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COVID-19 Coverage Issues: Where We Have Been and Where We May be Going

Prepared by: Justine Forsythe & Bo Carter

Whitelaw—Twining

Along with changing people's day to day lives around the world, the COVID-19 pandemic has been an enormous blow to businesses across Canada. The majority of the coverage issues we have seen arising out of the pandemic have been related to business income claims. These claims have required consideration of some novel coverage issues. Similar claims are being submitted to insurers around the world, presenting an opportunity to look to other jurisdictions for guidance.

As COVID remains a reality, other types of insurance claims are being reported as well, including potential third party liability claims.

1. Can Policyholders Access Their Business Interruption Coverage in Response to COVID-19?

All risk property policies issued to businesses typically include coverage for business interruption losses. Will business interruption coverage respond to cover these claims? There are various hurdles which may prevent such coverage being available to policyholders. A typical business interruption insuring agreement reads:

> This Form insures up to the amount stated in the Declarations, the loss of earning sustained, lost operating expenses which do no necessarily continue, during the necessary interruption of business caused directly by the perils insured against damaging the real or personal property during the term of this policy on the premises, where such damage or destruction is covered elsewhere in this policy.

This type of coverage is often found in an "All Risk" business property policy. "All Risk" coverage is meant to cover fortuitous loss, however it does not encompass every conceivable type of loss. In order for damage to be covered by an All Risk policy, it must be due to some fortuitous circumstance or casualty. A policy's business interruption coverage will typically only respond if the damage or destruction to real or personal property is also covered by the policy.

(a) Peril Insured Against - Direct Physical Loss or Damage

Typically in an All Risk Policy, the Insured Perils are all risks of "direct physical loss or damage" to the insured property. In a COVID-19 business interruption claim, the key issue is whether the insured property has suffered direct physical loss or damage.

The B.C. Court of Appeal confirmed in *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2015 BCCA 347, that "physical loss" and "damage" denotes an alteration in the appearance, shape, colour or other material dimension of the property insured. The property insured is usually the business property and premises. If a business was forced to close because of government mandate or a lack of customers and employees due to self-isolation practices, it is unlikely that the Policyholder will be able to establish a "direct physical loss or damage" to the property insured.

In *Acciona*, the B.C. Court of Appeal referred to *Transfield Constructions v. GIO Australia* [1996] NSWCA 538, an Australian case involving a claim for indemnification of the cost of repairing grain silos under a policy that insured against the risks of physical loss or damage. As a result of a construction defect, certain fumigation pipes had become blocked with grain, such that the silos could not be fumigated. The Australian Court held:

> No pipes were lost, no pipes were destroyed, no pipes were damaged. It is not contested that to remove the pipes and re-install them would have caused a financial loss to the plaintiff/appellant. That again is beside the point. Mr. Maconachie, learned senior counsel for the appellant said "The fact that the pipes were rendered useless constituted physical damage within the meaning of the policy." I do not think so. Loss of usefulness might in some context amount to damage, though even that is not beyond dispute, but in my view it cannot amount to physical damage. Functional inutility is different from physical damage.

In the case of contamination due to a virus, or the potential for that contamination, it is arguable that the business premises simply become less useful in the sense that the public was no longer using them or was using them less. However, there has likely been no direct physical loss or damage causing the premises to be less useful.

On March 30, 2020, the Ontario Superior Court of Justice released its decision in *MDS Inc. v. Factory Mutual Insurance Co.*, 2020 ONSC 1924, which is relevant to the issue of physical loss. The Court held that resulting physical damage to property can include loss of use.

