WEBINAR: Insurance Coverage for COVID-19 Losses
Five Things to Know and Do

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Speakers

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Five Things to Know and Do:

1. Gather All Insurance Policies
2. Know What Provisions They Contain
3. Prepare Your Claim(s)
4. Submit & Push Your Claim(s)
5. Monitor Legislation & Court Decisions
Don’t Trust Conventional Wisdom

- That wisdom holds:
  - Common insurance forms excluded virus claims since the Reagan era.
  - Pandemic disease cannot give rise to a covered claim.
  - Liability policies always exclude virus exposure.
- This wisdom is often wrong.

Preliminary Takeaways:

- Although many insurance policies use the same ingredients, like your mother’s casserole, each one is different.
- Terms and conditions must be thoroughly read and understood.
- Courts interpret insurance policies broadly in favor of coverage.
- In times like these, there is little to lose by making a claim.

Note: When your business is shut down, don’t worry about claims history.

1. What Policies Do I Have?
Look for the Following

<table>
<thead>
<tr>
<th>First Party</th>
<th>Third Party</th>
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</thead>
<tbody>
<tr>
<td>Commercial property</td>
<td>CGL/Umbrella</td>
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<tr>
<td>• Cancellation</td>
<td>E&amp;O Professional Liability</td>
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<td>• Pollution/Contamination</td>
<td>D&amp;O</td>
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<td>• Pandemic</td>
<td>Workers’ Compensation</td>
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<td>• Cyber</td>
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<td>Pollution</td>
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<td>Legal Liability</td>
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Commercial Property – Property Damage/Business Interruption Insurance Policies

• Rent loss
  – Often, coverage is tied to physical loss to insured property.

Property/Business Interruption Coverage

• All "risks" is interpreted broadly to cover any kind of risks
• Insuring agreement
• "Subject to the terms and conditions of this policy, we will pay for all risks of direct physical loss or damage by a covered cause of loss to covered property at a covered location (or within 1,000 feet thereof) and described in the most recent statement of locations and values on file with us or as described in the declarations to this policy.”
  – All risks of physical loss
  – All risks of damage
  – Lost income (profit)
2. What do the Policies Contain? (And How May Courts Interpret?)

Commercial Property Insurance

• Direct Physical Damage to the Covered Property Caused by a Covered Cause of Loss

Commercial Property Ins. (cont’d)

• Case law has held a variety of contaminating conditions constitute “physical loss or damage to property.”
  – Motorists Mutual Ins. Co. v. Hardinger, 131 F.App. 823, 826-27 (3rd Cir. 2005) (e coli contamination)
Commercial Property Ins. (cont’d)

• Courts have held that the inability to inhabit or utilize a building constitutes a “direct, physical loss” covered by property based business interruption insurance policies.
  – *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (gasoline vapors rendering church uninhabitable)

Commercial Property Ins. (cont’d)

• Cases have also held that actual property damage is not required to trigger civil authority coverage under a business interruption policy.
  – *Sloan v. Phoenix of Hartford Ins Co.*, 46 Mich. App. 46, 51, "irrespective of any physical damage ..., coverage was [triggered when] access to the insured premises was prohibited by order of civil authority."
  – *Houston Casualty Co. v. Lexington Insurance Co.*, No. Civ. A.H-05-1804, 2006 Westlaw 7348102 at *6 (So Dist. Texas June 15, 2006) which found coverage under “civil authority order” coverage when an insured closed an amusement park due to a mandatory evacuation order of the governor due to an approaching hurricane that never made landfall.

Commercial Property Ins. (cont’d)

• But compare *United Airlines, Inc. v. Insurance Company of State of Pennsylvania*, 439 F.3d 128, holding no coverage for the insured existed when Reagan National Airport closed following 9/11 attacks because loss was a result of the threat of future terrorism not due to the airline’s property damage.
Virus/Bacteria Exclusions Don’t End the Analysis

• Open question as to whether this exclusion will apply to “Civil Authority Coverage”
• “Plain, Express and Conspicuous” Rule. “Embedded” Exclusions (inside a an insuring provision, for example) disfavored.

3. Preparing Your Claim
Preparing Your Claims

• Claimed Losses must arise within the policy language.
• Contrast three buckets of possible losses:
  – The pandemic specifically.
  – The pandemic generally.
  – The result of a civil authority order.
• These distinctions are important.

Bucket 1: Losses from Pandemic Specifically:

• Clean up or decontamination costs.
• Costs of PPE/Other Protections?
• Possibly covered.

Bucket 2: Losses from Pandemic Generally:

• Decrease in business because economy has cratered.
  – Fewer customers buying goods or services.
• Likely not covered.
Bucket 3: Losses from Civil Authority Order:

- Decrease in business because of restrictions placed on your and/or others’ businesses by federal/state/local agencies.
  - People unable to come into your premises.
  - Customers not buying your goods because their premises are closed.
- Possible coverage under Business Interruption

Bucket 3: Losses from Civil Authority Order (cont’d)

- Maintain detailed documentation to fall into buckets 1 or 3 above:
  - Cancellations arising from shut down orders.
  - Prior budgets/business plans.
  - Pending orders/reservations pre-shut down.
  - Decontamination costs.
  - PPE/Protections:

Bucket 3: Losses from Civil Authority Order (cont’d)

- Be aggressive – not fraudulent – in identifying and detailing the specific losses suffered by your business.
- This will take work.
- NOTE: There is likely overlap between preparing insurance claims and preparing for governmental funding.
4. Submitting and Pushing Your Claims

- Understand the notice and claim procedures required by all policies under which you will submit a claim.
- Internal time limits are not uncommon. It is better to meet policy deadlines and then supplement with additional details.
- Submit directly to insurer and through broker.
- The broker is not the insurer. Efforts by brokers to discourage claims should be thoroughly understood prior to acting upon those directions.

Submitted and Pushing Your Claims (cont’d)

- Initial denials should be anticipated – Anecdotal evidence that industry has a campaign to try to discourage filings.
- Much of the law is in flux and will almost certainly be intensely litigated in the coming months and years.
- Filing a claim and contesting the denial may be a condition precedent to your being able to take advantage of some later favorable court decisions.
- Consider your own claim (or joining pending group claim) for Declaratory Relief/bad faith.
  - Restaurant groups have filed in Louisiana.
5. Keep an Eye on Legislative Responses and Court Decisions

Legislative Fixes?

• City Council Resolutions in San Francisco and Washington DC (pending)
  – Make clear that “business interruption” includes COVID-19 and applies retroactively.
• Similar legislation being proposed in California and other states.

Court Cases?

• Simon Wiesenthal Center sued Chubb Insurance Company.
  – Seeks declaration that coverage exists for shutdown of museums in response to COVID-19 orders.
• French Laundry Restaurant sued Hartford.
• Several class actions against Lloyd’s of London and others claiming improper denial of business interruption coverage where various business have been shuttered.
• Several Native American Nations have sued for coverage in Oklahoma.
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