

Navigating Business Interruption Claims Due to COVID-19

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Introduction

- ▲ The novel coronavirus has become a global pandemic.
- ▲ Many businesses have been forced to close or significantly change the way they operate.
- ▲ Business interruption insurance provides coverage for lost business income and expenses due to covered property losses.



Business Interruption Insurance: Specified Perils

- ▲ Some business interruption policies are “specified perils” policies and list what types of perils businesses are insured against
 - It is unlikely there is coverage for COVID-19 business interruption under specified perils policies



Business Interruption Insurance: All-Risks

- ▲ Most business interruption insurance is “all-risks” and provides coverage for business losses due to covered perils, subject to exclusions.



Business Interruption Insurance: All-Risks (cont'd)

- ▲ All-Risks policies generally require damage or loss to property and that the cause of such loss or damage was fortuitous.
 - “All risks of physical loss or damage” to insured property

Fundamental Principles

- ▲ The policy language is of the utmost importance. Read it and read it carefully.
 - Effect should be given to that clear language, reading the contract as a whole.
 - Ambiguities to be resolved with reference to the parties' reasonable expectations.
 - Burden on insured to prove a covered loss; burden on insurer to prove an exclusion applies.

Ledcor v Northbridge, 2016 SCC 37



Read the Policy

- ▲ Does your insurance expressly have coverage for a pandemic or an outbreak?
 - Since the 2003 SARS outbreak, more insurers have begun to offer coverage for business interruptions and expenses caused by epidemics and pandemics.



Outbreak Expense Insurance/ Pandemic Insurance

- ▲ The policy might cover business interruption from a “communicable disease”, in which case, COVID-19 would like be covered. Instead, the policy might cover business interruptions due to “notifiable diseases”.
 - Whether a pathogen is a notifiable disease depends on the governing health authority.



Outbreak Expense Insurance/ Pandemic Insurance (cont'd)

New World Harbourview v ACE Ins., 2010 HK

- ▲ Express coverage for “notifiable human infectious or contagious disease occurring within 25 miles of the Premises.”



Exclusion of Loss due to Virus or Bacteria

Alternatively, rather than expressly cover viral contagion the policy may expressly exclude it.

ISO commercial property exclusion wording introduced after SARS outbreak:

- ▲ Expressly excludes “loss or damage caused by or resulting from any virus, ... that induces or is capable of inducing physical distress, illness or disease.”

No Express Pandemic Coverage or Exclusion?

- ▲ Possibility of coverage through an All-Risks policy with no viral agents exclusion, but there are some large hurdles.
- ▲ Insured has the initial burden to prove a covered peril and physical loss or damage to insured property.

Insured's Burden of Proof

- ▲ How to prove physical loss or damage to insured property?
 - Evidence of any contact of business premises with an infected individual?
 - Business shut down with no evidence of such contact?
 - Business still open but customers stay away?

Direct Physical Loss or Damage to Property

- ▲ For all-risks policies, triggering event typically requires “direct physical loss or damage” to property.
 - Must the damage be observable or apparent?
- ▲ The issue with COVID-19 is not damage to property –issues relate to human interaction.

Direct Physical Loss or Damage to Property (cont'd)

- ▲ COVID-19 can contaminate surfaces with microscopic viral cells, is this damage to property?
 - The cells only live on the surface for a short time – after which, the property will be left in its original form.

Direct Physical Loss or Damage to Property

- ▲ Direct physical loss of or damage to property
- ▲ What is physical damage requirement?
 - Gas and glass on highway constituted damage to highway after crash until cleaned up;
 - Oil on water was injury to water and posed a danger to life and fire hazard;
 - Spilled lumber treatment chemical injured ground and impaired water system.



MDS v Factory Mutual Insurance

2020 ONSC 1924

- ▲ The insurance company argued that loss of use of one's premises does not give rise to "physical" damage.
- ▲ The Court noted that physical damage was not defined in the Policy, and that dictionaries did not provide much guidance.
 - 'Physical Damage' may be ambiguous
- ▲ The Court referred to an earlier decision in which the presence of fumes from a nearby oil spill constituted "physical" damage.



MDS v Factory Mutual Insurance (cont'd)

▲ The Court stated:

- “This interpretation is in accordance with the purpose of all-risks property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risks coverage”.

The Required 'Accidental Element'

- ▲ All risk insurance covers risks, not certainties, and requires a fortuitous event or circumstance.
- ▲ In 2003, the Supreme Court of Canada stated that an event is not an accident if it is bound to happen in the ordinary course of events.

The Required 'Accidental Element' (cont'd)

- ▲ “ ...the decision would have considerable impact on liability for infectious diseases generally, which are spread in the usual course of events by viruses and bacteria passed from person to person, whether by sneezing in a bus, an unprotected cough in a crowded elevator, or a simple handshake. In my view, for the reasons that follow, the policy here excludes bodily injury from processes that occur naturally within the body in the ordinary course of events and, as well, from diseases that are transmitted in the ordinary way without any associated mishap or trauma except the spread (or inception) of the disease itself.”
- ▲ (*Gibbens v Co-operators Life Insurance Co.*, 2009 SCC 59)

Standard Coverage Exclusions

- ▲ Insurer has the burden to prove an exclusion applies
- ▲ Pollution exclusion
- ▲ Contamination exclusion
- ▲ Wear and tear exclusion

Civil Authority Coverage

- ▲ Some businesses may argue that they suffered a covered loss of use as they were forced to close their doors by the government.
- ▲ In addition to losses arising from damage to insured property, policies commonly insure business losses when a civil authority orders a shut down because of a covered peril that has damaged another property within a certain proximity of the insured premises.
- ▲ Will be particularly significant in light of government mandated closures.

Civil Authority Coverage (cont'd)

- ▲ Insured will still have the burden to prove that premises within proximity sustained physical damage from a covered peril.
- ▲ Are government mandated closures because of any particular contaminated premises or because of the overall effort to limit the spread of the coronavirus?

Civil Authority Coverage (cont'd)

- ▲ NWT Chief Public Health Officer April 11, 2020 Order closing recreational facilities, bars, restaurants, *etc.*:
- ▲ “for the purposes of decreasing the effect of or eliminating a health hazard ... ”
- ▲ “in order to reduce the risk of spread of COVID-19 ...”

Prevention of Ingress/Egress

- ▲ Inability to gain access to premises due to covered loss at some other property
- ▲ Not government order. Different from Civil Authority coverage.
- ▲ Example: insured operates as tenant within a mall.

Contingent Business Interruption

- ▲ Covers expenses and income loss from covered loss at premises of a supplier or customer.
- ▲ Example: supplier or customer of Cargill meat plant in High River, AB.

Class Actions

- ▲ SASK – nationwide class action against business interruption insurers on behalf of policyholders
- ▲ QUE – class actions against business interruption insurers on behalf of policyholders in Quebec who operate restaurants



Conclusion

- ▲ COVID-19 raises novel insurance coverage issues
- ▲ It remains to be seen what the courts will do
- ▲ Clear the courts will do something given the class actions already begun
- ▲ Courts will try to be consistent in response
- ▲ Common issues lend themselves to determination in class action format

Questions?

THANK YOU



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