MDS was in the business of purchasing radioisotopes produced at the Nuclear Research Universal Reactor at Chalk River, Ontario (the "NRU"), which it then sold. Radioisotopes are used for cardiac imaging, cancer treatment and sterilization of medical products. On May 14, 2009, the NRU was shut down as a result of a leak of heavy water. The shut-down lasted 15 months and during that time, MDS could not purchase radioisotopes from the NRU and this caused MDS to sustain a loss of profits in excess of $121 million. MDS submitted a claim to its property insurer for loss of profits pursuant to the policy's Contingent Time Element coverage. The insurer denied coverage, in part on the basis of a "corrosion" exclusion which stated:

> C. This Policy excludes the following, but, if physical damage not excluded by this Policy results, then only that resulting damage is insured: ...
>
> 3) deterioration, depletion, rust, corrosion or erosion, wear and tear, inherent vice or latent defect.

The court concluded that the corrosion exclusion did not apply. Nevertheless, the court went on to consider in the alternative, that if the exclusion did apply, would the insured be able to prove that the claim came within the resulting physical damage exception to the exclusion. The court framed the issue in these terms: "Should resulting physical damage be defined narrowly to require actual physical damage, or should it be defined broadly to include loss of use?"

The court concluded that in the context of the *MDS* case and the specific policy wording, "resulting physical damage contemplates loss of use of the NRU…" and accordingly, had the corrosion exclusion applied, the insured then would have been able to bring itself back within the exception and thus would have had coverage. The court's conclusion was expressed as follows:

> [518] Applying the principles of *Ledcor* to interpret the meaning of resulting physical damage, I conclude that a broad definition of resulting physical damage is appropriate in the factual context of this case to interpret the words in the Policy to include impairment of function or use of tangible property caused by the unexpected leak of heavy water.
>
> [519] This interpretation is in accordance with the purpose of all-risks property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would

> deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risks coverage.
>
> [520] For these reasons, I conclude in the facts of this case that the Plaintiffs have met their onus of proving that the leak of heavy water from the calandria to the J-rod annulus was resulting physical damage, and that if the corrosion exclusion applies, then the exception provisions of resulting physical damage apply allowing coverage for the Plaintiffs losses.

Although the Court in *MDS* case inquired into whether actual physical damage was needed or loss of use was sufficient, it is arguable that this case does not stand for the proposition that loss of use without physical damage is sufficient to find "physical property damage". The reason is that *MDS* involved actual physical damage. Although the Court focused on whether there was physical damage to the J-rod annulus and found as fact there was not, there was physical damage to the NRU due to the leak of heavy water, which was MDS' position.

An understanding of the structure of the NRU is of assistance in this analysis. A simplified description of the NRU found in the *MDS* case is that it is similar in construction to a huge thermos. The interior core of the NRU is called the calandria, which contains heavy water. Like a thermos there is then a space surrounding the calandria. This space is called the J-rod annulus. The purpose is to create a space between the calandria and the outer layer of the NRU which is called the reflector. The reflector contains light water. From the outside in, the main chambers are the reflector, then the J-rod annulus, then the calandria. Water is not supposed to move between chambers.

Since being built, the NRU had some leakage from the reflector to the J-rod annulus. That is, light water escaped from the reflector into the J-rod annulus. Upon shut down, it was discovered that in addition to this known water leakage, there was also leakage of heavy water from the calandria into the J-rod annulus. This leaking of heavy water was caused by corrosion; however, the Court held that the corrosion was fortuitous as it was not expected and was due to the introduction of an aggressive agent that essentially caused pitting in the wall of the calandria. As such, the Court held that the type of corrosion of the wall of the calandria was not excluded under the corrosion exclusion.

Despite finding the corrosion exclusion did not apply, the Court provided *obiter dicta* reasons about whether, if the corrosion exclusion applied to exclude the corrosion of the wall of the calandria, whether the extension for resulting physical property damage would also apply to ground coverage.

