With COVID-19 It's Time to Read Your Insurance Policy

P. Andrew Fleming

Novack and Macey LLP

June 10, 2020

As the United States reopens, it is imperative that businesses promptly review their insurance policies to see if they cover income lost as a result of COVID-19.

In Illinois, the companies that were most affected were restaurants, bars, retail/service businesses and manufacturing facilities. All of them have been fully (or, at least partially) closed since March 2020, when Governor Pritzker announced a statewide stay-at-home order for all non-essential businesses. Needless to say, the income these businesses lost has been substantial. So do these companies have insurance coverage? Particularly if there is no evidence that their premises were ever contaminated with COVID-19? The answer lies in the wording of the insurance policy. In this article, we examine two insurance policies. One, where the insured has a strong claim for coverage; the other where it does not.

A. Policies Where Coverage May Apply

The first policy we reviewed was for a restaurant and provides coverage for "direct physical 'loss' of or damage to Covered Property . . . caused by or resulting from a peril insured against." Loss is defined as the "direct and accidental loss of or damage to covered property." At least one court has

recognized that where a policy insures against "loss" of property, the insured does not have to show actual physical damage to tangible property. Being deprived of the use of that property is sufficient for coverage. *US Airways, Inc. v. Commonwealth Ins. Co.*, 65 Va. Cir. 238 (2004).

Insurers repeatedly argue, however, that there is no coverage for business losses alone. They say that an insured's property must be physically damaged before coverage applies. And, in the current circumstances, insurers will almost certainly argue that COVID-19 did not cause physical harm to tangible property. That argument, however, ignores the specific language of the policy. The restaurant policy extends coverage to "physical loss of" *or* "damage to" property. By using the disjunctive word "or", the terms "physical loss of" and "damage to" become alternative provisions in the policy. Accordingly, a persuasive argument exists that any "physical loss of" property may be covered even absent "physical damage to" that property. Otherwise, the words "loss", "of" and "or" would be superfluous. And courts may not treat those words as superfluous and read them out of the policy. *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161 (11th Cir. 2005) (all words in a contract must be read and given meaning and effect).

When the words "physical loss of" property are read separately from the words "damage to property," it becomes clear that coverage may apply whenever a business is deprived of the use of its property. After all, that is how the words "physical" and "loss" are defined. Physical means relating to a material thing as opposed to something imaginary. Loss means "being deprived" of one's property. See *Spokane Cty. Fire Prot. Dist. No. 9 v. Spokane Cty. Boundary Review Bd.*, 97 Wash. 2d 922 (1982) (defining "physical"); The Random House Dictionary of the English Language, (2d ed. 1987) (defining "loss"). Here, COVID-19 caused businesses to be physically deprived of the use of their property. For example, the manufacturing plant was required to shut down and not allowed to manufacture goods. So, there may well be coverage. Moreover, if there is any confusion on this point (there shouldn't be) any

ambiguity in the policy language must be strictly construed in favor of the insured and against the insurer and in favor of coverage. St. *Paul Fire & Marine Ins. Co. v. Schilli Transp. Servs. Inc.*, 672 F.3d 451 (7th Cir. 2012)

A second basis for coverage may exist under the restaurant policy for damage caused to property other than the insured's property. In this situation, the policy may cover business income that is lost due to the action of civil authority prohibiting access to the insured's premises where: (a) access to the area immediately surrounding the damaged property is prohibited by the civil authority; and (b) the civil authority action was taken in response to dangerous physical conditions resulting from the damage to the nearby property.

Under this "civil authority" coverage, an insured must show that an adjacent property owner's property was damaged by a COVID-19 outbreak and that in response, the civil authority blocked the insured from accessing its own property. Being "adjacent" does not necessarily require that the damaged property be literally next door to the insured's premises. For example, the restaurant policy states that this coverage applies to damaged property within a one mile radius of the insured's premises. Accordingly, if an insured can show that a property (such as a nursing home) that is located within a mile of the insured's premises suffered a COVID-19 outbreak, that may be sufficient to trigger coverage.

Finally, the restaurant policy we looked at contained no exclusion for viruses. As demonstrated below, such exclusions do exist. Some insurers added them to their policies after the SARS outbreak in the early 2000s. The fact that the restaurant policy does not include this exclusion is important because the insurer could have included the exclusion but either chose not do so or tried to and the insured rejected it. Either way, the absence of the exclusion arguably confirms the parties' intent to provide coverage for a situation such as COVID-19.

B. Policies Where Coverage May Not Apply

In contrast to the restaurant policy, we looked at a policy for a service business. That policy contained similar insuring language to the restaurant policy but with one critical difference. It included the following exclusion:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following:
>
> **Virus or Bacteria**
>
> (1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

This alone may eliminate coverage. Indeed, we are aware of no reported decision holding this virus exclusion to be unenforceable.

Conclusion

As the country returns to normalcy, every business should review its insurance policy to see if it can recover the income it lost as a result of COVID-19. If a business decides to submit a claim, it should do so promptly. All insurance policies require that a notice of a claim be timely submitted. And while policies usually do not specify the specific time within which a claim must be made, the insured should err on the side of caution and submit a claim as soon as possible.

Of course, before doing that, you should use an experienced insurance coverage litigator to assist you in your analysis. The results you achieve may well turn on the skill and creativity of your professional advisors in submitting and presenting the claim.

P. Andrew Fleming is a partner and the chair of the Manufacturing Practice Group and co-chair of the Real Estate Practice Group at Novack and Macey LLP. He has extensive experience and success in handling insurance coverage matters against insurance companies. He can be reached at andrewf@novackandmacey.com; (312) 419-6900.