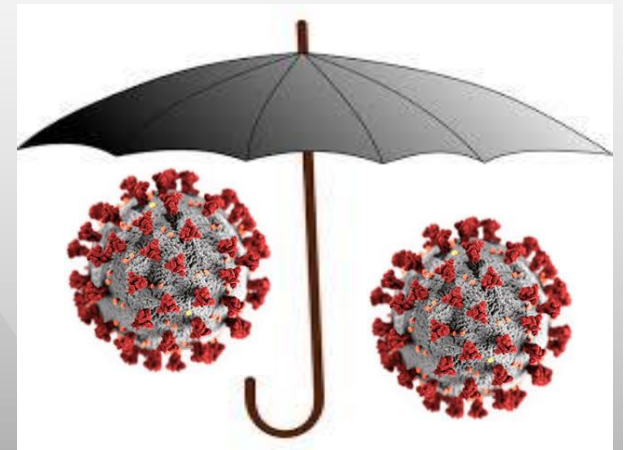




AMERICAN ASSOCIATION OF
PORT AUTHORITIES WEBINAR

Live Webinar
May 29, 2020
2:00 pm – 3:00 pm

INSURANCE COVERAGE AND CLAIMS PREPARATION RESULTING FROM COVID-19



Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

INTRODUCTION

- Welcome
- In this fast-changing and chaotic environment, we will try to provide some clarity about insurance for coronavirus losses
- We cannot tell you here whether your losses are covered or not, but we can give you a framework for the analysis

ANDERSON KILL AND OUR PANEL

Anderson Kill – Representing Policyholders For 50 Years

Anderson Kill has been a proud member of the AAPA for 20 years

Robert Horkovich
Anderson Kill P.C.

Finley Harckham
Anderson Kill P.C.

Ron Papa
National Fire Adjustment Co., Inc.

SPEAKER:



Robert M. Horkovich, Esq.
Managing Shareholder (Firm)
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Robert M. Horkovich is "the 'go-to person' in the area of insurance recovery," according to a client cited by Chambers USA, which has recognized Mr. Horkovich as a leading insurance recovery attorney every year since 2005. According to Chambers, Mr. Horkovich "has a strong 'client-first' attitude" and "is recognized in the market for his leading trial and negotiation skills, with an undisputed national presence."

Bob has obtained over \$5 billion in settlements and judgments from insurance companies for his clients. Bob is a trial lawyer with substantial experience in trying complex insurance coverage actions on behalf of corporate policyholders and governmental entities. His victories include one of the top 10 jury verdicts in the United States, the top insurance recovery jury verdict in the United States, seven landmark state Supreme Court decisions, eight jury verdicts and nine bench trial decisions in favor of the policyholder.

Bob also has represented The Port Authority of New York and New Jersey, San Diego Unified Port District, General Electric, Thiokol, Waste Management, Alcatel-Lucent, Garmin, SCI, Clorox (First Brands), Saks Fifth Avenue, NYU, Princeton University, United Bank, Spalding, Cascade, Tektronix, Maidenform, Bijan and Evander Holyfield.

As to asbestos insurance recoveries, Bob represents the Trusts in the W.R. Grace, Owens Corning, Congoleum, Fuller-Austin, Swan Transportation (Tyler Pipe), and Asarco cases, and the Asbestos Claimants' Committee in the Kaiser-Gypsum, Federal Mogul, PPG/Pittsburgh Corning, and A.P. Green (GIT) bankruptcies.

U.S. PORT AND HARBOR OPERATIONS TOTALLED \$3.4 BILLION IN 2019



Source: IBIS World

SUBSTANTIAL DROP IN PORT \$ REVENUE DUE TO COVID-19 SINCE 2/20



LOSS OF CRUISE INDUSTRY REVENUE

- US Cruise Industry Suspended Cruises Out of US Ports on 3/14/20.
- US Center for Disease Control & Prevention prohibited cruise lines from operating from US Ports from 100 days from 4/10/20 or until the pandemic is declared over.
 - Most cancel to August 1, 2020.



