February 2020

For Businesses Suffering From Coronavirus Losses, Insurance May Be the Remedy

The World Health Organization (WHO) has designated the coronavirus an international public health emergency. With nearly 500 people dead and nearly 25,000 infected across 27 countries, the outbreak increasingly looks like a pandemic. Hundreds of Americans have been evacuated from China, and the US Centers for Disease Control and Prevention (CDC) has issued a Level 3 travel warning, advising that all nonessential travel to China be avoided due to the ongoing outbreak.

In addition to the health concerns, world economies are on alert. Businesses worldwide have already been affected. Travel and events have been postponed or cancelled. Supply chains have been disrupted. For instance, 10 percent of the worldwide supply of flat panels for televisions and other electronic devices are manufactured in Wuhan, China, the virus’s epicenter, suggesting an imminent impact on electronics manufacturing, among other sectors. Meanwhile, automaker Hyundai just announced that it will idle plants in South Korea, pointing to a shortage of components due to the coronavirus outbreak. In other sectors, retailers have simply closed their doors. For example, Starbucks announced the closure of more than 2,000 cafes in China, while McDonald’s has closed 300 stores in Hubei Province. The financial impact is mounting and affected businesses are looking for ways to offset losses. Insurance may provide a source of relief, with a variety of coverages potentially responsive to losses associated with the outbreak.

Business Interruption and Supply Chain Disruptions

Business disruptions due to the coronavirus can create financial problems for policyholders. Commercial property policies cover losses of business income. Typically, however, the interruption must be caused by physical damage to covered property. In certain instances, coverage may be available where the interruption is due to other causes, such as orders from a civil authority. For instance, access to the insured’s business may be prohibited by federal emergency management directives, such as those provided under the Stafford Act, the Homeland Security Act of 2002 and the National Incident Management System. On the state level, disaster management directives, such as those provided under the Texas Disaster Relief Act and the powers of the Texas state government upon the declaration of “disasters,” specific “public health disasters” and “emergencies,” and similar statutes in and powers of other states, may trigger business interruption coverage. Even where the insured business is interrupted by a civil authority order, however, most but not all property policies require that the civil authority order result from some physical damage to property. Importantly, the law is not settled on what constitutes a “physical loss,” as cases throughout the country hold that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitute a “physical loss” for the purpose of business interruption coverage. Whether there is “physical loss” must be determined on a case-by-case basis. Thus, while traditional physical property damage associated with the coronavirus may be unlikely, it is important to pay close attention to any action by civil authorities and the particulars of each case, and review the specific language of each policy since even subtle variations in policy wording can make a difference between a covered or uncovered claim. And, where civil authority coverage is not available, policyholders should carefully examine all other available insurance to determine whether coverage may be available there.
As noted above, supply chains are already feeling the impact of coronavirus as manufacturing of critical components in China ceases, transport of completed goods slows to a crawl and suppliers, transporters and customers face facility shutdowns, quarantines or other workforce disruptions. When facing losses caused by supply chain issues, policyholders may look to their contingent business interruption (CBI) coverage for relief. CBI coverage is typically purchased as a property insurance extension. The extension addresses “contingent” losses, or losses that involve third parties on whom the policyholder’s business is dependent. CBI coverage is generally triggered when a supplier or key customer suffers a direct physical loss, which, in turn, disrupts the business operations of the policyholder, without any requirement that the policyholder itself suffer physical damage. CBI insurance can be an important risk management tool in the face of a public health emergency like the coronavirus.

**Event Cancellation Insurance**

Many businesses and organizations hosting events, particularly those involving attendees, performers or presenters from China, may cancel or postpone events due to concerns about the virus. Impacted businesses may be able to recover under event cancellation insurance policies for, among other things, lost profits and revenue; amounts paid to reimburse vendors, ticketholders or other third parties due to the cancelled event; and additional amounts that must be spent to host the event at an alternate time or place. Coverage is also potentially available for out-of-pocket or unexpected costs, lost advertising, lost ticket sales or other contractual obligations a business must pay as a result of the cancelled event. However, policyholders should be on the lookout for policy exclusions for communicable or reportable diseases, and for restrictions limiting coverage to necessary cancellations caused by government order.

**General Liability Insurance**

Commercial general liability (CGL) policies provide coverage for liability to third parties for bodily injury and property damage, as well as claims concerning privacy and other personal injuries. With thousands suffering bodily injury due to the coronavirus, the procedures that businesses implement to warn and protect against exposure to the virus may become a potential liability. For instance, businesses in the retail, travel, entertainment and hospitality businesses may face claims by customers alleging that the companies were negligent in failing to warn of or protect against the risk of exposure to the outbreak. These businesses may look to their CGL policies to provide coverage for such claims. Insurers may seek to rely on exclusions for exposure to viruses, bacteria or pollutants but such exclusions must be evaluated on a case-by-case basis and a myriad of arguments are available to policyholders to overcome such exclusions.

**D&O Insurance**

In addition to third-party claims targeting businesses directly, a company’s directors and officers may be subjected to shareholder suits alleging that unreasonable actions (or inaction) in response to the coronavirus caused the company economic loss. For example, federal securities laws may require certain disclosures by publicly held companies potentially affected by the spread of coronavirus. As a result, there is a risk that shareholders may allege executives and management failed to disclose risks posed by the coronavirus to the business’s financial performance, failed to observe protocols recommended by authorities or failed to develop adequate contingency plans. Directors and Officers (D&O) policies may provide coverage for these types of costs and liabilities. Although D&O policies generally exclude claims for bodily injury, such exclusions should not preclude coverage for shareholders’ economic loss claims that allegedly stem from management-level decisions. As with other potentially implicated coverage, the availability of coverage may turn on the precise wording of the policies at issue.

