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COVID-19/CORONAVIRUS –

BUSINESS INTERRUPTION INSURANCE:

Expectations, Legal Considerations, and Claims Handling

Widespread Business Income Loss

The economic loss caused by the COVID-19/Coronavirus pandemic is and will be devastating to many businesses. The governmental and societal response has been fluid. Every day, sometimes every hour, more detrimental developments occur.

The NBA was the first professional sports league to cancel games and indefinitely postpone its season. Other professional sports leagues soon followed suit and have essentially cancelled their seasons, causing a significant loss of revenue to businesses associated with the sports leagues, i.e., restaurants, bars, hotels, advertisers, sports memorabilia stores, parking lots, etc.

In Minnesota, first Governor Tim Walz issued a generic social isolation decree urging Minnesota residents to work from home, limit their shopping trips to only buy essential groceries and supplies, and to keep a recommended six-foot social distance from other people. Then, Governor Walz issued an executive order closing schools, forcing parents of school-age children to work from home and disrupting their working careers, which affected many businesses to continue normal operations. Next, Governor Walz issued another executive order closing bars, restaurants (limiting them to only take-out or curbside pick-up), beauty salons, bowling alleys, golf courses, movie theaters, and many other types of business that rely on attracting people to their stores, offices, and premises. Finally, on March 27, 2020, Governor Waltz issued Emergency Executive Order 20-20, a shelter-in-place order, ordering all Minnesotans to stay at home unless they are engaged in certain designated “essential activities” or “critical sector” work as defined in the order. The “stay home” order will remain in effect until April 10, 2020 at 5:00 p.m.

These responses to the COVID-19 pandemic has resulted in a drastic and dire impact on many business operations, both small and large. Major corporations are laying thousands of employees off. Many small and medium-sized businesses are closing down indefinitely, and some have already made the decision to close permanently. Affected businesses include: bars and restaurants, fitness centers and gyms, salons, spas, healthcare providers, veterinary practices, dental care providers, realtors, construction contractors, vehicle dealers, theaters, recreational venues, music halls, event venues, and many more.

Many other state governors have issued similar “stay home” orders across the country.

Insurance Claims for Business Interruption and/or Loss of Business Income will Skyrocket

These orders will cause a significant increase in insurance claims nationwide—especially under policies that provide coverage for business interruption and/or loss of business income. Some lawsuits seeking declaratory relief as to an insured’s rights under such a policy have already been filed and many more are certain to follow.

There are a number of potentially applicable federal, state, and local laws and regulations that might apply to analyzing insurance coverage. Of course, insurance coverage is generally governed by the specific terms, conditions, and exclusions contained in each individual policy. Coverage is also dependent on the case law of different jurisdictions. While there is no one-size-fits-all answer for every claim, below we’ve provided some information concerning claims for business interruption insurance that many insurers are likely to receive in the coming weeks.

One strategy to get ahead of the inevitable litigation on these issues is to obtain an initial analysis of coverage under policies that have been issued to businesses that have been affected by the outbreak. By obtaining legal analysis of specific policies under state specific case law, insurers can better evaluate the available defenses as claims are made and provide more efficient and accurate responses to their policy holders.

The attorneys at Lind, Jensen, Sullivan & Peterson welcome your inquiries to address specific questions as to such claims and lawsuits. Please remember that differing facts and policy provisions may call for different answers in each case, particularly as developments in response to COVID-19, and the impacts of those developments on business, continue to change.

WHAT INSURERS NEED TO KNOW REGARDING BUSINESS INTERRUPTION INSURANCE DURING AND AFTER THE COVID 19 PANDEMIC

General Types of Losses Covered

Business interruption insurance is included or added to many commercial property insurance policies and provides coverage for loss of income due to a slowdown or suspension of the insured’s operations at its premises. Although such coverage is generally only available in the event of direct physical loss or damage to the business’s premises, many policies also provide coverage for a suspension of operations due to a civil authority or similar order that prohibits access to a policyholder’s premises. Business interruption insurance often includes coverage for extra expenses that an insured may incur in order to continue operations following a covered loss. Business interruption coverage may also

include coverage for business income lost due to the physical loss or damage to a dependent property—such as material suppliers, product manufacturers, and customers.

