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The newsletter of the Illinois State Bar Association's Section on Insurance Law

From the Editor

BY DAVID M. KROEGER

This issue of *The Policy* focuses on insurance issues arising out of the current pandemic, and includes articles providing an overview of potential insurance issues as well as more in-depth analysis with respect to potential issues with respect to workers compensation, general liability and commercial property insurance.

I want to thank all those who have contributed articles for this special edition of *The Policy*.

As always, if any readers have articles that they would like to submit for publication, please contact me or any other member of the Insurance Law Section Council. Likewise, please don't hesitate to contact us with any suggestions for improvement of *The Policy* newsletter.

Contributing to this issue:
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A Discussion of Insurance Issues Resulting From the Coronavirus Pandemic by Common Types of Commercial Insurance Policies

BY FRITZ HUSZAGH

Barely two full months into the health and economic mess created by the coronavirus, governments, businesses and people are proactively and reactively dealing with the problems created by the situation. Meantime, incessant news coverage and commentary inundate media. In relation to insurance coverage, there has been much discussion about the insurance industry's role in helping to cushion the financial blow suffered by countless businesses, large and small.

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A Discussion of Insurance Issues Resulting From the Coronavirus Pandemic by Common Types of Commercial Insurance Policies

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Discussions range from (i) legislative and executive branch government officials commenting on the role and obligations of insurers; (ii) business owners commenting that they paid a premium for years and now want the benefit of coverage for business interruption; and (iii) insurance industry executives commenting that many current coverages were not written to cover pandemics, adding that if the insurance industry is forced to respond in a way that insurance executives do not think is required under existing contracts, then the government should back-stop the industry as well as set up a mechanism to deal with pandemics.

In addition to discussing the issue, some legislators have introduced legislation that would impose obligations on insurers by modifying contracts. Some legislators have introduced legislation that would define common policy terminology so as to broaden the possibility of recovery. Members of Congress have written letters to insurance industry organizations lobbying them to have their members behave in a way that will maximize recovery under insurance policies. Governors' proclamations were written (possibly due to lobbying by interested parties?) such that they made reference to "physical damage to property," which not coincidentally co-opts language found in insurance contracts. Administrative bodies in some states have written emergency administrative rules to modify burdens of proof, or introduce rebuttable presumptions, into guidelines pertaining to the handling of claims by insurers. Some states have issued directives requiring insurers to refund a portion of insurance premiums for coverages that have been positively impacted by behavior during the pandemic, and a number of insurers have proactively promised refunds of "unused" premiums in this respect, for example, on auto policies because people have driven many fewer miles than underwriters expected.

Meantime, law firms and lawyers representing businesses, primarily in the hospitality industry, have begun filing lawsuits against property insurers, many of which are class actions, to attempt to force payments for lost income and extra expense under business interruption coverages, or asserting a right to recovery based on loss of business imposed by reason of civil authorities. Warren Buffett commented during the annual shareholder meeting of Berkshire Hathaway (which owns many insurance operations) that there will be an "awful lot of litigation" relating to claims for insurance coverage growing out of the pandemic. Law firms, pro-policyholder and pro-insurer, have begun churning out white papers and blog entries discussing the issues (and thumping their chests, of course), and there are rumblings that the litigation finance industry is taking a good look at various opportunities presented by the anticipated tsunami of litigation.

In very general terms, the following commercial insurance coverages seem destined for many claims and myriad disputes:

Business Interruption/Civil Authority/Contingent Business Interruption

Most businesses insure themselves for first party loss, including loss to their property. Commercial property insurance is designed to protect against losses to business property. Several different, but related, components are frequently part of commercial property policies. These include business interruption, civil authority and contingent business interruption.

Business interruption policies, depending on language, provide coverage for lost income and/or extra expenses incurred as a result of the business not being able to operate, provided a covered loss occurs. The covered loss is typically worded as "direct physical loss of or damage to covered property." It is apparent that a key area of dispute will be whether the presence of coronavirus particles cause direct physical loss of or damage to property. Insurers will

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argue that the presence of the virus does not cause physical loss much less damage, while insureds will argue, not without some roughly analogous authorities to support them, that the presence of the pathogen necessarily causes loss or damage to any physical object on which it is present, even though the virus is not visible to the naked eye.

An added layer of uncertainty exists due to the fact that many if not most commercial property policies of recent vintage include an exclusion relating to the presence of bacteria, fungi and viruses, thereby attempting to close the door to a claim of coverage. Such exclusions were introduced by the insurance industry about the time that legionnaires and SARS and other infectious diseases were becoming more frequent and the expectation of substantial losses became more apparent.

Policyholder lawyers can be expected to argue that the industry must have assumed that the presence of a virus causes physical loss or damage to property, lest there would have been no need to add the exclusion. And it is noteworthy that for an additional premium, some insurers offer buy-back provisions whereby these types of claims are expressly covered, but up to pre-determined--usually smaller--amounts.

Civil authority coverage is typically found within the business income and extra expense coverage part of a commercial property policy. This cover is intended to deal with situations where a business suffers a loss of income or extra expense by reason of the actions by a civil authority. However, these policies contain a number of inherent requirements that can significantly impact the obligation, or the scope of the obligation, of the insurer. For example, most forms require that a covered cause of loss must cause damage to property other than property at the insured's premises, the concept being that damage to the other property causes the civil authority to prevent access to the insured premises. If that predicate is not met, then the coverage does not apply.

But even if this requirement is met, two further conditions typically must be met: the other damaged property must be within a set distance of the insured property; and the action of the civil authority must be taken due to dangerous physical conditions resulting from the covered cause of loss or to enable the civil authority to have unimpeded access to the damaged property. And even if these criteria are met, most civil authority provisions only allow for recovery of lost profits and extra expenses for a preset period of time, usually not more than four consecutive weeks. It is painfully obvious that insureds will have to carefully step around a lot of potholes in order to obtain relief.

