Claims and Legal Briefing
COVID-19

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The novel coronavirus (COVID-19) touched nearly every corner of the global economy and its institutions from businesses and non-profits to healthcare and education systems. We are still in the midst of responding to the pandemic, and all stakeholders are looking to draw from whatever resources they have available to sustain operations. Insurance policies represent a significant reserve in this regard, and many policyholders are pushing to recover under those contracts; however, noteworthy coverage obstacles abound. In light of those coverage obstacles, policyholders have been active in seeking alternative relief, and, thus far, the trend seems to be that governments and courts tend to oblige. This article reviews those developments.

State and Local Government Intervention

The concept of what constitutes a "direct physical loss or damage" is preventing many policyholders from obtaining coverage for business interruption claims. All carriers in some form or fashion, at least at this point, offer a version of the position where the presence of COVID-19 is not conclusive of direct damage to that property, which may trigger coverage. Actions from several state governments, however, suggest this definition of property damage may not hold. The most notable proposed change here is Pennsylvania's State Bill 1114 (the "COVID-19 Insurance Relief Act"). State Bill 1114 would seek to expand the definition of "property damage" as follows: a direct physical loss has occurred when "the presence of a person positively identified as having been infected with COVID-19" is on the insured's property or in within the vicinity of the insured's property. This is significant because every county in Pennsylvania has confirmed at least one positive case of COVID-19; thus, nearly any business property in the Commonwealth could potentially be a candidate to obtain business interruption coverage.

There appears to be support for intervention similar to Pennsylvania's State Bill 1114 in other states as well. The state legislatures of Louisiana, Massachusetts, New Jersey, New York, Ohio, and South Carolina have each introduced similar bills. (See Louisiana S.B. 477; Massachusetts S.D. 2888; New Jersey A.B. 3844; New York A.B. A10226; Ohio General Assembly H.B. 589; South Carolina S. 1188 (some bills relate only to small business policyholders, not all commercial properties). While these pieces of legislation are not law, and may never become law, they are indicative of the public pressure mounting on insurance carriers.

In addition to a change in state law, local orders are also trending favorably for policyholders on the "direct physical loss" concept. Examples include the respective shelter-in-place orders issued by the New York City Mayor's Office (Emergency Executive Order No. 100) and the Sonoma County Health Office (Order No. C19-05) because the COVID-19 virus is physically causing property loss or damage due to its "proclivity to stay airborne and to attach to surfaces for prolonged periods of time." Thus, while state bills may or may not materialize, local orders present another option for policyholders to demonstrate that the presence of COVID-19 constitutes physical loss or damage to the insured's property and/or that COVID-19 shelter-in-

place or stay-at-home orders trigger the "civil authority" business interruption coverage contained in most policies.

Federal Government Proposals
In addition to state-level developments, two federal proposals are also on the horizon. House Bill H.R. 6494, named the "Business Interruption Insurance Coverage Act of 2020", would, if passed, require carriers to cover COVID-19-related business interruption losses and would also nullify any exclusions for viral pandemics contained in existing property insurance policies. We will see if House Bill H.R. 6494 gains traction.

As an alternative to providing a new coverage framework, the House Financial Services Committee also proposed a draft bill, named the "Pandemic Risk Insurance Act of 2020," that would establish a federal "backstop" for pandemic insurance industry losses in excess of $250 million. The proposed Act would be similar to the Terrorism Risk Insurance Act, arising after 9/11. If passed, the Act, would create a federal program that would provide for public and private compensation for business interruption losses resulting from a pandemic. The $250 million threshold in this Act is key, as that is when the reinsurance intent is activated. The program would be triggered when industry losses exceed the $250 million threshold, but a cap would be in place at $500 billion in a single year. Carriers will charge a premium to policyholders for this reinsurance coverage, plus an admin fee. The details and logistics of funding remains uncertain for this program. A number of estimates for COVID-19 losses approach the trillions of dollars. In comparison to TRIA, the 9/11 losses were closer to $40 or $50 billion. The TRIA program liability cap is $100 billion. Under TRIA, if losses exceed that amount, all TRIA policyholders are paid pro rata. For a $1 trillion dollar Pandemic Risk Insurance Act example, the example policyholder would receive 10 cents on the dollar for coverage.

Caselaw

Judicially created precedent could be the third prong policyholders rely on for relief. The plethora of declaratory judgment actions across nearly every jurisdiction has just begun to resolve coverage disputes involving COVID-19 related claims. These matters will define the contours of the "direct property damage" definition, the "virus" exclusion, and the scope of civil authority coverage. Policyholders will undoubtedly develop creative and nuanced arguments in favor of coverage. It is expected that policyholders may try to pull language from cases such as the Friends of DeVito v. Wolf or Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America. In Friends of DeVito, the Pennsylvania Supreme Court characterized COVID-19's impact on possible loss of life as similar to other natural disasters. This is not necessarily indicative that a court will be persuaded by Friends of DeVito to treat COVID-19 as a covered peril under a property policy, but it is a characterization a court might want to compare and contrast when determining if or how "direct physical loss" may have occurred. In Gregory

Packaging, a policyholder of an industrial property was able to recover business interruption losses under its policy, because a district court found that "direct physical loss" can occur with the release of ammonia in the air even if there is no "distinct, demonstrable, and physical alteration" of a property's structure. Pairing Gregory Packaging with perhaps a court taking judicial notice that the virus has the "proclivity to stay airborne and to attach to surfaces for prolonged periods of time" could also help inform what constitutes a "direct physical loss." Only time will tell how the caselaw progresses. These actions will likely lag significantly behind the pace of business (or lost business), but they are still matters to monitor moving forward for the large masses of policyholders looking for assistance.

Conclusion

In a vacuum, COVID-19 presents several challenges for a policyholder to recover under its insurance program. However, momentum is building on multiple fronts where policyholders may see some relief in the future. These developments are complex, but sufficient support behind them could lead them to fruition. Policyholders will need to periodically review and evaluate legislative developments and caselaw.

Henderson Brothers previously addressed these policy provisions and prospects for coverage. Please see Henderson Brothers' COVID Resource Center and our related writings for detailed coverage analyses.

State Bill 1114 would also define COVID-19 as a covered peril and modify the civil authority coverage section to provide "coverage for loss due to an order … caused by the COVID-19 disease pandemic."

Friends of DeVito, et al. v. Wolf, 2020 Pa. LEXIS 1987, 2020 WL 1847100 (Pa. April 13, 2020).

Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014).

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