Issues Involving Business Interruption Claims and COVID-19
Introduction

This is a challenging time, but the attorneys at Roedel Parsons are ready to assist you and your business in navigating the COVID-19 crisis. Whether you’re faced with an employment-related issue, a construction law question, or something in between, we’re ready to help.

In an effort to assist your small- or medium-sized business, Roedel Parsons will be sending out special alerts, blog posts, and newsletters with particularly relevant information in short, digestible formats.

Please know that the attorneys and staff of Roedel Parsons are here for you. Since 1988, our mission has remained the same: to meet the needs of those who experience the challenges, struggles, and successes of life. That mission remains unchanged today.

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Business Interruption Insurance Claims

Many businesses are suffering business losses in the current coronavirus environment. Most businesses have business property insurance policies which contain coverage for business income loss. However, the question of whether business income losses related to the COVID-19 pandemic will be covered has not been answered by any court. There are several coverage issues to consider, which we discuss in this post.

To recover loss of business income there must be (1) a “direct physical loss of or damage to” covered property, and (2) a quantifiable business interruption loss. The most obvious examples of covered property include buildings, business personal property, and equipment. The key issue in all business interruption claims in this coronavirus environment will hinge on whether the presence of the coronavirus constitutes “direct physical loss or damage to” property and how the courts interpret as well as apply that policy language to COVID-19 claims since typically “direct physical loss of or damage” to covered property is not defined by the policy.

Although there are no cases interpreting whether the presence of coronavirus will satisfy the “direct physical loss of or damage to” requirement, because a virus is a microscopic “physical” organism, albeit invisible to the naked eye, its presence in a structure (such as on surfaces of business personal property and equipment) could reasonably be argued to satisfy the “direct physical loss of or damage to” covered property requirement even though the structure may not be altered since the structure (e.g., an office building, business property, etc.), would be rendered uninhabitable for some period of time because of the presence of the virus. On the other hand, it can be argued that since the building remains intact and the structure is not physically altered by the presence of the virus, that a business loss would not be covered since the monetary loss due to the inhabitability of the building is not a physical damage to property.

Louisiana has seen its first suit filed in the wake of business losses allegedly sustained as result of the COVID-19 virus. Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al., CDC, No. 20-02558, was filed in Civil District Court, Parish of Orleans, on March 16, 2020. Plaintiff, Oceana Grill, a restaurant in the New Orleans French Quarter, filed a Declaratory Judgment Action arguing, in sum, that since COVID-19 infects a surface and remains on that surface for up to 28 days, requiring remediation to remove, that a direct physical loss or damage to the property may occur triggering the business interruption provisions in the policy.¹ Further, Oceana sought declaratory relief that the COVID-19 restrictions implemented by Louisiana Governor John Bel Edwards and New

¹ Notably, the suit filed is a Declaratory Judgment Action requesting the Court declare that if the premises would become contaminated by COVID-19 that such contamination be considered a direct physical loss or damage under the policy. There was no evidence in the Declaratory Judgment that the premises were contaminated.
Orleans Mayor Latoya Cantrell triggered the civil authority provisions of its policy and that the policy would cover any future civil authority shutdowns of New Orleans’ restaurants because of physical loss from COVID-19 contamination. In support of its argument, Oceana cited *Widder v. Louisiana Citizens Property Insurance Corporation*, 2011-0196 (La. App. 4 Cir. 8/10/11); 82 So. 3d 291, wherein the La. 4th Circuit Court of Appeal held that a home contaminated with inorganic lead, making it uninhabitable until it was gutted and remediated, constituted a physical damage or loss triggering coverage under the applicable policy.

Similarly, commentary by policyholder attorneys in other areas of the country cite to the case of *Gregory Packaging, Inc. v. Travelers Property and Casualty of America*, No. 12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) as an example that lends support in favor of coverage. This case involved a successful recovery because of a release of an unsafe amount of ammonia from a refrigeration system inside an insured facility. The court found the ammonia rendered the insured’s premises uninhabitable and constituted a “direct physical loss” even though the structure was not altered. However, other Jurisdictions have not followed this line of reasoning. See *Universal Images Products v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (finding that intangible harms such as odors or mold/bacteria in HVAC system was not physical damage to property triggering coverage); *Great Northern Ins. Co. v. Benjamin Franklin Federal Sav. & Loan Ass’n.*, No. 90–35654, 1992 WL 16749, *1 (9th Cir. Jan. 31, 1992) (unpublished) (opining that asbestos contamination represented an economic loss and not a physical loss, inasmuch as the building remained physically unchanged).

Of course, any coverage analysis must begin with review of all policy provisions. Most recently issued ISO policy forms contain a virus exclusion. Such an exclusion would eliminate any coverage caused by or resulting from a virus, bacterium or other microorganism.

With Governor John Bel Edward’s Stay at Home Proclamation issued on March 22, 2020, Mayor Latoya Cantrell’s similar Proclamation issued on March 20, 2020, and an earlier Louisiana Department of Health Notice to all Dental Providers issued on March 17, 2020, businesses may be shut down because of a civil authority order. Coverage may be available for business interruption coverage triggered by a “civil authority” clause in the policy.

“Civil Authority” is a typical coverage extension to property coverage and specifically to business income and extra expense coverage. A typical civil authority clause reads as follows:
Civil Authority

1. When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

2. The coverage for Business Income will begin 24 hours after the time of that action and will apply for a period for four consecutive weeks after coverage begins.

3. The coverage for Extra Expense will begin immediately after the time of that action and will end when your Business Income coverages ends for the Coverage Extension.

Courts around the country have held that access to an insured’s premises is “prohibited” where the order or action of civil authority actually requires the insured’s business premises to close, thereby invoking coverage for business losses. The civil authority provision has been interpreted in Louisiana cases dealing with evacuation orders related to imminent hurricanes. See e.g., Dickie Brennan & Co. v. Lexington Ins., 636 F.3d 683 (5th Cir. 2011) (holding insured, a restaurant owner, failed to establish a causal link between the evacuation order issued prior to arrival of Hurricane Gustav and damage to other nearby property; the property claimed to be nearby was not very “nearby”; it was property in the path of the hurricane in the Caribbean).

If the coronavirus is found to be physical loss to property for reasons discussed supra, it is possible the civil authority coverage clause could be triggered if the virus is present on “other property” not your own; thus possibly alleviating the requirement to prove a shut down due to the virus on your own property.

The bottom line is that there is no bright line rule regarding if COVID-19’s impacts are covered. We foresee these issues being litigated in Louisiana and elsewhere around the Country as business struggle to find resources to cover losses from this unprecedented pandemic. Please keep in mind that the specific language for each policy and the specific facts of each claim will determine coverage outcomes.

If you have questions or want more information regarding insurance coverage and COVID-19, please feel free to contact: Thomas Balhoff (tbalhoff@roedelparsons.com) or Larry Roedel (lroedel@roedelparsons.com) in our Baton Rouge Office and Chuck Pisano
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We hope this has given you some needed guidance.