

PROPERTY AND BUSINESS INTERRUPTION INSURANCE IN LIGHT OF COVID-19

As countless business interruption claims have been asserted with limited success, companies should consider directing their focus to improving and enhancing their insurance policies to ensure coverage would apply to future pandemic scenarios.

COVID-19 RELATED INSURANCE CLAIMS

In *Studio 417 Inc. et al v. Cincinnati Insurance Co.*, the U.S. District Court in the Western District of Missouri denied a motion to dismiss the claim by the defendant against a group of hair salons and restaurants suing their insurer for business interruption losses caused by the pandemic, which they say resulted in a “direct physical loss” to their premises. This was the first of only five rulings thus far to have been made in favor of plaintiffs seeking business interruption coverage arising from COVID-19 losses. All other court decisions have ruled in favor of the insurance companies in denying business interruption claims related to COVID-19.

In fact, the U.S. Court of Appeals for the Eleventh Circuit recently held in favor of the district court’s granting of summary judgment in *Mama Jo’s Inc., vs. Sparta Insurance Company*. The court affirmed the district court’s determinations that “cleaning is not considered direct physical loss,” but rather requires a showing that the

THE BOTTOM LINE

In light of COVID-19, companies should review their insurance policies to make certain they are updated to improve their chances of triggering coverage for future pandemics.

property is rendered uninhabitable or unusable and the insured failed to show that a suspension of operations was the result of physical damage, which is required to establish business income coverage. Although not a COVID-19 claim, it is relevant to the current COVID-19 litigation and lends support to insurance company responses denying such claims.

IMPROVING PROPERTY INSURANCE POLICIES

Rather than directing resources solely to trying to overcome the challenges of a winning COVID-19 insurance claim, attention and focus should also be directed towards improving property insurance policies going forward to improve an insured’s chances of collecting on business interruption claims resulting from pandemics.

A few points to consider:

- 1) A property policy ideally should be written on a “special risk” (also referred to as “all risk”) basis. This means that the policy will cover property damage resulting from any cause of loss not specifically excluded on the policy.
- 2) Any specific “virus” exclusion, ISO form CP 01 40 07 06 for example, should be avoided.
- 3) Attention to the wording of all exclusions is important to ensure the wording is not broad enough to encompass a virus, which is an argument being made regarding the wording of some pollution exclusions.
- 4) Consideration for affirmative grants of coverage should be pursued, albeit with caution.

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Some broader property policy forms provide coverage from communicable disease, which should encompass virus and pandemics; however, sublimits are often applied to this coverage and attention to the specific wording of the coverage is vital to ensure it is not too narrow in its application.

This is precisely the point of contention between Thor Equities, LLC and its property insurer, Factory Mutual Insurance Co., in a suit filed in April in the U.S. District Court for the Southern District of New York in *Thor Equities, LLC v. Factory Mutual Insurance Co.*

The defendant insurer has suggested that only the sublimited limit of coverage applies to COVID-19 claims and the scope of coverage does not trigger other potentially relevant coverages, including time element, i.e. business interruption and time element coverage extensions.

It will be instructive to observe how this case proceeds. In the interim, careful consideration to the particular wording of the communicable disease coverage extension should be employed when negotiating this coverage enhancement.

FOR MORE INFORMATION

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