



COVID-19 and Business Interruption

May 12, 2020

Eric E. Reed, Esq., Partner

Jessica Hollobaugh Giresi, CPA/ABV, CFE, Partner

**Luanne Funari, Claims Manager, Area Vice President
Mid-Atlantic Region**





Today's Webinar Will Cover

- Insurance Coverage
 - Standard coverage types
 - Typical property damage loss vs. COVID-19 claims
 - Case Law
 - Legislative Update
- Business Interruption Losses
 - Calculation of typical property damage loss vs. COVID-19 claims
 - Documentation
- Claim Reporting

THIS PRESENTATION IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT INTENDED TO PROVIDE LEGAL, INSURANCE OR ACCOUNTING ADVICE. PLEASE SEEK INDEPENDENT PROFESSIONAL ADVICE TO DETERMINE HOW THESE ISSUES IMPACT YOUR UNIQUE BUSINESS.

Commercial Property Insurance and BII

Typical scenarios:

- Loss of functionality (fire/water/storm, etc.)
- Inaccessible (ingress / egress)
- Service interruption (power)
- “All risks” v. “specified perils”

Loss of “business income” due to covered risk

- Lost “net income,” extra expenses, property preservation
- “Extended business interruption” for gap from resumption to normalcy

“Direct loss or physical damage” requirement for claim

- Predicate for all parts (premises, contingent, civil authority)
- Undefined in policy



Fox Rothschild LLP
ATTORNEYS AT LAW

Commercial Property Insurance and BII

Civil authority:

1. Covered cause of loss (“physical loss or damage”) damages other property
2. Resulting action of civil authority prohibits access to insured property
 - Response to dangerous physical conditions resulting from covered cause of loss
 - Range limit (“immediately surrounding,” within a mile)
3. Time limits (72 hours after - 4 weeks after)

United Airlines v. Ins. Co. of Pa., 439 F.3d 128 (2d Cir. 2006)

- 9-11 closure of Reagan Airport caused by the fear of future attacks, not “repairing, mitigating, or responding” to damage caused by previous attacks



Commercial Property Insurance and BII

Ingress/egress:

- Access to insured property precluded by situation on other property
- *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000)
 - Boat manufacturing facility unharmed in Hurricane Floyd, but storm flooded only access roads, causing reduced production/lost revenues
 - Coverage found



Fox Rothschild LLP
ATTORNEYS AT LAW

Commercial Property Insurance and BII

Contingent business interruption:

- Supplier or direct customer's disruption precludes supply/acceptance of goods or services
- Tracks insured's triggering conditions (direct physical loss or damage at supplier/customer's property)
- Might identify particular suppliers or customers



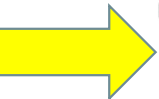
Fox Rothschild LLP
ATTORNEYS AT LAW

Commercial Property Insurance and BII

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

- 
- A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supercedes any exclusion relating to "pollutants".
- D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

- Insurance Services Office (ISO) issues post-SARS
- ISO not only form
- Not all policies include
- Contra:
Communicable disease endorsement



Fox Rothschild ^{LLP}
ATTORNEYS AT LAW

“Physical Loss or Damage” Cases

“Direct physical loss or damage” under property policy – not necessarily structural damage:

- Airborne asbestos: *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002)
- Meth lab fumes: *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. App. 1993)
- Lead dust: *Yale University v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002)
- Carbon monoxide exposure: *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (ambiguous)
- Ammonia release: *Gregory Packaging, Inc. v. Travelers*, 2014 WL 6675934 (D. N.J. Nov. 25, 2014)
- Cat urine: *Mellin v. Northern Security Ins. Co.*, 167 N.E. 544 (N.H. 2015)

Consider: (1) demonstrably present at property, and (2) renders property uninhabitable or unusable