Finally, contingent business interruption insurance is available to many businesses, and is of particular interest to smaller businesses. It is insurance that provides protection where a business depends on one or a few other businesses (the "contingent" business) for most of its materials or products, or where it depends on one or a few other businesses to purchase most of its products or materials, and a loss occurs to the other business which thereby impacts the insured's business. The problem that is likely to arise, in relation to coronavirus type claims, is that the loss to the contingent business must be caused by a direct physical loss of or damage to its property (i.e., the same problem discussed above in relation to business interruption coverage). And as discussed already, there will be extensive litigation over whether any business that suffers extra expense or lost income has suffered a direct physical loss or damage in the first place.

Workers' Compensation/Employers Liability and EPLI Insurance

The place and nature of one's employment, and the risk of employees becoming ill with COVID-19, will surely cause consternation for employers as well as insurers who provide workers compensation coverage. It is readily apparent that an employee at any business could be infected while at work, by either a fellow employee or by a customer. It is painfully more apparent that health care workers and other "first responders" (policemen, fireman, EMT crews and paramedics) and, to a lesser but still significant extent, "front line" and essential workers (e.g.., nurses, pharmacists, grocery workers, delivery service workers, etc.) are even more likely to be exposed to the virus while they are carrying on their jobs.

Under the Illinois Workers' Compensation Act, an injured employee is entitled to compensation when the worker has sustained an injury arising out of and in the course of the employment, while under the Workers' Occupational Disease Act, a worker is entitled to compensation where the disease arises out of and in the scope of employment, or where the disease has become aggravated and rendered disabling as a result of exposure of the employment.

Obvious problems of proof are apparent. Was the claimant exposed to coronavirus while working, or while carrying on with life outside of the job? That question is going to ricochet around the workplace, workers compensation boards and courtrooms for a long time to come.

In an effort, perhaps, to make things less complicated, the Illinois Workers' Compensation Commission recently enacted an emergency rule, 50 Ill. Adm. Code 9030, by which the existing language of an insurance-related administrative rule was supplemented to provide that in connection with Governor Pritzker's Disaster Proclamation 2020-38 (and related subsequent Proclamations), in proceedings before the Commission where the petitioner was a first responder or front line worker (as defined in Proclamation 2020-38), any such worker's exposure to COVID-19 was to be rebuttably presumed to have arisen out of and in the course of the Petitioner's first responder/front line worker's employment, and was to be rebuttably presumed to be causally connected to the hazards or exposures of the first responder/front line worker's employment. This rule was, very shortly after its enactment, struck down by a circuit court judge in Sangamon county, after which the rule was withdrawn by the Commission.

Suffice it to say that a lot of businesses as well as their workers, not to mention the many people sickened with COVID-19, have a very substantial interest in the public policy debate about the extent of workers' compensation injuries/workers' occupational diseases in this context.

Down the road, as governmental agencies start to address workplace requirements pertaining to risks associated with coronavirus infections, it would not be at all surprising if OSHA or state equivalents were

to impose workplace safety guidelines or protocols, which in turn may impact claims by workers which will then implicate work-related insurance coverages.

As for Employment Practices Liability Insurance, which covers "wrongful acts" pertaining to the workplace (such as discrimination claims), claims stemming from COVID-19 are likely to involve things such as whether layoffs were properly handled, and whether various classes of workers were treated in accordance with antidiscrimination laws, etc.

General Liability Insurance

Next to workers compensation insurance and commercial property insurance, the insurance coverage that most likely will be impacted by coronavirus claims is general liability insurance, designed to protect businesses from claims for bodily injury. This being America, businesses will invariably be sued by third persons, such as customers, who claim they were injured in their person by the presence of coronavirus at a place of business. Obvious proof problems may pose an obstacle to a successful outcome in these suits. But these suits will come, probably in substantial numbers before too long, and general liability insurers will be asked to handle claims against businesses in this regard.

Almost certainly, the major targets of such suits will be places of hospitality as well as businesses where people tend to congregate closely with other people, not to mention healthcare facilities. Interestingly, in the context of, say, a doctor's office, if a patient were to be sickened by the coronavirus while visiting the doctor's office, and he or she were to sue, would his claim fall under the office's general liability policy or under the doctor's malpractice policy?

It is no surprise that various models are being batted around among legislators that would, if enacted, provide some level of immunity against claims, perhaps along the lines of disallowing claims unless there is a showing, for example, of gross negligence or willful misconduct. And if that model comes to pass, it may engender fights with insurers over whether such conduct is an occurrence. And it would not be altogether surprising to see one or more of the various insurance organizations (such as ISO) promulgate additional exclusionary language that precludes claims of injury stemming from the coronavirus, but also promulgate language by which a buy-back of such coverage can be obtained for an additional premium.

Directors & Officers/Management Liability

Articles have appeared in various business publications that suggest many businesses may not have adequately evaluated the risks of a pandemic insofar as it may pertain to the operations of, or financial consequences to, the business, much less made appropriate disclosures as required by securities laws. Two Notre Dame professors noted that a review of annual corporate filings indicate that despite knowledge that a pandemic could adversely affect a business, only a relatively small number of public companies identified these risks in their 2018 10-K filings.

Aside from securities suits that may be filed against companies and their boards for failing to identify/quantify, and then disclose, these risks, it seems altogether possible that various mergers/acquisitions that have been scuttled by the pandemic might well lead to suits against businesses and managers. Likewise, in the event that insurers prevail in the majority of cases pertaining to business interruption losses, management might also be sued for not purchasing proper insurance to protect the company against such losses. Parametric insurance products (an insurance product where a pre-established payment amount is made in the event of a designated catastrophe) were available in the marketplace that could have insulated corporations from significant losses. For example, insurance brokerage Aon created a parametric product that was available to the hospitality industry beginning in 2018.

