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CRISIS PRACTICE

Coronavirus

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Healthcare Providers Should File Insurance Claims for COVID-19 Related Business Interruption Losses

The COVID-19 coronavirus ("coronavirus") pandemic has wreaked havoc on hospitals, healthcare systems, and other healthcare providers who have found themselves at the center of the pandemic. The harmful conditions created by the spread of the novel coronavirus in indoor environments, coupled with continued government restrictions on the ability of some providers to perform elective procedures during the pandemic, have damaged the balance sheets of many healthcare providers.

Most healthcare providers maintain commercial property policies that provide coverage for business interruption losses caused by physical loss of or damage to property. Many healthcare providers initially held back from filing claims because of the urgent need to focus on patient care, as well as efforts by some insurance companies to argue that coverage might not exist for this situation. However, all healthcare providers should take a close look at their insurance policies to avoid leaving valuable insurance coverage on the table and lean toward tendering business interruption claims to their carriers that may be covered.

Over the last eight months, some insurance companies have denied coverage for business interruption coverage claims related to the pandemic, regardless of the industry in which their policyholders operate, and often without diligent consideration of the full scope of the insurance coverage required. As a result, policyholders have filed more than 1,300 insurance coverage lawsuits and counting. The insurance industry has used the media, as well as a handful of often distinguishable decisions in their favor, to propagate the notion that no insurance coverage is available for business interruption losses caused by the pandemic. This insurance industry mantra is incorrect, and the tide is starting to turn in the still early stages of the insurance coverage battles taking places in courtrooms across the country. For example, in October 2020, a trial

court in North Carolina granted a policyholder's early motion for partial summary judgment and held that the insurance policy at issue provided business interruption coverage.[1] Similarly, motions to dismiss have been denied in numerous other jurisdictions,[2] and a court in Louisiana recently set a trial date for the first COVID-19 business interruption insurance coverage lawsuit that was filed in March,[3] rejecting the insurer's claim that COVID-19 losses are excluded under property damage policies. Finally, in almost 100 cases the insurer simply filed an answer rather than a motion to dismiss, allowing the case to proceed into discovery. Therefore, notwithstanding the misleading narrative the insurance industry has been pushing to discourage policyholders from filing claims, many policyholders will be entitled to pursue coverage for COVID-19 related business interruption losses.

Healthcare providers in particular often have stronger business interruption claims and broader policies than policyholders in other industries and have scored some early victories in lawsuits addressing the issue.[4] Therefore, healthcare providers should be particularly well suited to press their insurers to cover business interruptions for losses caused by the virus, for several reasons.

First, under most property policies, a policyholder must, as a threshold matter, demonstrate loss caused by "physical loss of or damage to property." Some early coverage lawsuits for COVID-19 claims were dismissed, mostly involving non-healthcare providers, because the policyholders did not plead that the coronavirus actually impacted their properties. Some of these policyholders even specified in their complaints that the virus was not present at their insured premises, giving courts an easy basis on which to dismiss. By contrast, healthcare providers are on the frontlines of the pandemic by interacting with and treating patients with COVID-19, making them uniquely situated to demonstrate the presence of the novel coronavirus at their locations. Healthcare providers also are well-positioned to show the impact that the coronavirus and related government restrictions have had on the locations where they do business, as providers continue to restrict lucrative elective procedures. Indeed, often the very need to treat COVID-19 patients at their facilities caused the inability to provide non-COVID related scheduled services. The ability to allege and demonstrate the actual presence of this coronavirus at their properties gives healthcare providers a leg up on other policyholders.

Second, many healthcare providers' policies are more favorable than other businesses' property insurance policies. Healthcare providers often purchase "all risk" policies that provide coverage for "all risks" due to physical loss or damage to property, unless specifically excluded. After the 2003 SARS epidemic, the Insurance Services Office developed broad virus exclusions that the insurance industry adopted in an effort to exclude business interruption losses arising out of infectious diseases in standard form policies. But many healthcare providers have property policies that do ***not*** contain these broad virus exclusions. For example, many healthcare providers have limited contamination or pollution exclusions that may contain the word "virus," but only apply to "costs" arising from a virus, as opposed to business interruption "losses" caused by the virus. Thus, the mere word "virus" in an exclusion to an insurance policy does not mean a lack of coverage for business interruption losses caused by the novel coronavirus. The subtle differences in the language used can mean many millions of dollars in coverage owed by insurance companies for business interruptions.

