What Policyholders Can Do Right Now to Maximize Chances of Insurance Recovery for COVID-19 Losses

By Creighton Page

Much has been written already concerning the potential for insurance coverage of Covid-19 related losses, especially under property / business interruption policies. Whether one can obtain coverage under a policy, depends, of course, on the specific type of coverage purchased and the specific terms of each policy. Coverage may be found in several different types of policies, including:

- Property /Business Interruption Insurance;
- General Liability Policies (e.g., for third-party claims by non-employees who become infected);
- Director and Officer Policies (e.g., if shareholders are aggrieved and allege a failure to act);
- Errors and Omission Policies.

Regardless of the nature of the loss or claim, or the type of coverage sought, there are several steps one can take to increase the likelihood of obtaining coverage:

- Notify the insurer early;
- Track expenses carefully;
- Take prudent steps to mitigate the loss;
- For property insurance, carefully adhere to policy provisions regarding when and how to document the "proof of loss."

Insurers are already geared up to challenge the claims on a number of fronts. Regarding business interruption losses, insurers and the law firms representing them have predictably filled the pages of legal periodicals and the like with articles concluding that all such losses, under any set of facts and policy language, will invariably fall outside of coverage either because (1) policyholders cannot prove "direct physical loss or damage" to property, and/or (2) various policy exclusions apply.[1] Similarly, policyholder advocates, like myself, have quickly collected judicial decisions and scientific arguments for the propositions that (1) a condition preventing the use of property is "direct physical loss" even if there is no structural damage to the property,[2] and (2) the "pollution" and "fungus" exclusions on which insurers rely must be construed narrowly and do not apply to viruses unless they explicitly so state.[3] (The purpose of this article is not to re-hash those arguments, though hopefully the reader will find the extensive citations and commentary in the footnotes to be a helpful resource.)

The debate has advanced well beyond the merely academic phase, as policyholders worldwide – ranging from restaurants, hotels, theaters, retailers, medical and other service providers and virtually every other industry – already have begun suing their property / business interruption insurers to recover their losses under the following types of coverage frequently found in those policies:

- "Business Income"[4] and "Extra Expense";[5]
- "Contingent Business Income";[6]
- "Civil Authority" or "Prohibition of Access";[7] or
- "Cleanup" or "Removal" Costs.[8]

The much-publicized case, *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.,* filed March 16 in Louisiana state court, began the wave of litigation, which has picked up rapidly in recent weeks, as each day brings reports of several more cases being filed in jurisdictions across the country.[9] These include several putative class actions and a petition to consolidate pending and future business interruption cases in a multi-district litigation ("MDL") proceeding. Much of this litigation appears to have been prompted by the receipt of quick disclaimer letters from insurers who seemingly performed little or only cursory analysis of the relevant facts or the specific policy language at issue before issuing a blanket disclaimer. Insofar as that type of response may have been common among insurers in the early-going of this crisis, this author suspects insurers may now, or soon will be, taking a much more cautious and thoughtful approach to their coverage decisions.

Rather than disclaiming coverage without reference to the relevant facts or policy wording (thus creating the potential for bad faith liability), insurers may instead start to respond with reservations of rights letters that (1) ask why notice was not given earlier, and/or (2) demand that proof of loss be furnished immediately. Regarding timeliness of notice, most policies require notice to be given as soon as practicable after the loss or damage. Assuming most policyholders began to suffer business interruption losses as early as March 2020 when stay-at-home orders became commonplace, it is plausible that insurers might question the timeliness of notices that are not received until months after the losses began. Regarding "proof of loss," many policies require, as a condition precedent to coverage, that the insured submit a sworn proof of loss within a specified time of the loss (typically 90 days). Other policies require the proof of loss to be submitted within a specified time after the insurer requests one. Either way, an insurer who responds promptly to a notice of loss by asking the insured to submit its proof will put the onus on the policyholder to quickly collect proof sufficient to demonstrate: (1) a "business income", "extra expense" or other loss covered by the policy, (2) caused by, (3) direct physical loss or damage to property, or (4) prohibition of access by a civil authority (which itself must be caused by direct physical loss or damage to property away from the insured's premises). Many policyholders may be unprepared or ill-equipped to do so. But a policyholder's failure to comply with this proof of loss requirement, or other policy conditions, may result in a forfeiture of coverage irrespective of whether a proper application of the facts to the law and policy wording otherwise would have resulted in coverage.

As courts begin to grapple with the substantive coverage questions presented by coronavirus losses, we expect that policyholder outcomes will vary dramatically based on, among other things, the specific policy language at issue and the factual evidence in support of the claimed loss or damage.[10] It is entirely possible, however, that future state or federal legislation will effectively mandate coverage for Covid-19 losses *irrespective* of the policy wording or evidence of physical loss or damage, with the government acting as a backstop for the affected insurers.[11] In the event of such legislation, conditions compliance will take a front and center role in the adjustment of claims, as it may be virtually the only coverage defense left for an insurer to rely on.