Read the Applicable Policy; if Key Terms are Not Defined in the Policy, Look to Applicable Case Law in your Jurisdiction

Because business interruption coverage usually requires that the insured sustains physical loss or damage to its insured property, the coverage determination will often turn on whether the COVID 19 pandemic caused physical loss or damage to the insured’s property within the meaning of the applicable policy. An insured may argue its premises sustained damage and that the virus was present within its premises if an employee or customer at the premises was diagnosed with COVID-19. Is that enough to prove damage at the premises? Courts will need to interpret what is meant by “damage” as used in each policy. The policy definitions of “physical loss,” “property damage,” and “damage” will be central to a coverage determination. If these or similar terms are not defined in the policy itself, the interpretation of such terms by case law will also be determinative.

For policies that provide coverage for business interruption where a civil authority has prohibited access to an insured property, there may be coverage in states that have ordered specific businesses to close or the population to remain in their homes. However, the orders in most states were made to generally achieve greater social distancing, not because the virus was found at any one particular location. Further, not every policy is the same and some may require such an order to be specifically directed at an insured premises. In policies providing coverage for business loss caused by civil authority orders, generally, actual property damage is not necessarily required. In past cases, coverage has been awarded when the access to a business property is not allowed or restricted even though there was no physical damage at the insured premises.

Some policies also provide event cancellation coverage. Typically, this type of coverage provides indemnification for losses suffered as a direct result of a cancellation, abandonment, curtailment, postponement, or relocation of an event. The COVID-19 crisis has caused thousands of cancelled and postponed events at a great financial loss to many businesses.

Review All Endorsements and Coverage Extensions

Some policies include endorsements and coverage extensions that may apply. Some of these endorsements and coverage extensions provide coverage for business interruptions and income losses caused by the presence of a contamination or a “communicable disease”. Depending on the policy language, COVID-19 may arguably be a “communicable disease” for which coverage may apply. These endorsements and coverage extensions also have limited or specified types of losses of coverage. The language in the policy dictates what is coverage and what amounts of losses are covered.

Anticipate the Creativity of Lawyers for Claimants

We anticipate lawyers for the insureds will be extremely creative in trying to broaden and expand coverage for many different types of business loss coverages. It will be important for the insurance industry to anticipate the many types of arguments that will be presented against them in an attempt to broaden coverage.

Prepare an Analysis of the Policy Exclusions

Many policies may contain a virus exclusion. Many, but not all, policies added exclusions designed to exclude coverage for viral outbreaks in the aftermath of SARS and H1N1, but not all policies contain such exclusions. Even if a policy contains a potentially applicable exclusion, a reviewing court may nevertheless find that the exclusion is ambiguous with respect to the current outbreak.

Accordingly, there is no clear answer to the potential coverage available for business interruption and business income losses caused by the COVID 19 pandemic, and many of these issues will likely need to be decided through litigation in the coming years. The determination will depend upon what types of losses are covered under the policy, the definitions of policy terms, the endorsements, conditions, and exclusions of each policy applied to the particular sets of facts giving rise to the claim.

PENDING LITIGATION AND GOVERNMENT ACTION

The First Lawsuits Have Started

First, in *Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London, et al.*, No. 2020-02558 (La. Dist. Ct., Orleans Parish, complaint filed March 16, 2020), a restaurant owner has sought a declaratory judgment that its insurance company is obligated to provide business interruption coverage under an all-risk policy that allegedly does not contain a virus exclusion. The restaurant owner is seeking a declaration that policy provides coverage for its business losses because of a civil authority shutdown of its restaurant business and that the COVI-19 coronavirus contaminated its premises. The owner asserts that COVID-19 satisfies the physical damage requirement because the virus is physically impacting private property and physical spaces by remaining viable on surfaces which then require cleaning and fumigating due to the intrusion of microbials, resulting in a direct physical loss needing remediation. The complaint claims that any argument by the insurer to the contrary would be a fraudulent misrepresentation that could endanger policyholders and the public.

