Latest Developments in the Brewing Battle Regarding Business Interruption Losses Due to COVID-19

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The battle between insurers and policyholders regarding coverage for business interruption losses due to COVID-19 is heating up. Several lawsuits have already been filed in Louisiana, Oklahoma, California and Illinois.[1] In New Jersey, Ohio and Massachusetts, bills have been introduced that would retroactively expand the scope of coverage under existing policies to include coverage for business interruption losses due to COVID-19.[2] The bills specify that they apply to policies issued to an insured with less than a certain number of eligible employees, which is defined as employees working more than a certain number of hours per week. The bills also provide that carriers who pay business interruption claims under affected policies may seek reimbursement from that state's insurance regulator, which would be funded by assessments on insurers. Even if these bills are enacted into law, they are likely to face stiff constitutional challenges from insurers who will argue that such laws unconstitutionally interfere with private contractual relations. In the meantime, policyholders and insurers are honing their respective arguments for and against coverage.

Insurers argue the "direct physical loss" requirement of most policies has not been satisfied.[3] Because the virus can be cleaned off of surfaces and repair or replacement of property is not necessary, there has been no "direct physical loss." Moreover, the business closures are due to a concerted effort to stop the spread of the virus and not necessarily the confirmed presence of the virus in the insured's facility. Indeed, the New Jersey, Ohio and Massachusetts bills are perhaps a tacit admission that these losses are not covered under the policies as drafted.

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[1] *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill v. Certain Underwriters at Lloyd's, London and Governor John B. Edwards in his official capacity as Governor of the State of La., and the State of La.*, Civil District Court for the Parish of Orleans, State of Louisiana; *Chickasaw Nation Dept. of Commerce v. Lexington Ins. Co. et al.,* Case no. cv-20-35, District Court of Pontotoc County, Oklahoma; *Choctaw Nation of Okla. v. Lexington Ins. Co.*, Case no. cv-20-42, District Court of Bryan County, Oklahoma; *French Laundry Partners, LP dba The French Laundry, et al. v. Hartford Fire Ins. Company, et al.*, Superior Court for the State of California, County of Napa; *Big Onion Tavern Group, LLC, et al. v. Society Ins., Inc.,* No. 1:20-cv-02005 (N.D. Ill. March 27, 2020)

[2] New Jersey Bill A3844; Ohio Bill H.B. 589; Massachusetts Bill S.D. 2888.

[3] *See United Airlines v. Ins. Co. of the State of Pa.*, 439 F.3d 128, 129 (2nd Cir. 2006) (losses suffered by insured airline as a result of the Sept. 11, 2001, terrorist attacks were not covered because the insured could not show that such lost earnings resulted from physical damage to its property or from physical damage to an adjacent property); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. June 11, 2018) (restaurant did not sustain direct physical loss when dust and debris from nearby roadwork could be remediated by cleaning); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (finding that mold which could be removed by cleaning was not physical damage, as it did not alter or otherwise affect the structural integrity of the building's siding); *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (holding that intangible harms such as odors or the presence of mold and bacteria in an HVAC system did not constitute physical damage to property); *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n,* 793 F. Supp. 259 (D. Or. 1990) (opining that asbestos contamination was not a physical loss, as the building remained unchanged), aff'd, 953 F.2d 1387 (9th Cir. 1992).

On the other hand, policyholders argue the "direct physical loss" requirement has been satisfied by the presence of the coronavirus. In fact, one local government in Florida included such a finding in its order to close nonessential businesses.[4] This argument finds support in the CDC's statement that a person can get COVID-19 "by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes."[5] In advancing this argument, policyholders rely on cases holding that the presence of harmful substances such as asbestos, fumes or odors may constitute direct physical loss.[6]

Even if the "direct physical loss" requirement is satisfied, insurers point to the virus or bacteria exclusion contained in most business interruption policies. As part of its filing of the exclusion with state regulators, Insurance Services Office (ISO) issued a circular that makes specific reference to such viral and bacterial contaminants as SARS (another coronavirus), rotavirus, influenza, legionella and anthrax.[7] Thus, the exclusion was specifically designed to apply to this type of situation.

Notwithstanding the "direct physical loss" requirement and the virus or bacteria exclusion, policyholders likely will argue that insurers should honor their "reasonable expectations" that their business interruption policies would cover these losses. However, the reasonable expectations doctrine should not apply where, as in the standard ISO forms, the policy language is unambiguous.[8]

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[4] *See* Broward County Administrator's Emergency Order 20-01 ("WHEREAS, this Emergency Order is necessary because of the propensity of the virus to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time."

[5] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

[6] *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 U.S. Dist. LEXIS 165232, at *1 (D.N.J. Nov. 25, 2014) (ammonia discharge inflicted "direct physical loss of or damage to" the insured's facility because the ammonia physically rendered the facility unusable for a period of time); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825 (3rd Cir. 2005) (finding that, under Pennsylvania law, contamination of a home's water supply constituted a "direct physical loss" when it rendered the home uninhabitable); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding that, under Massachusetts law, an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where "home was rendered uninhabitable by the toxic gases" released by defective drywall); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding that fumes from gasoline seeping into the soil under an insured church and rendering it uninhabitable established a "direct physical loss"); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294, 296 (La. Ct. App. 2011) (holding that dust from lead paint rendering a home unusable or uninhabitable qualified as a "direct physical loss"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997), aff'd in part, rev'd in part sub nom. *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) ("Direct physical loss also may exist in the absence of structural damage to the insured property."); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (holding that odors from a methamphetamine "cooking" lab constituted "direct physical loss" within the meaning of the policy); *Murray v. State Farm Fire & Cas. Co.* , 509 S.E.2d 1, 17 (W.Va. 1998) ("Direct physical loss also may exist in the absence of structural damage to the insured property . . . Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.").

[7] *See* ISO's July 6, 2006 circular [LI-CF-2006-175]; *see also* ISO Excluded Coronavirus Coverage 15 Years Ago by Edward Koch, et al., https://www.whiteandwilliams.com/resources-alerts-ISO-Excluded-Coronavirus-Coverage-15-Years-Ago.html.

[8] *See, e.g., Vanderbrook v. Unitrin Preferred Ins. Co.,* 495 F.3d 191 (5th Cir. 2007) (rejecting insured's arguments why they had a reasonable expectation of flood coverage despite a flood exclusion, including that that the policies were called "all-risk"); *Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc.*, 120 A.3d 1160 (Vt. 2015) (holding that "an insured's 'reasonable expectations' cannot trump 'unambiguous policy language.'"); *St. Paul Fire & Marine Ins. Co. v. Albany County School Dist. No. 1*, 763 P.2d 1255, 1263 (Wyo. 1988) ("A rule of construction that considers the reasonable expectations of the parties is of no assistance where the policy terms are clear and unambiguous. We will not absolve the parties to an insurance policy from the duty to read the policy.")

We continue to monitor this developing situation. In all likelihood, court intervention will be required to make a final determine as to coverage for business interruption losses due to COVID-19. The result could vary among states, depending on the state law applied to the policies.