



LAW ALERT

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Insurance Coverage and Coverage for COVID-19

Almost all of you likely have Property Insurance Coverage for your business, which coverage almost always provides coverage for: Business Income, Business Interruption and/or acts of Civil Authority.

In the past week we have seen many examples where an insured's broker concluded that there was no coverage provided by a specific property policy stemming from the COVID-19 Pandemic, and advised their client not to file a claim. The reason usually given is that these coverages, particularly Business Income or Business Interruption, require "physical damage or loss" to your property due to a "covered cause of loss." While many times such a conclusion may ultimately turn out to be right, we believe that advice is NOT correct.

Every business that has coverage for Business Income, Business Interruption and/or acts of Civil Authority should INSTRUCT their insurance broker to submit a claim to the applicable insurer for these coverages – even if it is true that the particular policy, as written, does not appear to provide coverage or excludes from coverage losses resulting from a virus.

The reasons for this strong recommendation are:

- 1) States are considering various legislative "overrides" of key exclusions and coverage requirements. While the initial attempts at legislative efforts may not be successful, there are likely to be other efforts by government to influence the actions of the insurance industry – as there was with Hurricane Sandy;
- 2) Courts may start to interpret these coverages as to find coverage in many situations, as illustrated below.

Back in 2002, the federal Court of Appeals for the Third Circuit (in New Jersey) found that the presence of a large amount of "asbestos in the air" of a building, causing the building to be vacated SATISFIED the Business Interruption requirement for "physical loss or damages." *Port Authority of New York and New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

Similarly, in a more recent decision by the federal district court in Manhattan, applying New York law, in a hurricane Sandy case found that a "flood exclusion" did not apply when a utility shut down its power grid in ANTICIPATION of Sandy because flooding was imminent. The Court held that, like the "virus" exclusion which is now relevant, required "actual" flood damages, not the threat of damages. *Newman Myers Kreimer Gross Harris P.C. v. Great N. Insurance Co.*, 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014).

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These two cases demonstrate that (1) something that is invisible, but real, such as the Coronavirus, can cause “physical harm or damages” to property. So if infected people were in a building or office, it may well require evacuation due to “physical harm or damage.” Conversely, the action of government in ordering everyone to stay home may satisfy a particular policy’s coverage for Civil Authority coverage. However, if a claim is not made with reasonable speed, in some cases within 30 days, the insurer may be able to disclaim for prejudicial late notice.

Further, filing a claim is something that can be done at NO cost: your insurance broker is paid their commissions or their fees in part to file claims on behalf of their clients.

Finally, some of you may believe your policy language does not cover losses due to the COVID-19 Pandemic because your property is not being “physically damaged” by the Virus, or contain an exclusion including damage due to a virus, or for other reasons. However, insurance policies are contracts, subject to interpretation, as illustrated in the two cases cited above. That is an area in which the lawyers at RMF excel. It may well be worthwhile to have us review your insurance policy.

However, whether you ask RMF to review your insurance policy or not: please have your broker file claims on your behalf.

Please do not hesitate to reach out to us with questions or for assistance on any of your legal needs

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