A HURRICANE NAMED CORONAVIRUS: WHY VIRUS EXCLUSIONS MAY NOT DEFEAT COVID-19 BUSINESS INTERRUPTION CLAIMS

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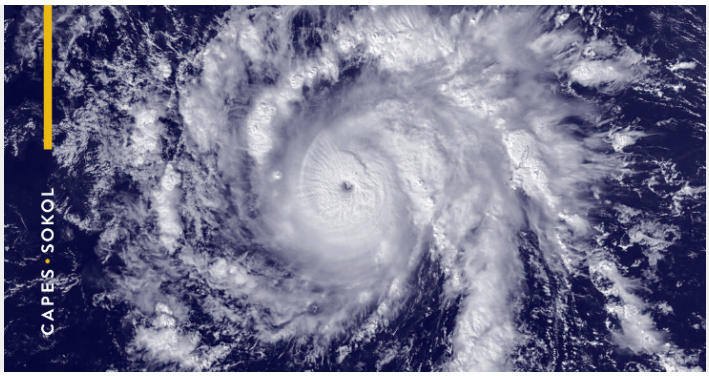

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To put it mildly, many businesses continue to struggle with disruptions caused by the COVID-19 pandemic. Employees are prohibited from entering job sites and have taken federally authorized leave en masse, supply chains are disrupted, and state and local health authorities close all but "essential businesses." Even for those businesses that nominally have remained open, many continue to operate at a fraction of their pre-pandemic levels. In response, companies have turned to their "all-risk" business interruption insurance policies. These policies typically provide insurance coverage for losses when business activities are disrupted because of unexpected events.

In response to these coverage inquiries, the insurance industry has preemptively broadcast to anyone who will listen that these policies contain "virus" exclusions sufficient to defeat COVID-related claims. The industry trumpets, "Nothing to see here, folks, move along!"

But is the coverage landscape *really* so simple?

This is not the first time the insurance industry cried "no coverage" in the wake of catastrophe. In the months and years following Hurricane Katrina, homeowners and businesses along the Gulf Coast turned to their insurers for funding to rebuild, and the insurance companies denied claims based on broadly written exclusions that, according to the insurance industry, barred recoveries in any way related to flood damage. In those policies, damage caused by wind and rain was typically covered, but damage caused by flooding was not. The resulting Katrina litigation informs the way insured businesses should now approach claims caused by COVID-19, a different but, in many ways, analogous disaster.

The Katrina Experience:

A Flood Exclusion is Sometimes not a Flood Exclusion

The coverage litigation following Katrina resulted in a mix of outcomes – some favoring the insurer and some the insured. However, what became very clear was that superficial reliance on exclusion headings was not tenable. Each claim would require evaluation of the policy and the circumstances of the loss to determine if losses were excluded.

Pinnacle Entertainment, Inc. v. Allianz Global Risks U.S. Ins. Co., No. 2:06-CV-00935, 2008 WL 6874270, 1 (N.D. Nev. Mar. 26, 2008) For instance, one typical policy excluded damage caused by "flood" which was defined in the policy as the overflow of inland or tidal waters. However, that policy provided coverage for "catastrophic weather occurrences." Under these circumstances, the Court reasoned that the parties contemplated the need to cover damages caused by named storms identified by the National Weather Service. Because of the inconsistencies between the two provisions, the district court ruled the policy was ambiguous and afforded coverage.

Northrop Grumman Corp. v. Factory Mu. Ins. Co., No. 05-CV-08444, 2007 WL 2385134, 11 (C.D. Cal. Aug. 16, 2007) In *Northrop Grumman Corp. v. Factory Mu. Ins. Co.*, a commercial policyholder prevailed in a claim against the insurer. There the question was whether wind-driven storm surge was covered by a policy that excluded flood damage. The flood exclusion's language could be logically interpreted in several ways, and the policy provision lacked clarifying wording such as "whether driven by wind or not." The court noted that the insurer could not prove that its interpretation was the only reasonable conclusion. Accordingly, the policy failed to *clearly* exclude loss due to storm surge or wind driven water and coverage was found. The opinion was reversed by *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777 (9th Cir. 2009) and remanded so the District Court could consider whether the efficient proximate cause doctrine demands coverage of the water damage notwithstanding the language of the contract.

Broussard v. State Farm Fire and Cas. Co., No. 1:06CV6 LTS-RHW, 2007 WL 113942, 3 (S.D. Miss. Jan. 1, 2007) In *Broussard v. State Farm Fire and Cas. Co.*, both water and high winds likely damaged an insured home. The homeowner argued that high winds and possibly a tornado decimated his home before

any flooding began. To obtain summary judgment and avoid a jury trial, the insurer had to establish what portion was attributable to each peril (one covered and one not). Because there were multiple perils, some insured and some not, the court denied summary judgment and left the matter for the jury to decide.

Policies that Exclude "Virus" May Not Provide Coverage for Global Pandemics

Insureds will have options to push back against their insurers' representations that "virus" exclusions bar any claim remotely relating to the COVID-19 pandemic.

Some virus exclusions may simply be ambiguous. For instance, policies may speak in terms of "excluded events" but only reference exclusions for "virus or bacteria." "Viruses" are, of course, not "events." Courts may find poorly worded policies ambiguous and unenforceable as applied.

Similarly, some exclusions may be narrowly interpreted to only apply to harm immediately caused by infection –the coronavirus disease itself. Many, if not the large majority of, business disruptions are far removed from actual infection. While some losses suffered are caused by the coronavirus disease (for instance, ill workers not reporting to the job site) many more are caused not by the coronavirus itself but by political and cultural decisions to shut down the economy. If the exclusions could be reasonably read both narrowly and broadly, the court will generally apply only a narrow reading to the exclusion.

Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc., 54 S.W.3d 661, 668 (Mo. App. E.D. 2001). Further, if a Court finds that coverage is specifically granted under the policy, the Court should construe any relevant exclusion not to eliminate coverage. Where a loss is covered under one provision, but excluded under another, any resulting ambiguities will be construed to provide for coverage.

Many business interruption policies provide coverage for closures caused by civil authority with the understanding that, should a state, local, or federal body limit or impair the business, the insurer will reimburse the owner for losses. Where a policy includes both civil authority coverage and an exclusion that bars claims for "virus… capable of inducing physical distress, illness, or disease" courts may conclude that the causes are distinct and the exclusion does not apply.

What is an Impacted Business to do?

Evaluation of an exclusion cannot stop at the exclusion's title. Above all, courts examine each policy and claim, on a case-by-case basis. Just as a "flood" exclusion won't exclude losses for all damages with any relationship to water, a "virus" exclusion will not exclude losses for all loss with any relationship to a global pandemic. Insurance agents' initial comments about "virus" exclusions should not dissuade policyholders. An insurer's pre-analysis rejection of coverage should be independently evaluated and, in light of the Katrina experience, impacted policy holders should stake aggressive positions.