MSF CLIENT ALERT

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Update On Insurance Coverage And Recovery During the COVID-19 Pandemic

At present, a hotly debated (and increasingly litigated) issue is whether policyholders impacted by the COVID-19 pandemic will be able to obtain any sort of recovery from their carriers under their potentially applicable insurance policies, including coverage for losses as a result of "business interruption" from the pandemic under All Risk policies. This Client Alert provides an update on pending litigation and proposed legislation relating to policyholders' recovery of losses sustained as a result of COVID-19, and discusses the immediate steps clients should be taking to preserve their rights to make COVID-19 related claims under their insurance policies. May 11, 2020

Pending Litigation

Policyholders and insurance companies are now litigating in federal and state courts across the country over whether insurance policies cover damages and losses arising from, or relating to, the COVID-19 pandemic. Perhaps the most frequently litigated issue involves coverage under "business interruption" (also referred to as "business income") insurance. To qualify for business interruption coverage, virtually all policies require that any lost income must arise from "direct" and "physical" loss or damage to a policyholder's property (or, in some cases, adjacent properties), rather than from losses associated with a general economic slowdown. Insurance companies have argued that the presence or suspected presence of the COVID-19 virus at or near a property does not constitute the requisite "direct" and "physical" loss or damage. Policyholders, on the other hand, have asserted that COVID-19 is a covered occurrence, arguing that "physical" *loss* does not require physical *damage* to the policyholder's property, and, even if it did, the virus' presence renders the property physically unusable until it is sanitized and disinfected and thus constitutes "direct" and "physical" property loss.

How courts will resolve these coverage disputes has yet to be determined. It is possible that courts will analogize the COVID-19 virus to natural disasters, such as hurricanes, fires, and high winds, which are more likely to qualify for business interruption coverage. At least one court, the Supreme Court of Pennsylvania, has recently concluded that the COVID-19 pandemic should be deemed a "natural disaster" within the meaning of the state's Emergency Management Services Code.[1] It remains to be seen whether other courts will follow the Pennsylvania high court's lead, or, if they do, whether that will be deemed to constitute the required "direct, physical damage" necessary to trigger coverage.

[1] *Friends of Danny DeVito v. Wolf*, No. 68-MM-2020, at p. 24 (Sup. Ct. Pa. Apr. 13, 2020).

Various other clauses in policies covering business interruption will likewise require guidance from the courts, including: (1) "civil authority" clauses, which apply in situations where access to a policyholder's property is prevented or prohibited by an order of the local, state, or federal government (here, while the terms of the various State governors' Executive Orders "closed" non-essential businesses locations, not all such orders "closed" the businesses, and some such orders that closed businesses did not clearly close premises, thus making it unclear whether the civil authority clauses apply); (2) "extra expense" clauses, which cover policyholders for expenses incurred to minimize the suspension of business and to continue operations as a result of a covered event; (3) "sue and labor" clauses, which cover expenses for emergency and temporary repairs to protect property; and (4) "contamination" clauses, which cover losses or damages resulting from actions by public health or other governmental authorities that prohibit access to property. Determinations of coverage will depend on the policy language in question, as well as the scope and specific language of applicable government orders (or lack thereof), plus the relevant caselaw in each jurisdiction in which insureds maintain their businesses, which have developed widely divergent interpretations of the standard policy language before the COVID-19 pandemic.

In addition to arguing over what insurance policies specifically *include*, policyholders and insurance companies are also litigating over what is expressly *excluded* from policies. For example, some policies contain "virus and bacteria" or "pandemic/epidemic" exclusions that insurance companies are relying upon to deny coverage for losses resulting from COVID-19. In other cases, insurance companies are citing "ordinance or law" exclusions to argue that the policies do not cover losses arising from enforcement of, or compliance with, any ordinance or law regulating the use of property. Moreover, other than carriers' arguments on whether the presence, actual or potential, of the virus on surfaces in policyholders' property might constitute "physical damage" sufficient to trigger coverage, because surfaces can be sanitized overnight, thus repairing the damage, carriers can also be expected to argue for extremely short, or virtually no, time during which coverage for business losses applies.

Coverage for COVID-19 losses may also be claimed in a variety of other policies, including Commercial General Liability (CGL) policies, Builder's Risk policies, property coverage policies, marine policies, and event cancellation policies, among others. Coverage for COVID-19 under these policies will vary from policy to policy and location to location.

The scope, effect, and validity of the relevant insurance clauses and exclusions currently remains uncertain, and will be determined by the courts in the months (and likely years) ahead.

Proposed Legislation

At least eight states, including New York and New Jersey, have introduced legislation that would retroactively force insurance companies to pay business interruption losses or damages resulting from the COVID-19 pandemic regardless of otherwise potentially applicable exclusions. Under New York's proposed bill, exclusions applicable to COVID-19 would be rendered void and insurance companies would be required to provide coverage for business interruption losses even for policies that prohibit such coverage. However, most proposed legislation also

contains significant limitations. For instance, the New York legislation would likely provide relief only to small businesses (those with 100 employees or fewer) and contain monetary caps. Furthermore, most proposed legislation would permit insurance companies to seek reimbursement from the states for the costs of paying losses on claims arising from COVID-19, thereby shifting at least some of the cost burden to taxpayers and having the insurance companies act in a funding capacity.

On the federal level, several members of the U.S. House of Representatives have introduced federal legislation similar to that proposed in New York, to provide business interruption coverage that would void provisions in insurance policies that purport to exclude coverage for losses arising from the COVID-19 pandemic.

Once any of these proposed bills are enacted and signed into law, such legislation is certain to face immediate legal challenge from the insurance industry. Among other things, insurance companies can be expected to assert that the legislation violates the Contracts (which limits the ability of the government to interfere with parties' rights under private contracts) and Due Process Clauses (which protects against the arbitrary deprivation of property) of the U.S. Constitution. State Constitutional provisions might also be implicated by such legislation. Moreover, if and when the U.S. Congress passes any legislation addressing insurance coverage and recovery, such legislation is sure to raise issues involving principles of federal preemption and supremacy to the extent the federal legislation conflicts with or differs from state legislation.

What Actions Should Policyholders Take?

At this point, although many commentators are predicting outcomes, no one can know how the flood of pending and anticipated litigation, as well as possible legislation concerning insurance coverage and recovery, will play out. However, there are two things that can be said with a high degree of certainty: first, policyholders suffering damages or losses as a result of COVID-19 must promptly submit a notice of claim under all of their potentially applicable insurance policies as soon as possible in order to preserve their rights. Second, given the public position taken by many insurance companies, policyholders should expect their notice of claim to be denied. Policyholders should speak with their insurance consultants to find out when and how to submit a notice of claim under their policies and how to phrase their notices so as best to ensure proper preservation of their claims. They then should be prepared to either litigate the coverage claims themselves (where the claims are large enough economically to justify such litigation) or wait before taking action for the now murky picture regarding potential legislation, and the insureds' likelihood of prevailing against the carriers in their respective jurisdictions, to become clearer.

For more information, or if you have any questions about the issues raised in this Client Alert, please contact a member of our Insurance Recovery team.

For more information or if you have any questions about how this new development may affect your business, please contact a member of our team.

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