* * *

Insurance coverage may be available for coronavirus-related losses under many types of policies. In
addition to the policies discussed in this alert, other potentially applicable coverages include insurance for
cyber risks and data breaches, product recalls, worker’s compensation, employment practices,
professional liability, travel-related risks and other exposures. For each policy, coverage will turn on the
specific language of the policy and the factual circumstances at issue. Policy conditions, such as the
timing of notice to the insurer, should be carefully evaluated as events develop. For businesses suffering
losses and looking to navigate or obtain coverage for the coronavirus, having experienced coverage
counsel can be invaluable.

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Louisiana Joins Push to Ensure Insurance Coverage for COVID-19 Business Interruption Losses

By Michael S. Levine & Kevin V. Small on April 2, 2020

Louisiana joins a growing list of states, including New Jersey, Massachusetts, Ohio, and New York that are considering legislation, here and here, that would require insurance coverage for the business interruption losses caused by COVID-19. We have discussed other legislative efforts here and here. The Louisiana House and Senate have each put forth bills that would, like the other states’ measures, require insurers to cover business interruption losses due to COVID-19 despite policy language that an insurer might try to rely on to argue otherwise. Unlike the other bills, however, the measure offered in the Louisiana Senate is not limited to small businesses (although the House bill is). Further, neither of the Louisiana measures provide a mechanism for the insurers to seek reimbursement for payments made pursuant to the law, which is unlike the other states’ legislation. We will continue to monitor these measures. Stay tuned.
OH, MA, and NY Join Push to Ensure Insurance Coverage for COVID-19 Business Interruption Losses

By Lorelie S. Masters, Michael S. Levine & Kevin V. Small on March 31, 2020

Following New Jersey, where similar legislation remains under informal discussion, lawmakers in Ohio, Massachusetts, and New York have now introduced legislation that would provide relief to small businesses for COVID-19 business interruption losses. The legislation is conceptually identical to the legislation introduced in New Jersey, discussed here last week. Although the New Jersey bill was subsequently pulled for further consideration with insurance industry representatives, it does appear to have been the roadmap for the Ohio, Massachusetts, and New York measures. Indeed, the new bills would force insurers to cover business interruption losses arising from the COVID-19 crisis despite language in the policies that insurers would rely on to argue otherwise. As in the New Jersey bill, insurers would be able to seek reimbursement for payments made under the law. The measures still must obtain further approval before going into effect. Stay tuned.
Just Because? COVID-19 Coverage under General Liability Insuring Agreements

Potential damages flowing from the COVID-19 pandemic, similar to those flowing from the opioid crisis, will likely result in courts considering the plain meaning of these common coverage triggers.

By Syed S. Ahmad and Rachel E. Hudgins
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A policy’s insuring agreement sets out the scope of coverage. It should be the starting point for any coverage analysis, especially when confronted with claims likely to arise from COVID-19. For instance, if a general liability (GL) policyholder faces liability for the negligent provision of services when short-staffed because of COVID-19-positive employees, would the employees’ illness constitute “bodily injury” that triggers coverage for the negligent services, even if those services did not result in bodily injury or property damage? The answer depends on the specific policy language.

One concept that will likely be the focus is the phrase “because of” in a GL policy’s insuring agreement:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’… to which this insurance applies.” In most cases, “because of” does not merit any consideration at all.

Under well-established contract interpretation principles, this policy language – like most others – is interpreted according to its plain meaning. That is true for liability claims that are common and straightforward and also for claims that arise less often. However, as commentators have noted, while the underlying contract interpretation principles do not change, the nature of the liability claim may bring into focus the significance of certain terms used in insurance policies. See, e.g., Kenneth S. Abraham, Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation, 25 Conn. Ins. L.J. 329, 350 (2019) (“However, when a claim for coverage of an unconventional form of liability arises – for example, when the party seeking to recover damages from the policyholder that are the consequence of bodily injury is not the same party who suffered the bodily injury – then the courts must become more explicit [about] what these words mean.”).

Some courts “interpret the phrase ‘because of bodily injury’ more broadly” than insuring agreements providing coverage “for” bodily injury. See, e.g., Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 616 (7th Cir. 2010). This makes sense given that the “because of” trigger is broad. The Medmarc court illustrated the difference with an example:

[A]n individual has automobile insurance; the insured individual caused an accident in which another individual became paralyzed; the paralyzed individual sues the insured driver only for the cost of making his house wheelchair accessible, not for his physical injuries. If the insured driver had a policy...
that only covered damages “for bodily injury” it would be reasonable to conclude that the damages sought in the example do not fall within the insurer’s duty. However, if the insurance contract provides for damages “because of bodily injury” then the insurer would have a duty to defend and indemnify in this situation.

Id. The Seventh Circuit Court of Appeals cited this logic in Cincinnati Ins. Co. v. H.D. Smith LLC, 829 F.3d 771, 777 (7th Cir. 2016).

In H.D. Smith, the insured pharmaceutical distributor allegedly provided West Virginia citizens prescription opioids in quantities so large that the insured should have known the drugs were being used illicitly. Id. at 773. West Virginia sued the insured for amounts it spent caring for drug-addicted citizens, and the insured sought a defense under its GL policy. Id.

The court found the claimed damages were due, in part, “because of bodily injury,” and therefore within the scope of coverage. In so deciding, the Seventh Circuit provided its own illustration:

Suppose a West Virginian suffers bodily injury due to his drug addiction and sues [the distributor] for negligence… [S]uch a suit would be covered by its policy. Now suppose that the injured citizen’s mother spent her own money to care for her son’s injuries… [H]er suit would be covered too… The mother’s suit is covered even though she seeks her own damages (the money she spent to care for her son), not damages on behalf of her son (such as his pain and suffering or money he lost because he missed work).