Event Cancellation/Trade Disruption Insurance

Thousands of corporate meetings, conventions and trade group conferences have been cancelled, causing tremendous losses in particular to the hospitality business (hotels and restaurants). And, of course, sporting events at all levels have been cancelled, causing huge financial losses. It is no secret, for example, that many large universities derive a very substantial amount of revenue from athletic programs and events.

Event cancellation and trade disruption insurance contracts may help mitigate losses suffered by businesses due to the inability to hold an event. The question invariably will be whether the business actually insured against a pandemic loss. Somewhat like travel cancellation insurance that an individual can purchase to protect a vacation, event cancellation policies contain a number of very substantial caveats and limitations. For example, some policies only cover events cancelled by reason of specified risks; others are "all risks." Even if the risk of loss is covered, some of these policies also contain exclusions pertaining to communicable diseases, a pandemic, or a shutdown due to governmental actions. Some of them insure against loss of profit, others for extra expense only. As with business interruption policies, the contracts are replete with provisions that serve as a tripwire against a full recovery.

Other Insurance Matters Arising From the Pandemic

As just mentioned, it is foreseeable that corporate management might be accused of not arranging appropriate insurance coverage to protect a business from losses caused by the pandemic. Likewise, it is inevitable that insurance brokers/producers/agents are likely to be the target of suits alleging they failed to counsel/advise/recommend/arrange appropriate insurance. That will become particularly evident, as suggested already, if the insurance industry has a high percentage of success in fending off claims under business interruption policies.

Finally, just as significant loss causing events (e.g., asbestos claims or losses stemming from the 9/11 attacks) rippled up the pipeline from insurer to reinsurer, accompanied frequently by significant and acrimonious disputes about how claims are allocated and apportioned between the former and the latter, it is a certainty that as the insurance industry processes the legal costs and loss payments that arise due to the coronavirus, questions will arise about how the reinsurance industry must respond under its contracts with insurers.■

Dramatic Expansion of Illinois Workers' Compensation Rights Leads to Injunction, Nullification, and Likely Governor Action

BY BRIAN A. ROSENBLATT

On April 15, 2020, the Illinois Workers' Compensation Commission ("IWCC") published a Notice of Emergency Amendments to the Illinois Workers' Compensation Act (the "Amendments" to the "Act") effective April 16, 2020, for a period of 150 days. The Amendments shift the burden of proof required by a petitioner to prove that injury relating to COVID-19 exposure is now rebuttably presumed to have arisen out of and the course of a first responder's work.

In response, on April 22, the Illinois Manufacturers' Association ("IMA") and the Illinois Retail Merchants' Association ("IRMA") filed a verified complaint against the IWCC and Commissioner Michael J. Brennan in the Circuit Court of the 7th Judicial Circuit, Sangamon County, IL, seeking to enjoin enforcement of the newly issued Emergency Amendments to the IWCC's Rules of Evidence.

On April 24, 2020, the Court granted a temporary restraining order enjoining the IWCC from enforcing the newly issued amendments pending further court proceedings.

The April 16, 2020 Emergency Amendments

The Emergency Amendments[1] unilaterally passed by the IWCC, as opposed to by the Illinois Legislature, substantively change the evidentiary requirements for COVID-19 First Responder(s) or Front-Line Workers(s) to establish that if they contract the virus, their exposure to the virus arose out of and in the course of their employment.[2] The amendment reads:

> In any proceeding before the Commission where the petitioner is a COVID-19 First Responder or Front-Line Worker … if the petitioner's injury or period of incapacity resulted from exposure to the COVID-19 virus during a COVID-19-related state of emergency, the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's …employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposure of the petitioner's …employment.[3]

This amended rule represents a dramatic change to a petitioner's burden to prove all elements of their cause of action, significantly the crucial elements of accident and causation. The burden now shifts to the employer to prove by a preponderance of evidence why an injury arising from COVID-19 exposure was not caused by work.

The April 22, 2020 Case

In response to the IWCC's Emergency Amendment, on 4/22/20, the IMA and the IRMA filed a lawsuit challenging the rule changes. Together, IMA and IRMA's memberships employ the largest number of workers in Illinois and contribute the highest share of the state's gross domestic product.[4]

Scott Cruz, one of the attorneys for the plaintiffs stated: "To be clear, this case is not about the wisdom of the substantive new law expressed by the Commission. This case is about the Commission far exceeding its rulemaking authority. The substantive law of Illinois, and the wisdom of implementing it, is for the legislature, after proper discourse, and not the whim of the Commission,"[5] He was further quoted as saying: "At a time when many are waiting for relief from the federal and state government in an effort to make payroll and retain workers, they will now be forced to pay for additional medical and salary costs regardless of whether an employee's illness was contracted outside of the workplace."[6]

The lawsuit alleges that any and all actions taken by the IWCC must be specifically authorized by statute. The Illinois Administrative Procedure Act ("IAPA") applies to and governs the actions of the IWCC.[7] The IAPA requires that all rules enacted by the IWCC comply with the provisions of Article 10 of the Illinois Administrative Procedure Act. The IAPA only authorizes the Commission to enact rules that either (1) establish **procedures** governing the cases before the IWCC or (2) implement or prescribe existing law or policy.