COVID-19 Coverage Cases

- Individuals, groups, class actions, EDPA MDL (*River Twice/Chops*)
- Essentially 2 groups of “non-essential” businesses:
 - Virus exclusion:
 - Claim arise from virus or from shutdown order? (*Geragos* cases)
 - Issues are “reasonable expectations of insured” and narrow reading of exclusions
 - No virus exclusion:
 - Elective medical/dentist practices, restaurant cases: (*Oceana Grill, French Laundry*)
 - Issue is whether COVID-19 civil authority shutdowns are attributable to “physical loss or damage to property”
 - Loss of use
 - Longevity of virus on surfaces in proximity to insured property



NJ COVID-19 Legislation

- Every property policy with a BII part construed to cover BII loss for COVID-19
- Override virus exclusion, moot “direct physical harm or loss”
- Apply if: (1) policy in effect on March 9, 2020, and (2) insureds had less than 100 FTEs in NJ
- Constitutional objection:
 - Article I, Section X, Clause 1: “No State shall ... pass any ... Law impairing the Obligation of Contracts....”
 - But state may act if (1) not “substantial impairment” of contract or (2) law is reasonable and appropriate way to advance legitimate public interest. *Sveen v. Melin*, 138 S.Ct. 1815 (2018)
- Congressional bill: “Pandemic Risk Insurance Act of 2020”
 - Federal reinsurance fund, triggered when industry losses exceed \$250 million



Lessons and Practical Tips

1. Know your policy language
 - Communicable disease coverage?
 - Civil authority part requires “physical loss or damage”?
 - Do you have a virus exclusion?
2. Support any claim with expert analysis if possible
 - Presence of virus or confirmed infected employees / customers on property?
 - Impact: inability to use / access / operate at property as applicable
3. Remain mindful of claim deadlines
4. Accountant support for lost revenue claim





COVID-19 Considerations: Loss Quantification

- Quantification of business interruption losses associated with COVID-19 will be difficult
- Business Interruption Losses: Potential Insurer Arguments
 - Revenues delayed, mitigated upon re-opening
 - Widespread closures v. immediate area
 - Pent-up demand v. loss of sale
 - Decreases related to economy, not the “property loss”
- Issues for consideration will be on a business by business basis
- Maintain documentation now



Loss Quantification: Documentation is Key

- Final calculations will not be done until restrictions are lifted
 - Could be 3-6 months after re-opening to enable an analysis of mitigation
- Documentation is key to help support future analysis
 - Detailed accounting records
 - Financial statements, tax returns, and general ledgers
 - Monthly dealer statements
 - Forecasts and budgets prepared prior to, and after, the onset of COVID-19
 - Specific COVID-19 documents
 - Timeline and support for all governmental orders, supply chain impacts due to plant closures, or other issues impacting business
 - Documentation of additional costs incurred, such as additional costs incurred relative to online/delivered sales, additional tech expenses, additional security (Separate in records)
 - Details of any loans and related interest costs
 - Identification of any changes in profit margins (i.e. are online sales during closure less profitable)

Claims Reporting

- Types of Claim Notices
 - Notice Only (Potential Claim)
 - Formal Claim Notice
- Information needed to place carrier on notice:
 - Date of loss
 - Date loss of income began
 - Date of office closing
 - Date of Federal State of Emergency
 - Date of “Stay at Home Order”
 - Primary Insured contact for investigation purposes
 - Description of Loss: Business Income loss as a result of COVID-19
- Expectations once carrier is placed on notice or a claim is reported
 - Reservation of Rights / Information request
 - Coverage Determination / Denial



withum+



Insurance | Risk Management | Consulting

Q&A

Eric E. Reed, Esq., Partner
Fox Rothschild, LLP
ereed@foxrothschild.com

Jessica Hollobaugh Giresi, CPA/ABV, CFE, Partner
WithumSmith+Brown, PC
jgiresi@withum.com

Luanne Funari, Claims Manager, Area Vice President
Mid-Atlantic Region, Gallagher
Luanne_Funari@ajg.com



Fox Rothschild LLP
ATTORNEYS AT LAW