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INSURANCE COVERAGE FOR PERILS CREATED BY THE CORONAVIRUS PANDEMIC

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As the coronavirus has quickly spread around the world and throughout the United States, in addition to its human toll it is causing massive disruptions and losses to businesses and all manner of institutions in this country. What began as a concern over supply chain disruptions originating in China has widened into the prospect of air travel, mass transit and whole cities at home and abroad being paralyzed, potentially for weeks or months. With this growing crisis comes a hugely important question: is the economic harm inflicted by the coronavirus covered by insurance? The answer will likely depend upon the specific circumstances surrounding a policyholder's loss and whether its insurance policies contain specific exclusions for the types of loss being suffered. Policies are not uniform in that regard, so it is important for businesses to read their insurance policies carefully.

Coverage Under First Party Property Policies

A likely source of coverage for financial loss from coronavirus is property insurance. Most businesses have first party property insurance policies which include coverage not only for property damage but also for lost profits resulting from that damage. The coverage for lost income, which is sometimes referred to as "business interruption" coverage, varies from policy to policy, but often covers loss resulting from, among other things, (1) damage to the policyholder's own property ("business interruption"), (2) damage to the property of a customer or supplier (or a supplier's supplier) ("contingent business interruption"), (3) government action such as evacuation orders ("order of civil authority") or (4) damage to properties which attract customers to the policyholder's business ("leader property").

The event which triggers any of these coverages is property damage. Without property damage somewhere, there will be no coverage for lost profits under a first party property policy. So, the fundamental questions with respect to property insurance coverage for every coronavirus-related loss are (1) whether the mere presence of the virus can cause or constitute property damage, and (2) whether such damage played a role in the loss of income.

The question of whether the presence of a virus can constitute "property damage" under an insurance policy has not been decided by the courts. Nonetheless, there is reason to believe that it can, both from cases involving coverage for analogous causes of loss and the language of some property insurance policies.

While the coronavirus is not reported to have resulted in any permanent physical damage to property, press reports indicate that it is transmitted either through the air or from touching infected surfaces. Thus, the virus can be present not only on people, but also in buildings, airplanes, trains, watercraft and other enclosed spaces, and on surfaces outdoors. In analogous circumstances courts have found that the presence of harmful substances at or on a property can constitute "property damage" that triggers first party property coverage. For example, in *Gregory Packing, Inc. v. Travelers Property Cas. Co. of America*, 2014 WL 66675934 (D.N.J. Nov. 25, 2014) ("Gregory Packing"), the court found that covered property damage had occurred when ammonia was accidentally released into a facility, rendering the building unsafe until it could be aired out and cleaned. In reaching its decision, the court stated that "property can sustain physical damage without experiencing structural alteration." *Id*. At *5.

In part relying upon the reasoning of *Gregory Packing*, a federal court in Oregon found that a business was entitled to business interruption coverage when it had to cancel performances at a theater due to smoke from wildfires which infiltrated the premises. *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 327247 (D. Ore. June 7, 2016). See, e.g., *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (the accumulation of gasoline under a church building constituted property loss); *Mellin v. Northern Security Ins. Co.*, 115 A.3d 799 (N.H. 2015) (court found that "physical loss" required "a distinct and demonstrable alteration of the insured property" but that

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could include "not only tangible changes to the property" but also "changes that are perceived by the sense of smell and exist in the absence of structural damage."). As in those cases, the presence of coronavirus caused a distinct alteration of the insured property.

Therefore, a very reasonable argument can be made from case law that property damage has occurred in places where the virus is present. Further, new and additional property damage can be introduced into an area by the same or additional infected people over time, which could strengthen the argument that places where large numbers of people congregate suffer ongoing property damage, no matter how long a single spore can survive there.

In addition, some property policies either expressly provide coverage for damage caused by disease, or only partially exclude such damage, sometimes barring coverage for the presence of bacteria, but not viruses. Thus, some policy forms provide both property damage and loss of income coverage for "communicable disease," and may also provide coverage for "decontamination." Those coverages are often subject to lower limits than other insurance provided under the policy, but they can have two benefits. First, they may provide some direct relief to policyholders who suffer losses related to coronavirus. Second, and perhaps more importantly, they weaken the arguments of insurers that the presence of a virus is not property damage.

Assuming coronavirus can cause property damage, the question of whether a particular loss is covered will depend upon the specific circumstances affecting the policyholder and the particular coverages and exclusions in the policy in question.

To date, it appears that most of the losses suffered by American business fall within the category of contingent business loss - a loss caused by damage to a supplier or customer. Many U.S. businesses have reported the loss of overseas suppliers and customers. Such supply chain losses are likely to increase as the disease spreads in the U.S. and affects domestic customers and suppliers.

Moreover, and importantly, the "supplier" whose property damage triggers contingent business interruption coverage may not be limited to the manufacturers or distributors of goods. It could be the airline, cruise ship or subway which brings customers to your business. To qualify as a "supplier" it is not necessary that the policyholder have a supply contract with the third party. For example, in *Archer - Daniels Midland Co. v Phoenix Assurance Co*, 936 F.Supp. 534 (S.D. Ill. 1996), the court held that the policyholder, a food processor, was entitled to contingent business interruption coverage because of property damage sustained by the Army Corps of Engineers, which operated the flooded Mississippi River boat channels, and farmers who lost crops that would have indirectly been sold to the plaintiff through intermediaries. The court relied upon the lack of a definition of "suppliers" in the policies, and the fact that the plaintiff paid a fee to Corps of Engineers to ship product on the river. Since that decision, some policies define "suppliers", but many do so in a way that includes suppliers of direct supplies and does not exclude entities that aid in the transportation of goods, such as sea ports or airports.

