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ALERT

COVID-19 and Insurance for Construction Delays

By Stephen D. Palley, Daniel J. Healy and Rhonda D. Orin

An immediate problem for many businesses as the coronavirus pandemic gathers force is the suspension or interruption of operations. While we usually think of property policies as applying to hazards like fires or storms, a range of property policies and coverages can also be triggered by loss of use, quarantine, and other interruptions to business resulting from this national public health crisis. This is a particular problem in the construction industry, where the impact of the pandemic may lead to expensive delays in completion because of site shutdown, access restrictions, or supply-related issues.

Commercial property policies typically apply to existing structures, while builders risk policies apply to property in the course of construction. There is some overlap, but this is the basic distinction between the two policy types.

Business Interruption Coverage

One of the widely used commercial property insurance policy forms addresses business interruption as follows:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by **direct physical loss of or damage to property** at premises which are described in the Declaration.

The question this presents is whether and how the COVID-19 outbreak might cause “direct physical loss.” One might read this language and conclude that it only applies to things like fires or obviously physical casualty losses, but there is more here than meets the eye and ample opportunity to find coverage for COVID-19–related losses triggered by this language.

For example, a quarantine that prevents or restricts access to a building might constitute “loss of use,” which in some cases can be deemed to constitute property damage. Similarly, the presence of the virus that causes a building to be shut down, leading to suspension of operations, might also be deemed to have caused direct physical loss. As a practical matter, there is after all no difference between a policyholder who can’t

ANDERSON KILL
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

ANDERSON KILL
1760 Market Street, Suite 600
Philadelphia, PA 19103
(267) 216-2700

ANDERSON KILL
1055 Washington Boulevard, Suite 510
Stamford, CT 06901
(203) 388-7950

ANDERSON KILL
1717 Pennsylvania Avenue, Suite 200
Washington, DC 20006
(202) 416-6500

ANDERSON KILL
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858

ANDERSON KILL
Wells Fargo Building
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 943-1444

ANDERSON KILL
107 Hobart Rd.
Newton, MA 02459
(617) 221-5445

www.andersonkill.com





who's who

Stephen D. Palley is a partner in the Washington

D.C. office of Anderson Kill. Mr. Palley is a seasoned litigator and trial lawyer with more than two decades of experience representing policyholders in complex insurance coverage disputes, with a particular focus on construction, engineering and infrastructure. He is also co-chair of Anderson Kill's recently launched Technology, Media and Distribution systems group, a cross-disciplinary team providing counsel to the emerging technology sector.

spalley@andersonkill.com
(202) 416-6552



Daniel J. Healy is a partner in Anderson Kill's Washington, DC, office and Co-Chair of the firm's Cyber Insurance

Recovery Practice Group. Mr. Healy represents policyholders seeking insurance coverage. As a former Trial Attorney at the Department of Justice, he has extensive experience in courts across the country.

dhealy@andersonkill.com
(202) 416-6547

use a building because it's been damaged by a fire and one who can't use a building because it's been infected by a dangerous virus. While an insurance company may argue that actual physical alteration to the property is required for coverage, court decisions in a number of jurisdictions have held to the contrary in cases involving substances that render a property unusable, such as ammonia, indoor air toxins and asbestos.

The fact that physical loss or damage is not limited to structural harm starts with the plain language of the insurance policies. The word "structural" is almost never used. Instead, words like "direct physical injury" appear in the boilerplate of pre-printed forms the insurance companies draft themselves. If "structural" damage is what they meant, that is what they should have said. Since they did not, the most basic principles of contract drafting make it clear that structural damage is not required.

Pollution Exclusions and Other Potential Bars to Coverage

Speaking of those toxic substances, the pollution exclusions in some property policies could potentially apply to viral outbreaks. Some policies even include specific viral contamination exclusions that likely encompass COVID-19. Absent such explicit language, courts have gone both directions in cases where insurance companies attempt to use their pollution exclusions to cover something not typically considered a "pollutant"—such as a viral outbreak. Some policies even contain exclusions that explicitly encompass *bacterial* outbreaks but not *viral* outbreaks like COVID-19.

Contingent Business Interruption Coverage

Many property policies also provide contingent BI (business interruption) coverage for losses caused by damage suffered by a supplier or client—a potentially critical coverage in this time of global supply chain disruption. Contingent BI generally requires that the damage to the supplier or customer in question is attributable to a covered cause of loss in the underlying property policy. Both standard and contingent BI coverage may specifically be available for loss of income suffered when a governmental authority prohibits access to a property (often specified as coverage for closure "by order of civil authority"). While this coverage, like contingent BI coverage, may require a direct physical loss or damage trigger in the base property policy, arguments such as those advanced above as to what constitutes property damage may apply.

Builders Risk Coverage for Construction Delays

The pandemic will likely cause delays for many construction projects as access to sites and material is impeded by illness and govern-



ment actions. Such delays may trigger builders risk policies, which cover loss or damage to property during the course of construction. Construction contract force majeure clauses (a provision allowing a party to withdraw from an agreement in the wake of an “extraordinary event”) may provide relief for delay-related issues. In some cases, policies may include specific coverage for force majeure or for compliance with ordinances or laws. While insurance companies may dispute coverage here, policies should be reviewed carefully and consideration given to all possible and reasonable constructions.

Many property policies include coverage loss mitigation, sometimes also found in a “sue and labor” clause in a builder’s risk policy. To the extent costs are incurred to prevent or limit harm caused by the presence of the virus, reimbursement may also be available under those parts of the policy.

These are only a few examples of first-party property insurance policies that can apply to losses arising from the pandemic. Many others may be triggered as well. For example, some larger corporate insureds may have coverage that applies generally to lost revenue from a government shutdown. Others whose business is event-driven may have special events or event cancellation coverage that is specifically applicable.

In all cases, it is important to be mindful of insurance policy notice requirements and to err on this side of reporting an actual or potential loss to your insurers. If you will be unable to access your physical office, it is also critically important that full copies of your policies be maintained and accessible in both electronic and (where feasible) physical form. ▲

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Rhonda D. Orin

is the managing partner of the firm’s D.C. office. She has represented policyholders exclusively for more than 30 years, recovering more than a billion dollars of insurance proceeds mostly from property and liability policies. She is a Fellow of the American Bar Foundation and her skills are recognized by Chambers, Best Lawyers and others.

rorin@andersonkill.com

(202) 416-6549

