Business Interruption Insurance and the Coronavirus: The emerging landscape of claims for COVID-19 loss

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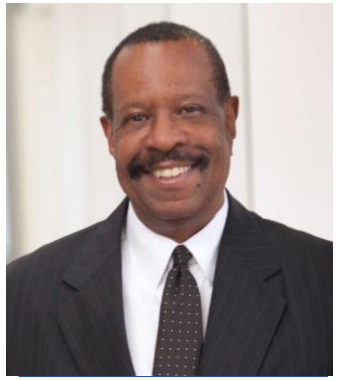

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Background

Are business interruption losses covered by commercial property insurance?

Battle Lines

Policyholders: YES

- Losses are due to “physical loss of or damage to property”
- Civil authority orders prohibit access due to physical damage
- Virus exclusion does not apply to non-virus causes; or exclusion is invalid
- Contamination exclusion does not bar coverage for viruses

Insurers: NO

- No physical loss or damage to property
- Civil authority orders not due to physical damage
- Virus/contamination exclusions bar coverage
- This is not what property policies were designed to cover

Key Commercial Property Provisions

- “All risk” vs. specified causes of loss
- “Loss of or damage to” property
- Business interruption/contingent BI
- Civil authority, ingress/egress
- Sue & Labor
- Virus / Contamination exclusions
- Communicable disease extensions

Key Questions: Trigger

Did the loss result from “physical loss or damage”?

Physical Loss or Damage

This Policy covers property… against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded….

The Insurer will pay for direct physical loss of or damage to property ….

"Loss" means accidental physical loss or accidental physical damage.

This Policy insures TIME ELEMENT loss … directly resulting from physical loss or damage of the type insured.

The Insurer will pay for the actual loss of business income … due to the necessary suspension or delay of operations caused by direct physical loss of or damage to property….

Key Questions: Period of Restoration

Assume there *was* direct physical loss or damage and BI coverage applies.

How does one calculate the period of restoration and quantify the damages?

Period of Restoration/Liability

The period:

a) starting from the time of physical loss or damage of the type insured; and

b) ending when with due diligence and dispatch the building and equipment could be:

(i) repaired or replaced; and

(ii) made ready for operations,

under the same or equivalent physical and operating conditions that existed prior to the damage.

"Period of restoration" means the period of time that:

a. Begins at the time of direct "loss".

b. Ends on the earlier of

(i) The date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(ii) The date when business is resumed at a new permanent location.

Key Questions: Civil Authority

What are the arguments for and against civil orders being due to physical loss or damage?

Civil Authority coverage

… if an order of civil or military authority limits, restricts or prohibits partial or total access … provided such order is the direct result of physical damage of the type insured….

…caused by action of civil authority that prohibits access to the premises, provided that:

(a) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage…

- Related: “ingress/egress”

Key Questions: Exclusions

Which exclusions pose the biggest obstacles to coverage? Are there ways around them?

Virus Exclusions

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

ISO form CP 01 40 07 06

This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:

1) contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use….

Contamination - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

Pollutant/Contamination Exclusions

We will not pay for "loss" caused by or resulting from any of the following:

(l) Pollutants

Discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" ….

"**Pollutants**" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Pollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the "pollutants"….

ISO Form FM 101 05 16

Key Questions: Bad Faith

When insurers respond with across-the-board denials, without investigating, is this bad faith?

Potential Claims for First-Party Bad Faith

- The "Predetermined Investigation"
- Unreasonable coverage interpretations
- Inadequate investigation (unfair claim practices)
- Bad faith without coverage?
- Agent/Broker errors and omissions

What Is (Usually) Not Bad Faith

- "Bona fide dispute" over coverage
  - *But check state law standards*
- Reliance on insured's description of loss
- Reasonable interpretation of policy rights and duties
- Reasonable but short investigation

Duty of “Utmost Good Faith”

- Insurers have an obligation to act in “Utmost Good Faith”:
  - To demonstrate that the insurer reasonably interpreted the policy
  - To demonstrate that the insurer reasonably conducted an investigation
  - To demonstrate that the insurer “looked for coverage” and not for a reason to deny the claim
  - To demonstrate a commitment to fulfill the insurer’s obligations to its policyholders

Conclusions and Parting Thoughts

Questions?