McKool Smith
TRIAL LAWYERS

Legal Alert

Insurance Coverage for Losses and Claims Associated with the Coronavirus

March 2020

Contact:

Robin Cohen
Principal
McKool Smith
(212) 402-9801
rcohen@mckoolsmith.com

TABLE OF CONTENTS

I. INTRODUCTION

Americans have known abstractly about the novel coronavirus outbreak in China and spreading around the world for months now, but in the last few weeks it has made a devastating landing in the U.S. This coronavirus, named SARS-CoV-2, has created a global pandemic that has caused thousands of cases and fatalities in the U.S. and has upended the U.S. economy. The economic turmoil caused by the outbreak is such that many businesses may not survive and will be forced into bankruptcy. With significant losses being incurred daily and no end on the horizon, businesses are turning to their insurers for as much badly needed coverage as they can find.

SARS-CoV-2 can spread from person to person from those in close contact or through respiratory droplets produced when an infected person coughs or sneezes. An early National Institutes of Health study has found that SARS-CoV-2 can also live on surfaces for a period of time, depending on the surface, up to two to three days on plastic or stainless steel. Individuals can be exposed to SARS-CoV-2 without developing the disease it causes, called coronavirus disease 2019 (COVID-19). Symptoms of COVID-19 can appear between 2-14 days after exposure.

The response by the federal, state, and local governments to the outbreak has been far-reaching. San Francisco issued a shelter-in-place order on March 16, 2020, requiring all individuals to stay home except for essential activities. New York Governor Andrew Cuomo signed the New York State on "PAUSE" executive order closing all non-essential businesses across New York State effective 8 PM on Sunday, March 22, 2020. Various other state and local governments have enacted their own ordinances or messaging, and the consistent message of the federal government is that people across the country should stay home as much as possible.

In this climate, businesses will turn to their insurers for as much coverage as they can provide. The breadth of this crisis may ultimately implicate many different kinds of insurance products on the market. Some of those situations are already all too real: costs for cleaning or other steps to address known or suspected presence of coronavirus on property, business interruption caused by the outbreak, including rising costs caused by supply chain disruption, and costs incurred for public relations or crisis management. Others are still largely hypothetical at this point, but will come into focus in the coming weeks and months: suits and other claims made against businesses for alleged negligence or mental anguish caused by actions taken or inaction in response to the outbreak. This White Paper will address strategies for maximizing insurance coverage in response to the coronavirus pandemic.

II. PROPERTY INSURANCE

A. Direct Physical Loss or Damage to Property

Policyholders that have had actual coronavirus exposure at their property that required or may require remediation may seek coverage for those costs under their property insurance policies. Most property insurance policies also contain business interruption or time element coverage that will compensate the policyholder for not only for lost business but also costs expended to resume business at the normal volume. Both property damage and business interruption coverages typically require that the policyholder show "physical loss or damage" to covered property.

The first hurdle for policyholders will therefore be establishing physical loss or damage when there is no easily visible damage to their property. Insurers have consistently denied coverage for non-obvious or non-structural damage to property or business interruption associated with non-visible damage on the ground that there was no physical loss or damage to property to trigger the coverage. Fortunately for policyholders, courts around the country have rejected those efforts and have found that where a condition such as on odor or the presence of harmful substances in the air or on surfaces makes property unusable or uninhabitable for its intended purpose, there has been direct physical loss or damage to property, even though there has been no direct, structural damage to the property.

The general proposition that direct physical loss or damage does not have to be structural or obvious, but can exist at the molecular level, is embraced by several courts. *See, e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *6 (D. Or. June 7, 2016) (finding that insurer's interpretation would add the word "structural" to the policy when it did not appear there), *vacated by joint stipulated request from parties*, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration."); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (N.H. 2015) ("[W]e conclude that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched . . . ."); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) ("We therefore hold that . . . Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.").

