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Policyholders Should Anticipate and Prepare to Defeat Insurer COVID-19 Coverage Denials



COMMENTARY
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Policyholders Should Anticipate and Prepare to Defeat Insurer COVID-19 Coverage Denials

IN SHORT

The Situation: Business interruption and other losses due to the continued global spread of COVID-19 are projected to total in the billions of dollars.

The Result: In an effort to discourage commercial policyholders from pursuing their COVID-19-related business interruption claims, the insurance industry has issued sweeping pronouncements of alleged "no coverage" for such losses.

Looking Ahead: Commercial policyholders should treat such insurance industry posturing with skepticism and remain mindful of the fact that there are potentially available avenues for the recovery of COVID-19 business interruption losses under many commercial property insurance policies.

As commercial policyholders continue to suffer significant COVID-19-related business interruptions, the insurance industry has come out in full force to try to convince the market that there is generally zero coverage available for such losses. While the insurance industry obviously has a financial incentive to limit its exposure by trying to deter policyholders from pursuing COVID-19 claims, many of the insurance industry's sweeping pronouncements of alleged "no coverage" do not withstand scrutiny.

Setting insurer rhetoric aside, in the weeks and months to come, two areas of major dispute—one factual and one legal—will be: (i) what level of factual support is needed to confirm the "actual" presence of COVID-19 at an insured location experiencing losses (or, under the terms of some policies, within a specified vicinity thereof with respect to government imposed closures); and (ii) whether the likely presence of COVID-19 at an insured location satisfies the "physical loss or damage" requirement contained in certain commercial property insurance policies.

With respect to the factual issue, it seems quite clear that COVID-19 is nearly omnipresent. Numerous reports acknowledge that the number of persons infected with COVID-19 is dramatically understated due to the lack of available testing. Apart from the lack of complete data, there is no question that the global incidence of COVID-19 infections is exponentially increasing. Indeed, government officials from numerous countries have provided estimates that the majority of their populations are likely to contract COVID-19—e.g., Germany (60-70%), Spain (80% of Madrid), and the United States (80% of New York and 56% of California).

Moreover, new data published by the Centers for Disease Control and Prevention indicates that COVID-19 was found living on a cruise ship's surfaces up to 17 days after its cabins were vacated, but before disinfection procedures had been conducted. Thus, policyholders should have strong arguments that it strains credibility for insurance companies now to suggest that COVID-19 is not present at every location occupied or trafficked by any significant amount of people.



While the insurance industry obviously has a financial incentive to limit its exposure by trying to deter policyholders from pursuing COVID-19 claims, many of the insurance industry's sweeping pronouncements of alleged 'no coverage' do not withstand scrutiny.



With respect to the legal issue, insurance companies are publicly proclaiming that their policies generally require "physical loss or damage" to trigger business interruption coverage and that something akin to a fire or a flood is needed to satisfy that requirement. However, that overly narrow interpretation of their policy obligations has already been squarely rejected by a number of courts, which have instead held that when a property becomes "uninhabitable" or "unfit for use," the "physical loss or damage" requirement is met.

For instance, in *Motorists Mutual Insurance Co. v. Hardinger*, the United States Court of Appeals for the Third Circuit determined that the presence of E. Coli bacteria could amount to "physical loss" to a home and that this determination would depend on "whether the functionality of the [] property was nearly eliminated or destroyed, or whether the[] property was made useless or uninhabitable." 131 F. App'x 823, 826-27 (3d Cir. 2005).

Likewise, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the United States District Court for the District of New Jersey acknowledged that "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage" and, accordingly, determined that ammonia gas discharge which rendered packaging facility "unfit for occupancy" and "unusable" constituted "physical loss" under the commercial property insurance policy at issue. 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

Beyond the fact that courts have already recognized that property which has been rendered "uninhabitable" or "unfit for use" has experienced a "physical loss," there is no question that a policyholder reasonably expects business interruption coverage under such circumstances —irrespective of the arbitrary nature of why its property has become unavailable. When confronted with ambiguities in interpreting the scope of coverage provided by a policy, most jurisdictions will look to the reasonable expectation of a policyholder to resolve such ambiguities in favor of coverage.

Recognizing the fight that is coming on these issues, lawmakers are expressing concerns about insurers avoiding covering business interruption losses, and the insurance industry has itself been seeking assistance from Congress to provide federal government relief for the business interruption claim exposures they simultaneously purport not to have.

Thus, in addition to carefully reviewing their actual policies, commercial policyholders should treat the insurance industry lobby's public posturing with skepticism and recognize that there are potentially available avenues for the recovery of COVID-19-related business interruption losses under the terms of many commercial property insurance policies. At the same time, commercial policyholders should continue to monitor state and federal legislative developments on these evolving issues.

TWO KEY TAKEAWAYS

1. In an effort to discourage policyholders from pursuing COVID-19 claims, the insurance industry has issued sweeping pronouncements of purported "no coverage" for COVID-19-related losses.
2. Commercial policyholders should treat the insurance industry lobby's public posturing with skepticism and



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remain mindful of the fact that there are potentially available avenues for the recovery of COVID-19-related business interruption losses under the terms of many commercial property insurance policies.



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