Id. at 774 (emphasis original).

A Kentucky federal court, considering a similar lawsuit, disagreed with this conclusion in dicta. Cincinnati Ins. Co. v. Richie Enter. LLC, No. 1:12–CV–00186, 2014 WL 3513211 (W.D. Ky. July 16, 2014). That citizens suffered physical harm or death due to prescription drugs, the court began, was not necessary to prove the state’s claim. Id. at *5. The alleged bodily injury “only explain[ed] and support[ed] the claims of the actual harm complained of: the economic loss to the State.” Id. The state was “not seeking damages ‘because of’ the citizens’ bodily injury; rather, it [was] seeking damages because it has been required to incur costs due to … drug distribution companies’ alleged distribution of drugs in excess of legitimate medical need. This distinction, while seemingly slight, is an important one.” Id. at *6.

That analysis ignores the significance of the actual policy terms. The court’s conclusion that the state was “not seeking damages ‘because of’ the citizens’ bodily injury” is undermined by the fact that individuals had suffered bodily injury, the state paid amounts to deal with that injury, and the state sought reimbursement of those amounts. Those facts should satisfy the “because of” trigger. That the state sought damages due to the distribution of drugs should not change the analysis. The policy language required only that the liability alleged be “because of” bodily injury, not that there be no other basis for liability. Tellingly, the court did not cite any authority supporting the “seemingly slight” distinction it relied on.

Furthermore, even if the Cincinnati court’s interpretation was reasonable, that would render the “because of” phrase ambiguous. When there are two reasonable interpretations of a policy provision, the ambiguity is resolved in favor of coverage. In fact, at least one court found the “because of” language ambiguous, since the insurer and the insured provided two different—though reasonable—interpretations of the phrase. State v. Am. Family Mut. Ins. Co., 693 N.W.2d 79, 82 (Wis. Ct. App. 2005). Applying the rule of
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Insurance Coverage Law Center | March 30, 2020

contra proferentem, the court construed the policy in the insured’s favor to provide coverage for fire suppression costs charged by the state. Id.

These cases highlight the importance of just one or two words in an insurance policy – “because of” versus “for”. The H.D. Smith suit, which is on appeal, may result in coverage for the $3.5 million settlement between West Virginia and the drug distributor. Potential damages flowing from the COVID-19 pandemic, similar to those flowing from the opioid crisis, will likely result in courts considering the plain meaning of these common coverage triggers.

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By Lorelie S. Masters & Michael S. Levine on March 30, 2020

Following on the heels of the directive issued to business-interruption eruption, insurers by the New York Department of Financial Services, Ricardo Lara, the Insurance Commissioner for the State of California, issued a “request for information,” about business interruption and related coverages so that the State can address “public policy options” and “understand the number and scope of business interruption type coverages in effect” in California and “the approximate number of [such] policies that exclude viruses such as COVID-19.”

As stated in the Notice, Commissioner Lara issued this Notice and “Business Interruption Survey (BIS-2020)” because the “expanding prevalence of COVID-19 within California and recent social distancing and ‘shelter in place’ directives from local governments and the Governor to reduce the continued rapid spread of the virus have left California businesses and the State facing uncertainty and weighing public policy options.” Because of those uncertainties and to address “public policy options,” the California Department of Insurance is directing insurers to respond to an “urgent data survey” by providing data in the four categories below regarding Business Interruption Coverage, Civil Authority Coverage, Contingent Business Interruption Coverage, and Supply Chain Coverage:

1. How many policies are covered under each of the coverages identified above?
2. Out of these policies, how many policies fall under businesses with more than 500 employees, or alternatively, meet your definition of large business?
3. Out of these policies, how many policies fall under businesses with less than 500 employees, or alternatively, meet your definition of medium-size business?
4. Out of those with less than 500 employees, how many policies fall under businesses with less than 100 employees, or alternatively, meet your definition of small business?

Responses, to be submitted in an Excel Workbook, are due by April 9, 2020. We will continue to monitor developments.

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First Houston-Area Lawsuit Filed Over COVID-19 Business Interruption Losses

By Lorelie S. Masters, Michael S. Levine & Leah B. Nommensen on March 30, 2020

A Houston-area wig store filed the first Texas COVID-19 lawsuit concerning business interruption losses Thursday in a state court in Harris County. The plaintiff, Barbara Lane Snowden DBA Hair Goals Club, filed suit, a copy of which can be found here, against Twin City Fire Insurance Company, a Hartford Insurance company. The lawsuit alleges that plaintiff has sustained and will continue to sustain covered losses during the COVID-19 outbreak and subsequent Harris County Stay Home Order. The lawsuit further alleges that plaintiff already sought coverage for its business interruption costs under the Twin City policy, but that claim was denied. Accordingly, plaintiff has alleged breach of contract, unfair settlement practices, violation of the Prompt Pay Act, and breach of the duty of good faith and fair dealing for Twin City’s wrongful denial of the claim.

