

CLIENT ALERT

Business Interruption Claims: Specific Issues for Insurers

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By now, policyholder advocates have focused on the fact that, apart from virus and contamination exclusions, a key issue for the viability of any COVID-19 claim for business interruption or civil authority coverage – at least under widely-used policy language – will be whether the policy trigger of physical damage can met by a coronavirus claim and, if so, how. Most property policies that cover business income loss provide that, to be covered, such loss must “be caused by direct physical loss of or damage to property at premises” described in the policy declarations.

Coronavirus claims for business income loss (or contingent business income loss, civil authority loss, etc.) do not involve loss caused by direct physical loss of or damage to property, under a straightforward understanding of that requirement. But this will be challenged, particularly under the theory that “contamination” of a premises should qualify as direct physical loss of or damage to property. Policyholder advocates will point to prior case law involving friable asbestos in buildings, smoke rendering a facility uninhabitable, and ammonia fumes, among other factual settings, in a search for authority to support their views. However, even if policyholders could somehow show that “contamination” should qualify as direct physical loss, they will likely be unable to prove, in the vast majority of instances, that their business premises were contaminated and business income loss caused by such alleged contamination. Policyholder advocates will then need to claim that preventative action to avoid contamination, i.e., to avoid what they contend is property damage, is sufficient to trigger the policy. Similar arguments will be made with respect to business interruption or civil authority coverage for business income loss from government shut-downs. There will be pressure to cover such claims as preventative measures, for instance. No one doubts that, in the coming weeks and months, these issues will be raised and litigated.

On March 25, I led a webinar on “Insurance Issues Arising from Coronavirus: Business Interruption and Other Possible Claims” along with Lorelie Masters of Hunton Andrews Kurth LLP, who represents policyholders. In addition to the arguments made by Ms. Masters, we received a host of questions that shed further light on what insurers should expect in litigation to come. Some of these questions, reproduced below, reveal quite a bit about the thinking of policyholder advocates who are looking for coverage.

Question: Would the suspension of operations due to a government ordered shutdown of your business be covered under a typical "direct physical loss" insuring agreement with no express virus exclusion but an exclusion for pollution and a catch-all exclusion for contamination for "all contamination other than pollution"?

Question: Since the virus attaches to the physical property and lasts for periods of time, wouldn't this qualify as "physical damage to the property" as a result of the peril and thus covered under the typical business interruption insurance? There is a NJ case whereby a judge ruled in favor of the plaintiff under this argument.

Question: Do you think the endorsement excluding loss due to virus or bacteria that was added to most policies after the SARS epidemic will be enforceable? Will Congress or political pressure come to bear to limit this exclusion?

Question: Might the US government take steps to indemnify insurers in whole or in part for providing coverage that might otherwise be excluded from CGL or other coverage?

Question: If a property policy has the ISO virus exclusion, what are the best arguments a policyholder can make for business interruption coverage anyway?

Question: Is physical loss definition changed by adding "direct," i.e. "direct physical loss," as the requirement in the policy?

Question: Does PLL [Pollution Legal Liability] coverage cover this?

Question: Does a lockdown ordered by a governmental authority to prevent spread of Covid-19 constitute "physical damage" for purposes of coverage?

Question: If a policy has no virus exclusions, which exclusions are available to the insurance company? Can we argue/conclude that viruses are covered since not specifically excluded?

Question: I would imagine that insurance companies will argue that the potential ability for a company to work remotely/virtually should have mitigated loss of revenue (not necessarily profit). Is a business better off completely shutting down (physically and remotely) to take this argument off the table or would that be considered negligent? This obviously assumes that we clear the "damage" hurdle.

Question: Assuming that virus contamination qualifies as physical damage, what sort of evidence would a policyholder need to generate to establish that the property *was* contaminated?

Question: Does the fact that insurers are adding the COVID-19 exclusions provide support for arguing that under "all risk" this was not excluded? If it was meant to be excluded, the insurer could have excluded it as it is doing now (with a COVID-19 specific exclusion).

Question: Even if you get the court to agree contamination constitutes physical loss, how do you prove actual contamination? Do you need a positive test from some employee? Or is the threat of contamination on business surfaces, in the indoor air, etc. enough?

Question: Assuming COVID-19 is deemed to cause "direct physical loss" to property, does the fact (assumption?) that the virus lives only a few days limit the extent of benefits that could be available?

As these questions make clear, businesses and their policyholder advocates are searching for ways to find coverage in widely-used property policies to address the economic hardship arising from the spread of COVID-19 and measures being taken to protect human life. Insurers also must carefully assess the facts presented by any claims and the specific policy language at issue. In many cases, there may be no real debate about coverage in light of express exclusions such as the 2006 ISO virus exclusion. However, policies without those terms may become a target for policyholders eager to shift the costs of the pandemic to their insurers, regardless of underwriting intent.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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