

Representing Policyholders in COVID-19 Business Interruption Cases

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The Future Is Now: Tips For A Successful Virtual Mediation



5/14/20

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**Virtual
Happy Hour**

**Thursday,
May 14, 2020**

Product Liability in the Amazon Age



5/19/20

JEREMY ROBINSON

MCLE Requirement

Complete the Attendance Poll

In order to qualify for MCLE, we will be conducting up to three attendance polls.
Please complete the polls to obtain your MCLE credit.

Your certificate will be emailed next week.

Questions?

Please use the Q & A feature for all questions



What is Business Interruption (BI) Insurance?

- ▶ Business Interruption (BI) coverage is an *optional* coverage that replaces lost business income after a *covered* loss
 - ▶ Business Owners Policy (“BOP”)
 - ▶ Commercial Multiple Peril (“Multi-Peril with BI Coverage” or “All Risk Coverage”)
- ▶ Distinguish First and Third party Coverage:
 - ▶ First-party claim: for one’s own losses or “business disruption”
 - ▶ Third-party claims: brought by others for losses

Coverages For Loss of Income and Remediation

- ▶ Business Income Coverage
- ▶ Civil Authority Coverage
- ▶ Pollutant Cleanup and Removal
- ▶ Coverage Under All Risk Insuring Agreement

A “Tooth and Nail” Fight

“Lawyers and the trial bar would come to torture the language on our standard industry forms and try to prove something exists that actually doesn’t exist, and try to twist the intent when the intent is very clear,” Greenberg said. **“The industry will fight this tooth and nail. We will pay what we owe.”**

- Evan Greenberg, Chubb Chairman and CEO

What Do They Owe?

- ▶ No Direct Physical Loss or Damage
- ▶ Viruses Exclusion
- ▶ Acts or Decisions of Governmental Body Exclusion
- ▶ Pollution Exclusion
- ▶ The order must apply to premises
- ▶ The order must prohibit Access
- ▶ The order must result from Specific Damage to Other Property
- ▶ The order must result from Direct physical Loss or Damage
- ▶ The Direct Physical Loss or Damage Must result from a Covered Cause of Loss
- ▶ Anti concurrent Causation
- ▶ Period of Restoration (“wash with soap”)
- ▶ Insurance application to deny the claim

Threshold question:

Is there direct physical loss or damage?

- ▶ Issue is *fact specific* to policy and policyholder's business
- ▶ The closer to *literal contamination*, the better the chance for coverage.
- ▶ Loss of use = physical injury to tangible property.
Thee Sombrero v. Scottsdale Insurance Company, 239 Cal. Rptr. 3d 416 (Cal. Ct. App. 2018)

The Devil is in the Details

▶ RTFC: Read the F***ing Contract

- ▶ The policies are long and the language is never the same
- ▶ ISO CP 01 40 07 06
- ▶ 401-1337 02 16 “Includes copyrighted materials of Insurance Services Offices, Inc., with its permission”

▶ Words Matter

- ▶ The *virus* is **SARS-COV-2**
- ▶ **COVID-19** is the *disease* caused by the virus
- ▶ Analogy: HIV is the virus and AIDS is the disease

Threshold question:

Is there Efficient Proximate Cause?

- ▶ Efficient Proximate cause means the “predominating cause of the loss”
 - ▶ Need not be the first or immediate cause
 - ▶ If predominant cause is excluded, then no coverage

Threshold question:

Is there an Exclusion?

- ▶ Acts or decisions by governmental body
- ▶ Virus exclusion
- ▶ Pollutant exclusion

Why exclude something that's not covered in the first place?

Business Interruption

- ▶ Direct physical loss of or damage to Covered Property
- ▶ Loss or damage must be caused by or result from a Covered Cause of Loss
- ▶ Limited to a period of restoration

Civil Authority Coverage

- ▶ Narrow coverage
- ▶ Like business interruption coverage, traditional civil authority coverage is often limited to physical loss or damage to property.
- ▶ Extending civil authority coverage: Insurers can always add endorsements to the policy to extend coverage to losses resulting from a disease outbreak.
- ▶ Example: During Ebola outbreak, ISO released Ebola-related commercial property endorsement that offered business interruption coverage following a government ordered shutdown the outbreak.
- ▶ This would extend traditional civil authority coverage to include losses that did no result from damaged property.

Pollutants

- ▶ Pollutant Exclusion: Is virus included in the definition of “Pollutants”?
- ▶ Carve-out for Pollutant Cleanup and Removal
 - ▶ If there is a covered cause of loss, then there is coverage for cleanup and remediation

Is there precedent?

- ▶ Ebola, Mad Cow, Bird Flu, Swine Flu, MERS, and SARS
- ▶ Katrina
- ▶ Chinese Drywall

Notice Requirements

- ▶ Courts strictly construe notice provisions
- ▶ Policyholder emails/communications with insurance broker/agent may not be privileged
- ▶ Practice of making blanket or general notice of claim to insurer
- ▶ Best practice of making fact-specific detailed notice of claim to insurer based on:
 - ▶ Specific policy language
 - ▶ Specific manner in which policyholder was affected

Expected Wave of Insurance Coverage Litigation - How Best to Resolve?

- ▶ Multi District Litigation “MDL”
- ▶ “Kings Court” jurisdiction in Pennsylvania
- ▶ Class Action
- ▶ Considerations:
 - ▶ Difference in Policy Language and Coverage forms
 - ▶ Disparate and Separate location of Plaintiffs & Defendants
 - ▶ Differences in business type, circumstances, and actual loss
 - ▶ Difference in applications, brokers, and underwriting approach
 - ▶ Claims handling practices
 - ▶ Direct viral contamination or interrupted

Legislative & Regulatory Action

- ▶ Federal legislation
- ▶ Several states have pending legislation changing business insurance coverage
- ▶ California has no such pending legislation
- ▶ Past CA Department of Insurance Action: Earthquake and Fire

Article I, Section 10 of United States Constitution: No ex post facto law or Law impairing the Obligation of Contracts.

FIO - DOI - NAIC

- ▶ California Department of Insurance - www.insurance.ca.gov
- ▶ International Risk Management Institute - www.IRMI.com
- ▶ National Association of Insurance Commissioners - www.NAIC.net
- ▶ Federal Insurance Office - U.S. Department of the Treasury
- ▶ www.JanMulligan.com
- ▶ www.MRVPC.com