Business Interruption and Civil Authority Coverage

Here is some good information that we have pulled from coverage response letters from policyholders. It is estimated that there could be as many as 50% of policies that do not have Virus Exclusions. That is why the insurance companies are pushing “NO PHYSICAL LOSS of or Damage to Property”.

Coverage: Most policyholders are in one of the three following categories relating to coverage language.

1. **Insurance Company is in strong position to deny coverage**
   
a. Covered Cause of Loss means Direct Physical Loss

b. ISO CP 01 40 07 06 exclusion for loss due to virus or bacteria or similar endorsement

c. Civil Authority Coverage

d. **Insurance Company’s Position:** The intention was to exclude coverage through the endorsement. The policyholder was not charged premium for the exposure.

2. **Insurance Company has defenses but case law is in favor of policyholders**

a. Covered Cause of Loss means Direct Physical Loss

b. **NO ISO CP 01 40 07 06 exclusion for loss due to virus or bacteria or similar endorsement**

c. Civil Authority Coverage

d. **Insurers Arguments as it relates to Business Interruption and Civil Authority Coverage:** Insurers disclaimers generally rely upon the proposition that COVID-19 did not cause a “physical loss of or damage to property”.

e. **Policyholder Position as it relates to Business Interruption Coverage:** The insurance company’s position is unsupportable. Property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality, as is the case here. It is widely recognized that a toxin does not need to be visible, to represent a form of physical damage. Hence, the law is well established that a noxious or offensive substance in or about a property qualifies as a “direct physical loss” to that property. See e.g., Matzner v. Seaco Ins. Co., 1998 Mass. Super. LEXIS 407, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide covered under an insurance policy that protected against direct physical loss or damage to property); Arbeiter v. Cambridge Mut. Fire Ins. Co., 1996 Mass. Super. LEXIS 661, 1996 WL 1250616 (Mass. Super. Ct. March 15, 1996) (oil fumes constituted a “physical loss” to the building triggering insurance coverage because, inter alia, “fumes are a physical
f. **Policyholder Position as it relates to Civil Authority Coverage:** 1.) COVID-19 rendered a business completely useless to its owners. The pervasive presence of COVID-19 (which led the Governors of virtually every state, including Massachusetts, to declare States of Emergency and close business and other public accommodations) is a “direct physical loss or damage” within the scope of the insuring grant because it directly impaired the property’s essential functionality. Insurance Companies reliance on the notion that the business did not sustain “direct physical loss or damage” due to COVID-19 is wholly without merit and is unsustainable as a matter of law. 2.) The Civil Authority coverage grant is triggered “[w]hen a ‘Covered Cause of Loss’ causes damage to property other than property at the described premises”. Governor Baker’s COVID-19 Orders and Declaration of a State of Emergency unequivocally establish, property in each and every town and county in Massachusetts has been infected with COVID-19. Each of those properties sustained a direct physical loss as a result of the virus, and each and every one of those properties is otherwise at risk of direct physical loss because of the virus. Consequently, there is no colorable basis for an insurance company to deny that a “Covered Cause of Loss” caused (and continues to cause) damage to other property.

g. **Policyholder Position as it relates to lack of virus exclusion:** If the Insurance Company intended to limit coverage, the insurance company would of have had a policy which included the industry standard Exclusion Of Loss Due To Virus Or Bacteria (CP 01 40 (07/06)) available since 2006.

3. **Policyholder in a strong position to obtain coverage or overturn a denial of coverage**

a. Covered Cause of Loss means “Risk of Direct Physical Loss”

b. NO ISO CP 01 40 07 06 exclusion for loss due to virus or bacteria or similar endorsement

c. Civil Authority Coverage

d. Insurers Arguments as it relates to Business Interruption and Civil Authority Coverage: Disclaimer exclusively relies upon the proposition that COVID-19 did not cause a “physical loss of or damage to property”.

e. **Policyholder Position as it relates to Business Interruption Coverage:** That position is unsupportable. Property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality, as is the case here. It is widely recognized that a toxin does not need to be visible, to represent a form of physical damage. Hence, the law is well established that a noxious or offensive substance in or about a property qualifies as a “direct physical loss” to that property.

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