Third, some healthcare provider companies have additional coverages in their property policies that specifically provide coverage for costs incurred or business interruption losses sustained due to the presence of a "communicable disease." Insurers have taken an inconsistent approach regarding whether to pay claims under these niche add-on coverages, even though COVID-19 clearly constitutes a communicable disease. Anecdotal data indicates that some insurers have been paying claims under the communicable disease coverage extensions while others have been forcing their policyholders to sue to obtain the coverage owed. While these coverage extensions sometimes are subject to a sublimit, they still can and often do provide valuable coverage, and undermine insurer arguments that the coronavirus does not cause "physical loss or damage."

In closing, because the insuring agreements and exclusions found in commercial property policies vary widely, and healthcare provider companies often have broader coverage than policyholders in other industries, healthcare providers should carefully review their policies for potential business interruption coverage, and should err on the side of providing notice of claims to avoid a late notice defense that could bar coverage. Moreover, for those healthcare provider companies whose claims have been denied and are considering coverage litigation, it is important to note that the manner in which a policyholder pleads its complaint can have an outsized impact on the policyholders' likelihood of success, and that most healthcare provider companies have unique claims that may be more likely to succeed given the unique exposures they face while fighting on the frontlines of the pandemic. Lastly, policyholders should be cognizant of potential statutes of limitations or other contractual time periods in their policies that can affect when a claim is supposed to be tendered or a lawsuit filed. That said, one more unique byproduct of the pandemic has been some legislative and/or judicial decrees that potentially extend these limitation periods. Therefore, while it typically is better to act sooner rather than later, there can be situations when claims can be successfully asserted despite what the insurer may argue to the contrary.

We work closely with our clients and their risk managers to collect from their insurers for losses arising from property damage, business interruption, event cancellation, and supply chain disruption caused by unforeseen and catastrophic events, and have obtained billions of dollars in insurance recoveries for our policyholder clients, including substantial recoveries under property policies and for healthcare provider companies who initially received coverage denials from their insurers.

[1] *North State Deli, LLC, et al. v. The Cincinnati Ins. Co., et al.*, No. 20-CVS-02569, Order Granting Plfs.' Mtn. for Partial Summary Judg. (Super. Ct. of Durham Cnty., N.C. Oct. 9, 2020) (granting summary judgment in favor of restaurant and "conclud[ing] that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property").

[2] See *Hill & Stout PLLC v. Mutual of Enumclaw Insurance Company*, No. 20-2-07925-1 SEA (Super. Ct. King Cnty., Wash. Nov. 13, 2020) for an example of a court denying an insurer's motion to dismiss. There, the court denied an insurer's motion to dismiss a dental practice's business interruption

claim and held that the dental practice's position that the government shutdown orders constituted a "physical loss of" or "deprivation of" its insured property—even if there was no structural damage or direct "physical damage"—was a reasonable interpretation of the term "loss." *See also Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ct. of Common Pleas, Cuyahoga Cnty., Ohio Nov. 17, 2020) (denying insurer's motion to dismiss and stating: "Here, not only do Plaintiffs allege that Covid-19 – a physical substance – was *likely* on their premises . . . , but that it *was* physically present and that it caused physical loss and damage. Accordingly, the Court finds that Plaintiffs have sufficiently alleged that Covid-19 existed on their premises, and that it caused direct physical loss and damage."); *Studio 417, Inc. v. The Cincinnati Ins. Co.*, --- F. Supp. 3d ----, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (denying insurer's motion to dismiss because plaintiffs "plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable").

[3] *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, No. 2020-2558 (Civil Dist. Ct. Louisiana Nov. 4, 2020) (denying insurer's motion for summary judgment and holding that genuine issues of material fact existed, including whether the policyholder's losses were caused by physical loss or damage to property).

[4] *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA (Super. Ct. King Cnty., Wash. Nov. 13, 2020) (denying insurer's motion to dismiss and finding that key language in dental provider's insuring agreement was ambiguous and should be construed against insurer); *Optical Services USA/JC1 et al. v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Aug. 13, 2020) (denying insurer's motion to dismiss against optometrist's business interruption insurance claim); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020) (denying insurer's motion to dismiss against a gynecologist office's business interruption insurance claim); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (denying insurer's motion to dismiss against dental practice's business interruption insurance claim).