Second, in *French Laundry Partners, LP dba The French Laundry, et al. v. Harford Fire Insurance Company, et al.*, venued in the Superior Court for the State of California, County of Napa, two restaurants owned by the Thomas Keller Restaurant group has initiated a lawsuit seeking declaratory judgment that two restaurant it owns are entitled to business

interruption coverage under their policies. Similar to the Louisiana case, the restaurants allege they are insured under an all risks policy that provides coverage for lost business income and extra expenses if access to the insured premises has been prohibited by a civil authority as a direct result of a covered loss in the immediate area. The restaurants further claim that the policy does not include an exclusion for viral pandemic and the "policy's Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus".

Finally, two separate lawsuits have been filed by the Chickasaw Nation and Choctaw Nation in Oklahoma state court against underwriters for Lloyd's of London alleging that they are entitled to coverage for business interruption losses for the closure of their casinos under a stay at home order. Similar to the above lawsuits, these Native American tribes allege that they both have an "all-risks" policy that provides coverage for business interruption losses. It is not clear whether the applicable policies contain any exclusions that might apply to viral outbreaks, but the complaints allege that their casino properties have been damaged by the virus.

These cases are in their infancy, but should be monitored closely by insurers and law firms as important test cases for the wave of litigation that will inevitably follow. Further, it is important to remember that each policy is different and courts generally interpret insurance policies broadly and construe any ambiguities in favor of finding coverage.

Government Actions May Influence Coverage Decisions

In addition, insurers and law firms should closely monitor legislative developments. Although no legislative or regulatory action has occurred in Minnesota at this time, other states have taken actions with respect to insurance policies. Indiana has issued a moratorium on the cancellation of insurance policies due to non-payment and the New Jersey house of representatives has proposed a bill that would specifically require coverage for business interruption due to the COVID 19 pandemic, and the bill sought to retroactively apply to all policies in effect at the time the state's governor declared a public health emergency on March 9, 2020. While the bill has since been withdrawn, it is anticipated a similar bill will be introduced. Additionally, the Ohio Legislature has introduced similar legislation. The Ohio bill would require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics. Finally, although no legislation has been proposed at this time, the New York Department of Financial Services has mandated that insurers gather and produce "certain information regarding the commercial property insurance [they have] written in New York and details on the business interruption coverage provided in the types of policies for which it has ongoing exposure."

While the New Jersey legislation has stalled for now, the actions outlined above show that legislatures are already looking for ways to shift some costs to insurers. Similarly, although the federal government has not enacted legislation, 16 congressional representatives signed

a letter to insurance industry and broker associations urging insurers to provide business interruption coverage for COVID-19-related losses. The American Property Casualty Insurance Association, the Council of Insurance Agents and Brokers, the Independent Insurance Agents & Brokers of America, and the National Association of Mutual Insurance Companies co-authored a response stating, “[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”

CONCLUSION

Whether a given policy provides coverage for business interruption losses due to COVID 19 remains an open question. Although most policies require physical loss of, or damage to the insured premises, some policies may provide coverage where a civil authority prohibits access to the insured premises. Ultimately, each policy is different and the available coverage will turn on the terms, conditions, and exclusions contained therein. Insurers should consider obtaining a preemptive coverage analysis of policies it has issued to affected business under applicable state law. Although not necessarily definitive, such analysis would allow insurers to rapidly respond to incoming claims by asserting all available defenses.

Given the court’s preference for finding coverage, the actions of state legislatures and regulatory agencies may change the coverage question in the coming months. Some states and certain federal representatives have already indicated their desire for insurers to provide coverage for business interruption losses due to COVID 19 notwithstanding the applicable policy provisions. Insurers and law firms should continue monitoring these developments in order to understand the potential coverage obligations.

If you have any insurance coverage or other questions about or related to the ongoing COVID-19 pandemic as it relates to your claims handling or business matters, please do not hesitate to contact our experienced lawyers at Lind Jensen Sullivan & Peterson by email or phone (612) 333-3637.

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