This lawsuit has three practical implications. First, the wave of COVID-19 business interruption claims has only just begun – these claims will soon become the new normal in Texas, where Stay Home Orders have only recently begun to be issued but are having wide-ranging and significant impacts on local businesses. Second, insurance companies are responding to COVID-19 insurance claims, so it is important for policyholders to take prompt action to notify insurers in the event a claim arises. Finally, while the lawsuit does not reference the specific insurance policy language at issue or Twin City’s basis for denying the claim, the seemingly quick denial of coverage is evidence that insurance companies will readily deny COVID-19-related claims with little investigation. As we previously explained here, insurers have been vocal against the insurability of resulting financial loss under policies affording business interruption coverage. It is imperative, therefore, that policyholders engage experienced coverage counsel to review their policies and their specific circumstances.
COVID-19 Impacting Cyber Security; Attacks on the Rise

By Michael S. Levine & Daniel Hentschel on March 27, 2020

While COVID-19 occupies most of the world’s attention, cyber-criminals continue to hone their trade. Consequently, with attention diverted and business-as-usual changing daily, the recent rise in cyber-related attacks comes as no surprise. Analysts have found that companies with an increased number of employees working remotely as a result of the coronavirus pandemic have witnessed a spike in malicious cyber-attacks. For example, the United States Health and Human Services Department experienced two separate cyber-attacks since the onset of COVID-19, with the attacks aimed at sowing panic and overloading the HHS servers. [1] These attacks, however, are not limited to the United States, as they have been reported across the globe. For instance, hackers launched a cyber-attack on a hospital in the Czech Republic, stalling dozens of coronavirus test results, only days after the government declared a national emergency. [2]

Pandemic and other distractions aside, businesses must remain vigilant and, as business models evolve to keep pace with workplace closures and stay-at-home orders, enhance their offsite security and support to protect from malicious access to their computer systems. Business owners should also make sure their cyber insurance coverage is up to date and appropriate for their specific new business models and risk profiles. Experienced coverage counsel can help to ensure that cyber-related losses will be covered by insurance and, equally important, ensure that an appropriate breach response protocol is approved and in place for immediate mobilization when an event occurs.

Two More Lawsuits Filed Over COVID-19 Business Interruption Losses

By Michael S. Levine on March 25, 2020

Two more lawsuits were filed yesterday concerning business interruption losses resulting from the COVID-19 pandemic. The plaintiffs, the Chickasaw and Choctaw nations, filed their lawsuits, copies of which can be found here and here, in Oklahoma state court against a litany of property insurers, led by AIG. The lawsuits seek an order that any financial losses suffered by the nations’ casinos, restaurants and other businesses as a result of the coronavirus pandemic are covered by the nations’ insurance policies.

According to the complaints:

On or about March of 2020, the United States of America became infected by COVID 19 resulting in a pandemic. As a result of this pandemic and infection, the Nation’s Property sustained direct physical loss or damage and will continue to sustain direct physical loss or damage covered by the policies, including but not limited to business interruption, extra expense, interruption by civil authority, limitations on ingress and egress, and expenses to reduce loss. As a direct result of this pandemic and infection, the Nation’s Property has been damaged, as described above, and cannot be used for its intended purpose.

According to the Chickasaw and Choctaw nations’ websites, both have temporarily closed their casinos, restaurants and other businesses to help stem the spread of the coronavirus.

The hospitality industry, including hotels, restaurants and casinos, and related travel industries like cruise lines, airlines and other industries dependent on large crowds, have been especially impacted by the pandemic. Insurers have been vocal against the insurability of resulting financial loss under policies affording business interruption coverage. However, insurers’ positions may be based on overly broad assumptions about policy wording and applicable law. In fact, many business interruption losses are covered, and affected policyholders should engage experienced coverage counsel to review their policies and their specific circumstances.
New York Orders Property Insurers to Explain Their Business Interruption Coverages

By Michael S. Levine & Lorelie S. Masters on March 19, 2020

In what may be entirely unprecedented, the New York Department of Financial Services (NYDFS), the insurance regulatory body for insurers operating in New York, has ordered that all property and casualty insurers authorized to issue policies in New York to provide details on the business interruption coverage provided in the types of policies for which it has ongoing exposure for COVID-19 related losses. A copy of the NYDFS March 10, 2020 Order (Order) can be found here.

The Order recognizes the substantial impact that policyholders are likely to experience from the COVID-19 pandemic. To facilitate the handling and payment of claims, the Order requires that insurers “explain to policyholders the benefits under their policies and the protections provided in connection with COVID-19.” Specifically, the Order required that each insurer do the following by March 18, 2020, with respect to the policies each has written:

1. Identify the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage effective as of March 10, 2020;
2. Examine its policies and provide a clear, concise and policyholder-friendly explanation of each coverage as it may apply to COVID-19 losses, both presently and in anticipation of future related developments (e.g., is there any potential for coverage as a result of COVID-19);
3. Provide each policyholder a written explanation of:
   a) The type of commercial property insurance held by each policyholder;
   b) Whether the policy provides “business interruption” coverage and, if so, the “covered perils” under the policy, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss;”
   c) A description of the type of damage or loss sufficient to trigger coverage under the policy;
   d) Whether the policy provides “civil authority” coverage and, if so, the type of damage or loss sufficient to trigger that coverage, any relevant limitations under the policy, and whether a civil authority order prohibiting or impairing the policyholder’s access to its covered property in connection with COVID-19 is sufficient for coverage under the policy;
   e) Whether the policy provides “contingent business interruption” coverage and, if so, the type of damage or loss sufficient to trigger coverage, a list of the “covered perils” under the policy, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss;” and
   f) Whether the policy provides “supply chain” coverage and, if so, whether such coverage is limited to named products or services from a named supplier or company, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss.”

