BUSINESS INTERRUPTION CLAIMS AND THE VIRUS

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Since March, when businesses of all types came to a screeching halt, there have been approximately 1,200 lawsuits filed in the United States against insurance companies seeking recoveries for their business losses. Although many of the affected businesses have re-opened their doors to some degree, the business losses have been unprecedented. So it is not surprising that many of these businesses are looking to their insurance companies for relief and even less surprising that insurance companies have largely rejected these claims, leading to the courthouse.

Some of these lawsuits have involved just one insured business against their insurance company; some have been filed jointly by multiple insured businesses and others have been filed as class actions. Some of these lawsuits have been filed in state court and others in federal court. But regardless of who filed or where these lawsuits have been filed, the results have been largely the same. For the most part, the courts have dismissed these lawsuits. The courts have largely done so based on the insureds inability to hurdle the "direct and physical loss" requirement in their insurance policies. To be sure, some policies specifically provide coverage arising for losses arising out of a virus and others provide coverage that does not require an occurrence in which there is a direct and physical loss to the insured premises. But most insurance policies do require a direct and physical loss to the insured premises.

Insureds and their lawyers have cleverly sought to sidestep the direct and physical loss requirement by arguing coverage under the civil authority provision found in most policies. But this provision does not necessarily provide a safe haven for the insured. Some civil authority provisions provide broad coverage where access to the insured's property is impeded as a result of some type of order from civil authority. In such policies, the path to coverage may be more clear. But the civil authority provision in most policies does require that the civil authority order was necessitated as a result of physical damage to the insured's premises or in the vicinity of the insured's premises. And in those policies, the insured again has somehow to establish direct and physical loss to its premises.

How does the insured establish physical loss or damage to the insured premises? This will be the trillion-dollar question. How does an insured show the virus caused physical loss or damage to its property? Does the presence in and of itself of the virus actually cause damage to insured premises? Is it enough to simply show that the virus was airborne? Or does the insured have to show something more—that it was on the insured premises' surfaces? Assuming all of that, what scientific evidence would an insured rely upon to establish these facts at a given point in time? And assuming the insured meets any or all of these thresholds, what is the period of restoration?

Perhaps these questions will only be esoteric questions. Perhaps with the new presidential administration, Washington will look to create some type of fund contributed to the insurance industry in some manner to provide relief in some measure to the business community. Certainly, some courts have taken and will take a broader view of coverage—for example, that physical loss does not necessarily mean a physical change in some respect to the insured premises. In the meantime, one thing is crystal clear--the analysis is complex and nuanced and will require careful analysis by an experienced professional. This is especially so because the provisions and language in insurance policies can vary in material ways, which affect the coverage analysis.

Consequently, if you have suffered a business loss, you should consult with counsel who specializes in insurance coverage and policyholders' representation.

Should you have any questions or concerns about your policy, your claim, or your insurance carrier’s obligations in the midst of the response to COVID-19, please do not hesitate to contact Michael J. Higer of Berger Singerman's Insurance Team.

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