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Client Alert: COVID-19 Insurance Coverage Issues: An Update

On March 16, 2020, we issued a Client Alert regarding COVID-19 impacts and losses. Now, several states, counties and municipalities across the United States have issued "stay at home" or "shelter in place" orders mandating that individuals remain in their homes except for essential travel and that all but essential businesses close for at least several weeks. State executive orders can be found here. Many companies understandably are concerned about the resulting loss of income and have begun looking to their insurance policies to see if they will cover such losses. The impacts of COVID-19 and insurance coverage issues are evolving and we are issuing this update to keep interested parties informed of the latest developments.

Many property insurance policies insure business income losses from the complete or partial suspension of operations due to some variation of "physical loss of or damage to" covered property. Policies also can cover an insured's loss of income caused by "physical loss of or damage to" someone else's property upon which the insured relies for business (e.g., customers or suppliers), often called "contingent business income" coverage. There also is "civil authority" coverage that insures loss of income when an order of a civil authority is issued because of "physical loss of or damage to" some other property and the order prevents access to the insured's property.

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A common theme for these coverages is the requirement of "physical loss of or damage to" property. Some courts have held that property that has been contaminated (e.g., ammonia fumes permeating a building) has suffered physical loss or damage. Similarly, a building contaminated with COVID-19 may have suffered physical loss or damage, but one hurdle would be proving the contamination in the first place. To that end, we note that many "shelter in place" orders specifically state that the virus has caused widespread property damage in the areas encompassed by the orders. *See, e.g., New York City Emergency Executive Order No. 100*: "this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage." If a company's employees actually have COVID-19 or were exposed to it, that also may help to establish that the virus is or was present in the company's property. Last week a lawsuit was filed in Louisiana by a restaurant seeking coverage for lost income due to COVID-19 and the governor's order restricting public gatherings. This lawsuit and others may test the boundaries of the requirement for "physical loss of or damage to" property. At this stage, it is too early to tell whether and to what extent the physical loss or damage requirement will impact coverage for any particular claim.

In addition to the physical loss or damage requirement, while the exact policy language varies, some policies have specific exclusions for communicable diseases and/or viruses. Such exclusions are an additional hurdle that insureds would have to overcome. The legislature of New Jersey currently is considering legislation that would negate these exclusions, and other states may follow suit. Whether such legislation will pass and, if passed, would survive any legal/constitutional challenges, remains to be seen.

There is no "one size fits all" policy for business income losses. Each policy is different and may have certain



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provisions or language that would significantly affect coverage for losses related to COVID-19. For example, some policies specifically insure losses due to communicable diseases, while others may have more expansive coverage for certain business income losses that is less dependent on actual physical loss of or damage to property (e.g., preservation of property to prevent "imminent" loss or damage). A review of your property policy by an experienced coverage professional may assist you in determining whether and to what extent it will respond to COVID-19 losses.

Given the current uncertainty regarding coverage for COVID-19 losses, the safest course of action for an insured may be to notify its insurer(s) of a loss, submit and document the claim according to the policy requirements, and wait for the response. At a minimum, this will reduce the risk that the insurer(s) will deny coverage based on late notice or failure to comply with some condition.

If you have any questions about your company's insurance coverage policies, do not hesitate to contact Angela Elbert, Paul Walker-Bright, Seth Lamden or your Neal Gerber Eisenberg attorney.

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