Finally, for each coverage described above, insurers must provide the applicable waiting period under the policy as well as the duration that each coverage will last once it has been implicated. Policyholders in New York should be on the lookout for notices from their insurers.
The NYDFS Order is likely only the beginning of the extraordinary steps regulators will be taking to manage the widespread losses that will result from the COVID-19 pandemic. Insurers have long-marketed so-called “multi-peril” and “all risk” commercial property policies based on their broad scopes of coverage. It is comforting that regulators are proactively taking steps to hold insurers to their obligations. How insurers respond to the Order will be telling and should provide early insight to the challenges that lie ahead for businesses in need of their insurance recoveries.
First Suit to Enforce Business-Interruption Coverage Filed

By Lorelie S. Masters & Michael S. Levine on March 18, 2020

On Monday, Oceana Grill, a restaurant in New Orleans, Louisiana, became the first to file a lawsuit over coverage for COVID-19 business interruption losses. The lawsuit, styled Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s of London, et al. (La. Dist. Court, Orleans Parish), seeks a declaratory judgment that an “all risks” property insurance policy issued by Lloyd’s of London must cover losses resulting from the closure of the restaurant following an order by the Governor of Louisiana restricting public gatherings and the Mayor of New Orleans’ order closing restaurants.

The Lloyds’ policy, like most first-party property insurance policies, affords coverage for business-interruption losses and contains an “extension of coverage in the event of the businesses closure by order of Civil Authority.” Specifically, the lawsuit seeks a declaration that “the policy provides coverage to plaintiffs for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination and that the policy provides business income coverage in the event that the coronavirus has contaminated the insured premises.” Furthermore, according to the complaint, “[t]he policy does not provide any exclusion due to losses, business or property, from a virus or global pandemic.”

As the complaint implies, an important issue will be whether the novel coronavirus constitutes the requisite “direct physical loss or damage” under the policy. Understanding COVID-19, its manner of transmission and its ability to live beyond a host organism helps support a conclusion that COVID-19 does indeed amount to the required direct physical loss or damage.

According to the CDC, the novel coronavirus is believed to spread mainly from direct contact with an affected person. However, COVID-19 also is understood to remain on surfaces. The duration can last at least three-weeks, depending on the type of surface material. This supports the conclusion that the presence of COVID-19 on business personal property, such as desks, computers and other office equipment, kitchen worktables and appliances, and dining room furniture and tableware can constitute direct physical loss or damage. This is especially so where the insurance policy contains no limiting language or definitions, as is often the case.

But findings of “direct physical loss or damage” as a result of some pathogen or irritant are not unique to COVID-19. For example, in Motorists Mutual Ins. Co. v. Hardinger, the U.S. Court of Appeals for the Third Circuit held that the presence of E. coli bacteria in the well of a house, which made the inhabitants of the house ill with respiratory, viral, and skin conditions, could constitute physical loss or damage to a structure. The issue turned on “whether the functionality of the [ ] property was nearly eliminated or destroyed, or whether the [e] property was made useless or uninhabitable.”

This issue unfolds in the light of case law in other fact situations in which courts have confirmed that airborne contamination also can qualify as “physical loss.” For example, a federal court in New Jersey concluded in Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am., 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.” From there, the court found that an ammonia discharge in a building inflicted direct physical loss of, or damage to, the insured’s facility because the release, which made the air unsafe, rendered the facility unfit for occupancy until the ammonia dissipated.
As we discussed on the blog Monday, the first event-driven securities lawsuit to arise from COVID-19 was filed last week. This week, the first suit to enforce business interruption coverage is on the books. What next week holds remains to be seen in what is now the “new normal.” No matter what the loss, however, policyholders should consider their insurance when quantifying losses resulting from COVID-19. Where covered, prompt action to notify insurers, mitigate loss, and properly categorize and quantify potential claims is critical.
All Aboard! COVID-19 Securities Suit Sets Sail, Implicates D&O Insurance

By Lorelie S. Masters, Michael S. Levine & Geoffrey B. Fehling on March 16, 2020

In a prior post, we predicted that novel coronavirus (COVID-19) risks could implicate D&O and similar management liability coverage arising from so-called “event-driven” litigation, a new kind of securities class action that relies on specific adverse events, rather than fraudulent financial disclosures or accounting issues, as the catalyst for targeting both companies and their directors and officers for the resulting drop in stock price. It appears that ship has sailed, so to speak, as Kevin LaCroix at D&O Diary reported over the weekend that a plaintiff shareholder had filed a securities class action lawsuit against Norwegian Cruise Line Holdings, Ltd. alleging that the company employed misleading sales tactics related to the outbreak.

The lawsuit alleges that the cruise line made false and misleading statements or failed to disclose in its securities filings sales tactics by the company that purported to provide customers with unproven or blatantly false statements about COVID-19 to entice customers to purchase cruises. Those allegations rely on two news articles reporting on the company sales practices in the wake of COVID-19: a March 11, 2020 Miami New Times article quoting leaked emails in which a cruise employee reportedly asked sales staff to lie to customers about COVID-19 to protect the company’s bookings; and a March 12, 2020 Washington Post article entitled, “Norwegian Cruise Line Managers Urged Salespeople to Spread Falsehoods about Coronavirus.” The lawsuit alleges that the company’s share price was cut nearly in half following these disclosures.

Most public companies targeted in securities litigation have some form of D&O or other management liability coverage. As with any event-driven securities claims, or really any insurance exposure, the ultimate coverage determination for lawsuits will turn on the specific policy language at issue. The good news for policyholders, however, is that D&O coverage is typically broad for securities-type claims like those alleged in the Norwegian lawsuit. The lawsuit is only a few days old, and it is unclear whether any of the claims will succeed. Regardless of whether any securities violations are proven, however, D&O policies can protect companies and individual insureds prior to any judgment or settlement by paying defense costs which can be substantial.