Article 10, Section 5, of the IAPA provides in part:

> Rules required for hearings. All agencies shall adopt rules establishing procedures for contested case hearings.[8]

The Complaint also alleges that the IAPA does not give the IWCC the statutory authority to enact rules that change the law or that violate the provisions of the IAPA that are not procedural.[9] The strict limitations on the IWCC's power to enact only procedural and interpretive rules is expressly recognized in the Illinois Workers' Compensation Act and the Illinois Workers' Occupational Diseases Act. Section 16 of the Illinois Workers' Compensation Act and Illinois Workers' Occupational Diseases Act are similar and provide in part:

> The Commission shall make and publish procedural rules and orders for carrying out the duties imposed upon it by law and for determining the extent of disability sustained, which rules and orders shall be deemed prima facie reasonable and valid.[10]

The crux of the Complaint is that the IWCC's Emergency Amendments violate the IAPA in that the Amendments change the burden of proof as set forth in the IAPA by creating a rebuttable presumption in favor of a petitioner that the petitioner in fact contracted COVID-19 in the course of his/her employment. Article 10 of the IAPA requires that the Commission follow the same rules of evidence as are applied in civil cases in Illinois circuit courts. Specifically, the IAPA provides:

> (a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.[11]

Prior to the Amendments, in proceedings before the Commission, a petitioner had the burden of proof to establish that his/her injuries arose out of and in the course of employment.[12] The only exceptions to this rule in the Act are exceptions that were made through the legislative process when enacted by the Legislature, and not through the unilateral actions of the IWCC. The Amendments allegedly violate the IAPA because they unlawfully remove the burden of proof from a petitioner having the exclusive burden to establish that he/she contracted COVID-19 as a result of their employment, require the employer to have to rebut the virtually irrefutable presumption that the petitioner contracted COVID-19 through the workplace and require the employer to provide evidence that the petitioner did not in fact contract COVID-19 as a result of their employment.[13]

The April 24, 2020 Temporary Restraining Order

On April 24, 2020, Sangamon County Circuit Court Judge John M. Madonia granted plaintiff's motion for a temporary restraining order.[14] In addition to plaintiffs' motion, the court also reviewed the IWCC's and Commissioner's response as well as a plethora of amicus briefs.[15] The court found that plaintiffs met their burden of proof required for the court to grant the "extraordinary remedy of injunctive relief" and issued the temporary restraining order.[16] The IWCC and the Commissioner were ordered to formally answer the Complaint by April 30, 2020, and the case was continued to May 4, 2020 for case management and to discuss plaintiff's pending motion for the issuance of a preliminary injunction.

The April 27, 2020 Nullification

On April 27, 2020, Commissioner Brennan, in a conference call discussing other topics, indicated that the IWCC had effectively nullified the prior Amendments, saying that the "time, expense and uncertainty of litigating the issue was prohibitive."

Conclusion

The legal challenge is to the manner in which a substantive change to the law was implemented, not whether the rule is fair.

At his April 14, 2020 news conference, Governor Pritzker was asked whether it is fair for employers to bear the tremendous financial burden that this rule change would impose. Pritzker said "in the middle of an emergency, the only way that you have to operate is to protect people as best you can… and to the extent that it's required that someone has to pick up the tab for that, sometimes it will fall on the people who are most able to pick up the tab."[17]

Of course, what Governor Pritzker is failing to address in that statement is that Illinois businesses—many of which are small—are already facing devastating losses as a result of the pandemic. These businesses cannot simply afford to "pick up the tab" that this historic expansion of workers compensation claims will impose.

It is notable that this change was enacted as an "Emergency Rule," with less than 24 hours' notice, rather than an amendment to the Act. Many other states that have made similar changes to their workers' compensation burden of proof have done so through the legislature, with the standard deliberative process and checks and balances that goes along with that (albeit on far more expedited bases given the pandemic). The fact that the change was made as a rule change, and that it may violate the Illinois Open Meetings Act, is disturbing and raises serious due process issues.[18]

This rule change specifically refers to "proceeding before the Commission" and "Petitioner." Applying a strict interpretation to those words, which is the default analysis absent any other evidence, one must presume that this rule change does not apply to any employee who has not yet filed an Application (which begins the litigation process).[19] In other words, "a proceeding before the Commission" only starts when an employee files an Application, moving an employee from a mere workers compensation claimant to a "petitioner."[20] Nothing in this rule change affects an employee's burden to prove that their condition actually is COVID-19, rather than another condition with similar symptoms.[21] Nothing in this rule change alters the fact that it is a petitioner's burden to prove that COVID-19 resulted in any significant permanent and partial disability.[22]

Even with the April 27, 2020 nullification, it is unlikely that the issue will die and many predict that Governor Pritzker will effectuate these changes through an Executive Order, as governors in some other states have done. Remember that the temporary restraining order was granted because of "invalid lawmaking." Since the governor can get around the legislature by using the powers vested in him by the Illinois Emergency Management Agency Act, we would expect an Executive Order imminently.■

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1. https://www2.illinois.gov/sites/iwcc/news/Documents/15APR20-Notice_of_Emergency_Amendments_CORRECTED-clean-50IAC9030_70.pdf
2. https://www.chicagolawbulletin.com/no-consensus-on-workers-compensation-emergency-ruling-20200416?utm_source=subscriber&utm_medium=email&utm_campaign=headlines&utm_content=1a-trial+bars+tangle+over+new+workers%26rsquo%3b+comp+rule
3. 50 Ill. Adm. Code 9030.70(a)(1) (emphasis added).
4. https://capitolfax.com/2020/04/22/business-groups-file-lawsuit-over-new-workers-comp-rule/
5. *Id*.
6. *Id*.
7. 5 ILCS 100 § 1-5 and § 1-20
8. 5 ILCS 100 § 10-5 (emphasis added)
9. Complaint, ¶ 17.
10. 820 ILCS 305 § 16
11. 5 ILCS 100 § 10-40(a)
12. The burden is on the party seeking an award to prove by a preponderance of credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Hannibal, Inc. v. Industrial Commission*, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill. Dec. 146 (1977).
13. Complaint, ¶¶ 29, 30.
14. Court Docket, Order not available at time of writing.
15. *Id*.
16. *Id*.
17. https://herald-review.com/news/state-and-regional/illinois-essential-employees-guaranteed-workers-compensation-during-pandemic/article_4796a4f6-3608-5c09-8b85-83d473cdce43.html
18. https://www.bdlfirm.com/dramatic-expansion-of-il-employees-workers-compensation-rights/
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.

