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BOARD DIVERSITY

Accelerating Gender Diversity on Boards: Reviewing Legislative Action

By *Stewart M. Landefeld, Evelyn Cruz Sroufe, Allison C. Handy, and Christopher Wassman*

Diversity may be the hardest thing for a society to live with and perhaps the most dangerous thing for a society to be without.
— *William Sloan Coffin, Jr.*¹

For the past generation, mainstream public companies in America have slowly increased the gender and racial diversity of their boards of directors to better reflect the faces of the American consumer and the shareholder base. Diversity on the boards of larger U.S. public companies has been a sign of success in the effort to show inclusion in corporate leadership: in 2019, almost half of the open board spots at S&P 500 companies went to women, and all S&P 500 companies had at least one female director.²

And by 2019, women made up about 26% of S&P 500 corporate directors, up from just

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Will Business Interruption Insurance Provide Coverage for Coronavirus Losses?

By Julie E. Nevins and Robert Lewin

With COVID-19 disrupting global supply chains and sales, businesses are losing income and incurring additional expenses as a result of the disruption. There likely will be an increase in insurance claims against insurance policies offering business interruption and/or contingent business interruption coverage. Whether the claims are covered will depend on the terms and conditions of the insurance policy and the circumstances of the loss.

One of the largest independent claim managers has cautioned that “successful claims under business interruption coverage for infection are not common.”¹ Indeed, there are no reported cases in the United States regarding business interruption coverage in connection with human infectious disease epidemics or pandemics. Commerce, however, has never been as global as it is today.

There are challenges to business interruption coverage. Some of those challenges are summarized below.

What Is Business Interruption Insurance?

Business interruption insurance protects against economic losses resulting from a business’s inability to put insured property damaged by a covered peril to its normal use. Business interruption typically indemnifies for loss of revenue that would have been earned had there been no business interruption and

the continuing normal operating expenses incurred during the time it takes to restore the damaged property. While coverage language frequently varies depending on the insurer and the coverage negotiated, the following is a sample insuring provision for business interruption coverage:

This policy insures against loss resulting directly from necessary interruption of business caused by physical loss or damage by a peril not otherwise excluded herein to insured property of the Insured, all subject to the terms and conditions of this policy.²

Typically, under standard business interruption policies, the following is required for a recoverable business interruption loss: (1) physical damage, (2) to insured property, (3) caused by a covered peril, (4) resulting in quantifiable business interruption loss, (5) during the period of time it takes to restore the damaged property.

Physical Damage to Property Is Typically a Threshold Requirement

Business interruption coverage is often part of a commercial property policy. Therefore, physical damage to insured property is typically required to trigger coverage. Business interruption by itself is not enough.

For example, in *Source Food Technology v. U.S. Fidelity and Guaranty Corp.*,³ a company that sold cooking oil and shortening made from beef tallow sought indemnity for business interruption coverage after the USDA prohibited the importation of beef products from Canada after cows tested positive for

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mad cow disease. The court concluded there was no coverage under the policy because the embargoed beef product the insured sought to import was not contaminated or damaged in any way.⁴

Source Food indicates that, depending on the language of the policy and the circumstances of the loss, contamination of property may constitute physical damage to property if there is sufficient proof of contamination.⁵

Civil Authority Coverage

Commercial property policies may include coverage for losses caused by forced closure of property by civil authority. The coverage typically applies when an insured is unable to access its property due to a government order as a result of physical damage to adjacent or nearby property. Thus, civil authority coverage typically requires physical damage to property to trigger the coverage. If the policy requires physical damage to adjacent or nearby property and the insured is unable to establish a causal connection between the government order and that physical damage, then there likely will be no coverage.

For example, in *United Air Lines, Inc. v. Insurance Company of State of Pennsylvania*,⁶ United Airlines sought indemnity for economic losses relating to government closure of Ronald Reagan Washington National Airport in connection with the September 11 terrorist attacks on the World Trade Center and the Pentagon. The relevant policy provision provided:

This policy insures against loss resulting directly from the necessary interruption of business caused by damage to or destruction of the Insured Locations resulting from Terrorism, Sabotage, Insurrection, Rebellion, or Coup d'Etat.

This section is specifically extended to cover a situation when access to the

Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises, not exceeding, however, two (2) consecutive weeks.⁷

The court held that United Airlines was not entitled to civil authority coverage because the airport was shut down before the attack on the Pentagon and was not “as a direct result of damage” to adjacent property, as required by the policy. The evidence showed that the shutdown was based on the fear of future attacks.⁸

In *Sloan v. Phoenix of Hartford Insurance Company et al.*,⁹ the court, however, interpreted the civil authority provision as not requiring physical damage to property to trigger coverage. Owners and operators of movie theaters made a claim for business interruption coverage following a curfew ordered by the Governor of Michigan in response to widespread riots. The policy provided:

1. This policy covers against loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property by peril(s) insured against during the term of this policy, on premises occupied by the insured and situated as herein described.

