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Insurance Coverage for Coronavirus-Related Business Interruption Losses

In light of these immediate and potentially extended challenges, businesses undoubtedly will—and should—ask themselves whether their commercial property insurance policies provide business interruption coverages for virus-related losses.

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The COVID-19 pandemic has been devastating for businesses across the country. Just a few statistics put the pandemic's rapid and expansive damage into perspective. Initial weekly jobless claims went from 280,000 on March 14 to 6.9 million on March 28. And this trend shows no signs of slowing. Indeed, certain economists and government officials predict that unemployment could reach a staggering 15%, and that our nation's GDP could fall by as much as 34% between April and June. Nor is there any immediate relief in sight. According to a federal plan for tackling the pandemic, it could last 18 months, with additional outbreaks coming in multiple waves.

In light of these immediate and potentially extended challenges, businesses undoubtedly will—and should—ask themselves whether their commercial property insurance policies provide business interruption coverages



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Courtesy photo

for virus-related losses. It seems that for those who already have submitted claims for coverage, their insurers have largely denied those claims as either falling outside the relevant policy's coverage provisions, or falling within one or more policy exclusions. These coverage denials have sparked a flurry of lawsuits filed by disgruntled policyholders across the country, including at least three proposed class actions. In the coming months, it is reasonable to

expect that insurers will face dozens (if not hundreds) more of these coverage actions. Foreseeing as much, two policyholder-plaintiffs even have asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate all these cases going forward, and thereby preclude the possibility of different courts in different states reaching different results with respect to the same key insurance issues.

While the ultimate determination of coverage will rest on the

specific language of the policy at issue in each case, there are several common threshold issues that the courts in these actions may need to consider. This article provides an overview of those issues, as well as a discussion of certain key legislative initiatives that separately could have a huge impact on insurers' liability for coronavirus-related business income losses.

Does the coronavirus cause "direct physical loss or damage"?

The first key threshold coverage issue that courts likely will need to consider is whether an insured's coronavirus-related losses are attributable to or flow from "direct physical loss or damage" to insured property, as is required by virtually every commercial property policy that provides business interruption coverage. Unsurprisingly (and for obvious reasons), insurers have generally taken the position that the presence of the coronavirus neither causes nor constitutes "direct physical loss or damage." Policyholders have pushed back, arguing that the virus indeed has caused "direct physical loss or damage," or alternatively, that the policy language setting forth this prerequisite to coverage is ambiguous and should be construed in their favor.

How courts will decide this issue is unclear, as there are no directly on-point precedents. And factually analogous cases involving other invisible substances or microorganisms have gone both

ways. For example, some courts have held that the presence of certain gases such as ammonia and carbon monoxide can cause or constitute direct physical loss or damage within the meaning of a commercial property policy. Other courts have reached the opposite conclusion with respect to substances such as dust, debris, and mold. Courts in different jurisdictions have even reached different holdings with respect to the same substance (asbestos). And the reasoning underpinning all these courts' decisions has been inconsistent and lacking in common principles. Whether courts across the country come to agreement in terms of how the "direct physical loss or damage" requirement applies in the virus context remains to be seen.

Are there any applicable exclusions?

As they typically are called to do in coverage lawsuits, courts additionally will need to examine the applicability of certain exclusions to coronavirus-related losses. Insurers might try invoking the standard exclusion for losses caused by or involving "pollutants," for instance. However, courts may be skeptical on this point, since the standard definition of "pollutants"—i.e., "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fibers, fumes, acids, alkalis, chemicals and waste"—says nothing about (or at least is ambiguous with respect to) viruses and other pathogens. Considering the general rule that

exclusions should be construed narrowly, as well as the "reasonable expectations" doctrine that many jurisdictions have adopted in some form or fashion (under which policy language is construed from the viewpoint of what the policyholder reasonably expected would be covered), there is a good chance that courts will find the typical pollution exclusion inapplicable to virus-related losses.

Nevertheless, since the SARS outbreak in the early 2000s, explicit "virus and bacteria" exclusions have become increasingly common in commercial property policies. These exclusions typically preclude coverage "for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress, or that is capable of causing disease, illness, or physical distress." Where a policy contains such an exclusion, the insurer would have strong grounds for arguing that it is not obligated to cover business income losses flowing from the COVID-19 pandemic.

Are there any applicable interruption-related coverage extensions?

Courts also will need to examine whether the policies at issue provide additional types of coverage (often called coverage "extensions"), aside from the standard coverage for business interruption losses. Some common extensions contained in commercial property policies include (among

others) Protection and Preservation of Property, Civil Authority, Dependent Business, Off-Premises Services, Supply Chain, and Communicable Disease coverages. While the details of these coverages are beyond the scope of this article, it is important to remember that they potentially could apply to a given loss even where the standard business interruption coverage may not.

Even if there is coverage, how long will it last?

Another key threshold coverage issue concerning claims for coronavirus-related losses is the amount of time for which a particular policy will provide coverage—which often is referred to as the “period of liability” or “period of restoration.” Some policies with business interruption and related coverages limit this period to the amount of time it would take the insured to repair, replace, or restore the physical loss or damage with reasonable due diligence. For a virus that presumably could be cleaned and eradicated fairly quickly, coverage under these types of policies may be limited. Indeed, the current guidance from various medical organizations and federal agencies suggests that COVID-19 can survive on hard surfaces for only a few days (at most), and that numerous chemicals are effective at cleaning infected areas.

In contrast, other policies contain much broader language that extends the period of liability until whenever the insured is

reasonably able to resume its normal operations. Needless to say, this period could last well beyond whenever the insured might be able to fully disinfect and thereby restore the safety of its premises. This difference could be critical, particularly for companies whose customers may be slow to return even after stay-at-home orders and other closures are lifted.

Will legislatures retroactively negate insurers’ policy-based coverage defenses?

As a potentially significant caveat to the foregoing discussion, state legislatures across the country are considering various initiatives aimed at limiting insurers’ ability to deny coverage for coronavirus-related business interruption losses based on the policy provisions discussed above (and others not addressed in this article). Lawmakers in Ohio, Massachusetts, New Jersey, New York, Pennsylvania, South Carolina and Louisiana have all introduced bills to retroactively expand business interruption insurance coverage to losses due to COVID-19. These proposals are largely limited to smaller businesses, with most of the benefits available only to insureds who employ fewer than 100 or 150 full-time employees. However, at least one proposed law (in Louisiana) would apply broadly to all policies in effect in the state as of a specified date. Likewise, while most proposals would offer insurance carriers

credits or reimbursement for at least some portion of additional costs, at least one state’s proposal would unilaterally impose additional costs on insurance carriers (again, Louisiana).

It is unclear whether any of these legislative initiatives will be enacted, as lawmakers already have received considerable pushback that, in some instances, has caused them to table or substantially rework their proposals. And even if these proposals ultimately are enacted, they likely will face constitutional challenges in court.

What is certain in these uncertain times is the likelihood of continued litigation over the applicability of standard business interruption insurance to COVID-19-related losses—whether according to the original terms of the relevant policy or as potentially modified by state legislatures (or perhaps even the federal government).

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