COVID-19 Wrongful Death Lawsuit Alleging Exposure at Work

BY DONN P. LAHAIE

On April 6, 2020, a wrongful death lawsuit was filed in Cook County, Illinois, on behalf of an employee of Walmart who was allegedly exposed to the COVID-19 virus while working.[1] The Plaintiff died from the alleged exposure. The suit alleges that Walmart and the local property owner, J2-M Evergreen, LLC ("J2") willfully and wantonly caused the death of Wando Evans, the Walmart employee.[2]

Specifically, the Plaintiff's estate alleges (in relevant part) that Walmart and J2:

1. Failed to implement social distancing guidelines promulgated by Federal and State authorities;
2. Failed to properly clean and sterilize the Walmart store to prevent infection, and failed to properly train personnel to implement and follow procedures designed to minimize the risks of contracting COVID-19;
3. Failed to provide Plaintiff and other employees with personal protective equipment and cleaning agents recommended by the Centers for Disease Control ("CDC") that are designed to protect against infection from COVID-19;
4. Failed to periodically interview and evaluate employees of Walmart for symptoms of COVID-19, and failed to warn Plaintiff and other employees that those experiencing symptoms may have been infected by COVID-19;
5. Failed to follow recommendations for mandatory safety and health standards promulgated by the Department of Labor and OSHA, and failed to conduct periodic inspections of the conditions and cleanliness of the Walmart store to prevent and/or minimize the risk of contracting COVID-19 as recommended by the CDC;
6. Failed to follow guidelines promulgated by the CDC in order to keep a safe and healthy environment, including failure to prepare and implement basic infection prevention measures, failed to develop an infectious disease response plan, and failed to prevent infection by installing protective devices and barriers;
7. Failed to develop policies and procedures for identification and isolation of sick people and failed to cease store operations and close when employees were experiencing symptoms of COVID-19; and
8. Hired employees by phone and other means in an expedited process which prevented the proper screening of prospective employees for signs and symptoms of COVID-19.[3]

On first impression, in light of the Illinois Workers' Compensation Act, it would seem that the lawsuit against Walmart alleging work related exposure is inappropriate and should be barred.

Section 5(a) of the Illinois Workers' Compensation Act provides that employees are not permitted to bring civil lawsuits against their employers for work-related injuries or diseases because workers compensation benefits are deemed to be the exclusive remedy for such ailments.[4] This is commonly referred to as the "Exclusive Remedy Doctrine."

However, in1990, a court found four exceptions (in relevant part) to the exclusivity provision.[5] In order to circumvent the Exclusive Remedy Doctrine, a plaintiff must show:

1. The injury was not accidental;
2. The injury did not arise out of employment;
3. He/she was not injured in the course of employment; or
4. The injury was not compensable under the Act.[6]

As such, pursuant to the Exclusive Remedy Doctrine, a Plaintiff would be exempt if he/she could show that an intentional act caused the injury or

illness because an intentional tort is not an "accident." In the instant case, Plaintiff did not allege an intentional act. Plaintiff has only alleged that the actions of the Defendants were negligent and/or willful and wanton.

This is problematic because negligent acts are deemed to be "accidental," and willful and wanton conduct does not rise to the level of a purposeful act. "Willful and wanton conduct is a hybrid between negligent acts and intentionally tortious behavior. Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing."[7] As such, lacking the element of intent, the Exclusive Remedy Doctrine would bar the civil action in the instant case based on the acts and omissions allegedly directed at Plaintiff as an employee.

However, there is a grey area which the court will have to address with respect to those allegations of acts and omissions affecting "employees and others."[8] The Dual Capacity Doctrine appears to be the only theory upon which Plaintiff's case potentially survives. If Plaintiff can show that the injuries (or illness) were not sustained in the course of employment and/or caused by the employment, he/she may be exempt from the Exclusive Remedy Doctrine. As referenced above, this exception is known as the "Dual Capacity Doctrine or Dual Persona Doctrine."

Previously, the Illinois Supreme Court prohibited an employee from suing his employer as result of negligent medical treatment administered by the employer's doctors.[9] Specifically, the court held that the employee's remedy was limited to the Workers' Compensation Act.[10] In reaching its decision, the court adopted a "dual capacity" test, which determines the employer's potential liability by assessing whether new obligations were created separate from the role of employer.[11] The act of protecting those other than employees from exposure to COVID-19 would arguably fall within the Dual Capacity Doctrine.

Applying the Dual Capacity Doctrine here, Plaintiff is alleging that some of the acts and omissions affected not only employees, but also "others," which necessarily includes the general public. It will be interesting to see how the court treats Plaintiff's allegations, and whether it applies the Dual Capacity Doctrine.

With the incredible number of employees who have been and/or will be exposed to COVID-19, this case will serve as an important one to watch.■

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1. Complaint, 20 L 003938.
2. *Id*.
3. *Id*.
4. 820 ILCS 305/1 *et seq*.
5. *Meerbrey v. Marshall Fields*, 139 Ill. 2d 455 (1990).
6. *Id*.
7. *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1060 (2d Dist. 2005).
8. Complaint, 20 L 003938.
9. *McCormick v. Caterpillar Tractor Co*., 85 Ill.2d 352,423 N.E. 2d 875 (1981).
10. *Id*.
11. *Id.*

Commercial General Liability Insurance in the Age of COVID-19

BY ROBERT SHIPLEY

Brief Overview

Commercial general liability ("CGL") policies are the most common form of liability insurance purchased by businesses. These policies are purchased to obtain broad protection and to transfer to the insurer the risk of liabilities for fortuitous injury or damage arising out of the conduct of the insured's business.

The scope of the coverage will depend upon the insurance that is purchased, including exclusions. The insuring agreement will determine the extent of the protection offered by the policy.

The current environment is disruptive and fluid. Attorneys whose practice is concentrated in business, insurance and tort litigation may reasonably expect an increase in work related to COVID-19 claims.