News reports of closures of entire cities overseas, or public gathering places, brings into focus the coverage for "order of civil or military authority." This insurance covers the policyholder's loss due to the prohibition of access to its premises if caused by property damage within a specified distance of the insured property, such as one or five miles.

The focus of authorities upon possible closures of places where large numbers of people gather could also trigger "Leader Property" insurance, which covers the policyholder's lost earnings resulting from the closure of a property that attracts customers to the policyholder's business. For example, the closure of a large amusement park might trigger leader property coverage for nearby hotels.

Of course, the presence of coronavirus in the policyholder's own premises could trigger both property damage coverage and business interruption coverage.

Moreover, many property policies provide extended period of indemnity coverage for up to a certain number of days after property damage has been repaired to allow the policyholder's business to resume normal operations and achieve pre-loss levels of income. This could be extremely valuable coverage because, as discussed below, any property damage from coronavirus which triggers coverage may be short lived, limiting the period of recovery for lost earnings, but it may take a long time for customers to return to businesses and areas that were infected.

While some or all of these coverages may be available for coronavirus- related losses, a variety of defenses may allow insurers to avoid, or limit, payment. First, some policies contain broad exclusions of damage caused by biological agents. Those exclusions may be found either in stand-alone provisions or be incorporated into exclusions for Pollution or Contamination (discussed below). Second, many policies contain sub-limits for some of the coverages discussed above, have waiting periods before the coverage is triggered, or both. Third, even if the presence of coronavirus is considered property damage, most time element coverages insure only the period of time needed to repair the damaged property. Insurers will argue that the virus exists for only a very short period in the air or on surfaces, and that a quick cleaning is all that is needed to eliminate it and thereby restore the property. Depending upon the circumstances of a particular loss, this argument could result in a very limited period of recovery. However, if the virus persists in people in an area recontamination is possible, which would extend the period of coverage. And as discussed above, many policies provide extended period of interruption coverage which would apply to losses incurred after the property damage has been remedied.

Further, in many instances there will be a disagreement over whether a business was closed or access

was denied because of actual property damage, or as a purely prophylactic measure to prevent the spread of the disease, which the insurers will argue is not covered. To that point, the Insurance Services office ("ISO"), an organization that drafts standard form policy provisions for the insurance industry, recently announced that has prepared forms which provide limited coverage grants for situations like the coronavirus pandemic, which, if incorporated into policies, will provide some coverage for purely preventive closures. Unfortunately, such provisions will not apply retroactively, and will likely be prohibitively expensive if marketed during the current crisis.

COVERAGE UNDER LIABILITY POLICIES

It is inevitable that some people who contract coronavirus will assert liability claims against others. Claims against employers for diseases that are peculiar to the particular occupation may be covered by workers compensation insurance, while contracting diseases that affect the general public ordinarily are not. Thus, it is possible that any claims by health care workers or emergency responders would be covered by workers compensation insurance, but that is not clear. Claims by non-employees should fall within the general coverage grant of general liability policies. However, general liability policies often contain broad exclusions of liability resulting from pollutants, irritants or contaminants. Some courts, though, have found such exclusions to be limited to contamination of the environment, and to not extend to conditions indoors. For example, the New York Court of Appeals in *Cont'l Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 80 N.Y. 2d 640 (N.Y.1993) held that a pollution exclusion did not apply to exposure to asbestos fibers in a confined space, even though asbestos was clearly a "pollutant, irritant or contaminant" which were among the categories of excluded causes of damage or injury. The Court found the exclusion to be ambiguous both because it was unclear whether the air in a confined space constituted the "atmosphere" as that term was used in the exclusion, and because the purpose of the clause was to bar coverage for environmental pollution.

It is also likely that some businesses will be criticized for their handling of the coronavirus pandemic and face claims from investors or third parties for whom they provide professional services. If that happens, policyholders should carefully examine their Directors and Officers and Professional Liability policies for possible coverage.

When evaluating coverage for any liability claim it is important to keep in mind that the defense coverage is based upon a liberal reading of the complaint against the policyholder. The mere possibility that the plaintiff has asserted a claim that will be covered by the policy is enough to trigger the defense obligation. Even if any liability that is ultimately incurred is not covered, defense coverage can be extremely valuable.

LOSS MITIGATION AND EXTRA EXPENSE

Both liability and property insurance policies, as well as the common law, impose upon policyholders the obligation to mitigate property loss or personal injury, and require the insurer to pay for those efforts, though some policies limit that coverage to amounts that do not exceed the additional loss that would have been incurred. Loss mitigation coverage is triggered by actual loss, damage or injury, so it probably would not apply to purely prophylactic measures taken to avoid a possible loss. However, once a loss or injury has commenced, efforts to contain it, such as closures of businesses, or costs incurred to make alternative arrangements for employees, may be covered. Likewise, extra expenses incurred in order to achieve safer means of production and deliveries of products and services may also be covered.

Finally, as the coronavirus crisis spreads and its impacts widen, it is important for policyholders to fully understand the coverage they have - or potentially have - so they can keep proper records of loss, promptly notify their insurers and be prepared to pursue coverage.