Courts do vary somewhat, however, on what effect the damage on a molecular level needs to have in order to qualify as direct physical loss or damage. The most stringent courts require that the structure be unusable or uninhabitable. *See, e.g.*, *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos in building did not render it "uninhabitable or unusable"); *Gregory Packaging*, 2014 WL 6675934, at *6 (ammonia in building made it "unfit for occupancy"); *TRAVCO v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) (physical damage to building not needed when it was rendered unusable by sulfur gas), *Mellin*, 115 A.3d at 805 ("Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property."); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (accumulation of gasoline made church uninhabitable); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294, 296 (La. Ct. App. 2011) (intrusion of

lead made house "unusable and uninhabitable"); *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (1962) (overnight erosion rendered house "completely useless").

Some courts, however, have held that total loss of use is not necessary as long as the use of the property has been reduced to a substantial degree or injured. *See, e.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (finding direct physical loss or damage where e-coli had "reduced the use of the property to a substantial degree"); *Sentinel v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (recognizing that physical loss "provisions require only that a covered property be injured, not destroyed"); *Murray*, 509 S.E.2d at 17 (citing *Sentinel*).

Ultimately this distinction is immaterial for most businesses seeking coverage for coronavirus losses under property insurance policies; any business which is forced to close entirely can meet either standard. However, for larger properties where only part of the property needed to be closed or access limited in some way, the standard requiring only reduction of use or injury to property can be an avenue to coverage.

A separate, but related, argument that property insurers can be expected to make is that because coronavirus can only survive on surfaces for a maximum of two to three days (based on current testing, available knowledge could change over time), any property damage or period of business interruption should also be capped at a matter of days, and simple cleaning is all that is required to address the condition to restore the property. However, given that many people are carrying the virus, with more than 44,000 cases in the U.S. alone as of March 24—including those who have not developed the disease or those whose symptoms may be very mild—there is a constant threat of recontamination to any property. Indeed, given that symptoms can take up to 14 days to develop after exposure to the virus, many thousands of people are undoubtedly walking around with coronavirus who are completely unaware of that fact. That constant threat, recognized by many city and state governments around the country, is part of what has led to orders closing non-essential businesses.

In this regard, certain of the cases cited above can provide additional support to policyholders' claims under property insurance policies. In the Third Circuit's *Port Authority* case, the court found that the mere presence of asbestos in a building did not make it uninhabitable or unusable, but it did state that direct physical loss or damage could be found in the policyholder could demonstrate that "there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility." 311 F.3d at 236; *see also Motorists Mutual*, 131 F. App'x at 826 (quoting *Port Authority* position that imminent threat meets standard for physical loss or damage). Similarly, in *Murray*, the Supreme Court of West Virginia considered claims under property policies by three homeowners who owned homes at the base of a highwall at an adjoining quarry. Rockfall from the highwall damaged two of the three homes, causing all three homeowners to move out. The court found all three homes experienced direct physical loss or damage "when it became clear that rocks and boulders could come crashing down at any time." 509 S.E.2d at 17.

These cases acknowledge the simple fact that in the case of highly dangerous conditions, it does not make sense to wait for inevitable property damage to occur in order to trigger property or business interruption coverage under property insurance policies. The same logic applies here: no rational person would insist that in order to obtain insurance coverage, businesses must stay open or continue normal operations until coronavirus can be definitively established on the property when based on the breadth of the outbreak it is

certain that would happen and lives would be at risk in the meantime. This is consonant with the purpose of insurance to protect against risks, not just losses after the fact. Property policies protect against risks of physical loss or damage, and many property policies explicitly cover all risks of physical loss or damage.

In *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 787 F.2d 349 (8th Cir. 1986), the building in which the policyholder's store was located was in imminent danger of collapse. The policyholder entered the building to remove what property it could and had to sell that property at a discount. Its insurer denied coverage, arguing there was no physical loss or damage to the property removed. The Eighth Circuit disagreed: "Because of the unquestioned danger of reentering the building, [the policyholder] could simply have left its property in the building pending its collapse; in that event, there would have been direct physical damage to the personal property. [The policyholder] merely mitigated the damages—as it should have done—by removing and salvaging as much property as it could before the building's destruction."

In the context of the coronavirus outbreak, businesses could have waited for confirmed cases of coronavirus on their premises to shore up their claims under their property damage policies, but by closing down or curtailing their operations they mitigated their damages, which, as the Eighth Circuit observed, they should have done.