The primary purpose of this article is to alert policyholders to the steps they can take right now to best preserve their chances of recovering Covid-19 related losses under property / business interruption polices as well as other policies that may be implicated, such as directors & officers liability, errors & omissions liability (professional liability), cyber and CGL policies, among others. While the likelihood of a successful insurance recovery may be impacted by numerous factors over which policyholders have little or no control at this point, dutiful adherence to your policy's notice, proof of loss, mitigation, cooperation and other conditions is one thing

you can control, and it should be top-of-mind when assessing your potential insurance coverage for Covid-19 losses.

I. Notice of Loss / Notice of Circumstances

Property policies typically require the insured to give notice as soon as practicable after loss or damage occurs for which the insured seeks coverage. In the case of "business income" loss such as lost profits or continuing normal operating expenses while operations are suspended, the insured's loss commences as soon as such expenses are incurred or the lost profits begin to materialize. Policyholders should be cognizant and keep track of all such expenses and other losses that are incurred, not only for purposes of eventually proving the loss (discussed below), but also for purposes of making sure that notice of the loss is given in a reasonably timely fashion. A policyholder who waits to give notice of its Covid-19 related losses until several weeks or months from now risks exposing itself to a late notice defense.

Moreover, if in fact legislation is passed that essentially forces insurers to cover Covid-19 losses irrespective of the policy's coverage terms, late notice and other conditions compliance defenses may become the primary weapon for insurers to resist payment. Even if late notice does not operate as a bar to payment, one might reasonably expect that insurers paying Covid-19 claims by mandate of state or federal legislation might start by paying the claims for which they already have an established claim file. Accordingly, there may be significant benefits to be had simply by getting one's foot in the door. In light of the uncertainty regarding how future judicial decisions or legislation may change the coverage landscape, *it makes sense for most policyholders to promptly give notice of their Covid-19 business interruption losses, irrespective of whether the policy language appears to exclude coverage for such losses*.

Under occurrence-based liability policies (CGL, for example), notice of an occurrence that may result in a claim also must be given as soon as practicable. Accordingly, if a policyholder is aware of confirmed Covid-19 cases within its office space, for example, it may reasonably anticipate that the presence of the virus could give rise to bodily injury claims and there is arguably cause for notice to be given. The possible benefit of doing so would be to lock in coverage for any such future claims under the current year's policy before explicit Covid-19 exclusions are added to the next year's renewal policies.

For the same reason, policyholders under claims-made policies (*e.g.*, D&O, E&O, EPLI) should consider giving a "notice of circumstances" that could give rise to a Covid-19 related claim – for example, claims related to the company's handling of shelter-in-place advisories and orders, reductions in force, securities disclosures, etc. – before the end of their current policy period. While it may be a challenge to articulate the specific wrongful act the policyholder expects to give rise to a claim, or the identity of the claimants and the injuries suffered, it is worth trying to give a sufficiently detailed notice if there is any reasonable cause for believing claims may be asserted. As just noted, it is highly likely that your next policy will include an exclusion for Covid-19 related claims, so any steps a policyholder can take to lock in coverage under its current policy should be seriously considered.

II. Mitigation

Both liability and property insurance policies, as well as the common law, impose upon policyholders the obligation to mitigate losses, and require the insurer to pay for the costs of mitigation efforts, though many policies limit mitigation coverage to the amount by which the expenses reduced the loss that otherwise would have been incurred. Accordingly, there may be coverage for costs incurred to make alternative arrangements so employees can get back to work, or extra expenses incurred to allow production or delivery of products and services to resume or continue.

Although this coverage often applies only to expenses incurred after actual loss has begun (where such expenses prevent additional loss), policy language varies on this point, so policyholders should not assume that purely prophylactic measures taken to avoid a possible loss (rather than reduce an existing one) are never covered. In fact, Foley Hoag has very recently obtained a seven-figure recovery for a policyholder who was forced to incur substantial sums in order to avoid a future loss that had not yet materialized (though it was certain to occur if the mitigating expense had not been incurred).

III. Proof of Loss

As previously mentioned, property policies require the insured to submit a sworn "proof of loss" in support of its claim within some specified time (usually 60-90 days) after (1) the date of the loss, or (2) the insurer's request for a proof of loss. Do not let this policy requirement become a trap for the unwary! In our experience, insurers are often content to let the claim adjustment process play out over a lengthy period of time during which the policyholder furnishes to the insurer any information that is reasonably requested for purposes of evaluating the claimed loss. Sometimes an insurer *never* requests a proof of loss if all material issues can be resolved during the less formal claim adjustment process. In other cases, insurers will either agree to extend the deadline for submitting a proof of loss or simply wait until the claim adjustment process has completed before requesting one. But, just because insurers are often willing to work with the policyholder on these deadlines when it is sensible to do so, you should not assume that will be the case without express written agreement from the insurer.

