

NEWS ALERT**INSURANCE RECOVERY GROUP****Beware of the Double Whammie!**

By Rachel Snow Kindseth and Marilyn B. Fagelson | October 6, 2020

“Double Whammie” is not a technical term, but you get the point: when you are hit with not just one, but by two devastating blows when only one was enough to wreak havoc. Recent events have inflicted such damage on many businesses. Businesses have been forced to close or restrict operations as a result of actual COVID-19 exposures at their place of business or as a result of a governmental order or by a supply chain interruption because of the effect of the pandemic elsewhere. Just as reopening was beginning to occur, some businesses were forced to extend closures as a result of civil unrest following the killing of George Floyd. Others may have been damaged by a string of hurricanes or windstorms or an unrelated fire.

Unfortunately, having more than one misfortune befall your business does not necessarily increase your chances that insurance will come to the rescue. Coverage for such calamities will depend upon whether your policy provides coverage where there is “concurrent causation.”

“Concurrent causation” is a term that refers to the situation where two or more events (or perils) have contributed to a single loss. Under concurrent causation coverage, if insurance applies to cover one of the perils that contributed to the loss, the insurer must cover the loss, regardless of the fact that another, non-covered peril also contributed to the loss either simultaneously or sequentially.

Some policies avoid the application of concurrent causation principles because their policies restrict coverage to damage that is “only” caused by specific perils. Other policies may have an “anti-concurrent causation” provision, which bars coverage for a loss that is partially caused by an excluded peril, even if a covered peril was also a contributing cause. This provision has been referred to as a concurrent cause exclusion because when an excluded peril contributes to a loss, it negates coverage for perils otherwise covered by the policy.

The “Exclusions” section is subject to an anti-concurrent causation provision when it states, for example, “We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.” See Lombardi v. Universal North America Ins. Co., 2015 WL 600823, at *2 (Conn. Super. Jan. 21, 2015) [59 Conn. L. Rptr. 774].

To determine what is legally considered to be the cause of loss, Connecticut follows the “efficient proximate cause” rule where “the efficient cause – the one that sets the other in motion – is the cause to which the loss is to be attributed, though the other cause may follow it and operate more immediately in producing the disaster.” (Internal quotation marks omitted.) Frontis v. Milwaukee Ins. Co., 156 Conn. 492, 499 (1968). An anti-concurrent cause provision circumvents or “defeats the common law efficient proximate cause rule.” Lombardi, 2015 WL 600823, at *3 (citation omitted); see also Thurston Foods, Inc. v. Wausau Bus. Ins. Co., 3:15cv14 (WWE), 2019 WL 2075880, at *4 (D. Conn. Mar. 6, 2019) (citing Lombardi and another superior court case as relevant rulings to apply state substantive law).

What then if your business is closed first by governmental orders issued in response to health emergencies caused by Covid-19 and then damaged by riots before those pandemic-related orders were lifted? So far the insurance industry has largely denied claims for business closures caused by the pandemic, arguing that contamination in the workplace does not constitute property damage that is a necessary predicate for business interruption coverage or that virus exclusions bar coverage. Although there are several courts that have rejected the Insurers' arguments, more courts have agreed with the insurers and have concluded that there is no coverage for pandemic related closures. ([See our previous client alert](#)). In jurisdictions where courts have rejected coverage for pandemic related closures, if civil authority orders intended to quell rioting coincide with civil authority orders restricting business operations due to the pandemic, insurers are likely to raise anti-concurrent causation provisions to attempt to avoid all coverage.

Sadly, even if no anti-concurrent causation provision applies, where there is no coverage for pandemic-related losses, proof of damages for covered claims will necessarily be more difficult. Business interruption coverage will replace the loss of business income only to the extent the covered peril caused that loss. Insurers will surely continue to argue that pandemic-related losses are not covered and that most of a business's loss is attributable to the pandemic. To fairly establish the loss attributable to a second, covered event, policyholders will not only have to show revenue just prior to that covered event, but also how their businesses would grow as governmental restrictions ease or how they found ways to grow in the face of our country's "new reality." Such damages claims are likely to be one of the central features of policyholder/insurer disputes for years to come.

If you have questions about whether your current insurance policies provide coverage for your business losses arising out of recent events, do not hesitate to contact us.

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