Another case that may prove particularly applicable for claims under property policies for losses caused by coronavirus is *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009). In *Wakefern*, the policyholder sought coverage for the food spoilage at its Shop-Rite stores during the 2003 blackout. The blackout started with physical damage to power equipment in Ohio but eventually spread such that the power equipment servicing the Shop-Rite locations was not damaged, but was nonetheless receiving no power. The insurer attempted to deny coverage, arguing there was no physical damage to the policyholder's own power equipment. The Superior Court of New Jersey, Appellate Division, rejected this argument because the power equipment was "physically incapable of performing their essential function." *Id.* at 734.

Here, as a result of the coronavirus outbreak, a policyholder's property—whether it is a sports arena, college classroom, restaurant or retail store—may be completely intact, undamaged, and perfectly able to perform its function, but for the fact that due to the omnipresent threat of coronavirus (and the government's response to the same), customers cannot get to it. If one looks at a city or state as a network, now, as in *Wakefern*, otherwise undamaged property is nonetheless incapable of performing its essential function.

Once claims are made and denied and litigation is filed, insurers will have to flesh out their positions to support such denials. However, the cases that have been cited to date to support the claim that the issue of

whether coronavirus will satisfy direct physical loss or damage provisions "is not so cut and dry"[1] are easily distinguishable.

The first of the cases that has been cited by insurers' counsel to date is *Mama Jo's, Inc. v. Sparta Insurance Co.*, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun. 11, 2018), in which the court found there was no direct physical loss or damage when dust infiltrated a restaurant from an adjacent construction site. However, that policyholder could not satisfy the standard above that the property was unusable or even significantly injured because the restaurant remained open every day. *Id.* at *25. Here, restaurants are either closed or limited to takeout and delivery, a much more serious loss of use to the property than experienced by the policyholder in *Mama Jo's*. In *Mastellone v. Lightning Rod Mutual Insurance Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008), mold staining on the exterior of the policyholder's house was found not to constitute physical injury to the property because the policyholder's own experts specifically found that the condition did not render the house uninhabitable and the staining could have been removed by cleaning. *Id.* at 1134, 1144. The same is true of *Universal Image Productions v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010), where the policyholder's expert did not suggest that the property should be vacated and the condition did not render the premises uninhabitable. *Id.* at 710. Lastly, in the decision in *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990), where the court held that the presence of asbestos in a building that caused a tenant to move out caused only economic loss, not "direct physical loss," was specifically distinguished by several courts, including the *Oregon Shakespeare* court also in the District of Oregon, as presenting "different circumstances" in which asbestos that was present, but had not been released, in a building left the building "intact and undamaged." 2016 WL 3267247, at *9.

While some policyholders may have specific coverage in their property policies for communicable diseases, many of these coverages are subject to a low sublimit reflecting a policyholder's concern for a minimal outbreak affecting just their business (e.g., contamination in a restaurant) and not a global pandemic affecting all businesses and forcing closure of their business. Policyholders who purchased such coverage should expect to receive prompt payment of those limits from their insurers upon satisfying any policy prerequisites to the coverage. However, in order to avoid limiting recovery to just those sublimits, a close reading of the coverage is necessary in order to support any argument to narrowly construe what loss falls within communicable disease coverage and is subject to the sublimit, and what loss falls outside sublimits and is subject to the general limit of the policy.

[1] Randy Maniloff, Ed Koch, and Margo Meta, *ISO Excluded Coverage for Coronavirus Coverage 15 Years Ago*, Coverage Opinions (Mar. 14, 2020), https://www.coverageopinions.info/Vol9Issue2/ISOExcludedCoverage.html.

B. Contingent Business Interruption

Another avenue for coverage for losses sustained by businesses due to coronavirus is contingent business interruption or contingent time element coverage. Contingent business interruption coverage provides coverage for lost business sustained by the policyholder due to direct physical damage sustained by a supplier or customer.

As stated above, the presence of coronavirus at any location would likely satisfy the requirement of physical loss or damage. While some policies have specific lists of contingent business interruption locations, for those that do not, contingent business interruption coverage has been broadly interpreted by courts.

