

ANDERSON KILL

Policyholder Alert

COVID-19 Insurance Coverage and the Virus Exclusion



By Robert D. Chesler
and Nicholas Insua

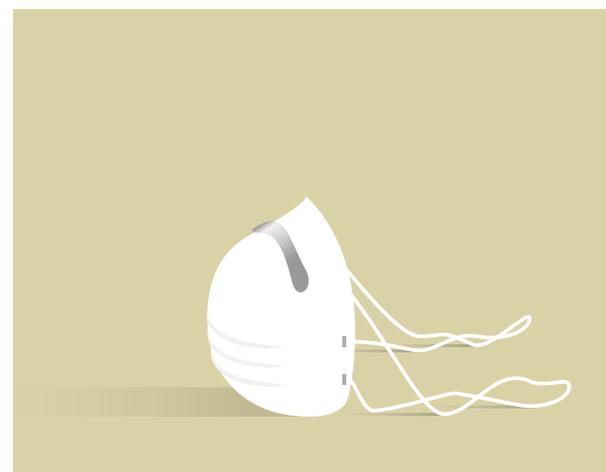
Companies interested in pursuing insurance coverage for COVID-19 business interruption loss should review their virus exclusions — if the policy contains one — to see if they contain anti-concurrent cause language.

The virus exclusion has emerged as a major obstacle to companies seeking insurance coverage for COVID-19 business interruption. Most — but by no means all — property policies contain virus exclusions. However, recent case law suggests courts will review the precise wording of a virus exclusion in determining coverage. In particular, a court may look to see whether a virus exclusion contains “anti-concurrent cause” language in determining coverage.

States employ different rules of causation. Some are “proximate cause” states. This means that if either the first or the last act that produces a loss is covered by the insurance policy, then the policyholder has coverage. Some policyholders have argued that the last act in causing loss was not the virus but the government lockdown order, making it the proximate cause of the loss. Other states are “concurrent cause” states, which means that if more than one cause acts to bring about a loss, and at least one of the causes is covered, any resulting loss should be covered as well.

The insurance industry has countered such causation rules by inserting anti-concurrent cause language into the policy exclusion, for example, stating

that an exclusion applies regardless of whether another covered cause is the proximate cause of the loss. Alternatively, the policy may state that coverage does not exist if the excluded cause contributed: directly or indirectly” to the loss. This language essentially means that if the virus is a contributing factor to the business interruption loss, insurance companies will assert that coverage is foreclosed regardless of the role played by the lockdown orders (or any other potentially covered cause of loss).



However, not all policies contain anti-concurrent cause language. In *Westfield Area YMCA v. North River*, several YMCAs sought coverage for COVID-19 business interruption loss in state court in Union County, New Jersey. The in-

insurance company moved to dismiss on the basis of the virus exclusion, among other reasons. The virus exclusion in at least one of the policies did not contain anti-concurrent language. The court denied the motion to dismiss, holding that it could not find as a matter of law that a virus exclusion without anti-concurrent language would bar coverage for the COVID-19 loss.

In *Eye Care Center v. Twin City Fire Ins.*, the court also addressed the anti-concurrent cause issue. In that case, the court initially denied coverage because of the virus exclusion, and the policyholder replied that the proximate cause of its loss was the government lockdown. The court rejected this argument, specifically because the virus exclusion contained “directly or indirectly” anti-concurrent language.

These cases show that policyholders whose virus exclusions do not contain anti-concurrent language have a substantially stronger coverage case than those policyholders whose exclusions

do contain such language. Companies interested in pursuing insurance coverage for COVID-19 business interruption loss should review their virus exclusions – if the policy contains one – to see if they contain anti-concurrent cause language. ▲

ROBERT D. CHESLER is a shareholder in Anderson Kill's New Jersey office and is a member of the firm's Cyber Insurance Recovery Group. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs.

rchesler@andersonkill.com

(973) 642-5864

NICHOLAS M. INSUA is a shareholder in the New Jersey office of Anderson Kill who focuses his practice on insurance recovery litigation and counseling. Nick also represents clients in business disputes outside the insurance coverage context.

ninsua@andersonkill.com

(973)-642-5863

We are interested in your feedback on topics for future articles and seminars. Please email us.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes – with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C. and Los Angeles, CA.

This was prepared by Anderson Kill P.C. to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the authors or Mark Garbowski at mgarbowski@andersonkill.com or (212) 278-1169, with any questions.