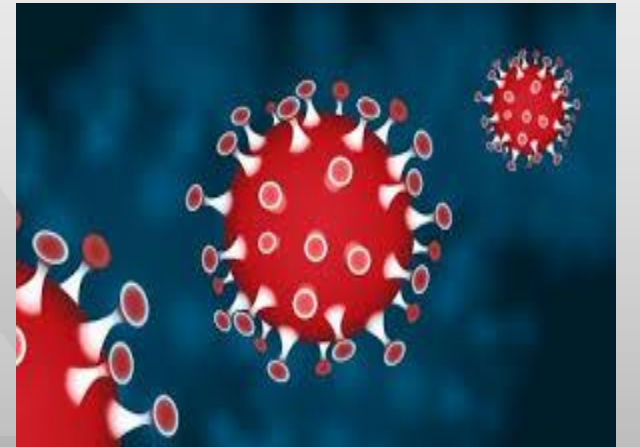




AMERICAN ASSOCIATION OF
PORT AUTHORITIES

Live Webinar
May 4, 2020
2:00 pm – 3:00 pm

INSURANCE COVERAGE FOR LOSSES STEMMING FROM THE CORONAVIRUS



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
Finley Harckham
Rhonda Orin

SPEAKER:



Robert M. Horkovich, Esq.
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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.

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.



PRECIPITOUS DROP IN PASSENGER AND CARGO VOLUME

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



Source: PortStrategies 3/23/20

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.



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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."

FUNDAMENTALS

- Many different types of insurance policies may provide coverage for this situation
- Each policy will require careful review, as wording can differ even among standard forms



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



NAMED PERILS OR ALL RISK

Named Perils

- Enumerated and limited: weather delays, travel delays, illness, accident, death of honoree or performer

All Risk

- All but that which is specifically excluded



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 EXTENSION

“This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured *at a location or within five (5) statute miles of it*”*

* Emphasis supplied

CORONAVIRUS AND 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



CORONAVIRUS AND CIVIL AUTHORITY (CONT'D)

- Typically the order must be triggered by actual PD, not purely as a precaution
- Coverage is usually limited to a period of time (e.g. thirty or sixty days)
- Civil authority is potentially a very fertile ground for coronavirus coverage and our next speaker will focus on the government orders in place

INGRESS-EGRESS EXTENSION

“This Policy covers the Business Interruption Coverage loss incurred by the Insured due to the necessary interruption of the Insured’s business when ingress to or egress from a described location(s) is *physically prevented*, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured *whether or not at a described location*”*

* Emphasis supplied

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

SPEAKER:



Rhonda D. Orin is the managing partner of the firm's Washington, D.C. office. She is recognized in Chambers USA as being ‘extremely smart, fiercely tenacious’ and having ‘outstanding business judgment.’ Rhonda has recovered more than \$1 billion for policyholders nationwide, including first-party property damage and business interruption claims, cyber liability, third-party liability claims, directors & officers liability and errors and omissions coverage. Rhonda has been lead counsel in multiple jury and bench trials, argued before the highest courts of several states, and appeared in cases before U.S. Supreme Court.

Rhonda is a Fellow of the American Bar Foundation, an honor given to less than 1% of attorneys. Her skills are recognized by Chambers, the Legal 500, the D.C. Women’s Bar Association, Best Lawyers, Super Lawyers and others. A former journalist, Rhonda also is the author of “Making Them Pay: How to Get the Most from Health Insurance and Managed Care” (St. Martin’s Press 2000).

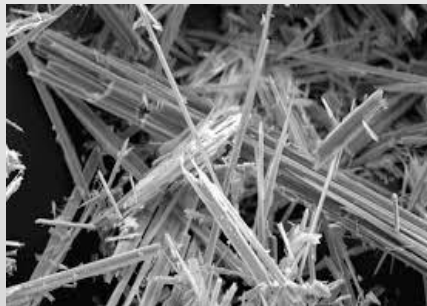
POTENTIAL COVERAGE ISSUES

- 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”?



CORONAVIRUS AS PHYSICAL DAMAGE?

- “Physical damage” = carpet fumes, carbon monoxide leaks, asbestos fibers, ammonia, bacteria in water, etc.
- There is case law on both sides of some issues
- Insurance companies will argue there is no damage



MANY CASES FAVOR COVERAGE

- *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 327247 (D. Ore. June 7, 2016) (business entitled to BI coverage when it had to cancel performances at a theater due to smoke from wildfires that infiltrated the premises)
- *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (the presence of large quantities of asbestos in the air of a building may constitute “physical loss or damage”)
- *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013) (finding “direct physical loss” where “home was rendered uninhabitable by the toxic gases” released by defective drywall)

“PHYSICAL” IS NOT “STRUCTURAL”

- *Mellin v. Northern Sec. Ins. Co.*, 167 N.H. 544, 550-51, 115 A.3d 799, 805 (N.H. 2015) (responding to plaintiffs’ argument that “physical loss encompasses pervasive odors,” the court concluded that “physical loss may include not only tangible changes to the insured property, but also changes that . . . exist in the absence of structural damage”)

BUSINESS INTERRUPTION COVERAGE

- Communicable Disease Coverage
- Civil or Military Authority Coverage
- Ingress/Egress 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



BUT AREN'T THERE EXCLUSIONS?

- “Contamination Exclusion”
- Other exclusions that include the term “virus”
- Pollution exclusions // Mold-Bacteria exclusions
- Manuscript exclusions



GENERAL CONSIDERATIONS

- Exclusions are narrowly construed
- They must be unambiguous in order to bar coverage
- The burden of proof is on the insurance company
- They may apply to some, but not all, coverages



“CONTAMINATION EXCLUSION”

- “**contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use of occupancy”
- Applies “unless directly resulting from other physical damage not excluded by the Policy”
- Contamination is defined in relevant part as “any condition of property due to the actual or suspected presence of any . . . virus”

“VIRUS EXCLUSION”

- Standard forms were drafted in 2006 by the Insurance Services Office (“ISO”) and another industry-wide organization
- Insurance companies seek permission from state insurance departments to include them in their policy forms
- They usually get it but not always

WHAT ABOUT SUBLIMITS?

- You need to read the declarations and all related provisions
- Some sublimits are dollar limits and some are time limits
- Many policies limit “Communicable Disease” coverage more than “Ingress/Egress” and “Civil Authority”



LIABILITY COVERAGE

- Policies typically include coverage for Bodily Injury, Property Damage and Personal and Advertising Injury
- Consider caselaw, including Legionnaires' Disease and air quality cases
- Consider exclusions, like pollution, mold, fungus and bacteria
- Consider conditions, like failure to mitigate

WHAT YOU SHOULD BE DOING NOW

- Give prompt notice to all possible insurance companies
- Take reasonable measures to mitigate your losses
- Capture costs of rescheduling or other mitigation
- Preserve records and documents
- Cooperate with insurance company investigations
- Seek advice and counsel: brokers, risk managers, accountants, lawyers



QUESTIONS?



THANK YOU.



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