In *Archer-Daniels Midland Co. v. Phoenix Assurance Co.*, 936 F. Supp. 534, 540–44 (S.D. Ill. 1996), the policyholder, a major processor of agricultural goods in many cases shipped using the Mississippi River, sustained a major disruption due to historic flooding of the Mississippi in 1993. The policyholder made a claim for contingent business interruption including the U.S. Army Corps of Engineers as a supplier that had sustained damage because it was responsible for maintaining the structures that ensured navigability of the Mississippi, and also all Midwestern farmers, even though the policyholder purchased their crops through intermediary grain dealers. The court ruled that both entities qualified as suppliers of the policyholder, notwithstanding the attenuated relationships, under the broad definitions in the contingent business interruption coverage of the policy at issue. *See also DIRECTV v. Factory Mut. Ins. Co.*, 692 F. App'x 494, 494–96 (9th Cir. 2017) (finding insurer knowledge of policyholder business can extend contingent business interruption coverage beyond direct suppliers); *Park Electrochemical Corp. v. Cont'l Cas. Co.*, 2011 WL 703945 (E.D.N.Y. Feb, 18, 2011) (finding policy ambiguous as to whether a policyholder's subsidiaries could qualify as suppliers for contingent business interruption coverage).

Virtually every business in the world is suffering some kind of contingent business interruption as a result of the coronavirus pandemic. Suppliers are raising prices or going out of business and customers are disappearing, especially individual customers for retail businesses. Policyholders should maintain close communication with their suppliers and customers so that they can carefully document these added costs or lost revenues and make contingent business interruption claims. In many policies, contingent business interruption has a lower sublimit than the coverage provided for business interruption, so policyholders should be strategic in how they present their claims.

C. Law or Civil Ordinance and Ingress or Egress Coverage

Another avenue for coverage is coverage extensions in many property insurance policies that provide coverage in the event property is inaccessible due to law or civil ordinance, or because the manner of ingress and egress to the property is inaccessible. This coverage is typically very straightforward. *See Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 556–57 (E.D.N.C. 2000) ("The court cannot find, and neither party has provided, any case in any jurisdiction that interprets an ingress/egress clause contained in the business interruption loss section of an insurance policy. The court believes that this is due to the fact the meaning of the clause is exceedingly clear.").

Importantly, courts have taken into consideration the type of access to the property that the policyholder reasonably expected in construing ingress/egress provisions. *See, e.g.*, *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 217 S.E.2d 551, 565 (N.C. 1975) ("We hold that when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is [r]easonable access under the circumstances."). The interpretation of ingress/egress provisions to include the reasonable manner of access to the property would foreclose an insurer from arguing that ingress/egress coverage to a business is not triggered because a person could access the business by commercially unreasonable means.

In an attempt to stem the tide of the coronavirus outbreak, city and state governments have issued sweeping orders forcing many businesses to close and those that remain open to work at a reduced capacity (for example, restaurants that can remain open for take-out or delivery only, or other retail businesses limiting the amount of people in their stores at any one time). Law and civil ordinance coverage in a property policy could provide coverage for losses as a result of these actions. Moreover, the orders also call for people to remain at home as much as possible. In that manner, law or civil ordinance has deprived even businesses that remain open of customers at their usual frequency.

III. GENERAL LIABILITY INSURANCE

Most businesses also maintain general liability insurance, so-called litigation insurance, to provide coverage for defense costs and settlement or other indemnity costs in the event they are named as a defendant in a lawsuit. Liability policies can be either claims-made or occurrence policies. Claims-made policies provide coverage for any claims made against the policyholder during the policy period, and occurrence policies cover claims based on occurrences that take place during the policy period. Most liability policies define occurrence as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." This occurrence definition is very broad and would certainly include any claims for exposure to coronavirus. Typically the definitions of "claim" in such policies are broad enough to include demand letters and requests for money, as well as suits, and the definitions of "wrongful act" that needs to be alleged to trigger coverage are exceedingly broad and cover "any alleged act, error, omission, misrepresentation, misstatement" and numerous other categories of alleged acts. Given that, most liability policies should respond and provide defense coverage for suits against policyholders sued for alleged negligence, intentional or negligent infliction of emotional distress, or other kinds of mental anguish by customers or employees who allege that coming to a certain business exposed or potentially exposed them to coronavirus. *See generally, e.g.*, *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15 (N.Y. 2003) (finding commercial general liability insurer had a duty to defend and indemnify policyholder in underlying negligence suit alleging exposure to dangerous paint solvent fumes).

