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Coronavirus 'Civil Authority' Coverage May Hinge On Science

By **Jeff Sistrunk**

Law360 (March 18, 2020, 9:04 PM EDT) -- A New Orleans restaurant recently filed the first of a potent wave of lawsuits seeking insurance to cover losses from government-mandated closures due to the novel coronavirus outbreak, and disputes over this "civil authority" coverage may center on the unsettled science on how long the virus can linger in properties.

Oceana Grill, which is in New Orleans' French Quarter, argued in its **Monday complaint** that the civil authority prong of its "all risk" property policy with underwriters at Lloyd's of London should cover its lost revenue following statewide orders that sharply curtailed the size of public gatherings and required restaurants to cease on-site dining.

Like many civil authority provisions, the one in Oceana Grill's policy requires that a government restriction stem from a "direct physical loss" — or damage — to a nearby property for coverage to apply. John W. Houghtaling II of Gauthier Murphy & Houghtaling LLC, an attorney for the restaurant, told Law360 that this requirement is met by the COVID-19 pandemic. He noted that Louisiana's governor and New Orleans' mayor supported their restrictions by pointing to concerns of the coronavirus contaminating, and thereby damaging, public spaces.

Oceana Grill's suit was the opening salvo in an expected wave of litigation over the applicability of civil authority coverage during the pandemic, given the proliferation of federal, state and local orders across the country requiring businesses to close or sharply limit their operations. But even if companies' policies don't exclude coverage for viruses — as Oceana Grill's does not — attorneys told Law360 they may still face a tough task in fulfilling the direct physical loss requirement, given the unsettled and still-evolving science around the coronavirus.

"A typical civil authority scenario is where there is a fire or a collapsed building, and authorities shut down businesses on the same block," said Clark & Fox partner Michael Savett, who represents insurers. "Here, making an argument that coronavirus actually caused physical damage to a nearby property will be a hurdle for insureds."

There is not yet a consensus in the scientific community regarding how long the novel coronavirus can survive on surfaces or materials. One study issued this week by the New England Journal of Medicine indicated it can survive on cardboard for up to a day and on plastic and stainless steel for up to 72 hours. In addition, past research has found that other coronaviruses, such as those that cause MERS and SARS, can survive anywhere from two hours to 28 days, depending on temperature and other factors.

Therefore, policyholders and insurers embroiled in civil authority coverage disputes are likely to turn to scientific experts to ascertain whether, and for how long, the coronavirus contaminated buildings affected by government-mandated closures.

"I think you are going to have a battle of experts within the scientific community as to whether or not a virus of this type causes physical damage," Savett said.

Saxe Doernberger & Vita PC partner Gregory D. Podolak, who represents policyholders, said scientific inquiries into whether policies' direct physical loss requirement was satisfied could prove costly and be complicated by companies' inability to access their properties for long stretches of time.

"There will be a huge strain on resources for insureds if carriers are going to argue that they need to produce a scientific report confirming the presence of coronavirus," he said. "That illustrates just how untenable this type of reading of this policy language can be in practice."

According to Haynes and Boone LLP partner Stephen Raptis, even if an expert determines the coronavirus has a fairly short lifespan on a surface, "there is always the risk of re-contamination," which he said could fulfill the direct physical loss requirement.

"I would argue that this is a continually renewing physical loss, as long as individuals are continuing to come through a property," said Raptis, who represents policyholders. "These civil authority orders are intended to prevent re-contamination."

Some attorneys said policyholders may have another route to civil authority coverage that wouldn't involve intensive scientific scrutiny.

Anderson Kill PC shareholder Nicholas Insua explained that policyholders can also argue that, "to the extent coronavirus has infiltrated a premises, the loss of functionality of that property is akin to physical loss or damage."

Insua cited several cases to support this stance, including a New Jersey federal court's **2014 ruling** in Gregory Packaging v. Travelers, in which the court found an ammonia release at a factory constituted direct physical loss or damage to the building.

Podolak also said this "loss of functionality" argument could be viable, especially in cases in which it is difficult to determine whether a property was contaminated with the coronavirus.

"When you get to those properties where the presence of the virus is not able to be determined, I query to what extent the specter of COVID-19 alone might qualify as direct physical loss or damage under a 'loss of functionality'-type litmus test," he said. "I think you will see a lot of head-butting between insureds and their carriers on this."

However, Zelle LLP partner Shannon O'Malley, who represents insurers, asserted that the mere threat of coronavirus contamination shouldn't be sufficient to meet the direct physical loss requirement and trigger civil authority coverage.

To bolster that contention, she pointed to a number of decisions in civil authority coverage disputes following the Sept. 11 terrorist attacks and major hurricanes. Among those was the Second Circuit's 2006 ruling in United Air Lines Inc. v. Insurance Co. of the State of Pennsylvania, in which the court affirmed that United couldn't force its insurer to cover lost earnings due to the national disruption of flight service after 9/11 because the airline's facilities at Ronald Reagan Washington National Airport were not damaged by the terrorist attack on the Pentagon.

"If an order is issued to avoid future problems that have nothing to do with physical loss or damage, courts have held that this is insufficient to trigger civil authority coverage," O'Malley said.

--Editing by Breda Lund.