The allegations at issue in the recent lawsuit, while specific to the securities filings and alleged business practices of a particular company, are targeted at public communications, marketing efforts, sales practices, and corporate management that could be scrutinized in a variety of different industries impacted by COVID-19. In addition, it is possible that plaintiffs file suits based on other theories under federal securities laws, such as claims that a company misled investors about its exposure to the risk of a pandemic, its oversight and risk management practices, or the adequacy of its business continuity plans. As a result, this is the first but likely not the last event-driven lawsuit relating to the current situation. Having sufficient D&O coverage in place, and notifying the insurers and pursuing coverage for defense costs (or liability, if any), can be critical to mitigating risk of increased event-driven COVID-19 exposures. In addition, counsel for public companies should keep in mind the possibility of COVID-19-related securities law claims in reviewing past disclosures and in preparing future disclosures.
Workers Compensation, Insurance, and COVID-19


Workers’ compensation provides the exclusive remedy for injuries and illness that employees suffer arising out of and within the course of their employment. In the early stages of this pandemic, work-related travel to high impact countries or work-related exposure in a case that was being tracked by public health authorities provided support for work-related exposure. In healthcare settings, work-related exposure will likely be established when exposure to infected patients occurs. But in other settings and as the disease spreads in the United States, the analysis about whether an illness is covered by workers’ compensation will be more difficult.

Workers’ Compensation and “Ordinary Diseases of Life”: Many states do not authorize workers’ compensation coverage for “ordinary diseases of life.” Employers should review their own state workers’ compensation laws closely, but an ordinary disease of life is generally defined as an illness to which the general public is equally exposed, and is not a result of the peculiar or unique nature of an employee’s job. At this stage of the pandemic within the United States, it is possible that state workers’ compensation commissions may view COVID-19 as an ordinary disease of life because untraced community infection is widespread. In that case, an employee would not qualify for workers’ compensation, and the employer’s workers’ compensation insurance might not apply.

When workers’ compensation does not apply, obviously the exclusive remedy provision does not apply, and employees may sue their employers in tort. Employees also can sue even if workers’ compensation does apply to their illness if they can claim that the exposure was caused by the willful act or omission of their employer. The definition of “willful” for workers’ compensation purposes differs from state to state.

Employers are working diligently to put protocols in place to mitigate occupational exposure to COVID-19. If an employer follows a protocol that considers available public information from the WHO and the CDC and/or state and local health departments, and makes decisions that reflect the best available information, they should have good defenses to any tort suit.

Insurance: In addition to implementing precautionary workplace policies and procedures, employers should also consider how their insurance applies to pay for losses associated with COVID-19. Many employers already have Workers’ Compensation and Employers’ Liability Insurance which, as the title suggests, is designed to protect a business against two main liabilities. The first is money that the company is required to pay an employee under a given state’s workers’ compensation laws. This expressly includes liability for bodily injury by disease, so long as the disease is caused or aggravated by the conditions of employment. If state law points to workers’ compensation as the exclusive remedy for any employee who may become infected by COVID-19, this coverage grant should squarely apply.

The second risk that this insurance covers is an employer’s liability for any bodily injury claims that fall beyond the scope of workers’ compensation laws. Numerous policy exclusions may apply in such a scenario, however, and the facts must be considered on an individual basis. Employers may also have unique issues to address based on the locations covered by the policy and whether the infected employee is based domestically or internationally. All of these considerations must be taken into account in evaluating the potential applicability of workers’ compensation coverage.
Critically, workers’ compensation and employer liability insurance policies impose certain duties that must be met in order to preserve coverage. These typically include:

1. Providing immediate medical and other services as required by the applicable workers’ compensation law;
2. Providing the insurer with the name and contact information of the injured employee;
3. Providing prompt notice of any demands or legal claims made; and
4. Cooperating with the insurer and assisting in the defense of any claim.

Finally, there may be situations in which other insurance may apply to liabilities arising out of COVID-19. For example, depending on the facts alleged and causes of actions asserted, commercial general liability (“CGL”) insurance may apply, providing a duty to defend the policyholder and coverage for settlement or judgments (if any).

In the event an employee becomes infected by COVID-19, employers should consult their relevant insurance policies and provide notice to their insurers while being sensitive to privacy considerations. Skilled labor and employment and coverage counsel should be consulted from the outset to ensure that any unique circumstances can be addressed at the claim’s inception.
Client Alert

March 2020

COVID-19: Contract Cancellation and the Doctrines of Impossibility and Frustration of Purpose

Contracts are essential to business. They formalize obligations, eliminate risks, and provide a measure of certainty in what can be an uncertain world. The law expects parties to keep their bargains, and when they don’t, damages are the typical remedy. But unexpected, supervening events happen, and they can profoundly affect the parties’ obligations. The law has long accounted for this scenario—one which bears a close resemblance to the events unfolding today around the SARS-CoV-2 virus.

On March 11, the World Health Organization elevated the status of the novel coronavirus outbreak that causes COVID-19 to a “pandemic,” and on March 13, the President of the United States declared the COVID-19 outbreak a national emergency. As supply chains, public health, and economic stability are increasingly compromised, many businesses may find themselves in an unexpected position: either unable to perform a contract they agreed to before the outbreak, or concerned their contract partners may be unable to fulfill their contractual obligations.

Our previous client alert focused on force majeure clauses. Force majeure clauses are common commercial-contract provisions that excuse a party’s non-performance under exceptional circumstances without penalty. But failure to perform may also be excused under the common-law defenses of impossibility and frustration of purpose. Businesses anticipating contract disputes should carefully consider whether these doctrines may apply to their agreements. It is important to note that these doctrines can also apply where parties have no force majeure provision in their written contract, or where they have only an oral contract. And special provisions may apply to contracts involving the sale of goods, both domestically (Uniform Commercial Code § 2-615) and internationally (United Nations Convention on Contracts for the International Sale of Goods Art. 79).

