THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Insurance

COVID-19: Ultimate business interrupter

By **David Rogers**

David Rogers

(July 14, 2020, 9:32 AM EDT) -- The COVID-19 pandemic has led to the shutdown of a large portion of the global economy. In Ontario, this has included the shutdown of most non-essential businesses and the ongoing requirement for individuals to maintain physical distancing.

In turn, businesses have seen profits reduced to a trickle and in many cases, this has led to forced bankruptcies and closures.

The provincial and federal governments have implemented various measures for the assistance and protection of certain businesses, but for most, this is simply not enough.

Many of the Ontario businesses that have seen significant losses are in turn following the steps of many counterparts in the United States and looking to their insurers for coverage. More specifically, many companies are making enquiries about potential business interruption coverage under their all-risks insurance policies.

All-risks insurance

All-risks insurance policies are generally property policies and they can provide a broad range of coverage for all risks of property damage, including business interruption losses.

Insurers will in turn usually rely on a number of specific exclusions in order to narrow this broad coverage. Property policies do not generally define the term "property damage," as is the case with most commercial liability policies, and therefore the scope of that term is often open to interpretation.

Although policy wording can vary, most property policies contain very similar policy language. Businesses are often unique however, and insurance risks can be underwritten in a way that is specific to that unique business.

Therefore, it is very important that insurers and policyholders review the actual wording of the policy at issue when considering potential coverage issues under an all-risks property policy.

Business interruption insurance

Business interruption insurance generally forms part of an all-risks policy, and provides coverage where the policyholder has suffered losses as a result of physical damage to either its property or to a nearby property, or physical damage elsewhere causing the disruption of its supplies or interference with the ability of customers to access the insured's business.

Requirement for property damage

One common condition for these types of coverages is the requirement that there be property damage in order to fit within the initial grant of coverage.

This becomes complicated when considering COVID-19-related business losses, as many policyholders will not have sustained direct physical damage to their property, such as would generally be caused in a water or fire loss. Instead, these businesses have had to close their doors because of provincial government orders.

Therefore, although the purpose of the closures is to prevent the spread of the COVID-19 virus to the property, there is not, on a narrow interpretation of the term, actual physical loss or damage to the property itself or to property within the supply chain.

This is the general position that most insurers are likely to take when considering questions of coverage for these types of business losses: COVID-19-related business interruption losses are not the result of physical loss or damage to property.

Role of courts in interpreting coverage

However, where there is no definition of property damage in the policy, courts play an important role in providing guidance and will generally do so through the well-established principles of insurance policy interpretation.

This means a court will consider whether there is a clear literal meaning to the term or whether it is capable of more than one meaning. If the term is capable of more than one meaning, there is in turn an ambiguity, and such ambiguities should be interpreted *contra proferentem*, or against the party that drafted the clause, so long as the outcome is within the reasonable expectations of the parties.

Traditionally, courts have interpreted the definition of property damage within the grant of coverage to require actual physical damage to the property itself. Some courts however, notably in United States, have taken a broader view of the term property damage, finding that where businesses have been shut down due to a government order, the ensuing loss of use of the property is physical loss or property damage.

A very recent trial level decision from the Ontario Superior Court of Justice in *MDS Inc. v. Factory Mutual Insurance Company* 2010 ONSC 1924 (*MDS Inc.*) follows similar reasoning in finding that a government ordered shutdown of a business did constitute physical loss or damage to property on a broad interpretation of that term to include loss of use or function.

Policyholders are likely to see this decision as opening the door to a wider interpretation of business interruption coverage in the context of COVID-19-related claims. However, policyholders and insurers alike should proceed with caution.

The *MDS Inc.* decision was based on a complicated fact scenario, which will certainly make it distinguishable in many future coverage disputes. However, each determination will also be unique and fact specific, so the precise wording of each specific policy term must be carefully considered in any analysis.

By order of civil authority

Some businesses will also have additional insurance specifically for the consequences of an infectious disease, including losses resulting from an order by a civil authority shutting the business or prohibiting access to the policyholder’s property.

This second type of coverage will often not require physical damage to the insured property, although it may or may not require a confirmed outbreak of the disease at the property itself.

This appears on its face to be a more straightforward type of coverage. However, here too there are disputes arising between insurers and policyholders over the proper interpretation of the policy terms, including the term “civil authority” and the term “order.”

Further, consider where coverage requires proof that the shutdown occurred due to an actual outbreak at the insured’s premises. Does a wide-ranging shutdown like we have seen in Ontario, done for the purpose of protecting against such an outbreak at the premises, therefore fit within the policy coverage even though the outbreak never occurred?

The answer is a difficult one, as the costs to the policyholder of the shutdown have arguably protected against the imminent peril of an otherwise covered claim.

This is one of many additional questions that will be decided on a case-by-case basis over the coming months and years, as businesses try to rebuild in the aftermath of COVID-19.

Conclusion

Although the COVID-19 impact on businesses in Ontario has been staggering, it is unlikely that private insurers will play a major role in assisting these businesses to rebuild.

Specifically, it is unlikely that COVID-19-related losses would be covered under the business interruption provisions of most all-risks property policies, which require actual property damage.

However, policy wording can be unique, and it is imperative for both policyholders and insurers to carefully review the actual language of the policy at issue and consider the special facts of each claim for coverage before determining a coverage position.

David Rogers is a partner at Rogers Partners LLP*. He regularly advises insurers and policyholders on coverage issues and is actively involved in litigating coverage disputes. Rogers can be reached at* david.rogers@rogerspartners.com*.*

Photo credit / eag1e ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Yvette Trancoso-Barrett at* Yvette.Trancoso-barrett@lexisnexis.ca *or call 905-415-5811.*

© 2020, The Lawyer's Daily. All rights reserved.