7. Interruption by Civil Authority. This policy is extended to include the actual loss as covered hereunder, during the period of time, not exceeding 2 consecutive weeks, when as a direct result of the peril(s) insured against, access to the premises described is prohibited by order of civil authority.¹⁰

After reviewing the plain language of the policy, the court held there was business interruption coverage under the civil authority provision for losses incurred to comply with the Governor's order.¹¹

Furthermore, only government orders causing a business to close will constitute a civil authority order. If a business closes because of government action that does not rise to the level of an order, such as an advisory to stay off the streets following a hurricane, then there will be no civil authority coverage.¹²

Lastly, following September 11, Hurricane Sandy, and other disasters, insurers tightened policy language to make clear that property damage was a requirement for coverage and added hours clauses which specified that business interruption coverage would not be triggered for days.

Contingent Business Interruption Coverage

Contingent business interruption coverage protects against economic losses resulting from damage to the property of a person on whom the insured depends for its business, such as a supplier or a customer. The terms of the coverage vary from policy to policy and may be limited to damage to a direct supplier's property or may extend to damage to the property of indirect suppliers, such as suppliers of suppliers.

For example, in *Pentair, Inc. v. American Guarantee and Liability Insurance Co.*,¹³ the insured sought coverage under a manuscript all-risk property policy following an earthquake in Taiwan. A substation that supplied electricity to Pentair's Taiwanese factory suppliers was damaged by the earthquake, disrupting the factory suppliers' ability to manufacture goods to be shipped to the insured. A "Contingent Time Element" provision in the policy "extended the business interruption coverage to include losses incurred by Pentair as the result of 'damage' to 'property of a supplier of goods and/or services to the Insured' that is caused by a covered peril."¹⁴ The court held there was no coverage because the electrical substation was not a supplier of goods and services to the insured.¹⁵

Virus and Disease

Viruses and disease are typically not an insured peril unless added by endorsement.¹⁶ Furthermore, viruses and disease may be excluded expressly.¹⁷

In *Meyer Natural Foods, LLC v. Liberty Mutual Fire Insurance Company*,¹⁸ the court held that a contamination exclusion barred coverage for the contamination of beef with *E. coli* while in the insured's possession. The exclusion provided:

We will not pay for loss or damage caused by or resulting from any of the following, regardless of any other cause or event, including a peril insured against, that contribute to the loss at the same time or in any other sequence:

10. The actual or suspected presence of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.¹⁹

Causation and Financial Losses

Business interruption losses must be caused by a covered peril. For example, in *Dictiomatic, Inc. v. U.S. Fidelity & Guaranty Co.*,²⁰ an insured, the seller of translating devices, made a claim for business interruption coverage following a major hurricane that damaged the office building where it leased space, preventing access to its office for a couple of weeks. The court held there was no coverage under the policy because the insured "suffered income losses throughout its entire period of operation immediately prior to the hurricane, and further that there is inadequate proof that [the insured] would have achieved profitability during the period of

business interruption or immediately thereafter . . . and would have been unprofitable even without the business interruption.”²¹

In addition, losses may arise from multiple causes—covered and uncovered. Whether there is coverage for a combination of covered and uncovered causes will be based on the policy language and the jurisdiction’s law regarding concurrent causes.

Furthermore, proof of financial losses can be complex, similar to proving lost profits damages in a commercial case. Causation and losses must be well documented and mitigation efforts should be made where possible.

Insurance Industry Response to Coronavirus

Standard business interruption policies typically include an endorsement excluding viruses and/or epidemics. In response to past epidemics, specialty insurance, however, was developed to respond. For example, in October 2014, in response to the Ebola epidemic, specialty brokers in conjunction with the Ark Specialty Program of Lloyds of London offered a new type of coverage called “Pandemic Disease Business Interruption Insurance” to cover loss of income arising from government-mandated closure of healthcare facilities and diminished revenue in the aftermath of a quarantine.²²

The insurance industry is responding to the coronavirus epidemic. In early February 2020, ISO developed two new endorsement forms—“Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus” and “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation).”²³ These forms provide coverage or actual loss of business income and extra expenses caused by a government order closing the insured’s premises or quarantining all or part of the premises and from government

suspension of some modes of public transportation. If dependent properties are included in the coverage, such as a supplier’s or customer’s premises, then the coverage applies to the dependent property as well. Note, the forms were not filed with any states and are not being added to ISO’s form portfolio.²⁴

If the past is any indication, there may be further responses, including specific exclusions for coronavirus.

Now Is the Time

Experts on climate change warn that there will be serious disease outbreaks in the future as temperature rises.²⁵ Now is the time for insurers to review their policies to determine whether their policies may be construed to provide coverage for losses resulting from disease outbreaks, like the coronavirus, and for consequential losses not directly caused to the insured, such as where a supply chain is interrupted and the insured is impacted. Now is also the time for insurers to evaluate the opportunity to provide insurance coverage for risks like the coronavirus as insureds experience the potentially uninsured dislocation such disease outbreaks may cause.