PRECIPITOUS DROP IN PASSENGER AND CARGO VOLUME

- Some ports saw a 30% drop in cargo volume in March 2020 compared to March 2019.
 - Maersk expects 20-25% drop in 2020.



Sources: PortStrategies 3/23/20, Maritime Executive 5/15/20.

TENANT RENT AND CHARGES ARE IMPERILED

- Port Tenants are requesting fiscal relief from rents and charges.



Source: PortStrategies 3/23/20

AIR TRANSPORTATION IS EXPERIENCING A STRONG DECLINE

- Projected Reduction of 39% to 72% of seats offered by airlines in 2020.



Source: ICAO Uniting Aviation

COVID-19 HAS DISRUPTED SUPPLY CHAINS OF NEARLY 75% OF U.S. COMPANIES



Source: Axios Economy & Business 3/1/20

SPEAKER:

Finley Harckham is a senior litigation shareholder in the New York office of Anderson Kill and serves on the firm's Executive Committee.

Finley regularly represents and advises corporate policyholders and other entities in insurance coverage matters. He has successfully litigated, arbitrated and settled hundreds of complex coverage claims. His areas of particular focus include property loss, environmental, business interruption, directors and officers liability, construction, professional liability, aviation liability, cyber and general liability claims.

Finley also founded two Anderson Kill non-legal subsidiaries: Anderson Kill Insurance Services, LLC, and Anderson Kill Loss Advisors, LLC. Those companies provide insurance consulting and property and business interruption loss quantification and settlement services.

Since 2009, Finley has been recognized by Super Lawyers for Insurance Coverage. In addition, since 2012, he has been recognized by Chambers USA for policyholder insurance dispute resolution in New York and has been described as *"a tenacious litigator and a real gentleman"* and *"reasonable, confident and as adept at taking a hard line as he is at finding workable compromises."* Legal 500 USA also recognized Finley for insurance advice to policyholders and has described him as being a *"leading practitioner in the field of insurance and reinsurance for natural disasters."*



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SPEAKER:



Ronald J. Papa, SPPA
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Ron is the President of National Fire Adjustment Company and has been instrumental in NFA's growth for more than 30 years. He has successfully adjusted more than 2,000 insurance losses working for a wide range of clients.

Ron earned the prestigious designation of Senior Professional Public Adjuster and is accredited by the National Association of Public Insurance Adjusters (NAPIA), of which he is past president. He was named Person of the Year by NAPIA for "outstanding leadership" and recently addressed the National Symposium of Insurance Commissioners at their conference in Florida. Ron is approved as an instructor by numerous State Insurance Departments, the New York State Bar Association, and the Society of CPAs.

He graduated from Niagara University.

COMMERCIAL PROPERTY POLICIES

- Property policies provide coverage for a variety of PD and BI risks.
- General rule: there must be property damage somewhere to trigger coverage.
- Insurers will argue that the mere presence of Covid-19 is not enough to constitute PD – need a physical alteration of insured property.
- This will be a key issue for courts to address.
- Different courts can reach different decisions.



PROPERTY DAMAGE AND BUSINESS INTERRUPTION

- PD: costs to repair/replace where PD results from a covered cause of loss
 - Decontamination / communicable disease cleanup costs where insured premises infected
- BI: lost profits stemming from covered PD
 - During the period needed to repair or replace the damage



EXTENDED BUSINESS INTERRUPTION

- BI coverage for the period needed to restore a policyholder to its pre-loss level of business
- Capped at a period of days (e.g. 365)
- Important for PD losses which can be quickly remedied
- Important question: is this coverage limited to BI losses or to other time element losses as well?



