

Insurance Coverage for Costs and Losses Due to the COVID-19 Pandemic: Some Considerations

by Skip Durocher

The novel coronavirus, and the respiratory disease it causes (COVID-19), continue to exact a human toll. As state and national governments fight to mitigate the impact, businesses are also attempting to address the social and economic impacts. A key question many businesses are facing is when or if insurance coverage will play a role in responding to first party and third party losses and costs due to COVID-19.

The below focuses on the potential insurance coverage available to respond to a business's own costs and losses due to impacts caused by COVID-19, rather than to respond to liability to such companies in the event they receive claims related to alleged COVID-19 damages. Confirming coverage may have its challenges; there are potential hurdles such as the need to demonstrate "physical loss or damage" and application of exclusions aimed at viruses. Given the likely cost of COVID-19, however, such coverage is worth analyzing and potentially worth pursuing, depending on the language of the particular policy and the applicable state law.

The costs of COVID-19 will come from a number of impacts, including:

- The need for a business to shut down and clean due to the diagnosis of an employee or customer with COVID-19;
- A business's decision to direct employees to work from home or to close;
- The impact on restaurants, convenience stores, coffee shops, public and private transportation, and others due to the decision by entities or businesses to direct employees to work from home or to close;
- The impact on theaters, restaurants, coffee shops, etc., due to the decision by individuals to decrease entertainment activities;
- Production slowdowns due to a shortage of components because of supply chain issues; and
- The requirement for businesses to close due to governmental order (*i.e.*, "stay at home" or "shelter in place" directives).

Property insurance – including insurance with building and personal property and business income (and extra expense) coverages – is the place to start a review of

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potential coverage for these costs and losses.

Under standard commercial property forms issued by the Insurance Services Office (ISO), coverage extends to “direct physical loss or damage” as well as “actual loss of Business Income . . . sustain[ed] due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration’” and “the necessary expenses . . . incur[red] during the ‘period of restoration’ that . . . would not have [been] incurred if there had been no direct physical loss or damage to property.” Do the impacts caused by COVID-19 constitute “direct physical loss or damage to property,” which is generally a prerequisite for these coverages? The language of the policy, as well as the particular state law applicable to the policy, will control this decision, but there are at least four overarching considerations.

First, if an insured’s employee or a customer is diagnosed with COVID-19, there is an argument that there has been “direct physical loss or damage” to property. One of the oft-cited cases is *Gregory Packaging, Inc. v. Travelers Property & Casualty Co. of America*, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014). There, insured Gregory Packaging sought coverage for the “loss of property and an interruption of business” following the release of ammonia from a refrigeration system inside its facility. The insured evacuated the facility and hired a remediation company to dissipate the ammonia. The insurer denied coverage for the claim, contending there was no “direct physical loss or damage to covered property.”

The court disagreed. Relying on 3rd Circuit precedent, the court concluded that the term means “a distinct, demonstrable, and physical alteration” of a property’s structure, and that a property can sustain physical loss or damage “without experiencing structural alteration.” According to the court, ammonia, which “physically rendered the facility unusable for a period of time,” constituted a “direct physical loss.”

Analogously, the presence of the novel coronavirus – rendering a building not fit for its intended purpose – could constitute “direct physical loss.” The length of time that coverage would apply will depend on the facts and likely scientific evidence regarding the contagious nature of the novel coronavirus and its survival rate. Again, this a state-specific issue, driven by the language of the policy. And it is not free from doubt: insurers have cases they can cite to support their likely determination that there is no direct physical loss in such circumstances.

There also have been political efforts urging insurers to provide business interruption coverage under existing commercial property policies for losses due to closures tied to COVID-19. And lawmakers in the New Jersey General Assembly are in discussions with insurers regarding potential changes to an existing piece of legislation that would retroactively expand business interruption insurance to include losses attributable to the COVID-19 pandemic. These discussions have been met with resistance from the insurance industry. Nonetheless, they further emphasize the need for a specific analysis of the policy language, under the law of a potentially applicable state or states. And, given the likely losses due to the COVID-19 pandemic, a claim to the insurer may be advisable.

Second, for the insureds who slow down or close due to the public health threat of the novel coronavirus without any actual diagnosis of COVID-19, coverage may be more challenging, although further analysis is in order. For example, in a first of a kind case, last week a Louisiana-based restaurant filed suit against its insurer, seeking a determination of business interruption coverage related to the “global pandemic virus and civil authorities’ response.” The plaintiffs noted that “[t]he virus is physically impacting public and private property, and physical spaces in cities around the [restaurant],” including “by the fact that the deadly virus physically infects and stays on the surface of objects or materials, ‘fomites,’ for up to twenty-eight days, particularly in humid areas below eighty-four degrees.” Plaintiffs seek a declaration of coverage “for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss” from the novel coronavirus and that the policy “provides business income coverage in the event that the [novel] coronavirus has contaminated the insured premises.”

This Louisiana matter relies, in part, on civil authority coverage, which is often included as an extension of coverage in commercial property policies. Civil authority covers actual loss of “Business Income” and necessary “Extra Expenses” “caused by action of civil authority that prohibits access to your premises due to damage to property” other than the insured property. A classic fact pattern would be a natural disaster, such a tornado or hurricane, which while sparing the insured property physical damage, causes a shutdown and loss of income because of rescue and clean-up efforts. The civil authority must prohibit access to the area immediately surrounding the damaged property (which must be within a certain mileage from the insured property) and must be taken “in response to dangerous physical conditions resulting from the damage.” This Louisiana case – which specifies that the policy “does not provide any exclusion due to losses, business or property, from a virus or global pandemic” – attempts to use the directive by the Louisiana governor banning gatherings of 250 or more people, as well as any future directives, to obtain insurance under the civil authority coverage. Given the prevalence of such directives, and even more restrictive ones, this is a theory worth considering.

Third, for approximately the past 15 years, standard ISO forms have included an “Exclusion Of Loss Due To Virus Or Bacteria” (or other similar types of exclusions) providing that there is no coverage for loss or damage caused by or resulting from any virus that induces or is capable of inducing physical distress, illness or disease. The exclusion, *which is not included on all policies*, has not been subject to much litigation, so the interpretation of the clause is not yet settled and may differ by jurisdiction. That said, it provides a potential hurdle to coverage.

Fourth, some policies specifically *include* coverage for losses caused by viruses. These are generally specifically negotiated endorsements. Once again, the important first step is to read the policy.

As the novel coronavirus, and its impacts, spread, it is important for insureds to read and understand their policies, understand the law applicable to their policies, and, where appropriate, submit and document potential claims in a timely manner. Dorsey & Whitney has extensive experience working with clients with property insurance claims, and we are

prepared to assist your business in accessing its potential claims.