite the park not suffering any physical damage when the hurricane's path did not make landfall in Florida). Following suit and filing suit, a restaurant in New Orleans has already brought an insurance coverage action under a "civil authority" provision in its "all risk" property policy to cover lost profits caused by a statewide order requiring that restaurant cease all on-site dining. *See Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's London et al.*, (La. Dist. Ct. for Parish of Orleans) (case number currently unavailable).

A complete review of a "civil authority" policy provision by a coverage expert is critical to provide greater opportunity for coverage of COVID-19 losses.

EVENT CANCELLATION COVERAGE

Event Cancellation Insurance is coverage that protects event-related revenue or expenses against cancellation due to circumstances beyond an insured's control. Some policies provide for "All Cause Coverage," meaning that the policy will cover everything that is not otherwise excluded. Thus, an "all-cause" event cancellation policy could potentially provide coverage for event cancellations due to the coronavirus.

It must be noted, however, that if an insured is just now purchasing event cancellation insurance, inevitably, a virus exclusion will be included as insurers are no longer issuing coverage without an exclusion related to the coronavirus outbreak. However, if event cancellation insurance was purchased prior to January 2020, there is a possibility that a cancellation due to COVID-19 will be covered.

Event Cancellation Insurance, much like all other insurance policies, must be carefully reviewed to determine the specifics of coverage and attendant exclusions.

GENERAL LIABILITY BODILY INJURY COVERAGE

A CGL policy covers an insured's liability for bodily injury and property damage suffered by third parties. A claim that a policyholder caused harm to third-party by allowing or failing to prevent exposure to COVID-19 could be covered by a CGL policy.

At least one potential claim has already arisen. On March 9, Ronald and Eva Weissberger filed a federal lawsuit in California against Princess Cruise Lines, claiming that as a result of the cruise line's negligence, they were exposed to COVID-19. Specifically, the Weissbergers alleged that because of an outbreak of COVID-19 on a previous cruise, the cruise line knew there was a risk that its passengers would be exposed and failed to take the necessary steps to protect its passengers. Does insurance cover the Weissbergers' and other similar claims? The short answer is "it depends."

The 2012 ISO CGL policy form promises to pay "those sums that the insured becomes legally obligated to pay as damages because of bodily injury." "Bodily injury" is defined to include "bodily injury, sickness, or disease sustained by a person." The promise by the insurance company to pay those sums that the insured becomes legally obligated to pay because of sickness or disease suggests that insurance coverage would be available to the cruise line for the Weissbergers' claim and to other policyholders for similar claims.

Once an insured establishes that a claim is within the coverage granted by a policy, an insurance company seeking to avoid its coverage obligations must prove that no coverage is available because one or more exclusions apply. The standard ISO CGL policy form contains several exclusions that potentially apply to bar coverage.

First, the ISO policy form contains an exclusion for bodily injury "expected or intended from the standpoint of the insured." In the Weissbergers' case, an insurance company would invoke the "expected or intended" exclusion to deny coverage because the cruise line knew or should have known that it was placing its passengers at risk of being exposed to the COVID-19 virus. In another claim, with different facts, the expected or intended exclusion may not apply if the policyholder had no previous notice of any risk to third-parties.

Another standard exclusion contained in the ISO policy form bars coverage for bodily injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The standard policy definition of a "pollutant" is "any solid, liquid, gaseous or thermal irritant or contaminant." Although there is no consensus, some courts have

held that biological contaminants, like mold or a virus, are not pollutants. *See Cooper v. Am. Family Mutual Ins. Co.*, 184 F. Supp.2d 960 (D. Ariz. 2002). Other courts have reached the opposite conclusion and held that biological contaminants are pollutants. *See Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325, 1330, (S.D. Fla. 2006). No Pennsylvania court has specifically addressed whether mold, viruses, and other biologic contaminants are "pollutants" within the scope of the pollution exclusion. Whether the pollution exclusion applies to bar coverage for COVID-19 bodily injury claims will depend, largely, on the state where the claim arises.

Finally, although it is not a common exclusion, some liability policies bar coverage for claims arising out of the "transmission of a communicable disease, virus, or syndrome." If a liability policy contains communicable disease exclusion, the insurance company will undoubtedly rely on it to deny coverage.

Securing coverage for bodily injury claims arising out of actual or alleged exposure to COVID-19 presents both factual and legal challenges. Ultimately, whether coverage is available will depend on the facts of the claim and the specific language of the policy.

If you have any questions on this alert or any other insurance related matter, please contact Beth A. Slagle at bas@muslaw.com, Andrew L. Noble at aln@muslaw.com, or Joseph A. Carroll at jac@muslaw.com or any other Meyer, Unkovic & Scott attorney with whom you have worked.

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