

Insurance Companies Face a Wave of COVID-19 Related Claims

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The insurance industry can expect a wave of claims in the wake of the Coronavirus pandemic, which has caused a disruption of human activity on a global scale. Governments have struggled to contain the medical crisis while trying to minimize damage to the economy. Many jurisdictions have implemented emergency restrictions on the number of people who can congregate in a given location and ordered that only “essential” businesses can remain open. This has led to many businesses closing their doors and the cancellation of many conferences, sporting events and other organized gatherings of people.

The cancellations will lead to many insurance claims. This article focuses on business interruption and event cancellation claims. It will also address anticipated fights over how Force Majeure clauses in insurance policies will affect the outcomes of these coverage disputes.

Overview

The insurance industry has created various exclusions in reaction to prior outbreaks, such as the 2003 SARS epidemic. These exclusions are now ubiquitous, and as a consequence the majority of insureds can expect that claims made for business interruption arising from COVID-19 will be denied, except in the minority of cases where these exclusions were left out of the policy.¹ According to policyholder attorney Chip Merlin, insurance industry research following the limited SARS outbreak demonstrated that the insurance industry would be bankrupted if it were to pay all claims in the event of a significantly larger global pandemic such as the Spanish Flu of 1918.² So, in the case of COVID-19 claims, standard policies will give carriers ample grounds to deny most claims, but the policyholder bar may be able to exploit certain policies in order to obtain coverage in unique situations depending on variable policy language and fact patterns.

Case in point is possibly the first such lawsuit in the nation, *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.*, Civil District Court for the Parish of Orleans, Louisiana.³ As noted Randy Maniloff's article about the case, the ISO introduced a mandatory

¹ Merlin, Chip, *Merlin Law Group*, “Is There Business Income Coverage for Coronavirus?” <https://www.propertyinsurancecoveragelaw.com/2020/03/articles/commercial-insurance-claims/is-there-business-income-coverage-for-the-coronavirus/>

² *Id.*

³ see Maniloff, Randy, *Property Casualty 360*, “First coronavirus coverage suit filed for business interruption”, <https://www.propertycasualty360.com/2020/03/19/first-coronavirus-coverage-suit-filed-for-business-interruption/?slreturn=20200226085420>.

“virus” exclusion in 2006, a few years after SARS.⁴ Curiously, the policy in *Cajun Conti* lacked this exclusion.⁵ Because the lack of this exclusion, *Cajun Conti* may prove to be the exception to the rule should the plaintiffs obtain coverage on these grounds, though time will tell.

Business Interruption

There are many reasons why it will be difficult for policyholders to prevail on most business interruption claims stemming from the COVID-19 pandemic. Generally, business interruption coverage is triggered when a property experiences “direct physical loss or damage,” typically fire, flood, water, wind, or some other similar occurrence.⁶ Consequently, these policies do not generally foresee coverage for losses when the physical structure of the covered property was not actually damaged.⁷

The *Cajun Conti* plaintiffs evidently anticipated this defense by claiming that the building in that case, a restaurant, was physically damaged by being contaminated by COVID-19.⁸ Notably, the complaint states that “the deadly virus physically infects and stays on the surface of objects or materials, ‘fomites,’ for up to twenty-eight days...[therefore it is] clear that contamination of the insured premises by the coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment.”⁹

Likewise, many policies have standard exclusions that could bar COVID-19 related claims. Per policyholder attorney Brian Mahany, after the SARS outbreak, insurance broker Aon produced a white paper stating that SARS claims would most likely be denied under standard mold and pollution exclusions.¹⁰ And as noted above, exclusions for “virus” or “infectious disease” are also found in most policies.¹¹

⁴ *Id.*

⁵ *Id.*

⁶ Byer, Anita, *Law.com Daily Business Review*, “Policies May Offer Limited Coverage for These Coronavirus-Related Scenarios”, <https://www.law.com/dailybusinessreview/2020/03/04/policies-may-offer-limited-coverage-for-these-coronavirus-related-scenarios>

⁷ *Id.*

⁸ Maniloff, n. 3, *supra*.

