New Jersey Law Requires Insurers to State Whether Business Interruption Policies Cover Global Virus Transmission, Pandemic Coverage

By: Edward M. Koch and Felix S. Yelin
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On May 12, 2021, New Jersey Governor Phil Murphy signed into law a bill requiring insurers to go on record as to whether their policies, which provide coverage for the loss of use and occupancy and business interruption, cover global virus transmission or pandemics. The law first requires an insurer to disclose to new and renewing insureds whether the policy provides such coverage. The Commissioner of Banking and Insurance prescribes the form and manner of providing this notice for this first provision. The law also requires any insurer who has in force such a policy to so inform its insured in writing (via mail or electronic means) within 30 days of the date of enactment.

This law comes in the wake of the still ongoing COVID-19 pandemic that impacted the United States economy since the first quarter of 2020. First-party insurance coverage issues involving business interruption are a hot and timely issue in the insurance coverage world. Many commercial insurance policies contained ISO form CP 01 40 07 06, titled "Exclusion for Losses Due To Virus or Bacteria" (virus exclusion). The virus exclusion excludes business interruption coverage payments "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."

In 2020, New Jersey (followed by multiple other jurisdictions) unsuccessfully introduced legislation that would have required commercial insurance carriers to provide business interruption coverage to indemnify eligible insured businesses facing a loss of business ***regardless*** of the presence of any virus exclusion. However, this bill failed, possibly due to potential constitutional issues with such legislation.

While New Jersey state and federal courts have overwhelmingly ruled in favor of insurers in first-party, COVID-19-related business interruption coverage cases with valid virus exclusions,[1] not all commercial policies contain such exclusions.

But even without a virus exclusion, the insured is still charged with the tall task of demonstrating physical loss or damage to its insured property and/or that a civil authority order prohibited access on account of damage to nearby property. Indeed, some New Jersey courts have given the insured some leeway to accomplish this task beyond the pleading stage. *See, e.g., Optical Services USA/JCI v. Franklin Mutual Insurance Company*, 2020 N.J. Super. Unpub. LEXIS 1782, *27-28 (denying an insurer's motion to dismiss, even with a virus exclusion, and permitting the insured plaintiffs to engage in discovery and explore a legal theory that "physical damage occurs where a policy holder loses functionality of their property" or a civil authority order results in a change in the property). Indeed, the court in *Optical Services* relied on a Superior Court of New Jersey precedent that appeared to recognize that the term "physical" can mean more than material alteration or damage. *See Wakefern Food Corporation v. Liberty Mutual Fire Insurance Company*, 406 N.J. Super. 524, 546, 968 A.2d 724, 738-39 (Super. Ct. App. Div. 2009) (finding coverage for a grocery store that lost power when electrical grid and transmission lines were physically incapable of performing their essential function even though physically undamaged). Nevertheless, the majority of New Jersey state and federal courts continue to hold that the threat of the COVID-19 virus is not sufficient to demonstrate physical loss or damage to property. *See, e.g., Ralph Lauren Corporation v. Factory Mutual Insurance Company*, 2021 U.S. Dist. LEXIS 90526, at *8 n.7 (D.N.J. May 12, 2021) (recognizing multiple New Jersey decisions finding in favor of insurers and noting that "Stay-at-Home" Orders and occupancy restriction allegations were insufficient to establish direct physical loss

or damage to property).

So, what does all this mean? Insurers must decide now, in policies including the loss of use and occupancy and business interruption, whether the policy is intended to cover global virus transmission or pandemic coverage. For policies that have a pandemic, virus, microorganism, or similar exclusion, the answer is a simple "no." However, for policies lacking such exclusions, insurers now have to resolve whether global virus transmission could otherwise satisfy the insuring agreement by causing a loss or damage to property. Because the overwhelming majority of courts have concluded that the presence of a virus does not cause loss or damage to property, the answer should also be "no" to place the issue beyond doubt. An insurer desiring to afford coverage for global virus transmission or pandemic coverage should provide such coverage through an appropriate endorsement and with a commensurately appropriate premium.

If you have questions or would like further information, please contact Edward M. Koch (koche@whiteandwilliams.com; 215.864.6319) or Felix S. Yelin (yelinf@whiteandwilliams.com; 215.864.6317).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

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[1] See "Covid Coverage Litigation Tracker – Merits Rulings on Motions to Dismiss," https://cclt.law.upenn.edu/judicial-rulings/, University of Pennsylvania Law School, accessed on April 20, 2021 (indicating twenty four (24) full dismissals with prejudice, one (1) partial dismissal with prejudice, and only two (2) denials of dismissal at the pleading stage for policies with virus exclusions)