This will include claims that individuals were exposed to the coronavirus while present at a business as well as claims involving the failure to protect against the transmission of the virus, e.g., failing to properly clean and disinfect or failing to establish a protocol to protect against exposure. An analysis of the scope of coverage provided by a CGL policy will be critical to both the defense and prosecution of COVID related claims. This article will focus on claims for bodily injury and the pollution and communicable disease exclusions.

What Constitutes Bodily Injury

CGL policies provide coverage for bodily injury (or property damage) sustained by a third party arising from an occurrence. The insurance term occurrence is typically defined as an accident or event that results in damage or injury that was unintended or unexpected by the insured, including continuous or repeated exposure to substantially the same general harmful conditions. Thus, claims for bodily injury typically connote a physical problem, e.g., injury to the body caused by or arising from an accident. For example, in a case

involving an insurance coverage dispute where the underlying facts involved the apparent transmission of E. coli bacteria from one family member to another, and no asserted coverage exclusion, coverage was found under a CGL policy. *Travelers Property Casualty Co. of America v. RSUI Indemnity Co.*, 844 F. Supp. 2d 933 (N.D. Ill. 2012).

COVID-19 and CGL Coverage

Coverage Considerations

Businesses that are sued for allegedly causing one of their customers to contract COVID-19 will directly implicate potential CGL coverage. While the insured business will expect that any claim of bodily injury will be covered, the policy language must be examined. From the insurer's perspective, the focus of these claims will center on the various coverage exclusions, including those for pollution and communicable disease, as well as others including mold, fungus and bacteria.

The general rules relating to the interpretation of insurance policy exclusions are well established. Ambiguous provisions will be construed most strongly against the insurer, and liberally in favor of the insured. The test is not what the insurer intended by the policy language, but what a reasonable person in the position of the insured would understand the policy language to mean. If the words used in the insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *American Standard Insurance Co. v. Allstate Insurance Co.*, 210 Ill. App. 3d 443, 569 N.E.2d 162 (1st Dist. 1991). This is "especially true" with respect to provisions that limit or exclude coverage. *See, e.g., Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992); 1 New Appleman IL Insurance Law Practice Guide §§ 1.20, 1.21 (2019).

Another important consideration is the distinction between the duty to defend and the duty to indemnify. The duty to defend is the insurer's obligation to defend and pay the defense expenses on behalf of the insured in a lawsuit. The duty to indemnify is the insurer's obligation to pay damages awarded against its insured, including damages paid in a settlement. The duty to defend is broader than the duty to indemnify.

This principle is only applicable when the insurer has the obligation or potential obligation to indemnify. Thus, a court's focus will be whether the allegations of the complaint, if true, would potentially bring the claims within the coverage of the policy.

Will COVID-19 Claims Be Covered

The standard commercial general liability policy includes "disease" under its definition of bodily injury. Barring any coverage-altering endorsements, which is a key inquiry, it is likely that coverage will be found thus triggering the duty to defend. It is more reasonable to conclude that coverage will be found when the claim is for alleged contact or transmission within the business premises and not discharged or transmitted beyond those premises.

Asbestos cases are instructive. The Illinois Supreme Court has held that exposure to asbestos constitutes bodily injury, which occurs when asbestos fibers are inhaled and retained in the lung. Therefore the insurer whose policy was in force at the time a claimant was exposed to asbestos (and did not have a policy exclusion) must provide coverage. *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150 (Ill. S.C. 1987)

Pollution Exclusion

Does a pollution exclusion which includes an exclusion for exposure to "contaminants" include a virus, i.e., is a virus fairly defined as a contaminant under the policy? If not, any such pollution exclusion should not bar coverage. The language of the pollution exclusion must be closely examined to determine if it is susceptible to more than one interpretation by the reasonable insured, thus rendering the exclusion ambiguous. How pollution is defined – and how broadly a court will interpret the scope of the exclusion – will all impact whether liability arising out of a disease outbreak is covered or not.

Certainly, if the pollution exclusion contains the specific word "virus," the reasonable expectation is that the exclusion would be upheld. *See, e.g. PBM Nutritionals LLC v. Lexington Insurance Co.,* 724 S.E.2d 707, 711 (Va. 2012) (policy excluded 'contaminants or pollutants …. Including but not limited to bacteria, fungi, virus …).

The majority of pollution exclusions do not contain a specific virus reference. While courts in Illinois and across the country are grappling with the impact of the coronavirus on insurance claims, a review of past Illinois decisions involving exposures to other types of contaminants is instructive.

In a case involving a claim of mold exposure, the Illinois appellate court held that because the word 'mold' was not specifically contained in the pollution exclusion, coverage was afforded for plaintiffs' mold related injury claims. *In re Liquidation of Legion Indemnity Co.*, 2015 IL App (1st) 140452, 44 N.E.3d 1170.

In *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 494, 687 N.E.2d 72, 81-82 (1997), the Illinois Supreme Court, relying upon a North Carolina appellate court, found persuasive the language of a pollution exclusion which used terms of art in an environmental context. Quoting *West American Insurance Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), with approval, the Illinois Supreme Court rejected American States' efforts to characterize a claim for carbon monoxide poisoning as falling within the pollution exclusion. Specifically the court found persuasive that the policy, which used the terms "discharge, dispersal, release or escape of a pollutant," required the pollutant to be discharged into the environment to trigger the pollution exclusion and deny coverage to the insured**.** *Koloms*, 177 Ill. 2d at 494, 687 N.E.2d at 81-82. *Accord Country Mutual Insurance Co. v. Hilltop View, LLC,* 2013 IL App (4th) 130124, 998 N.E.2d 950; *Westfield Insurance Co. v. Indemnity Insurance Co. of North America,* No. 16-cv-3298, 2019 U.S. Dist. LEXIS 185978 (C.D. Ill. Oct. 25, 2019); *Village of Crestwood v. Ironshore Specialty Insurance Co.,* 2013 IL App (1st) 120112, 986 N.E.2d 678.