⁹ *Id.*

¹⁰ Mahany, Brian, “Coronavirus, Insurance Bad Faith and Business Interruption Insurance”, <https://www.mahanyertl.com/2020/coronavirus-insurance-bad-faith/>

¹¹ *Id.*, Merlin, n.1, *supra*. The New York State Department of Financial Services, the governmental authority on insurance matters in the state hardest hit by the pandemic, summarized the status of possible business interruption claims sufficiently in a FAQ for consumers: “It is unlikely that a current business interruption policy has contemplated the coronavirus specifically. However you should check to see if your policy has an exclusion that would disable coverage for incident triggered by an epidemic or pandemic, which might apply as the COVID-19 situation evolves. Also, any claim would still need to be related to your property damage for coverage to be

Many insureds may seek coverage under Civil Authority provisions in addition to business interruption. A common Civil Authority provision starts as follows, in part: “We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss”.¹² Under this language, a “direct physical loss” to the insured premises is not necessary assuming neighboring properties were damaged and government authorities consequently closed the area to business.¹³ For instance, in the aftermath of the Boston Marathon bombings, many businesses near the bombing site were closed by authorities for a period despite not being directly damaged.¹⁴

The *Cajun Conti* plaintiffs have used a similar argument while seeking a declaration that the Louisiana governor’s public gathering restriction, and New Orleans mayor’s restriction on restaurant operations, trigger the Civil Authority provision of their policy.¹⁵ It remains to be seen how the court will deal with that argument.¹⁶

The ISO has already responded to the likelihood of business interruption claims due to COVID-19 by offering two new business interruption endorsements. One form is titled “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus” and the second is called “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation).”¹⁷

Notably, the forms cover actual losses stemming from the closing of a premises brought about by government order, even if no actual cases in the area are known and the action is made as a precaution (many standard policies may not cover closures brought on by “fear” of the virus unrelated to actual cases).¹⁸ Losses will be excluded under these forms if the virus was spread intentionally by a terrorist or similar group.¹⁹ Further, the costs of cleaning or disinfecting the premises, or testing and monitoring for the virus, would be similarly excluded.²⁰ Likewise, these

triggered. Department of Financial Services, “The Novel Coronavirus and Business Interruption Insurance – FAQs”; https://www.dfs.ny.gov/consumers/coronavirus/business_interruption_insurance_faqs

¹² Swerling, Milton Winnick, Public Insurance Adjusters Inc., “What is ‘Civil Authority’ Coverage”; <https://www.swerling.com/news/2018/civilauthoritycoverage>

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Maniloff, n.3, *supra*.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

forms will not cover losses brought on solely by consumer fear of contracting the virus, when the premises' operations are not suspended by the government.²¹

As one policyholder attorney concedes, “The fact that the ISO is issuing endorsements providing for cover would suggest that most forms offer no coverage”.²² Another policyholder attorney was hesitant to rely on civil authority claims, writing “Civil authority coverage *might* cover a coronavirus claim. One really must carefully interpret the precise wording of the policy. For example, can one argue that property rendered unfit for public gatherings because of contamination qualifies as a physical loss? What if the CDC quarantines a cruise ship partially out of fears that the ship itself can spread the virus? Depending on the precise wording of the policy, there may be coverage.” (emphasis in original)²³

In the event of a massive wave of business interruption claims, there is a distinct possibility that legislatures and regulatory agencies at the state and federal level will allow otherwise excluded COVID-19 claims to be paid, and simultaneously reimburse carriers. Indeed, as of this writing, the New York State Assembly is considering a bill that would extend business interruption coverage to businesses with policies that would not otherwise cover “business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.”²⁴ Only businesses with under 100 eligible employees would qualify, and insurers would be able to make an application to the state to be reimbursed.²⁵

Event Cancellation

Event cancellations are another likely source of claims. Professional conferences, sports leagues, concerts, theme parks, and other profitable public events have been cancelled due to the spread of COVID-19 and the requirement of social distancing. Event organizers typically buy insurance policies to protect against such unforeseen closures. Policyholder attorneys seem to be far more bullish on claims under event cancellation policies should be aware of the grounds under which they can limit these claims.

This attitude was expressed by Lorelie S. Masters and Micheal S. Levine of Hunton Andrews Kurth, writing, “Policyholders buy these specialized policies reasonably expecting that

²¹ *Id.*

²² Merlin, n.1, *supra*.

²³ Mahany, n.10, *supra*.

