

# ANDERSON KILL POLICYHOLDER ADVISOR

*The Policyholder Law Firm*



## Tips for Pursuing Insurance Claims for Losses from COVID-19

By Finley Harckham

**M**any businesses and other entities have submitted insurance claims for business interruptions and extra expenses stemming from the disruption of their businesses by COVID-19. Whether these claims stem from the presence of the virus on the policyholder's own property or the property of customers or suppliers, or result from government orders impairing access to insured locations or other properties, the vast majority of policyholders have received either flat-out denials of coverage or requests for very specific and sometimes voluminous information. Those demands come even though in all likelihood the insurance company intends to deny coverage based on the simple argument that COVID-19 is not property damage, or that viruses are excluded under the policy in question. In other words, the lengthy information requests and the effort required to comply with them likely serve no purpose other than to allow the insurance company to assert that it investigated the claim.

Either situation, a blanket denial or an information request, can leave the policyholder wondering how, if at all, to continue to pursue the claim. The following tips can help policyholders bring a claim to resolution as quickly as possible and with the greatest chance of success.

### 1. Obtain an Expert Evaluation of Your Coverage

Pursuing coverage for COVID-19-related losses will likely be time-consuming and expensive. It is therefore fundamentally important for policyholders to obtain an expert evaluation of their coverage and the likelihood of prevailing on their claims. Many policyholders have so far avoided this step by submitting very simple and general statements to their property insurance companies that they have suffered loss from COVID-19, providing little, if any, specific information relating to the loss. That can be a prudent first step, particularly because the scope and extent of most losses is not yet known. The response to such a notice might be a denial of coverage or, perhaps more likely, a request for information supporting the claim. In either event, the policyholder is not left with a clear idea of whether the claim is worth pursuing, either through the insurance adjuster or, if the claim has been denied, in court.

There is no single correct answer for every claim. Numerous policy forms, some with relevant manuscript provisions, have been issued that are materially different from one another, often providing different coverages and containing different

---

**Finley Harckham** is a senior litigation shareholder in the New York office of Anderson Kill. Mr. Harckham regularly represents and advises corporate policyholders and other entities in insurance coverage matters and he has successfully litigated, arbitrated and settled hundreds of complex coverage claims. His areas of particular focus include property loss, business interruption, directors and officers liability, construction, professional liability, cyber and general liability claims.  
[fharcckham@andersonkill.com](mailto:fharcckham@andersonkill.com) | (212) 278-1543

potentially relevant exclusions. Whether a particular loss is covered could depend on a number of factors based on the facts of the claim and the policy provisions. No one can tell most policyholders with confidence they are entitled to coverage for COVID losses, because the courts will have to decide a threshold issue of whether COVID-19 constitutes, or causes, property damage needed to trigger business interruption and extra expense coverage under most property policies.

However, an experienced coverage counsel, broker or insurance advisor can help identify potentially applicable insurance grants in some policies, including:

- Damage to the policyholder's own property and resulting business income loss.
- Extended business income loss, for loss from government orders.
- Loss from supply chain disruption or property damage to "attraction" or "leader" properties.

Equally importantly, the broker or counsel can help identify and evaluate potential pitfalls, or advantageous policy provisions, which may help the policyholder determine whether, and how, to pursue the claim.

## **2. Cooperate with Insurance Company Requests for Information, but Demand Prompt Coverage Determinations**

Responding to detailed and seemingly irrelevant requests for information may seem like a waste of time, particularly in the current environment where the insurance industry has given every indication that it will deny the vast majority of claims. Nonetheless, if the insurance company has not denied coverage and is at least going through the motions of investigating a claim, then cooperating with the investigation is the best course of action to avoid a later defense from the insurance company claiming the policyholder refused to comply with a condition to coverage. So, policyholders should provide all requested information that bears upon their claim. If some requests seem burdensome and irrelevant, the policyholder can ask why the information is needed, but it is best not to ignore or refuse to comply with such requests.

However, while the insurance company is entitled to investigate the claim, the policyholder is entitled to a reasonably prompt determination of coverage. For example, if the insurance company has already made up its mind to deny coverage on the theory that a virus does not cause property damage or is excluded, the investigation may be a sham and therefore a waste of the policyholder's time and resources. Accordingly, policyholders should feel free to ask insurance companies the pointed questions that could quickly bring the claim investigation to a head. For example, "Do you concede that there are circumstances under which a COVID-19-related claim could be covered under my policy? If so, what are those circumstances?" Putting the insurance company on the spot in this way could save a lot of time and bother in getting to the almost inevitable point of deciding whether to pursue the claim in the face of a denial.

