

Insurance Coverage and the COVID-19 Crisis

On March 16, 2020, a New Orleans restaurant brought suit seeking a declaration that coverage under an "All Risks" Business Interruption Policy was available for losses attributable to the COVID-19 pandemic. Although no claim had been made under the policy, the restaurant sought a declaration that, among other things, a surface infected by COVID-19 constituted "direct physical loss or damage," thereby triggering its business interruption coverage. This position was buttressed by an emergency declaration from the Mayor of New Orleans directing restaurants to limit operations to take-out and delivery service, stating that the COVID-19 virus "caus(es) property loss and damage in certain circumstances."

The suit also addressed potential civil authority coverage, as the restaurant is also seeking a determination of coverage based on the fact that the Louisiana Governor's orders necessarily implicate the civil authority coverage set forth in the policy. Which, like business interruption coverage, also requires a finding of "direct physical loss or damage" for coverage to apply.

Several arguments will likely be advanced in the face of these claims. First, looking to the position that COVID-19 does not cause "direct physical loss" to property as required by the "clear and unambiguous" policy language, some policyholder firms are taking the position that COVID-19 is similar to cases finding an ammonia release or presence of friable asbestos equated to property damage. A review of these cases shows that significant distinctions can be made, such as the determination rested on the fact that the buildings themselves were rendered unusable by humans because experts found the levels of contamination were objectively too high for human occupancy. Similarly, the purpose of governmental shut-down or Shelter in Place orders is to slow the transmission of COVID-19, i.e., "flatten the curve" as opposed to asserting that an entire city, county or state is a "hot zone." No governmental entity has issued an evacuation order to any building or facility where COVID-19 is present, even in senior centers in Washington, where, unfortunately, many of the senior occupants died of the disease.

To this point, the current governmental orders seem more akin to when the FAA shut down airports and the businesses therein following 9/11. When this issue was litigated in the Southern District of New York, the court rejected the argument that business interruption claims were covered, finding no property damage as the closures were based on the fear of future attacks, not because of the damage to the Pentagon and World Trade Center.

It is also anticipated that, in the context of commercial general liability coverage, insurers will look to rely on existing mold or pollution exclusions in policies. While these exclusions typically define "pollutants" as any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, some make specific reference to bacteria, organic pathogens or viruses which would clearly be applicable in the face of COVID-19. However, exclusions without this particular language may not be considered applicable, as many states, including New Jersey, limit the application of pollution exclusions to traditional environmental pollutants such as groundwater or soil contamination.

A stand-alone endorsement that specifically excludes loss due to virus or bacteria was approved in 2006 by the Insurance Services Office (ISO) and is also standard in many policies following the SARS outbreak. This endorsement precludes coverage for "loss or damage caused by or resulting from any virus, bacterium or other microorganisms that induce or is capable of inducing physical distress, illness or disease" and applies to business income and business interruption claims, among others.

Some modern first-party policy wordings extend limited coverage to "virus," "disease," "contagious disease," "infectious disease," and "communicable disease," or the like. The coverage is generally set forth on the

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policy's declarations page with its sublimit. It would apply to each of the policy coverage sections, including, for example, business interruption, contingent business interruption, rental value/income, leasehold interest or interruption by civil or military authority.

Finally, putting aside policy language, the U.S. House of Representatives reached out to insurance industry trade organizations echoing New Orleans' Mayor that the COVID-19 pandemic closures are a "direct physical loss" from damage to property triggering business interruption policies.

In New Jersey, legislation has been sponsored that would retroactively create coverage for COVID-19 losses. NJ Bill A-3844, as drafted, provides that every insurance policy issued in the state for loss or damage to property, which includes business interruption, in force from March 9, will be understood to include coverage for business interruption due to a global virus transmission or pandemic. The legislation would apply to New Jersey businesses with less than 100 eligible employees, meaning full-time employees working 25 hours or more per week. Reimbursement to insurers is also contemplated as part of the legislation, stating that insurers can apply with the New Jersey Commissioner of Banking and Insurance for relief and reimbursement from a fund established for this purpose.

It has been reported that, despite support in the Assembly, the legislation is being held to allow more time for substantive review and amendment. The Insurance Council of New Jersey expressed concern over the fact that the legislation would retroactively interfere with existing insurance contracts and mandate coverage where it may not currently exist. Indeed, the constitutionality of such a law is an issue as it would directly impair the rights and obligations of the contracting parties in violation of Article 1 of the United States Constitution.

Comment: The COVID-19 pandemic is unprecedented; the situation is fluid making it difficult to take a definitive coverage position when the volume and nature of claims remain in question as well as the enforceability of certain policy provisions. Weber Gallagher is closely monitoring these issues and will continue to update our clients as new developments occur.