These lawsuits already are being filed, including multiple suits against Princess Cruise Lines for gross negligence. Undoubtedly, many more such suits will follow. These suits are particularly susceptible to class action litigation, as one affected plaintiff can bring suit on behalf of all similarly situated individuals, and can result in significant costs to defend. These suits could also implicated directors' and officers' liability policies to the extent that suits name directors or officers as defendants for actions taken in their capacity as directors or officers.

Each claim will merit its own analysis against the specific liability policy at issue to confirm that coverage will be provided under that policy. The main issue that many of these claims will have in common is that many liability policies contain consent-to-defense provisions that require the insurer to consent to retain defense counsel or other professionals. While being sued typically has a company launch into a flurry of activity to mount a defense, it behooves policyholders to make one of those activities coordination with liability insurance carriers to make sure coverage is immediately available and is not delayed or reduced by insurers raising consent provisions. Policyholders should be prepared to be dogged in pursuit of obtaining insurer agreement, as insurers will be flooded with claims and may not be as proactively responsive.

IV. OTHER TYPES OF POTENTIALLY TRIGGERED INSURANCE POLICIES

There are all manner of insurance products in the market and purchased by companies to respond to their specific needs, and all policies will warrant scrutiny to make sure coverage is maximized for all the different kinds of losses that may be caused by coronavirus. Here are some common examples of other insurance that may be triggered by coronavirus losses:

- **Leader property insurance** provides coverage to businesses if a nearby business that attracts customers to a policyholder's business suffers loss or damage. With virtually every major gathering place in the U.S. shuttered due to coronavirus, any policyholders that depend on those gatherings for business and that has leader property insurance would have a claim under that policy and/or coverage.
- **Event cancellation insurance** provides insurance for specific events. Again, most events for which event cancellation insurance have been purchased have been cancelled. These policies are often specifically negotiated between policyholders and insurers, so reference to the specific policy will be necessary to advise on coverage and strategy. One wrinkle for these policies is that as they evolve more quickly than other policies, coronavirus-specific exclusions began appearing in them in late 2019 and may be commonplace going forward. If a given event cancellation policy has this exclusion, the policyholder should make sure it was bargained for at the time of policy placement.
- **Pollution liability policies** provide coverage for cleanup costs and costs incurred defending against claims based on the presence of pollutants. The terms of these policies may be narrowly defined to apply only to classic pollutants, but they could be defined broadly enough to include coverage for viruses.
- **Crisis management coverage** is available under many different kinds of policies and can provide coverage for the costs associated with retaining public relations or other professionals, or communicating with customers, in the event of a crisis. Coronavirus would qualify as a crisis under the common definition of the term, but policyholders must refer to their specific policies to see if this coverage was purchased and under what terms.
- **Professional services coverage** provides coverage for allegations of any act, error, omission, breach of duty, misstatement or misleading statement, negligent misrepresentation, or breach of contract in the rendering or failure to render professional service. Coverage will largely depend on what the policy includes within the definition of "professional services," which can be defined broadly as an

service performed for a fee, or narrowly to include only specific delineated services. If an insured are forced deny a service or breach an existing contract due to complications arising from coronavirus, that claim should made to the carrier.

V. EXCLUSIONS

While there are several avenues to coverage for losses policyholders are already experiencing, the unfortunate reality is that many policyholders may face attempts by insurers to bar those avenues by virtue of exclusions in policies that provide the above coverages.

One common exclusion is found in Insurance Services Office ("ISO") form CP 01 40 07 06 entitled "Exclusion for Loss Due to Virus or Bacteria." ISO is a centralized service that drafts insurance policy language and circulates it to state regulatory agencies so that upon approval it can be used by insurers in their policies. The exclusion provides, in relevant part, that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

It is critical for policyholders to analyze their entire policy to see if there are other provisions that could limit the applicability of this exclusion. Moreover, if insurers attempt to assert exclusions that are worded differently that this ISO exclusion, policyholders can argue that if insurers wanted to exclude coverage for disease-causing virus they should have done so more clearly. Indeed, courts have been willing to afford very narrow interpretation to similar exclusions in the past. *See, e.g.*, *Old Town Canoe Co. v. Cont'l Cas. Co.*, 2005 WL 2674902, at *1–4 (D. Me. Oct. 20, 2005) (interpreting exclusion for loss caused by extremes of temperature (which also included bacteria or virus) to only apply to extremes of external temperature, not internal temperature in locations where policyholder's goods were stored). And it is a fundamental tenet of insurance policy interpretation in New York (and across the country) that any exclusion from coverage must be in clear and unmistakable language, and such exclusions are strictly and narrowly construed against the insurer. *See, e.g.*, *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984).