The analysis focused on the lack of physical damage to the components of J-rod annulus, and the loss of use of the NRU. However, the Court does not explain why it focused only on whether there is physical damage to the J-rod annulus, and not on the NRU as a whole. In our view, while the corrosion itself may be excluded, there is still physical damage to the NRU because there is physical displacement of the heavy water from the calandria into the J-rod annulus. It is arguable that the escape of water into the wrong chamber of the NRU is resultant property damage because it can be distinguished from the corrosion to the calandria wall. If, for example, there was no water in the calandria, or any substance that could escape, then there could be corrosion without escape, and in that case there would be no resultant physical damage to the NRU as a result of the corrosion. In fact, it seems that the Court, while not expressly acknowledging the leak itself as resulting property damage, connects coverage for loss of use with that physical damage:

> [461] When the leak of heavy water with Tritium emissions was detected, the NRU was shut down until the source of the leak was identified and repaired. As the location of the leak was

> unexpected, the complex process to repair the leak and meet the safety protocol of the CNSC took 15 months. The physical loss or damage of the leak of heavy water triggered the shutdown, and caused "the disruption of the normal movement" of the supply of isotopes to MDS until the NRU was reopened in August 2010 as approved by the CNSC.
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> [Emphasis Added]

While the *MDS* case creates a chance that there will be coverage for business interruption caused by loss of use of physical property, the weight of the caselaw supports that the argument is that there is no coverage when there is loss of use without physical harm to property. In other words, loss of use on its own is unlikely to amount to "physical" loss or damage.

The *MDS* decision has limitations in the context of business interruption claims that may are presented arising from the COVID-19 pandemic. First, the discussion about loss of use was *obiter dicta* because it was not necessary in light of other findings made by the court. Second, and perhaps more importantly, the discussion about loss of use did not focus on the insured sustaining a loss of use of its own premises, but rather, it focused on the insured sustaining the loss of supply of a product from a supplier and the policy provision under consideration was contained in what is best characterized as a contingent business interruption endorsement.

The *MDS* case is an outliner, especially given British Columbia's Court of Appeal's view of "physical" damage and loss not including inuitility as set out in *Acciona* above.

(b) Excluded Perils

If the business interruption must be caused by an insured peril, we must consider a policy's list of excluded perils.

Often policies include an exclusion for "loss or damage caused by or resulting from delay, loss of use or occupancy". Arguably, any profits lost by reason of an insured business having to close or choosing to close in response to the pandemic is a loss of use or occupancy and therefore not caused by an insured peril.

Policies also typically include "contamination" exclusions. Often, the word "contamination" is included with various other listed causes of loss, including dampness, evaporation, marring, scratching and other similar causes.

"Contamination" nestled into similarly worded exclusion clauses has been held to mean inherent contamination: *Tux and Tails Ltd. v. Saskatchewan Government Insurance (c.o.b. S.G.I. Canada),* [2003] SKQB 287 and *Largent v. State Farm Fire & Casualty Company*, 842 P.2d 445 (Ore. App., 1992).

Property policies often include a microorganism exclusion which operates to exclude coverage for any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to "mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health", or similar causes of loss.

Whether the Court would read the exclusion clause, which will be interpreted narrowly, to exclude coverage for claims caused by a virus is an open question. On a plain reading, a virus may be a substance

whose presence poses an actual or potential threat to human health. However, the other types of "substances" listed in the exclusion do not necessarily call to mind viruses. It is possible that the Court would find this exclusion ambiguous and decline to apply it to exclude COVID-related losses.

(c) Business Loss Coverage Extensions

Some business interruption policies contain various coverage extensions, which typically have specific limits. The limits tend to be relatively low.

Civil Authority coverage applies where a civil authority prohibits use or access to the insured premise as a direct result of damage to neighboring premises caused by loss or damage that is insured. As set out above, loss or damage that is insured is typically "all risks of physical loss or damage" and the closure of any neighboring premises due to COVID is likely not as a result of "physical loss or damage".

