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COVID-19: Business Interruption Claims Are You Covered?

Adrienne Markell

The novel coronavirus, or COVID-19, has disrupted daily lives with necessary social distancing, travel bans, and voluntary and involuntary quarantines. It has also forced many businesses in Ontario to close their doors to the public. On April 3, Ontario Premier Doug Ford revised the list of essential businesses in order to direct additional businesses to close, as well as restricted specified businesses to providing services by alternate methods. The “essential” businesses who continue to operate may see liquidity problems and could face financial distress as a result of lower sales volumes.

Disrupted businesses are now looking to their insurance brokers and insurance policies to determine whether the losses triggered by COVID-19 can be recovered through a claim. Across the United States, we have seen several Class Action lawsuits arise alleging that under standard commercial property forms, coverage is provided for “the actual loss during the period of time while access to the premises is prohibited by order of civil authority as a direct result of damage to the premises by an insured peril”. Do the impacts of COVID-19 constitute “damage to the premises” or more likely through “an order of civil authority” or legislated lockdown?

In *Gregory Packaging, Inc. v. Travelers Property & Casualty Co. of America*, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25), the insured claimed for business interruption coverage resulting from an employee’s injury as a result of an ammonia release in its facility. As a result of the injury, the facility was forced to close for five days. The insurance

company argued that there was no direct physical loss or damage to the property as a result of the ammonia. The court disagreed with the insurance company stating that a broad and “widely accepted definition, physical damage to property means a distinct, demonstrable, and physical alteration. While structural alteration provides the most obvious sign of physical damage,” the courts have found “that a property can sustain loss or damage without experiencing structural alteration.” As a result, ammonia, which forced closure of the premises, constituted a “direct physical loss.”

Similarly, in *MDS Inc. v. Factory Mutual Insurance Company*, the insured sought coverage after they were unable to purchase isotopes from Atomic Energy Canada Ltd. as a result of a leak of heavy water in AECL’s reactor. The leak did not cause physical damage to AECL’s reactor. The insurer denied coverage claiming the reactor had not sustained physical damage. The court

concluded that “physical damage” was broad enough to include the loss of property even in the absence of physical damage.

Those courts’ decisions were made based on unique sets of facts; however, it does lead to the question of whether forced closure as a result of COVID-19 will be covered under standard commercial property insurance.

While the question of whether coverage is afforded for closure as a result of COVID-19, a company should also consider whether losses resulting from the shut-down of a key supplier or customer under these circumstances would be covered.

With forced closures across Ontario, many events have also been forced to cancel or postpone. While certain insurance policies include coverage for event cancellation, the policy wordings normally exclude coverage for communicable disease. The exception is where the insurance policy explicitly includes “pandemic insurance.”

Organizers of the 2020 Wimbledon Championships, who have paid for pandemic coverage since the SARS outbreak in 2003 (costing them nearly \$34 million over the last 17 years), are expected to receive a \$141 million insurance payout as a result of cancelling the tournament. Very few pandemic insurance products exist at this point as the risk is not fixed and, as a result, are difficult to underwrite.

While coverage has been afforded to organizations who had the foresight to include pandemic coverage in their annual premiums, many businesses that have been required to cancel events are looking to the clause of "force majeure". The force majeure clause generally provides coverage in the event of unexpected acts of God or nature. The Supreme Court of Canada has defined an "act of God" as a "supervening, sometimes supernatural, event, beyond control of either party, [which] makes performance impossible".

The discussion around coverage as a result of COVID-19 is continuing to evolve. Disruptions to businesses as a result of COVID-19 are expected to increase in the future. While it appears that insurers are not volunteering to cover losses as a result of the pandemic at this time, companies who have suffered losses as a result of mandated closure, contaminated facilities, or reduced turnover as a result of COVID-19

should contact their insurance brokers for greater clarity on their own policy wording and possible recourse.

Business interruption losses are less tangible than property losses, making them more difficult to calculate. In determining losses as a result of COVID-19, businesses need to establish projected profits (absent the pandemic) as compared to profits/losses as a result of the pandemic. In extreme situations, the entire value of the business may be lost necessitating a pre-COVID-19 business valuation to be determined. Such losses may also extend beyond most typical insurance policy indemnity period coverage. Businesses also must consider any savings as a result of forced closures and any subsidies in order to avoid double counting. Policy terms often vary in establishing business interruption losses and a careful review of the policy wording is required.

As events continue to unfold, Crowe Soberman LLP is working to stay current on developments and consulting with counsel in the insurance space. We have considerable experience in calculating losses under a variety of commercial insurance policies.

How Can Crowe Soberman Support You?

In these uncertain times, it is essential to remain agile and proactive as the COVID-19 situation unfolds. Having timely

access to financial experts, insights and news as quickly as possible is critical—and that's where we can help.

We have established a dedicated COVID-19 Resource Hub, highlighting areas of business operations that will likely be impacted by coronavirus. Whether you need to discuss your current financial situation and learn what options are available to you, or you want to be guided through the appropriate cash flow management strategies for your business, our team of experts are ready to help you at every step of the way. Please do not hesitate to reach out to your Crowe Soberman professionals for support during these challenging times.

We are in this together.

This article has been prepared for the general information of our clients. Specific professional advice should be obtained prior to the implementation of any suggestion contained in this article. Please note that this publication should not be considered a substitute for personalized tax advice related to your particular situation.

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Adrienne Markell, Manager, Valuations | Forensics | Litigation

Adrienne Markell is a Manager in the Valuations | Forensics | Litigation (VFL) team at Crowe Soberman. She has a background in business valuations, shareholder disputes, and economic damage quantification. She is also experienced in auditing and tax. You can connect with Adrienne at adrienne.markell@crowesoberman.com.

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Our core services are in Audit, Tax, and Advisory. Along with these, we have professionals who specialize in Business Valuation, Claims Valuation, Corporate Recovery & Turnaround, Forensics, Estates & Trusts, Global Mobility Services, HR Consulting, Commodity Tax (HST), International Transactions & Consulting, International Tax, Litigation Support, M&A Transactions, Management Services, Personal Insolvency and Succession Planning. Members of our various specialty services groups are available when required as a technical resource to assist the client service team.

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