



IFA LEGAL SYMPOSIUM

Managing Risks in Contracts and Relationships Due to COVID-19

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Speakers

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Discussion Agenda

- Big Picture: COVID-19 Impact & State of Affairs
- Insurance Coverages Implicated by COVID-19
- First-Party Coverage: Business Interruption Claims – Covered or Not?
- Additional Lines of Coverage
- Legislative Responses to COVID-19
- The Franchise Agreement: Indemnification & Contractual Risk Transfer
- Emerging Risks of COVID-19 & Recommended Best Practices

Insurance Coverages Implicated by COVID-19:

COVID-19 impacts both First- & Third-Party coverages

First Party Insurance Coverage:

Policyholder is able to assert claims under own insurance policy for losses it has incurred

- Commercial Property
- Business Interruption
- Civil Authority
- Ingress/Egress Coverage

Third Party Insurance Coverage:

Protects policyholder from liability claims brought by third-parties as a result of negligence

- CGL
- Auto Liability (Mixed 1st & 3rd Party)
- Employment Practices Liability

First Party - Property Insurance

✓ *Commercial Property policies cover “Loss” or “Loss of Profit” resulting from:*

- (1) Damage to the policyholder’s own property (“**Business Interruption**”)
- (2) Damage to the property of a customer or supplier (or a supplier’s supplier) (“**Contingent Business Interruption**”) – definition of “supplier” key
- (3) Government action such as quarantine orders/gathering restrictions (“order of **Civil Authority**”) – may not require direct physical loss/damage?
- (4) Lack of entry/exit to insured premises due to damage caused by covered peril to third-party property (“**Ingress and Egress**”)

Civil Authority Coverage

Some policies provide coverage for losses caused by acts of “civil authority” that block access to an insured’s facilities.



- May require direct physical loss to property to trigger.
- May apply when government acts prohibit access to property of suppliers, providers, or vendors.
- Some policies may require a prohibition of access – governmental mandates key to triggering.
- May be limited to a certain time frame (e.g., 30 days).

Contingent Business Interruption

- Coverage for when a dependent property (e.g., a supplier) is forced to suspend operations.
- The loss or damage must be caused by a covered cause of loss – direct physical loss still required!
- Some locations may be excepted out – e.g., countries with trade restrictions.

Myths About COVID-19 First-Party Coverage

Insurers & certain State Insurance Regulators have discouraged policyholders from seeking coverage:

With the outbreak of the Coronavirus, some business owners may be wondering whether their insurance policies cover losses resulting from a business shut down or other losses related to the Coronavirus. Typically, coverage for losses occurring as a result of a pandemic, epidemic or other infectious or communicable diseases are excluded under the standard business owner's policy. To be covered against a business loss resulting

- SC Department of Insurance

This may not be the case – policy language will always control along with set of facts

Northern District of Ohio:

Representative Business Interruption Decisions

Henderson Road Restaurant Systems, Inc. v. Zurich, (N.D. Ohio Jan. 19, 2021)

Motion for summary judgment granted in policyholder's favor because lost their real property and that its "business operations were suspended by direct physical loss of or damage to property at the premises."

Brunswick Panini's, LLC v. Zurich Am. Ins. Co., (N.D. Ohio Feb. 19, 2021)

Motion to dismiss granted because "[n]either the COVID-19 virus nor the state government orders caused 'directly physical loss of or damage to' Plaintiffs' Insured Property."

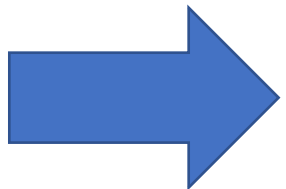
Neuro-Communication Services, Inc. v. The Cincinnati Ins Co., (N.D. Ohio Jan. 19, 2021)

Questions Certified to Ohio Supreme Court:

- 1) "Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; **or**
- 2) does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?"

Third-Party Liability Policies

- Businesses open to public may face liability for inadequate measures to prevent the transmission of COVID-19 (security, safety, cleaning, or simply by remaining open for business).
- Claimants may attempt to link their infection directly to employees' infections.
- Example: South Florida couple sued Princess Cruise lines LTD claiming negligence by failing to take precautions to prevent the outbreak on one of its ships .



Key aspect will be if lawsuit alleges that bodily injury and/or property damage arose because of an **accident** (i.e. an “**occurrence**”). Expected to be widely litigated given various interpretations of “occurrence” and “accident” across the USA

Commercial General Liability

Coverage for “bodily injury” or “property damage” caused by accidents to third-parties

Conditions of Coverage:

- **“Damages”**
 - Monetary damages, medical expenses, clean-up costs.
 - Costs to comply with workplace safety regulations, injunction (i.e. training, ppe)???
- **“Because of”** – Causation standard, state specific issue
 - ✓ Lower standard → “but for” causation?
 - ✓ Heightened standard → proximate cause?
- **“Bodily injury or Property Damage”**
 - Does BI include emotional distress/mental anguish?
 - PD includes Loss of Use of tangible property.

