

The Playing Field for Coronavirus Insurance Recovery is Wide Open

By

Insurance recovery for coronavirus raises a wide range of issues, including (i) liability arising out of civil authority, (ii) what constitutes physical injury to property and (iii) the applicability of pathogen-related exclusions, if any. As a preliminary matter, each individual insurance policy must be reviewed, as the applicable language may vary from policy-to-policy. Variance matters. In our first blog on insurance recovery issues related to coronavirus, we highlighted issues of **but for or efficient proximate cause; i.e., causation**, which can play a key role for policyholders in avoiding general pathogen-related exclusions. Some additional insights that could make a difference follow.

Civil Authority and the Direct Physical Loss or Damage Requirement

The scientific community currently is studying how long the novel *coronavirus* can survive on surfaces or materials. One study has indicated ranges from up to a day to 72 hours, depending on the type of material. If there is scientific evidence showing that the virus does, in fact, pose a danger that survives on surfaces, duration should be a red herring. That danger or risk alone sets in motion a duty to act. As to whether this satisfies the *physical damage* component, the most cogent counter to the carriers' attempt to argue otherwise is to borrow from notions of *trespass*. The presence of the *coronavirus* clearly constitutes a **physical intrusion**; that intrusion should satisfy the policy definitions. In any scientific battle of the experts, the policyholder should prevail on the premise that the definition is ambiguous. If there are two reasonable interpretations, under the general rules of insurance policy interpretation, the policyholder's interpretation wins.

In addition, in reading certain first party policies, their pathogen-related wording wittingly or unwittingly seems to presuppose that mere presence of a pathogen satisfies the physical injury requirement. From there, it is a short step to business interruption and contingent business interruption coverage **with or without** a civil authority mandate.

Moreover, policies define property damage to include **loss of use**, which, by definition, does not require *physical loss or damage*.

Effect of Exclusions

The rules of interpreting exclusions to an insurance policy may be decisive in securing coverage. Under those rules, exclusions are narrowly construed. Again, *ambiguities* will inure to the policyholder's benefit. Further, *lack of precision* commonly acts to limit the scope of exclusions. Words have consequences, especially as used in exclusions.

Policies may expressly address *loss caused by communicable disease* either in the insuring agreement or exclusions. The devil will be in the details. If we look to the dictionary, we see that **pathogen means any disease producing agent especially a virus, bacterium, or other microorganism**. So, *pathogen* is the umbrella which includes different distinct sub diseases. A common analogy is dementia the umbrella for the different diseases such as Alzheimer's, or Lewy body. For purposes of insurance, different types cannot be used interchangeably or lumped together, as each has a precise meaning. The backbone of insurance is precision.

Two case studies illustrate this point. The first involves **acid rain**. In the 1990s, utilities' policies contained a general **acid rain exclusion**. Our client's facility emitted acid containing particulates onto surrounding properties and the homeowners sued for property damage. The insurance company denied coverage, invoking the *acid rain exclusion*. In the coverage litigation we contended that **acid rain** has a specialized meaning; *i.e.*, a phenomenon in the Northeast in which Canadian acid containing particulates were windblown into the U.S. That meaning was documented in the literature. For its part, the carrier contended

that **acid rain** was generic and applied to any acid-containing particulate that was emitted from a utility. We resolved the dispute in a mediation on a favorable basis. What happened next is critical. The insurance company, which only writes insurance for the utility industry, **revised its standard policy**, removing the term **acid rain** and substituting a broad acid containing *particulate* worded exclusion.

The second illustration involves **early asbestos-related exclusions**. In the 1980s, one of the original asbestos-related exclusions referred solely to **asbestosis**. As we know, **asbestosis** is the least problematic exposure, as it is dwarfed by other **asbestos-related diseases such as mesothelioma**. In an opposition to a motion to transfer a coverage case regarding the scope of asbestos-related insurance, we defined the exclusion as the **asbestosis-only exclusion**. It stuck. The judge adopted our definition in his decision denying transfer. The carriers spent the rest of the litigation trying to get out from under the limitation we placed on the exclusion. Once again, shortly thereafter, the insurance industry amended all asbestos-related exclusions to encompass any and all **asbestos-related diseases**.

The experience in these areas – and the insurers' actions thereafter – illustrate that insurers' efforts to deny coverage based on an imprecise exclusion may not be unsuccessful.

The Takeaway

Read your policies in their entirety. Fully press the universal rules that apply to the interpretation of insurance policy provisions, *i.e.*, (i) ambiguities are construed against the insurance company; (ii) if there are two reasonable interpretations, the policyholder's applies; (iii) exclusions are narrowly construed; and (iv) hold insurance companies to precision and the actual meanings of the words chosen. To that end, notions of what constitutes **physical injury in the coronavirus context is not static and will be of first impression**. It is exactly in these circumstances that policyholders can forge good results. The playing field is wide open.

If you have questions regarding how to handle insurance recovery in the wake of Coronavirus, please contact an attorney in Paley Rothman LLP's New York City office.



Robert Shulman (Insurance Recovery Chair) and Cristen Rose (Principal)