This can be a crucial element to your claim for coverage. For example, SARS-Cov-2 is the actual "virus" that causes the "disease" coronavirus. Should an exclusion apply solely to "communicable diseases," but not to viruses specifically, there should be a question as to whether, construed narrowly, that exclusion should apply where a business is forced to shut down out of concern that the virus could spread or because the virus itself, without a host, may be present in your structure.

Further, courts can be reluctant to enforce provisions that may be technically triggered by a given circumstance, but the interpretations of those provisions would frustrate the reasonable expectations of the policyholder. For instance, in *Wakefern*, the court stated that even if the insurer's "narrowly parsed definition of 'physical damage'" in the specific context of power grid functioning was correct, the policyholder and insurer did not negotiate the policy as "electric utilities contracting about technical aspects of the grid." *Id.* at 734–35. Instead, one party was an insurance company and the other was a supermarket operator, and the supermarket operator reasonably believed it had coverage for any kind of power outage. To rule that it actually

did not have that kind of coverage based on extensive expert testimony well beyond the knowledge of either party at the time of contracting would frustrate that reasonable expectation. *Id.* at 734–35.

Similarly here, insurers may attempt to narrowly parse pollution or contamination exclusions to point out that coronavirus technically fits within one of the categories, but policyholders can fight back by arguing they are not epidemiologists, they did not know such exclusions would also exclude coronavirus or other communicable diseases, and if insurers wanted to exclude those diseases they needed to do so more clearly.

Lastly, a significant battle is going to be waged over causation of loss. Even if a policy has an exclusion that purports to preclude coverage for "viruses" or "communicable diseases," that should not automatically mean that such peril is the cause of loss such that no coverage is available. For example, if a business is forced to shut down by civil law or ordinance, or shuts down in anticipation of the same or merely out of precaution related to coronavirus, it is arguable that the mandate, not the disease, is the true cause of the loss. *See, e.g., Massi's Greenhouses, Inc. v. Farm Family Mut. Ins. Co.*, 233 A.D.2d 844, 844 (N.Y. Sup. Ct. App. Div. 1996) (question of fact whether losses were caused by quarantine or by contamination). In this regard, the policyholder should examine language that the policy uses for application of exclusions; does the language require that the loss be "from" or directly result from an excluded peril, or need to "arise out of" or be "attributable to." Assuming the policy does not have anti-concurrent causation language addressing a situation where a loss has multiple included and excluded causes—and many do not—this is likely to be a very substantial issue for most policyholders.

VI. CONCLUSION: 10 STEPS FOR EVERY POLICYHOLDER TO MAXIMIZE COVERAGE

The coronavirus pandemic is posing any number of challenges to our society and economy; it can be dizzying keeping up with developments, business challenges, and the insurance claim process. To simplify the thought process, here are ten practical steps to maximize insurance coverage for coronavirus, as published in Law360 (https://www.law360.com/articles/1254510)

Review of Coverage in Place

1. The first step in order to maximize insurance coverage for losses caused by coronavirus is to carefully examine the coverage you have in place. Already, there are reports of insurers claiming their policies do not cover cancellation due to infectious disease. While some policies expressly cover loss caused by communicable disease, the coverage may be narrowed by exclusions or could be subject to low sublimits or high retentions.

2. If an insurer takes the position that there has been no property damage sustained if people are staying away from a given business, policyholders should consult their policies to see if loss of use of property qualifies as property damage.