## **3. Do Not Accept Reservations of Rights That Do Not Clearly Articulate the Possible Grounds for Coverage**

Insurance companies often issue purported reservations of rights that provide no clear indication of the basis for denying coverage. In these letters, the insurance companies briefly recite their understanding of the facts relevant to the claim, and draw the policyholder's attention to various policy provisions, which are quoted one after another without providing any context or explanation of how they supposedly support a defense to coverage. Then, the letters state that "for the foregoing reasons" — when in fact no reasons have been given — the insurance company reserves all of its rights to deny coverage. Sometimes these letters conclude with an invitation to the policyholder to provide whatever additional information may be relevant. Of course, such a letter leaves the policyholder to guess at what specific defenses may ultimately be raised by the insurance company, and does nothing to advance the resolution of the claim.

If the insurance company is going to reserve its rights, the policyholder is entitled to know why, and it's important that the specific grounds are disclosed. In many jurisdictions, insurance companies are required to state the

specific grounds for reserving their rights, and a failure to do so may result in a waiver of coverage defenses. Moreover, fully understanding the insurance company's position is important for evaluating coverage and whether the claim should be pursued.

#### **4. If the Claim Is Denied but May Be Worth Pursuing, the Policyholder Must Decide Where and When to Commence Legal Action**

If a claim is denied, the policyholder has a certain amount of time to commence a coverage action or arbitration, based either on state statutes of limitations or contractual limitations. Policies must be checked carefully for contractual limitations periods, and, if they exist, the enforceability of such clauses under applicable state law. Also, many policies require sworn proofs of loss submitted within a specified period of time. Fortunately, insurance companies will typically agree to toll statutes of limitation and the deadlines for sworn proofs of loss. However, such agreements should be obtained in writing because failure to comply with time limitations can result in forfeiture of coverage. Note that the time period for presenting a sworn proof of loss may run from the date the loss was discovered or began. Those provisions might be enforced against policyholders even if the applicable period expires before the loss has ended or while the parties are still engaged in the claim investigation or negotiations.

Some policyholders will have no choice but to pursue their claims immediately and aggressively in court in order to recover funds necessary for their survival. Others, who are not in desperate need of their insurance recoveries, might decide to put off their own suits while others incur the expense of obtaining court rulings on the important issues that will affect many policyholders' claims. Those issues include whether the presence of COVID-19 is sufficient to satisfy the requirement of property damage needed to trigger coverage. Waiting may be a sound strategy, but policyholders with the luxury of time should still bear in mind the potential downsides of sitting on the sidelines while others make relevant law.

First, insurance policies are interpreted under state law, which means that each state will

interpret key policy provisions, even if they are standard in policies used throughout the country. It is not uncommon for multiple trial and appellate courts within a state to reach different conclusions on identical policy interpretation issues. So it may take several years before an issue is settled under the law of the state applicable to a particular insurance policy.

Second, some policies present better opportunities than others for policyholders to prevail on the key threshold coverage issues. For example, policies that provide some coverage for virus or communicable disease, or only partially exclude such causes of loss, give policyholders arguments not available under other policies to the effect that COVID-19 is property damage, because the policy itself acknowledges that viruses are not excluded in all instances. Policyholders with better than typical policy language would be well served to try to move their claims quickly to avoid having to argue they're entitled to coverage even though the courts have held that other claimants are not.

Third, most claims present some unique facts that will not be resolved in other policyholder's claims, such as whether the requirements of order of civil authority coverage for losses by reason of a government order have been met, including whether the virus was present within a specified distance of insured premises; and whether the order was entered because of the actual presence of the disease or simply as a prophylactic measure, which insurance companies will argue does not satisfy the requirement of property damage to trigger coverage. These will be important issues for many policyholders, because the massive disruption of the economy is largely the result of government orders prohibiting or limiting access to premises, which is precisely what order of civil authority coverage is intended to insure.

#### **Conclusion**

Thus, it is in the interests of most policyholders to take a very proactive role in evaluating and pursuing their claims — and not let the insurance company dictate the claim adjustment process and timing. ▲

---

## About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C. and Los Angeles, CA.

*This was prepared by Anderson Kill P.C. to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the editor, Mark Garbowski at [mgarbowski@andersonkill.com](mailto:mgarbowski@andersonkill.com) or (212) 278-1169, with any questions.*

© 2020 Anderson Kill P.C.