Notes

1. Crawford & Co., *The Insurance Impacts of 2019 Novel Coronavirus* 4.
2. *Baxter Int’l, Inc. v. Amer. Guar. & Liability Ins. Co.*, 369 Ill. App. 3d 700, 704 (1st Dist. 2006).
3. *See Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006).
4. *Id.* at 838.
5. *See also Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997) (“[W]e must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.”); *General Mills, Inc v. Gold Metal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001) (finding “direct physical loss” when oats were sprayed with an unapproved, but non-toxic, pesticide and could not be sold pursuant to FDA

regulations, even though they were safe for consumption); see also *Source Food Tech., Inc.*, 465 F.3d at 838.

6. 439 F.3d 128 (2d Cir. 2006).

7. *Id.* at 131.

8. *Id.* at 134–35.

9. 46 Mich. App. 46, 207 N.W.2d 434 (1973).

10. *Id.* at 49, 436.

11. *Id.* at 49–50, 436–37.

12. See, e.g., *Penton Media, Inc. v. Affiliated FM Ins. Co.*, Case No. 3cv2111, 2006 WL 2504907, at *6 (N.D. Ohio Aug. 29, 2006), *aff'd*, 245 Fed. Appx. 495 (6th Cir. 2007) (holding that FEMA's take-over of the Javits Center pursuant to a lease agreement following the attacks of 9/11 did not constitute an "order of civil authority").

13. 400 F.3d 613 (8th Cir. 2005).

14. *Id.* at 614.

15. *Id.* at 615; see also *Millennium Inorganic Chems. Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 744 F.3d 279 (4th Cir. 2014) (holding "direct supplier[s] of materials to the Insured's locations" did not include supplier of natural gas with whom the insured lacked contractual privity and who had no control over the gas once title to the gas passed to an intermediary that sold the gas to the insured).

16. Health care endorsements may include communicable disease coverage, such as:

We will pay for the following under Communicable Disease Coverage:

(1) Direct Physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at the premises described in the Declarations.

(3) If the Declarations show you have Business Income with Extra Expense Coverage . . . , we will pay for the actual loss of business income, rental value, or necessary extra expense or expediting expense that you sustain due to the necessary full or partial suspension of operations during the period of restoration. The suspension must be caused by direct physical loss or damage caused by or resulting from a covered communicable disease event at the premises described in the Declarations.

Catholic Med. Ctr. v. Fireman's Fund Ins. Co., Case No. 14-cv-180, 2015 WL 3463417, at *2 (D.N.H. June 1, 2015) (emphasis in original). "Communicable disease" was defined as "any disease caused by a biological agent that may be transmitted directly or indirectly from one human or animal to another;" and "communicable disease event" was defined as an "event in which a public health authority has ordered the premises described in the Declarations be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such premises." *Id.* at *3 (emphasis in original).

17. See, e.g., Robin Paxton, "As virus spreads, insurers exclude Ebola from new policies," REUTERS, Oct. 22, 2014, <https://www.reuters.com/article/health-ebola-insurance-idUSL3N0SG69X20141022> (last visited Mar. 1, 2020).

18. *Meyer Natural Foods, LLC. v. Liberty Mutual Fire Ins. Co.*, 218 F. Supp. 3d 1034 (D. Neb. 2016).

19. *Id.* at 1037–38.

20. See *Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.*, 958 F. Supp. 594 (S.D. Fla. 1997).

21. *Id.* at 603–04; see also *Dickie Brennan & Co. v. Lexington Ins.*, 636 F.3d 683 (5th Cir. 2011) (holding insureds failed to establish causal link between evacuation order issued prior to arrival of hurricane and damage to nearby property to recover under civil authority provision).

22. Stephanie Goldberg, "NAS offers coverage for Ebola-related business closures," BUSINESS INSURANCE, Oct. 17, 2014, <https://www.businessinsurance.com/article/20141017/NEWS06141019880/NAS-offers-coverage-for-Ebola-related-business-closures> (last visited Mar. 1, 2020).

23. Christine G. Barlow, Coronavirus spurs ISO to provide business interruption endorsement, PropertyCasualty360, Feb. 10, 2020, <https://www.propertycasualty360.com/2020/2/10/iso-provides-business-interruption-endorsement-in-response-to-coronavirus-414-171888/> (last visited March 1, 2020). In 2014, ISO had released similar forms in response to the Ebola epidemic in 2014. See Verisk, "ISO Creates Insurance Options to Help Businesses Survive Ebola," <https://www.verisk.com/archived/2014/december/iso-creates-coverage-options-to-help-businesses-survive-ebolal> (last visited Mar. 1, 2020).

24. *Id.*

25. David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* 109-14 (2019).



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