Relevant Exclusions:

- “Pollution” exclusions
- Bacteria/Fungi (CG 21 67 12 04)
- Pollution Exclusion
 - ✓ Is the virus a pollutant or contaminant
 - ✓ State law dependent
- Communicable Disease
 - ✓ Manuscript v. ISO CG 21 32 05 09
- Virus Exclusion

CGL Policy – McDonald's Victory

McDonald's Corp., et al., v. Austin Mutual Insurance Company

- McDonald's Corp. & Franchisee group filed suit against their CGL insurer seeking to secure insurance coverage for damages arising from lawsuit filed against McDonald's stemming from COVID-19.
- McDonald's alleged that Austin Mutual breached its duty to defend in connection with the underlying lawsuit under liability policies.
- The Northern District of Illinois has held that Austin Mutual did have a duty to defend under the CGL policies for damages related to COVID-19.

Employment Practices Liability Coverage

Coverage for:

- **Loss** resulting from **Claims** against **Employer** for **Employment Practices Wrongful Acts** (i.e. breach of employment contract, employment-related torts, wrongful termination). - *definition of “employment wrongful acts” key*
- **Potential COVID-19 Related Claims**: wrongful termination, retaliation, discrimination, defamation, harassment, invasion of privacy
- **Relevant Exclusions**:
 - Employee bodily injury claims excluded (WC)
 - Exclusion for actual or alleged violations of OSHA
 - *Exception for retaliation/wrongful termination claims in connection with employee claims under OSHA (i.e. unsafe workplace/imminent COVID-19 danger)*
 - *Wage & Hour*

Workers Compensation

- Covers medical expenses, lost wages, and rehabilitation costs to employees who are injured or become ill “**in the course and scope of employment**”
- Also pays death benefits to families of employees who die “in the course and scope” of employment.
- WC statutes typically require the ***disease be peculiar to the worker's job by virtue of how it is caused and manifested*** or how job conditions result in a particular hazard.
- *Claimant has the burden to prove exposure to the virus was in the workplace – **THIS IS KEY***
- Some States exclude disease and sickness from Workers Compensation coverage

Legislative Responses to COVID-19

State Legislation – Key Provisions

- Mandate coverage for loss of use and business interruption losses due to COVID-19
- Prohibit insurers from denying coverage due to a lack of direct physical loss or damage to property
- Void any virus or similar exclusions
- **Retroactive Application** from date of declared state of emergency
- Limited to small businesses (# of employees)
 - New Jersey: N.J. Draft Bill A-3844
 - Ohio: H.B. 589
 - Massachusetts: SD.2888
 - New York: Draft Assembly Bill A10226

Federal Legislation –

Pandemic Risk Insurance Act (PRIA)

- Establish Pandemic Risk Reinsurance Program & Fund (PRRP)
- Private insurance companies & federal government share responsibility for payment of covered losses
- Mandates coverage for business interruption losses resulting from outbreak of infectious disease or pandemic that is declared emergency or major disaster by President
- Fund would pay 95% of covered losses when aggregate industry insured losses exceed \$250 million dollars
- Reinsurance Fund annual aggregate limit capped at \$500 billion dollars
- **Retroactive Application**

Indemnity Provisions in Franchising Agreements

- An example of a typical indemnification clause in FA:

You will protect, defend, hold harmless and indemnify us, the Franchisor Entities and each of our and their respective affiliates, directors, officers, interest holders, shareholders, owners, members, managers, partners, employees, accountants, agents, attorneys, representatives, heirs, successors and assigns, from and against any and all costs and expenses (including attorneys' fees, arbitration and court costs, investigation costs and costs of collection), losses, liabilities, damages, claims and demands of every kind or nature, arising in any way out of or relating to your actions or omissions to act, whether under this Agreement, in the operation of the Business or otherwise.

Force Majeure Clauses Re-examined

- Covid-19 pandemic exposed a problem in a typical form:

Whenever a period of time is provided in this Agreement for either party to perform any act, except the payment of monies, neither party shall be liable nor responsible for any delays due to strikes, lockouts, casualties, acts of God, war, governmental regulation or control or other causes beyond the reasonable control of the parties, and the time period for the performance of such act shall be extended for the amount of time of the delay.

Emerging Business Risks & Recommended Best Practices

- *Non-Waiver Provisions Contained in Franchise Agreements*
 - Most franchise agreements contain non-waiver provisions
 - But courts don't love them
 - Documentation of deferrals and abatements
 - Question: waiver of claims required as quid pro quo?
- *Non-Discrimination Obligations*
 - *Always keep these in mind when crafting deferral and abatements*

Emerging Business Risks & Recommended Best Practices

- *COVID-19 Specific Situations*
 - Relief from Royalty and Other Fees
 - Deferral was common combined with waiver of minimum royalties
 - Delayed Openings
 - Covid caused delays in permits, bank loans, construction, etc.
 - Extensions on deadlines (blanket and case by case)
 - Landlord-Tenant Relationships
 - Application of *Force Majeure*?
 - Reality on the ground was rent deferral despite lease terms

INSURANCE BEST PRACTICES & TAKEAWAYS

- Treat insurance requirements as franchise system standards
- Tailor insurance requirements to specific operational risks of system.
- Track/enforce franchisee compliance w/ insurance requirements
- Consult your broker and coverage counsel to determine scope and limits of coverage
- Submit any non-frivolous claims – notice of claim alone will not impact loss rating or premium
- *Policy Language is Key!*

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Thank You!