Impossibility

The common law doctrine of impossibility provides that a party’s contractual obligations are excused when supervening circumstances make the performance impossible or impracticable. Courts around the country routinely refer to the definition set out by the Restatement (Second) of Contracts § 261:

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary.

The doctrine contains several important requirements. Chief among them is that the parties must have shared a basic assumption that the supervening event would not occur. The supervening event must not have been reasonably foreseeable, nor is it enough that performance is more difficult or expensive than the parties had originally anticipated. The Restatement illustrates the “basic assumption” requirement as follows:

On June 1, A agrees to sell and B to buy goods to be delivered in October at a designated port. The port is subsequently closed by quarantine regulations during the entire month of
October, no commercially reasonable substitute performance is available (see Uniform Commercial Code § 2-614(1)), and A fails to deliver the goods. A’s duty to deliver the goods is discharged, and A is not liable to B for breach of contract.

Courts also draw an important distinction between objective impossibility (performance cannot be done) and subjective impossibility (I cannot perform), requiring the defense to be premised upon the former but not the latter. And while the common law strictly limited the defense to instances of physical or legal impossibility, courts in more recent times have utilized a more lenient standard premised upon impracticability.

**Frustration of Purpose**

Closely related to impossibility, frustration of purpose applies when a change in circumstances makes one party's contract performance worthless to the other party. See Restatement (Second) of Contracts § 265. The defense commonly contains three elements:

1. the party’s principal purpose in making the contract is frustrated;
2. an event occurred whose non-occurrence was a basic assumption underlying the contract; and,
3. the party invoking the defense was not at fault.

The validity of the defense often turns on the first element. The principal purpose of a contract must be something which is so completely the basis of the contract that, without it, the transaction between the parties would make little sense. Thus, while impossibility is primarily concerned with “the nature of the event and its effect upon performance,” frustration is concerned with “the impact of the event upon the failure of consideration.”

The famous “Coronation Cases” provide a royal example of frustrated purpose. In *Henry v. Krell*, a British court excused a defendant from his promise to pay fifty pounds to watch the coronation parade of King Edward VII from the plaintiff’s flat when the coronation was abruptly cancelled due to the King’s health. *Krell* demonstrates that frustration is not substantial when the disadvantaged party merely stands to gain less than the bargained-for performance. Rather, the frustration must be so total, and caused by an event so wildly unpredictable and outside the scope of either party’s reasonable expectations, that it would be unfair to enforce the terms of the contract. The Second Circuit, for example, limits the doctrine to “virtually cataclysmic, wholly unforeseeable events.”

**Key Considerations for Clients**

- Determine whether the contract contains any provisions expressly excluding impossibility or frustration of purpose;
- Check the law in the jurisdiction that governs the contract, as state law may vary; and
- Document facts that show how the pandemic has affected the ability to perform.

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COVID-19: Excusing Performance of Commercial Contracts due to 'Force Majeure'

On March 11, the World Health Organization identified as a “pandemic” the novel coronavirus outbreak that causes COVID-19. Businesses around the globe and in all sectors have felt the impact as operations and supply chains have been disrupted. These disruptions have left some businesses unable to fulfill contractual obligations or concerned that their contract partners will be unable to fulfill theirs. Clients should think about contractual force majeure clauses or the common law doctrine of frustration of purpose if they find themselves in one of these situations.

What is a Force Majeure Clause?

Force majeure clauses define circumstances beyond the contracting parties’ control that can render contractual performance too difficult or even impossible. The theory behind the clause is that at the time of contracting, neither party reasonably anticipated and priced into the agreement the risk of the “force majeure” event. The clause may operate to suspend performance by, or release from further performance, the party timely invoking it. The following sample is typical of language you may see in a force majeure clause:

**Force Majeure.** In no event shall XYZ Corp. be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the XYZ Corp. shall use reasonable efforts which are consistent with accepted practices in the industry to resume performance as soon as practicable under the circumstances.

These clauses can come in many varieties and should be carefully reviewed. For agreements without force majeure clauses, the common law doctrines of frustration of purpose or impossibility of performance may provide similar relief.

Invoking and Interpreting the Force Majeure Clause

Many contracts require that the party invoking a force majeure clause provide prompt written notice of same to its contract partner. The failure to send such notice in a timely manner may result in waiver of the rights provided by the clause. Some contracts provide surprisingly strict notice provisions.

If parties to a contract dispute whether COVID-19 constitutes a force majeure event under their agreement, the issue will have to be decided by litigation or arbitration under the law applicable to the contract. Most jurisdictions in the United States construe force majeure clauses narrowly and according to their plain language. If the clause does not contain a catch-all provision like the sample clause above, the clause will likely be interpreted only to apply to the specifically enumerated list of events contained in the clause. Where clauses do contain a catch-all provision, courts may restrict the catch-all to events very similar to those specifically enumerated.
Generally, the party seeking to invoke the clause and suspend or avoid its contractual obligation must demonstrate the existence of a qualifying force majeure event, that the event directly caused its inability to perform, and that it was unable to fulfill its contractual obligation despite reasonable efforts to do so. Normally, the protections of a force majeure clause cannot be invoked simply because performance of contractual obligations has become more expensive or more difficult because of the occurrence of the force majeure event. For example, if Party A agreed to supply Party B with olives, but Party A’s olive supplier in Italy was no longer able to ship because of COVID-19, Party A would have to try to source its olives from another location, even if that increased its costs. If the parties’ agreement, however, required Italian olives specifically, and none could be had from any source, then Party A’s performance obligations may be excused or suspended.