CIVIL AUTHORITY

- PD need not always occur at insured premises.
- Civil Authority: lost profits stemming from action/order of a civil authority that prohibits, prevents or impairs access to your business.
 - Covered PD typically required within some geographical proximity to the insured premises (*e.g.*, five miles).
 - But not always – ISO form



CONTINGENT BUSINESS INTERRUPTION

- Contingent BI: covers lost profits stemming from covered PD at upstream supplier or downstream distributor or customer.
- Often coverage applies to multiple tiers of suppliers and customers.
 - “Supplier” could be interpreted broadly. *See Archer - Daniels Midland Co. v. Phoenix Assurance Co*, 936 F.Supp. 534 (S.D. Ill. 1996) (a food processor was entitled to CBI coverage because of PD sustained by the Army Corps of Engineers, which operated the flooded Mississippi River boat channels, and farmers who lost crops that would have indirectly been sold to the plaintiff)
- CBI may extend to PD at “leader” or “attraction” properties.
 - *E.g.*, hotel nearby large amusement park
- May include civil authority and extended BI coverage.

COMMUNICABLE DISEASE COVERAGE

“If a described location owned, leased or rented by the Insured has the *actual not suspected presence* of communicable disease and access to such described location is limited, restricted or prohibited by:

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability *at such described location with such presence of communicable disease*”*

* Emphasis supplied



POTENTIAL COVERAGE ISSUES

- Has there been “direct physical loss or damage”?
- Do exclusions bar coverage?
 - Virus
 - Communicable Disease
 - Pollution
 - Contamination
- Are there sublimits?
- What is the “actual loss sustained”?



CLAIM PREPARATION AND PRESENTATION

- These are complex claims
- Assemble a team with expertise
- Policy interpretation
- Claim preparation
- Negotiating with insurance companies
- Risk manager
- Licensed public adjuster
- Accounting expertise
- Legal expertise
- Broker



NOTICE OF THE CLAIM

- Give notice right away even if the loss is continuing.
- It is enough at first to give general notice without a lot of detail.
- Follow up notices



RESPONDING TO INSURER REQUESTS FOR INFORMATION

- Provide all available information.
- Do not be constrained by the way the requests are worded.
 - Present the information in a way that supports your claim.
- In addition to what is requested, provide any additional facts which support your claim.



HOW TO GET ATTENTION FOR YOUR CLAIM AMONG THOUSANDS

- Request prompt attention to your claim.
- Inform the insurer of the financial burden you are facing.
- Include any loan default deadlines or other urgent deadlines you are facing.
- Put everything that does and does not happen in the claim investigation/adjustment in writing to the insurer.



DEALING WITH RESERVATION OF RIGHTS LETTERS

- You are entitled to an explanation, not just a reference to policy provisions.
- Seek expert advice.



DEALING WITH DENIALS OF COVERAGE

- Strategic considerations:
 - Try to negotiate?
 - File suit?
 - Wait to see how the law develops for other similar claims?



PROOF OF LOSS DEADLINE

- Policies often require sworn proofs of loss within a specified period of time.
- Time period starts to run when the loss commences – not when it ends.
- Get extensions in writing.



HOW TO CALCULATE A BUSINESS INTERRUPTION LOSS



EXPENSES TO PROTECT PROPERTY FROM FURTHER DAMAGE. SOME POLICIES COVER EXPENSES TO PREVENT IMMEDIATE IMPENDING LOSS



BUSINESS INCOME & EXTRA EXPENSE

- Expediting Expenses to Reduce the Loss
- Extra Expenses to Resume Operations – Not Necessarily Reducing the Loss
- Ordinary Payroll Coverage (x days)



BUSINESS INCOME & EXTRA EXPENSE (CONT'D)

- Lost Revenues
- Additional Expenses: Rent, Transportation, Salaries, etc.
- Less: Saved Expenses (if any)



APPRAISAL

- Each side names their Appraiser
 - The two Appraisers chose an Umpire.
 - Binding when 2 of the 3 agree.
 - Not for coverage issues. Only to establish the amount and extent of loss.

CONTINGENT BUSINESS INCOME

- Your customers and suppliers and *maybe* your customers' customers and your suppliers' suppliers.



QUESTIONS?



THANK YOU.



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