   In policies that include loss of use as property damage, whether in the definition of property damage or elsewhere in the policy, the policy contemplates that there can be property damage other than tangible

physical damage to property, and that is the kind of property damage policyholders can show as a result of coronavirus. For example, in the case of an empty arena that would otherwise be hosting a NBA or NHL game, although the arena property is intact and undamaged, the policyholder has suffered loss of use because the property cannot be used now that those leagues have suspended their seasons due to concerns of coronavirus exposure. Policyholders can reinforce this argument by reminding insurers that they have a policy- or common law-based duty to mitigate their loss or damages. By cancelling events, flights, classes, or whatever other form their business takes, the policyholder is acting in accordance with that duty to mitigate.

3. Another potential avenue to coverage under property insurance policies is coverage for property damage or loss of access to property by civil ordinance or law. In many areas affected by the virus, governments have enacted prohibitions on gatherings of people above a given maximum size. Business interruption due to such ordinances would likely be covered under many property insurance policies.

4. In this third-party liability context, a key first step in the event of a claim made against a policyholder is to review the policy to determine whether there are provisions requiring insurer consent prior to engaging defense counsel, public relations firms, or other professionals. If consent is required to engage the firms the policyholder would like to engage, it is essential to work with the insurer to obtain that consent at the onset of the claim rather than wrangle with the carrier in the future over whether and to what extent costs incurred without consent are covered.

5. Note that in the review of policies to determine what coverage is available, it is never too early to hire coverage counsel to perform or assist with the review and the initial stages of any claims being made. Early involvement of coverage counsel can enable the policyholder to best position a claim at the outset and avoid any missteps that coverage counsel would have to try to minimize if hired in the later stages of the claim.

The Claim Process

6. Virtually all policyholders, and certainly all insurance brokers, are aware of the importance of providing prompt notice of claim, or notice of circumstances of a situation that could evolve into a claim, to potentially implicated insurers, and to cooperate thereafter with reasonable requests for information made by the insurer.

However, more and more insurers are using the information gathering process to indefinitely delay the claim process until more information emerges, information that may allow the insurer to deny coverage. This is especially prevalent in large claims in the tens or hundreds of millions of dollars, and the coronavirus outbreak has the potential to cause very large claims.

To avoid being stuck in that claim purgatory, policyholders should document their cooperation with all insurer information requests. This documentation should include requesting confirmation from the insurer that (a) it received information in response to a given request and (b) that at the time it does not require any more information in response to that request. Moreover, policyholders should communicate clearly and in writing when they do not possess information responsive to a given

request. These steps will best position a policyholder should its insurer attempt to play for time during the claim process. Corporate policyholders can use the services of claim advocates from their insurance broker or coverage counsel to assist with creating this record.

7. To best present a claim for business interruption coverage, it is important for businesses to carefully identify and document specific business opportunities lost due to the outbreak. Businesses should also assess what records or models are available to as accurately as possible demonstrate past revenue and demonstrate what future revenue would have been if not for the outbreak.

Hope for the Best, Prepare for the Worst

8. Policyholders should be prepared in the event of an adverse claim decision, and given the exposure insurers will likely face as a result of the outbreak, it is reasonable to expect them to deny claims at a greater rate or seek to delay the process as much as possible. It is advisable to retain coverage counsel before a problem arises so that a policyholder can have the benefit of counsel's advice from the very onset of an issue and be best positioned to press its claim.

9. To prepare for an adverse claim decision, policyholders should be aware of any alternative dispute resolution provisions in their policies that may require them to perform certain steps in the claim process before litigation can be commenced, such as non-binding mediation. These provisions may also impose a "cooling-off period," a number of days that the parties must wait after the final ADR process before litigation can be commenced.

10. Policyholders should also be aware of the effect of suit limitations provisions (requiring suit to be brought within a given time from the date of the loss or claim), forum selection clauses, or choice of law provisions on the procedure and merits of any litigation over their claim. Based on these provisions, coverage counsel can advise policyholders as to which jurisdiction is the most advantageous to the policyholder to file suit.

Understanding these provisions and their impact can help policyholders proceed with their claim in the most aggressive fashion and exert the most pressure on their insurers to maximize coverage they may badly need in this time of global crisis.

For further information, contact:

Robin Cohen
rcohen@mckoolsmith.com

Marc Ladd
mladd@mckoolsmith.com

Alexander Sugzda
asugzda@mckoolsmith.com