It will be the rare case where Covid-19 related losses are easily and finally provable within 90 days of the first loss. More common will be policyholders who suffered their first Covid-19 related losses in March 2020, but continue to incur new losses – and the amount of those losses continue to grow – for many more months. Under such circumstances, it makes little sense for a policyholder to submit a sworn proof of loss in June 2020 before the loss is complete and can be quantified. Accordingly, we recommend that policyholders confirm with their insurers as soon as notice is given that policy provisions purporting to require proof of loss within a specified time will not be enforced unless and until the insurer makes a written request for proof of loss. This approach will protect policyholders against the risk of unwittingly breaching a condition to coverage and thus giving the insurer another weapon with which to resist coverage. It also serves as a pre-emptive measure against the risk of an insurer using the policy requirement to effectively force the policyholder to hurriedly put together a proof of loss that is incomplete or could be strengthened with additional time and resources.

Once you have given your notice and confirmed that no proof of loss needs to be submitted in the immediate future, that does not mean your work is over and nothing else need be done until the pandemic has passed. To the contrary, policyholders should be meticulously tracking all coronavirus-related expenses and other losses and collecting the documentation that will be necessary to support those losses. The first step is to establish a team. The team will certainly include policyholder employees who have access to the company's accounting records and can track payroll and other normal expenses, as well as revenues, to identify any increases / decreases that may be attributable to Covid-19. (In the case of contingent business interruption losses, you will need to collect relevant information from the vendor, supplier or other third party where the property damage occurred.) The team also may include forensic accounting experts with experience in preparing business income insurance losses and/or coverage counsel who can assist you in identifying policy coverages that may be applicable and the kinds of expenses and other losses that may be compensable. Preparing a proof of loss and the supporting documentation can be a significant undertaking; having your proof ready at hand can pay dividends when the time comes to submit your sworn statement.

Finally, policyholders should keep in mind that the insurer is not the only one who can use proof of loss requirements in the policy as a weapon. Policies also typically require that the insurer take a coverage position

and/or pay the claimed loss within a specified time of the insured's submission of a proof of loss – usually, 30 days. If an insurer is dragging its feet in making payment despite the policyholder's best efforts to furnish all requested information during the claim adjustment process, the policyholder can submit its proof of loss as a means of forcing insurer action.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Page or contact your Foley Hoag attorney.

[1] *See*, *e.g.*, O'Malley, "Commercial Property Insurance Coverage and Cornoavirus," https://www.zelle.com/Commercial_Property_Insurance_Coverage_and_Coronavirus; Koch, Maniloff and Meta, "ISO excluded Coronoavirus Coverage 15 Years Ago", https://www.whiteandwilliams.com/resources-alerts-ISO-Excluded-Coronavirus-Coverage-15-Years-Ago.html.

[2] *See*, *e.g.*, *Gregory Packing, Inc. v. Travelers Property Cas. Co. of America*, 2014 U.S. Dist. LEXIS 165232, *13-17 (D.N.J. Nov. 25, 2014) (covered property damage occurred when ammonia was accidentally released into a facility, rendering the building unsafe until it could be aired out and cleaned;"property can sustain physical damage without experiencing structural alteration."); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x. 823, 824-26 (3rd Cir. 2005) (e coli contamination of a home's water supply constituted a direct physical loss to property because, despite the lack of physical damage, it rendered the home uninhabitable); *Cooper v. Travelers Indemnity Company of Illinois*, 2002 U.S. Dist. LEXIS 29085 (N.D. Cal. Nov. 4, 2002) (same); *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 Mass. Super. LEXIS 407, *9-13 (Mass. Super. Aug. 12, 1998) (finding that because "direct physical loss" was ambiguous, carbon monoxide exposure fell under the definition); *Port Auth. of NY and NJ v. Affiliated FM Ins. Co.*, 311 F.3d 225 (3d Cir. 2002) ("Where the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, there has been a distinct loss to its owner" satisfying the "direct physical loss" requirement); *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 U.S. Dist. LEXIS 74450, *13-26 (D. Ore. June 7, 2016) (loss arising out of canceled performances at a theater due to smoke from wildfires which infiltrated the premises caused by "direct physical loss or damage" to property); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Colo. 1968) (the accumulation of gasoline under a church building causing flammable vapors to infiltrate the building constituted "direct physical loss"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) (finding direct physical loss where a "home was rendered uninhabitable by the toxic gases" released by defective drywall, irrespective of whether property suffered lasting physical damage); *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) ("physical loss may include not only tangible changes to the insured property, but also changes that . . . exist in the absence of structural damage," such as pervasive odors). *See also Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor that rendered the property unusable constituted physical damage for purposes of CGL policy).