Policies may contain a Negative Publicity extension which provides an extension of coverage for loss of profit and incurred necessary "extra expense" for up to 30 days resulting from interruption of or interference to the Insured's business operations as a result of a "noticeable" infections or contagious disease manifested by an employee or employee of a manufacturer of similar products to the Insured's products. "Noticeable" is defined to mean that a public health authority must be notified of the infections or contagious disease. This coverage extension typically has a low limit.

This extension contains an exclusion for any loss resulting from, caused by or contributed to by, arising or resulting, directly or indirectly, in whole or in part, from a "pandemic outbreak" declared by Civil Authority or "public health authority". Any coverage under this extension is excluded due to COVID-19 being declared a pandemic by the WHO.

Policies may contain an Extra Expense extension which provides an extension of coverage for incurred necessary "extra expense" resulting from interruption of or interference to the Insured's business operations as a result of a "pandemic outbreak" declared by Civil Authority or "public health authority" during the policy period. Again, this extension typically carries a low limit.

"Extra expense" is defined as the excess of the total cost of conducting the Insured's business during the time period required to repair or replace lost or damaged property over the total cost of conducting the business that would have been incurred had no loss occurred. This definition does not fit neatly within the coverage extension, because it refers to "repairs" and "lost or damaged property". This extension appears to include in the calculation of the total cost of conducting the Insured's business, necessary additional expense resulting from the interruption or interference with the Insured's business operations resulting from COVID-19.

This extension excludes any loss resulting from, caused by or contributed to by, arising or resulting, directly or indirectly, in whole or in part, from, among other things:

- any increased costs incurred to comply with the enforcement of any law or order ; or
- any loss, cost or expense arising out of testing for, monitoring of, clean up, removal, containment or treatment of a noticeable human contagious or infectious disease including viral … infections...

In addition to the exclusions, this extension is usually limited in duration. The coverage lasts for the lesser of 30 days from the declaration of the pandemic by Civil Authority or "public health authority" or the reasonable time required to comply with the declaration.

The last relevant extension is a Foodborne Illness extension. This endorsement insures loss resulting from interruption of or interference with business carried on by the insured at the premises as a direct result of various enumerated perils. One of the listed peril is "infectious or contagious disease manifested by any person while at the premises or an outbreak of a notifiable human infectious or contagious disease within 20 kilometers of the premises." Again, this extension typically has a relatively low monetary limit.

While the title of the endorsement refers to foodborne illnesses, the enumerated peril does not. By not expressly using the limiting language of foodborne illness in the wording of the endorsement itself, it leaves open the possibility of a broad interpretation of what qualifies as infectious or contagious diseases. Arguably, this would include those that are not foodborne and would include the virus that causes COVID-19.

In order for COVID-19 to fall within this peril it must first be an infectious or contagious disease. According to the WHO an infectious disease is caused by pathogenic microorganisms, such as bacteria, viruses, parasites or fungi. An infectious disease is contagious when it can be transmitted from person to person. The virus that causes COVID-19 likely qualifies as an infectious and contagious disease.

Next, to be covered, COVID-19 must have been manifested by someone at the Insured premises (typically a restaurant for this type of coverage) or it must be notifiable and there must be an outbreak of it within 20 kilometers from the premises. A notifiable human disease is a disease which is required by law to be reported to government authorities. In Canada, nationally notifiable diseases are infectious diseases that have been identified by the federal government and provinces and territories as priorities for monitoring and control efforts. Through the Canadian Notifiable Disease Surveillance System, provinces and territories voluntarily submit annual notifiable disease data, which are used to produce national disease counts and rates. For instance, SARS is on the Canadian list of notifiable diseases, but it was not added to the list until 2004, after the SARS outbreak.

While COVID-19 is not yet on the Canadian list of notifiable diseases, it is on the list of notifiable diseases in Alberta. It is not clear whether it is on such a list in British Columbia, however, it is clear that all cases of COVID-19 *are* being reported to the government. Given that insuring provisions are to be interpreted broadly, COVID-19 would likely be considered a “notifiable human infectious or contagious disease”.