**Force Majeure Checklist for COVID-19**

- Review critical contracts to assess what force majeure rights, remedies and requirements may apply if your or your contract partner’s operations are disrupted.
- Identify the law applicable to those contracts and understand whether it has unique characteristics or requirements related to the application of force majeure clauses.
- Review relevant force majeure notice requirements under your agreement and apply them strictly.
- Assemble and retain documentation of the basis for your force majeure claim or the rejection of your counterparty’s claim.
- Document efforts to comply with contract obligations or to identify alternative means of satisfying those obligations.
- Coordinate communications with your contract partners concerning force majeure claims so that the messages emerging from your business to counterparties are consistent, vetted and ideally reviewed in advance by counsel.

Evaluate whether a force majeure invocation by you or your major contract partners may trigger public reporting requirements or affect loan covenants or other agreements outside of the contract containing the clause.

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Cancelled Due to COVID-19? Look Closely at your Event Cancellation Policy

By Lorelie S. Masters & Michael S. Levine on March 12, 2020

Timing is everything. Just as conference season is getting into full swing, COVID-19 has lashed out in force. In the past 24 hours alone, we have received numerous calls from clients about annual meetings, trade shows and speaking engagements they have been compelled to cancel, all on short notice, due to the novel coronavirus.

While there has been much discussion about the potential for business-interruption and other coverages for losses stemming from coronavirus-related cancellations, slowdowns, supply chain disruptions and the like, including on this blog, many businesses have another front-line protection – event cancellation insurance – for the immediate losses occasioned by the necessary cancelations of many marquee events. Policyholders buy these specialized policies reasonably expecting that they will spring into action under these very circumstances, where a major event requiring extensive advanced preparation and investment suddenly must be canceled due to forces beyond the control of the stakeholders. Yet many seem to be downplaying (see here and here) the applicability of this coverage in the face of COVID 19. Insurers advertised these policies as providing protection for just these kinds of situations. While sensationalist headlines in some articles (e.g., about the South by Southwest Festival in Austin) have proclaimed that event-cancellation insurance “does not apply,” policyholders should not take that “no” for an answer. These policies often provide much broader coverage, with few or no applicable exclusions, making it critically important to carefully examine the wording of your event cancellation insurance. Our insurance coverage lawyers can assist with a quick review of your policies and advise on potential arguments favoring coverage under what may seem on a first read to be limited policies.
Three Key Insurance Issues to Consider In Securing Coverage for Coronavirus Losses

By Lorelie S. Masters, Michael S. Levine & Geoffrey B. Fehling on March 2, 2020

The CDC reports that, as of the end of last week, the coronavirus disease had spread through China and to 31 other countries and territories, including the United States, which has now seen its first two related deaths. The public health response in the United States has been swift and includes travel advisories, heightened airport screening, and repatriation and quarantine of potentially infected individuals. Outside the United States, countries like China, Italy, and South Korea have implemented more severe measures to combat the disease. From smart phones to automobiles, coronavirus has major short- and long-term implications for public and private companies facing potentially significant supply chain disruptions, store and office closures, and other logistical issues. These business losses, however, may be covered by insurance. Below are several key insurance considerations for policyholders to contemplate when evaluating the availability of insurance coverage for coronavirus-driven losses.

D&O

Directors’ and officers’ policies may respond to securities lawsuits arising out of coronavirus-related disclosure obligations. With global stock markets now in “correction” territory, investors will be asking whether steps could have been taken to avoid substantial losses in value. Federal regulators, such as the U.S. Securities and Exchange Commission, impose various disclosure obligations on public companies in annual reports, securities offerings, and other filings. As a result, business must contend not only with recouping direct losses from diminished business operations, but also with potential securities lawsuits related to the alleged failure to disclose actual or potential coronavirus concerns.

In addition, the recent market volatility and economic disruptions, coronavirus may also have a significant impact on pending mergers, acquisitions, IPOs, and other business transactions. These fluctuations can lead to both increased (where potential buyers may take advantage of decreased stock prices) and decreased (such as postponing or scuttling deals involving impacted companies) financial transactions, all of which can lead to more claim activity from shareholders, buyers, and other potentially impacted parties.

As with other recent adverse events, these coronavirus scenarios can lead to so-called “event-driven” litigation triggering coverage under D&O or similar professional or management liability policies. Heightened government involvement in minimizing the public impact of coronavirus and increasing risk of unscrupulous individuals taking advantage of the public health emergency may also lead to an uptick in government investigations and regulatory scrutiny in the wake of coronavirus.

Cross-Border

The large-scale economic, political, and social impact of coronavirus across the globe highlights numerous cross-border insurance concerns. For example, coronavirus losses may originate abroad or may result in claims against policyholders in foreign jurisdictions. For companies with international reach, does it matter where their loss occurred?
Even if insurance policies provide worldwide coverage, government authority, political activity, and other regulatory environments related to coronavirus may vary greatly across jurisdictions and can complicate insurance coverage issues more so than other domestic public health emergencies. Companies may also have insurance policies affording repatriation or medical evacuation coverages for executives abroad who may be impacted by coronavirus.

**Supply and Demand**

Finally, businesses should look to property and other first-party policies to determine whether they provide business interruption coverage for any coronavirus-related disruptions to supply chains or other business operations. Traditional business interruption coverage under those policies may cover not only lost income, fixed costs, and extra expense, but also losses due to forced closures because of government-mandated curfews, street closures, or quarantines or costs incurred in temporarily relocating operations to a new location.

Insurance known as “contingent business interruption” coverage (which we have reported on previously in the wake of coronavirus and other public emergencies) may also pay for loss of income due to coronavirus-driven disruptions to suppliers, customers, vendors, transporters, or other entities upon which a policyholder relies to operate its business.

Adopting strategies to address coronavirus-related exposures that include evaluating insurance considerations can help mitigate risk and maximize recovery in the event of a business loss or claim.