[3] *See*, *e.g.*, *Keggi v. Northbrook Property & Casualty Insurance Co.*, 13 P.3d 785, 789-90 (Ariz. Ct. App. 2000) (bacteria are living, organic irritants that do not fit within definition of pollutant); *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343-44 (M.D. Fla. 2010), aff'd 513 Fed. Appx. 927 *931-32 (11th Cir. Mar. 22, 2013) (existence of separate bacteria exclusion supported conclusion that bacteria was not a contaminant for purposes of pollution exclusion); *Johnson v. Clarendon Nat'l Ins. Co.,* 2009 Cal. App. Unpub.

LEXIS 972, *34-36 (Cal. App. Ct. Feb. 4, 2009) (typical pollutant exclusion does not apply to naturally-occurring biological contaminants such as bacteria or viruses).

The author notes that, while fungus exclusions often include "other microorganisms" within their scope, viruses are not actually themselves microorganisms because they are not alive as their own entity; they behave as a living thing only in the body of their host organism. *See*, *e.g.*, https://www.britannica.com/science/virus.

Moreover, if the typical fungus exclusion applying to "microorganisms" were sufficient to exclude coverage for loss caused by viruses and other communicable diseases, then why would the Insurance Services Office ("ISO") have thought it necessary in 2006 to introduce a new exclusion for "Loss Due to Virus or Bacteria" that is capable of causing illness or disease? *See* ISO Form CP 01 40 07 06 for Commercial Property Insurance.

[4] "Business Income" is commonly defined as: (1) Net Income (Net Profit or Loss before Income taxes) that would have been earned or incurred . . .; and (2) Continuing normal operating expenses, including payroll . . .." A typical insuring agreement provides coverage for "actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss." Business Income sometimes also includes "Rental Income" or "Rental Value", or the policy may have an entirely separate coverage for Rental Income.

[5] "Extra Expense" is commonly defined as "reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." A typical Extra Expense insuring agreement (usually found in the same policy form as Business Income) provides: "We will pay Extra Expense . . . to (1) Avoid or minimize the 'suspension' of business and to continue 'operations' at the described premises or at replacement premises . . .; or (2) Minimize the 'suspension' of business if you cannot continue operations."

[6] This coverage typically extends to loss of Business Income sustained and Extra Expense resulting from "the necessary 'suspension' of the insured's business activities at the described premises if the 'suspension' results from direct physical loss or damage caused by a Covered Cause of Loss to property at Dependent Locations or Attraction Properties." Dependent Locations, in this example, would be the premises of the insured's suppliers, vendors and others on whom the insured relies to conduct its normal operations. Attraction Properties would be the premises of other companies whose operations attract customers to the insured's business – for example, an anchor tenant in a shopping mall. Similar coverages may also be referred to as "Dependent Business Premises", "Leader Property" or "Supply Chain" coverage.

[7] The "Civil Authority" coverage typically extends to loss of Business Income sustained and Extra Expense incurred "caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than the described premises, caused by or resulting from a Covered Cause of Loss." Some policies also include a separate "Prohibition of Access" coverage –usually with lower sub-limits – that does not require direct physical loss or damage to property, as long as the prohibition of access is a result of a covered peril that has occurred or is certain to occur imminently at or near the covered premises.

[8] This coverage typically applies to the cost of cleaning up or removing "pollutants" or "fungus" from the covered property, even if the policy generally excludes loss or damage caused by the presence or release of pollutants or fungus.

[9] Relatedly, companies of all types are finding themselves named as defendants in suits seeking damages arising out of the companies' handling of the Covid-19 situation and/or decisions made by management. These suits will implicate policies covering directors & officers liability, errors & omissions liability (professional

liability), cyber and commercial general liability, among others. Though we are presently unaware of any lawsuits that have been filed seeking coverage under those types of policies, it is likely only a matter of time.

[10] For example, policyholders who can demonstrate confirmed Covid-19 cases within their premises or among their workforce may have better chances of recovery than those who suspended operations without confirmed cases or exposures. And policyholders relying on civil authority coverage may fare better if the government order in question specifically relies on the existence and threat of property damage as a justification for the order. These are just a few examples of how the factual circumstances might impact the potential for coverage.

[11] *See*, *e.g.*, Massachusetts bill S.D. 2888, filed March 24, 2020, which provides, in pertinent part: "Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer in the commonwealth may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property."

See also Discussion Draft of "Pandemic Risk Insurance Act of 2020," circulated earlier this month by Rep. Carolyn Maloney, D-N.Y: https://www.law360.com/articles/1264228/attachments/0.