While in 2006, the Insurance Services Office ("ISO"), an insurance industry organization introduced an endorsement, (CP 01 40 07 06), containing an exclusion for loss due to virus or bacteria, this endorsement was applicable to property policies. There has been no comparable ISO endorsement for a CGL policy.

The above review indicates that absent the

inclusion of the word "virus," the pollution exclusion should not bar a claim for COVID-19-related injury.

Communicable Disease Exclusion

The Communicable Disease Exclusion, (CG 21 32 05 09), is often contained in CGL policies. This exclusion provides, in relevant part:

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;

b. Testing for a communicable disease;

c. Failure to prevent the spread of the disease; or

d. Failure to report the disease to authorities.

This endorsement appears to be a more significant roadblock to a successful insurance claim. The inquiry will focus on the definition of "communicable disease," whether COVID-19 is a "communicable disease," and whether the medical impact of the virus, i.e., breathing impairment and loss of bodily function, is the disease or some combination thereof.

While plaintiffs will almost certainly argue ambiguity, the well accepted definition of a communicable disease arguably includes viruses. COVID-19 is the illness caused by a novel, or new, coronavirus first identified in Wuhan, China, in late 2019. The virus is SARS-Co-V-2, and the disease the virus causes, coronavirus disease 2019, is abbreviated as COVID-19. https://www.apha.org/topics-and-issues/communicable-disease/coronavirus

Conclusion

While an insured business may very well have legal liability for a claim, and each case will be heavily dependent upon its facts, business should not assume their CGL policy will provide the necessary security should a case have to be defended and indemnification paid. The key to whether a CGL policy offers coverage for a COVID-19 claim will be the review and construction of each policy. Among the many extra concerns now present, the insurance issue should not be overlooked.■

Property Policy Coverage for 'Direct Physical Loss'

BY JIM NYESTE

Property insurance policies typically cover "direct physical loss or damage" to covered property resulting from a covered cause of loss. In a so-called "all-risk" policy, "covered cause of loss" is typically defined to include all "risks of direct physical loss or damage" except for those set forth in a lengthy list of exclusions. Obviously, there can be many variations among the insuring clauses of property policies, but the requirement of "direct physical loss or damage" is practically universal.

The concept of "direct physical damage" is not too difficult. At the heart of it there must be actual physical change to the covered property. That change may be burning, breaking, bending, scratching, pitting, coating, or some other unwelcome change to the physical characteristics of the property. Or it might be the contamination of the property by bacteria. *Massi's Greenhouses v. Farm Family Mutual Insurance Co*., 649 N.Y.S.2d 307 (N.Y. App. Div. 1996). Presently, the contamination of property by the coronavirus is getting a lot of attention. While other authors are writing about business interruption losses due to the coronavirus and "direct physical damage," this article will look at the concept of "direct physical loss."

If the property has not suffered any physical damage, or if physical damage to the property cannot be proved, might there nevertheless be coverage based on "direct physical loss"? If so, the policyholder may be able to recover for its business interruption losses or for its extra expenses in conducting its business elsewhere or in a different manner.

The policyholder's coverage argument is premised on the proposition that "loss" and "damage" must be given different meanings. If "loss" meant the same thing as "damage," then the word "loss" in the policy's insuring clause would be redundant. The use of a redundant term contravenes the basic principle of contract construction that tries to give every provision meaning without rendering any portion superfluous. In interpreting a contract, meaning and effect must be given to every part of the contract including all its terms and provisions, so no part is rendered meaningless or surplusage. *Martindell v. Lake Shore National Bank*, 15 Ill.2d 272, 283, 154 N.E.2d 683, 689 (1958). A court must strive to give each term in an insurance policy meaning unless to do so would render the clause or policy inconsistent or inherently contradictory. *Outboard Marine Corp. v. Liberty Mutual*

Insurance Co., 607 N.E.2d 1204, 1219, 154 Ill.2d 90, 123, 180 Ill. Dec. 691, 706 (1992). An insurance policy must not be interpreted in a manner that renders provisions of the policy meaningless. *Cincinnati Insurance Co. v. Gateway Construction Co*., 865 N.E.2d 395, 399, 372 Ill.App.3d 148 (1st Dist. 2007). Consequently, "direct physical loss" must be something different than "direct physical damage."

A modest amount of research reveals that there is substantial support for the argument that the loss of use of property due to nearby physical damage amounts to a covered "direct physical loss," even though the policyholder's own property has not sustained any physical damage.[1]

One example of such loss is discussed in *Manpower, Inc. v. Insurance Company of the State of Pennsylvania*, No. 08 C 0085 (E.D. Wis. Nov. 3, 2009), Dkt. Doc. 79, slip opinion. Right Management ("Right"), a subsidiary of Manpower, Inc., was a tenant of four floors in a multi-tenant office building. The building included a garden courtyard and a basement parking garage. A portion of the supporting concrete slab of the garden courtyard fell onto the parking garage beneath it. Although the courtyard and garage were badly damaged, the collapse did not cause any noticeable damage to Right's four floors in the building. Nevertheless, the local Department of Public Safety deemed that there was a serious risk to the safety of the building's occupants, so occupation of the entire building was prohibited until further order. As a result of the collapse and the order of the Department of Public Safety, Right was unable to occupy its offices for a substantial period of time and had to relocate, losing business income, incurring extra expenses, and losing access to its business personal property within its office space.

Manpower submitted a claim for Right's $12 million in losses under its insurance policy with Insurance Company of the State of Pennsylvania ("ISOP"). The policy included a business interruption provision covering up to $15 million in losses. A sublimit of $500,000 applied to the Civil Authority coverage,[2] and ISOP refused to pay Manpower more than this $500,000 sublimit. Manpower sued for the balance, claiming that the available coverage was not confined to the Civil Authority provision. In its motion for partial summary judgment, Manpower argued that the collapse and Public Safety order rendered its office inaccessible and therefore resulted in a "direct physical loss" of its property. In opposition, ISOP argued in a cross-motion for summary judgment that Manpower did not sustain a covered loss because the collapse did not physically damage, move, or alter Manpower's property in any way.