The next issue is whether there was an “outbreak” of COVID-19 within 20 kilometers of the Insured’s premises. According to the WHO, a disease outbreak is the occurrence of disease cases in excess of normal expectancy. We expect that this would require some sort of spread of the disease. While there is likely to be considered an outbreak in British Columbia at large, it is unclear whether there are any localized outbreaks within 20 kilometers of the Insured's business. If there was such an outbreak, then business interruption or interference must be a direct result for coverage to attach.

2. US Case Law

There have been a few recent cases decided in the United States dealing directly with COVID-19-related business interruption. In *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.,* 1:20-CV-03311 (S.D. N.Y., May 14, 2020) and *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*, Case No. 20-258-CB (Ingham County, Mich., July 1, 2020), the Courts rejected the policyholders' claims for coverage because they failed to allege any form of physical loss or damage to their respective properties.

In *Gavrilides*, two restaurants sought $650,000 in damages for losses suffered after Michigan issued executive orders in March limiting the two restaurants to take-out and delivery orders. The restaurants claimed that the requirement in their policy that any "suspension of operations" must be caused by direct physical loss or damage to one of their insured properties had been satisfied, because the restaurants were "damaged during the pendency of the [executive orders] because people were physically restricted from dine-in services." The Court dismissed the claim as there was no physical loss of or damage to the property. In that case, there was no evidence that COVID-19 had entered the premises, whether through an employee or a customer.

In *Social Life Magazine, Inc. v. Sentinel Insurance Co. Ltd.*, No. 20-cv-3311 (VEC) (S.D.N.Y.), the Court denied an emergency application by order to show cause for a preliminary injunction requiring the insurer to pay insurance proceeds to the policyholder immediately for COVID-19 damages. In denying the motion, the Court made the following comments:

> I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is not what's covered under these insurance policies.

More recently, in Missouri, in *Studio 417, Inc. v. The Cincinnati Insurance Company*, Case No. 20-CV-03127 (E.D. Mo., Aug. 12, 2020), the Court denied the insurer's motion to dismiss. In the relevant policies, the insurance company agreed to pay for direct "loss," unless the policies excluded or limited the loss. The policies defined "loss" as "accidental physical loss or accidental physical damage." The court noted that the insurance policies did not define direct "physical loss" and relied on the "plain and ordinary meaning of the phrase." Based on the plain and ordinary meaning of "physical loss," the court held that plaintiffs sufficiently pleaded that "COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." This Missouri case appears to be the exception rather than the rule respecting the American COVID-19 cases.

In *Studio 417*, the Court distinguished between "physical loss" and "physical damage", saying loss was broader than damage. In *Acciona*, the Court held that physical loss and damage both required an alteration in appearance, shape, colour or other material dimension. The Court's reasoning in *Acciona* will be preferred by British Columbia Courts.

3. FCA Test Case

The Financial Conduct Authority ("FCA"), the UK's conduct regulator for financial services firms and insurers, brought a test case before the High Court of Justice Business and Property Courts against 16 insurers to determine issues of principle in relation to policy coverage under various policy wordings for business interruption losses arising from the COVID-19 pandemic. Out of the 16 insures, eight agreed to participate in the test case.

On September 15, 2020, the Court released its decision. The Court was asked by the FCA to review the various policy wordings and decide whether coverage was available, in principle, by reference to an agreed statement of assumed facts.

By March 6, COVID-19 was a notified disease across the UK. On March 11, 2020, the WHO declared COVID-19 to be a pandemic. In early to mid-March, the British Prime Minister was advising people to avoid non-essential travel and to work from home if possible. On March 21, 20120, the Secretary of State for Health and Social Care made regulations requiring the closure of certain businesses, including restaurants, cafes, bars and public houses, as well as cinemas, spas, gyms and other similar businesses. Further restrictions were enacted over the following days.

