

2020 Fall Conference LIVE Virtual: The Case Goes On

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# COVID-19 and Aviva Business Interruption Claims

Presented by:

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## What is Business Interruption Insurance?

- What does it cover?
- What is the coverage period?
- What is a 'loss'?

## Astronomical Losses

- April 2020: more than 50% of Canadian companies had lost at least one-fifth of their revenue due to COVID-19, some of which is due to mandatory business closures.
- Estimates in the United States indicate that small businesses have lost \$255 to \$431 billion per month as a result of government-ordered closures.

## Standard Coverage Clause

Physical damage or loss to property

*“we will pay for your loss of “business income”, your incurred necessary “extra expense”, or loss of “rental value” sustained during the Period of Indemnity due to the total or partial suspension of your “normal business operations” directly resulting from and necessitated by “covered direct physical loss” subject to the provisions and limitations set forth in this Form as applicable to the coverage specified on the “schedule”*

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## *MDS Inc. v. Factory Mutual Insurance Company*

- Leak of radioactive water at a nuclear facility
- No physical damage
- Facility proactively shut down – but then ordered to close by Canadian Nuclear Safety Commission
- Shut down lasted 15 months – loss of \$121,248,000.00
- ONSC contemplated if ‘physical loss’ is broad enough to cover ‘loss of use of premises’

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## Cases Considered by the Court

- *Jessy's Pizza (Bedford) v. Economical Mutual Insurance Co.*, [2008] N.S.J. No. 319
- *Port Authority of New York and New Jersey v Affiliated FM Ins* (2002), 311 F.3d 226 (U.S. C.A. 3rd Cir.)
- *Universal Image Productions, Inc. v Chubb Corp.* (2010), 703 F.Supp.2d 705 (U.S. Dist. Ct. E.D. Mich.)
- *Western Fire Ins. Co. v. First Presbyterian Church* (1968), 437 P.2d 52 (U.S. Colo. S.C.)

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## MDS OUTCOME

- “In this case, the leak of heavy water required the shutdown of the NRU rendering it unusable. With continued operation there was a very real imminent risk of harm.”
- broad interpretation of direct physical loss, allowing coverage in a situation where a public body declared that the premises in question were uninhabitable.
- This case is under appeal.
- When would COVID-19 meet this high threshold?
  - Many unknowns regarding COVID-19

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## Pandemic Coverage

*"to help offset your income loss during a pandemic outbreak, the tripleguard™ insurance plan's practice interruption coverage automatically provides up to \$1,000 per day after the first 24 hours (up to a \$20,000 aggregate annual limit) when you are prohibited from entering your office by an order from a civil authority or public health official... Pandemic outbreak means an outbreak of an infectious disease resulting in serious illness that becomes prevalent over the human population throughout a region."*

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## U.K. Test Case

*The Financial Conduct Authority v Arch and Others*

- The High Court interpreted
  - Disease wordings
  - Restricted access wordings
  - Hybrid wordings

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## Disease Wordings

- III.C.2.a. This form is extended to insure the actual loss of “business income” sustained by the Insured as a direct result of any of the following circumstances:
  - ...
  - ii. an outbreak of a contagious or infectious disease within 25 kilometres of the “premises” that is required by law to be reported by government authorities.

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## Restricted Access Wordings

“8. Prevention of access – non damage

- your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your business caused by **an incident within a one mile radius of your premises which results in a denial of access or hindrance in access to your premises** during the period of insurance, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours.”

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## Hybrid Wordings

- 4.a. This form insures the actual loss of “business income” sustained by the Insured caused by the interruption of the “business” at the “premises” when ingress or egress from the “premises” is restricted in whole or in part:
  - ...ii.(a) by order of civil authority resulting from any of the following occurrences:
    - ...
    - (2) an outbreak of a contagious or infectious disease that is required by law to be reported to governmental authorities.

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## *Nordik v. Aviva*

### **Negative Publicity Coverage:**

- III.C.2.a. This form is extended to insure the actual loss of “business income” sustained by the Insured as a direct result of any of the following circumstances:
  - ...
  - ii. an outbreak of a contagious or infectious disease within 25 kilometres of the “premises” that is required by law to be reported by government authorities.

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## *Nordik v. Aviva* cont'd

~~Claimed~~ **Claims** are also advanced under a restricted access coverage which is essentially a hybrid wording. One of the specific clauses in dispute is as follows:

**Access coverage:**

- 4.a. This form insures the actual loss of “business income” sustained by the Insured caused by the interruption of the “business” at the “premises” when ingress or egress from the “premises” is restricted in whole or in part:
  - ...ii.(a) by order of civil authority resulting from any of the following occurrences:
    - ...
    - (2) an outbreak of a contagious or infectious disease that is required by law to be reported to governmental authorities.

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## Conclusion

- Read policies closely
- Insurers rejecting claims on a wholesale basis
- Will Canadian Courts follow in the footsteps of the English High Court?
- Will these claims proceed as class actions or individual actions?

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# THANK YOU

Please feel free to call or email with questions.

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