The court agreed with Manpower and rejected ISOP's argument that Manpower's property had to be physically damaged in order to obtain coverage beyond the Civil Authority sublimit. The court wrote:

> As an initial matter, I reject ISOP's argument that a peril must physically damage property in order to cause a covered loss. As noted, the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language. However, a contract must, where possible, be interpreted so as to give reasonable meaning to each provision without rendering any portion superfluous. [Citation omitted]. Thus, "direct physical loss" must mean something other than "direct physical damage." Indeed, if "direct physical loss" required physical damage, the policy would not cover theft, since one can steal property without physically damaging it. And ISOP does not contend that the policy did not cover theft.

Manpower, Inc. v. Insurance Company of the State of Pennsylvania, No. 08 C 0085 (E.D. Wis. Nov. 3, 2009), Dkt. Doc. 79, slip op. at 12-13. The court also held that Manpower's loss was "physical," even without physical damage to its premises, because the loss was due to a physical event, the collapse of another part of the building. The court also distinguished Manpower's loss from ones that are only "intangible" or "incorporeal" as it involved physical premises. *Id.* at 14-15.

The court further held that Manpower's loss was "direct," stating:

> In the context of a property insurance policy, the word "direct" indicates that the policy covers only losses and damage proximately caused by a covered peril — that is, it means that the policy does not cover remote losses. [Citations omitted]. In the present case, the collapse was the proximate cause of Right's loss of its interest in its property. As explained above, although the order of the Department of Public Safety was also a cause of this loss, that order simply recognized that the collapse had rendered the entire building uninhabitable and Right's property inaccessible. The collapse was not remote from the loss, and thus the loss was direct.

Id. at 15. Finding that Manpower had sustained a "direct physical loss" of its property, the court granted Manpower's motion for partial summary judgment and denied ISOP's cross-motion.[3]

Another helpful case for the policyholder is *Hampton Foods, Inc. v. Aetna Casualty & Surety Co*., 787 F .2d 349 (8th Cir. 1986), in which Hampton Foods, a grocery store, rented space in a building and had insurance from Aetna on its personal property covering "loss or damage ... resulting from all risks of direct physical loss." *Id.* at 351. Aetna did not insure the building in which Hampton was a tenant. Wind load and snow load caused the building to become unstable, and the city building inspector determined that it was at risk of imminent collapse and ordered its evacuation. Before the evacuation order took effect, Hampton removed much of its inventory from the building and sold it at salvage value. Because salvage value was substantially less than market value, the sale resulted in a substantial loss to Hampton. In addition, Hampton did not remove its business equipment from the building, and the equipment was later destroyed when the building was demolished without notice to Hampton. Aetna denied coverage

for both the realized economic loss on the inventory and the demolished business equipment on the ground that there was no "direct physical loss" to the property. Hampton brought suit, contending that the policy required only damage or loss resulting from the "risk" of direct physical loss, and that there was such a loss here. *Id.* The court held that the insuring agreement was ambiguous and construed it in favor of the insured. Although the court agreed with the insurer that not every risk of loss is covered by the policy, it found that both Hampton's realized economic loss and the loss of its equipment constituted direct physical losses, reasoning that Hampton suffered "direct, concrete and immediate loss due to extraneous physical damage to the building."

Other helpful cases for the policyholder include *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (1962). There the court found coverage under a homeowner's policy where a house which, though undamaged, was left standing on the edge of, and partially overhanging, a newly formed cliff after a landslide. The homeowner was allowed recovery for the cost of subsequently building a retaining wall and for the fill necessary to support the house. The court rejected the insurer's argument that physical damage to the house itself was required for coverage, stating:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another.

Id. at 248.

Further support is provided by *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34 (1968), where the loss of use of a church was covered as "direct physical loss" because gasoline vapors had infiltrated the halls and rooms of the building making it uninhabitable and unsafe. The court explained that "loss of use" does not in and of itself constitute a "direct physical loss" because it can be occasioned by many different causes; but under the present factual circumstances, having been caused by a physical event, the loss of use of the building was a "direct physical loss."

An additional case for policyholders is *Murray v. State Farm Fire and Casualty Co.*, 509 S.E.2d 1, 203 W.Va. 477 (W. Va. 1998). In that case, two homes were damaged and one was at risk of damage from rocks that began falling from the highwall of an old quarry. The fire department compelled all three families to leave their homes because of the possibility that additional rocks could fall. Investigation of the quarry wall confirmed that it was likely that further rockfalls would occur. The insurance companies covering the homes argued that the three homeowners could not recover for the total loss of their homes, but only for the actual physical damage sustained. The court disagreed, finding that all three houses, including the one that had sustained no physical damage, had suffered "direct physical loss." The court held that "direct physical loss" may exist in the absence of structural damage to the insured property.

The foregoing five cases do not represent an exhaustive search of cases concerning coverage for "direct physical loss." They do, however, suggest that there is an argument for coverage of business interruption losses even when the policyholder's property has not been physically damaged. Assuming that their policies do not have applicable exclusions as to the cause of loss,[4] policyholders serious about pursuing coverage for their COVID-19 business interruption losses should develop the "direct physical loss" argument further.■

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1. There are some coverages specifically tailored to the situation where the policyholder's property has not been physically damaged. For example, many policies provide "dependent property" coverage, which applies when the policyholder's property depends on a third-party's property for essential material or services and the third-party's property suffers physical damage that interrupts the supply of material or services to the policyholder's property. This article is concerned with the broader concept of "direct physical loss," without limitation to the "dependent property" situation.
2. "Civil Authority" coverage applies to the loss of business income and extra expense incurred over a specified number of weeks when access to the insured premises is prohibited by governmental action.
3. Ultimately, Manpower and ISOP settled their dispute, and the case was dismissed on June 10, 2014.
4. For example, many property policies now have exclusions for "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."