The Court noted that standard Business Interruption wording is contingent on the occurrence of physical or material damage to the insured premises. The issue about whether there is coverage under that "standard" wording was not before the Court. The decision does not address what we consider to be the major issue for most business interruption claims in British Columbia: the direct physical loss or damage issue.

The court reviewed 21 sample policies issued by the various Defendant insurers. The FCA estimated that approximately 700 policies across 60 insurers and 370,000 policyholders could potentially be affected by the test case. The Court considered two broad categories of coverage provisions: Disease Clauses and Prevention of Access Clauses.

The Disease Clauses provide extensions to standard Business Interruption coverage. Generally, these clauses provide coverage for business interruption in consequence of or following the occurrence of a notified disease within a specified radius of the insured premises. Of course the various policies all had different wording.

The FCA argued that there was a Notifiable Disease in all parts of the UK by March 6, 2020 and as such, there was an occurrence of a Notifiable Disease within 25 miles of an insured's premises when an person or persons with COVID-19 was within 25 miles of those premises The insurers argued that the cover was only against business interruption or interference proximately caused by a local outbreak of a Notifiable Disease (i.e. one that was within 25 miles).

The Court considered eight various Disease Clauses, but generally concluded that disease cover is not confined to only a local occurrence of a notifiable disease. The Court reasoned that the policy drafters must have contemplated that government authorities might take action in relation to an outbreak of a notifiable disease as a whole and would not likely take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.

The Court held that the Disease Clauses should be interpreted to avoid the result that there would be no effective cover if the local occurrence were a part of a wider outbreak, and where, precisely because of the wider outbreak, it would be difficult or impossible to show that the local occurrence made a difference to the response of the authorities and/or public.

The court held that the majority of the Disease Clauses it considered provide coverage if there is an occurrence of a case of the disease within the radius provided for in the policy wording if that occurrence is part of a wider picture which dictated the response of the authorities and the public itself which led to the business interruption or interference.

Of course the interpretation of each policy depended on the policy wording. Two of the Disease Clauses considered by the Court were held to be applicable to relatively local cases, as opposed to national or global outbreaks. These clauses included reference to a causal "event". The "event", being the occurrence of the disease within a 25 mile radius must cause the business interruption or interference. Other occurrences in different places could not be said to have been the same "event". These clauses confine coverage to specific occurrences of the disease and contemplate coverage only for specific and localized events.

The Prevention of Access Clauses grant coverage when the access to a policyholder's premises is prevented by order of a public authority. These clauses are not limited to cases where access is prevented by an insured peril and therefore do not carry the requirement of direct physical loss or damage, unlike the Civil Authority coverage extensions discussed above.

The Court was not able to rule with finality on these clauses as each coverage determination would have to be very fact-specific. The Court did conclude that a complete stop of the business was not required. Rather, the hindrance or disruption of the use of the insured premises would likely be sufficient to trigger coverage in most cases. For instance, if a restaurant could not have dine-in customers but continued to provide takeout, that would likely be enough of an interruption to fall under the insuring agreement.

The Court outlined some of the key issues for insurers to consider with respect to these type of clauses, including whether the restrictions at issue were imposed by a public authority or some other entity, whether the restrictions were advisory or mandatory and how the insured conducted its business before and after the advisories.

The decision has been appealed by various of the insurers and by the FCA.

In the meantime, the FCA has issued guidance setting out its expectations for insurers in dealing with business interruption cases following the judgment.

The most significant ruling to come out of the FCA case for Canadian insurers, is that the Disease Clauses can be triggered by the pandemic as a whole and that one case within the specified radius in the clause would be enough to find coverage.

The Civil Authority coverage extensions in Canadian policies typically require direct physical loss or damage and again, that issue was not before the Court in the FCA test case.

We expect that B.C. Courts would look to the test case if presented with similar policy wording. The coverage extensions which may provide similar cover tend to have lower limits and in the context of the losses suffered by business as a whole over the course of the pandemic, the covered losses (if there are any) will likely only make up a small proportion.