²⁴ New York State Assembly, Memorandum in Support of Legislation, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10226&term=2019&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y&LFIN=Y&Chamber%26nbspVideo%26nbspTranscript=Y

²⁵ *Id.*

they will spring into action under these very circumstances, where a major event requiring extensive advanced preparation and investment suddenly must be cancelled due to forces beyond the control of the stakeholders.”²⁶

Despite policyholder attorneys’ optimism, insurance carriers should comfortably be able to deny many claims for event cancellation depending on the policy language and facts at play. First, the organizers of these events simply may have failed to purchase event cancellation coverage, and would be forced to seek to have their claims covered through other policy provisions, such as business interruption. Second, most insurance policies will require the insured to seek to mitigate its damages as a pre-requisite to coverage. In the event cancellation context, this may require, for example, sports leagues to prove that they could not reschedule their seasons to a later date. If the events are successfully rescheduled, reduced profits from holding the event in an unfavorable date (i.e. holding the NHL playoffs in August, when interest in winter sports is lower and there is competition with outdoor recreation, the NFL preseason, etc.) may not be covered.

Further, many policies contain exclusions that may protect carriers inundated with COVID-19 event cancellation claims. Many event cancellation policies contain exclusions barring claims brought for losses arising as a result of a communicable disease when the disease is declared an epidemic or pandemic by the World Health Organization (WHO) or a government agency.²⁷ The WHO declared COVID-19 a pandemic on March 11, which should give carriers a sigh of relief.²⁸

Force Majeure

Carriers may also expect claims for contingent business interruption, as businesses rely on force majeure provisions to break contracts with suppliers or distributors due to the consequences of the COVID-19 pandemic. A Force Majeure event is an unexpected occurrence that prevents a party from satisfying their obligations under a contract. Many insurance policies have force majeure clauses that could possibly cover losses for the failure of businesses to satisfy contracts due to complications from COVID-19 and the pandemic’s impact on supply chains.²⁹

²⁶ Masters, Lorelie S., Levine, Michael S., *Hunton Insurance Recovery Blog*, “Cancelled Due to COVID-19? Look closely At Your Event Cancellation Policy” <https://www.huntoninsurancerecoveryblog.com/2020/03/articles/event-cancellation/cancelled-due-to-covid-19-look-closely-at-your-event-cancellation-policy>

²⁷ Davis, Michael C., *et al.*, *Insights: Venable LLP*, “Update: Insurance Coverage for Event Cancellation Due to COVID-19 in Light of Pandemic Declaration” <https://www.venable.com/insights/publications/2020/03/update-insurance-coverage-for-event-cancellation>

²⁸ *Id.*

²⁹ Sherman & Sterling, “COVID-19: Force Majeure Event?” <https://www.shearman.com/perspectives/2020/03/covid-19--force-majeure-event> and Richman, Lisa M., *et al.*, *McDermott Will & Emery, Insights*, “Force Majeure and COVID-19: Frequently Asked Questions” <https://www.mwe.com/insights/force-majeure-and-covid-19-frequently-asked-questions>

Generally, however, insureds must take all reasonable steps to avoid or mitigate any loss or the consequences of the loss. Accordingly, while the situation surrounding COVID-19 may frustrate typical supply chains, alternatives may be found that could prevent the insured from breaking its original contract outright, leading to a smaller insurance claim. Indeed, many jurisdictions, such as New York, excuse performance under Force Majeure clauses only when truly impossible—an objective standard—and not simply impracticable or requiring an unreasonable expense.³⁰ Attorneys at Paul Weiss believe that “the COVID-19 pandemic will require courts to address calls to liberalize the doctrines of impossibility and impracticality,” which implies that, under the current law, Force Majeure arguments will not provide grounds for businesses to break their contracts in many situations.³¹

Moreover, as with the other insurance policy provisions discussed here, exclusions may bar claims stemming from COVID-19 in particular or infectious diseases and pandemics in general.

Conclusion

The COVID-19 pandemic has created a brave new world in almost every aspect of human experience. The insurance industry is no exception. It may take years for courts to resolve these issues. Let’s all hope we don’t face another pandemic that causes us to look to the resulting case law.

³⁰ Boehning, H. Christopher, et al., *Paul Weiss: Litigation*, “UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic” <https://www.paulweiss.com/practices/litigation/litigation/publications/update-force-majeure-under-the-coronavirus-covid-19-pandemic?id=30881>

³¹ *Id.*