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Is Covid-19 Flushing Out Another "Too Big to Fail" Excuse?

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Remember during the last recession when some institutions were considered "too big to fail" and thus needed special protection? *See* Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?*, The New York Times, June 20, 2009. Are we seeing something similar take shape in the insurance industry – but this time to avoid actual contractual obligations?

Recent articles discussing whether insurance companies should be forced to fulfill the promises made in their policies – even when there is no exclusion that would otherwise preclude business interruption coverage caused by Covid-19 – appear to be based in part on the premise that the novel coronavirus cannot be "physical loss or damage" because the *magnitude* of the damage is too great. In one recent article, the author surmised that "[m]ost traditional insurance policies were never meant to provide coverage for a global pandemic. Simply put, the damage caused by a pandemic, a global event, is prohibitively large for any amount of underwriting to account for it." Larry P. Schiffer, *Does the Novel Coronavirus Cause Direct Physical Loss of or Damage to Property?*, The National Law Review, April 30, 2020. Essentially, declares this argument, insurers cannot possibly have intended to cover Covid-19 business interruption losses because the losses are too large.

Fortunately, insurance contracts cannot be rewritten after the fact merely because the insurance company faces a lot of exposure. We certainly know it never works that way for insureds. If an insured miscalculates and purchases too little insurance, no matter how much money they have paid in premiums or how catastrophic their personal or business loss, the insurance company will be merciless. It must work both ways for insurance contracts ever to inspire any confidence.

To be sure, there is a serious legal and factual question as to whether typical business interruption coverage is triggered by losses from this pandemic, and that is whether the novel coronavirus and the business shutdowns it caused fairly constitute "physical loss or damage." Everyone connected with insurance law will be closely watching the litigation of this issue, and much will turn on early precedents.

Historically, courts considering the question of "physical loss or damage" have split, which is one of the reasons the litigation on this issue now will be such an interesting spectator sport, as each

side can draw on a respectable, but opposite, line of authority. *Compare Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. 17-049098, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) (clause that provides coverage for the "direct physical or loss of or damage to" property "contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) ("physical loss or damage" did not have to constitute a structural change but could simply be damage rendering "the facility temporarily unfit for occupancy"); *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185, 2000 WL 726789 (D. Ariz. Apr. 18, 2000) (interpreting "physical damage" to include "loss of use and functionality") *with Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (no coverage for property rendered unusable by mold in ventilation systems because no structural or other tangible damage to property); *Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d (S.D.N.Y. 2014) ("direct physical loss or damage" required physical element not met when power was preemptively shut by power provider to preserve integrity of utility system during Hurricane Sandy).

But this much must be clear: contractually speaking, the novel coronavirus causes "physical loss or damage" or it does not, regardless of the magnitude of the *ultimate industry-wide* coverage obligation.

This principle is *especially* persuasive given that insurance companies know *exactly* how to draft specific exclusions for pandemics. Fortunately, most courts agree, by strictly and narrowly interpreting policy exclusions, and refusing to insert them in policies where they don't exist. *See, e.g., General Refractories Co. v. First State Ins. Co.*, 94 F.Supp.3d 649, 662 (E.D.Pa. 2015) (where "more precise, broader exclusionary language could have been but was not used," insured's narrower interpretation governed over insurer's broader attempt); *Interstate Fire & Cas. Co. v. Dimensions Assurance Ltd.*, 843 F.3d 133, 137 (4th Cir. 2016) (insurer's "decision to use different language in different sections of the Policy when addressing the coverage available … must be understood as an intentional decision.").

And before the recently oft-cited "virus exclusions" are given any credence, it must be considered whether the term "virus" is found in any policy's exclusion at all. There is no "standard" virus exclusion that exists in all property policies. While most will contain some sort of pollution or contamination exclusions that may or may not list or define the pollutants or contaminants intended to be excluded, there are not all that many policies that actually expressly list biological contaminants and even fewer that include viruses. Because, as explained above, exclusions are interpreted narrowly with the burden resting on the insurers to prove their application, it is understandable that the generally non-existent "virus exclusion" has been introduced in the industry's rhetoric.

Finally, many questions of coverage will be fact-sensitive, and early sweeping arguments may be premature. For example, do the *E.coli* precedents bear on the question of physical loss or damage? Some reports suggest that the *E.coli* precedents depend on the fact that *E.coli* physically infects the premises and stubbornly clings, whereas the Coronavirus is more easily dispatched with common disinfectants. But we actually do not yet know that with any certainty. And if the

insurance industry is truly going to rely on the (likely faulty) premise that the novel coronavirus may simply be "wiped" or "washed" away and is therefore different from the *E.coli* contaminations held to constitute "direct physical loss" (*see Cooper v. Travelers Indem. Co. of Illinois*, No. 01-2400, 2002 WL 32775680 at *5 (N.D. Cal. Nov. 4, 2002); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005)), then the industry has opened itself up to long and protracted litigation by basing its central defense on that factual issue.

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