4. Potential Third Party Claims

Policyholders are beginning to report potential third party claims.

If a plaintiff makes a claim against a policyholder for damages arising out ot he transmission of COVID-19, such a claim would likely qualify as a claim for compensatory damages arising out of bodily injury and all under a homeowners or CGL policy insuring agreement.

The defence of such claims will involve a difficult causation analysis. It would likely be hard for a claimant to prove that the defendant was the course of the transmission of the virus, as opposed to elsewhere in the community.

The British Columbia government released a Ministerial Order relevant to the defense of a third party claim arising out of the transmission of COVID-19. The Order protects people who operate or provide essential services from liability for damage relating, directly or indirectly, to COVID-19, if those people operate or provide those service (or reasonably believe they are providing those services_ in accordance with all applicable emergency and public health guidance.

The object of the Order is to protect individuals who are working to provide failing services essential to health, public safety and social functioning. The Order does not apply to protect someone of they are grossly negligent.

Other potentially insured third party liability claims include claims for wrongful dismissal or constructive dismissal. There is likely nothing special about COVID-19 which would change the way such claims are defended.

An employer can terminate an employee or let an employee go at any time for almost any reason, as long as the reason does not violate the employee's human rights, and is not discriminatory. IN such a dismissal without cause, an employee is owed severance pay. However, the B.C. *Employment Standards Act* provides for certain circumstances where an employer will be exempt from providing an employee with notice of termination. One of those exceptions is if the employee is "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance". The Employment Standards Branch has stated that business closures and staffing reductions due to COVID-19 may be just such an unforeseeable event. That being said, if the employee's work could be done in a different way, say by transitioning to working from home, the exception will not likely apply.

5. Class Actions

Various class actions seeking insurance coverage for COVID-19 related losses have been commenced across Canada. Some are claims against essentially all domestic insurers on behalf of all policyholders. he lawyers prosecuting these claims allege that business interruption is designed for circumstances such as the COVID-19 pandemic. No doubt Underwriters would disagree wholeheartedly with that statement. The largest class action of this type was filed in Ontario and names 22 defendants alleging breaches of their business interruption policies.

Each policy wording and each circumstance of loss will be individual to the individual policyholders. This may be a hurdle for certifying the claim as a class action. Since coverage determinations must turn on the relevant policy wording, it may be difficult to delineate common issues for determination in the class actions.

Other actions are specific to insurer and specific to insured industry. For instance, a claim has been filed against Aviva on behalf of Canadian hotels that were denied insurance coverage for business income lost because of the pandemic. The lawsuit was filed on behalf of Roshan Holdings Inc. as representative plaintiff. It owns and operates two hotels in Ontario. The hotels were not required to close, but their operations were significantly restricted as they could not offer food and beverage services and amenities including the pool and gym had to be closed.

A similar claim has been brought against Lloyds in the Alberta Court of Queen's Bench seeking $180 million in damages for lost rental income for rental premises in the Canmore area. Lloyds took the position on the representative plaintiff's claim that the loss did not arise from "direct physical loss or damage".

TD Bank has been sued on behalf of its policy holders for failing to pay travel insurance claims following COVID-19 cancellations.

These claims for specific categories of policyholders against specific insurers will likely be more successful in obtaining class certification. Proceeding by class action makes sense given that the limits for any coverage that may be available for these losses are typically low.

6. Conclusion

The COVID-19 pandemic has resulted in novel types of business interruption claims and has required analysis of coverage extensions which are typically not engaged in other circumstances.

The fight for business interruption coverage will likely play out in the Courts over the next number of years. We also expect various insured third party claims will now also begin to flow into our clients' offices.

For more information on this topic or for further questions, please contact:

Justine Forsythe
D. 604. 891.7237
E. jforsythe@wt.ca