



Can Insurers Retroactively Modify Policies to Exclude Coronavirus?

By Theresa A. Guertin

Every day brings new challenges and concerns as the world grapples with the novel coronavirus. Businesses are already looking to their insurance portfolio as a way to lessen the anticipated impact on their bottom line. Policyholder and insurer side litigators alike seem to agree that we will likely see coronavirus-related coverage issues litigated for years, long after the pandemic has been contained.

I recently became aware of one insurer that has been attempting to retroactively endorse their policies to exclude virus and bacteria losses. The endorsement is intended to apply to numerous lines of first party property insurance coverage written by this insurer, from commercial property to builder's risk and inland marine. The exclusion is broadly worded, and provides that the insurer:

[W]ill not pay for any loss, damage, expense or costs caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. Any contamination of property caused by virus, bacteria, gasses or fumes is not physical injury to property. This exclusion also applies to any loss arising directly or indirectly out of fear or threat (whether actual or perceived) of any virus, bacterium or other microorganism.

The explanation given by the insurer was, apparently, that the exclusion was meant to be included in the policyholder's recent renewal—but the March 2020 edition date of the endorsement clearly belies this excuse. Clearly, this insurer is trying to get out ahead of any potential claims that coronavirus contamination constitutes a "physical loss," a typical prerequisite for triggering first party property coverage.

Virus and bacteria exclusions aren't new, but insurers who do not use ISO forms may be behind the curve in excluding the risk from their policies. In 2006, ISO released form CP 01 40 07 06, "Exclusion for Loss Due to Virus or Bacteria." The insurer quoted above has implemented some of this ISO wording in its exclusion, although other parts are its own creation. Despite this, the ISO exclusion does not appear to be ubiquitous throughout the industry – at least in the New York market, perhaps 1/3 of policies we have reviewed have such an exclusion.¹

Regardless of the history, forcing a policy change of this nature on insureds mid-policy period is bad behavior that likely will not go uncontested by insureds. It is questionable if a policy change of this nature would be deemed enforceable by a court. Although insurers modify their policies mid-policy period all the time, such changes are typically in response to their policyholder's request – for example, a request to change or add additional insured endorsements. Major changes are accompanied by an increased premium. Here, though, the insurer is attempting to enforce a new *exclusionary* change on the policy, presumably without any sort of change (i.e., reduction) to the overall premium.

Basic principals of contract law support the idea that a contract (which is what an insurance policy is) cannot be modified except by mutual consent of the parties. It is also possible to push through a modification if the contract itself provides for modification. Whether or not a particular insurance policy contains language supporting unilateral modification will have to be analyzed on a case-by-case basis.

It is also possible that state legislatures or insurance divisions may step-in to prohibit insurers from retroactively limiting or excluding coverage for coronavirus-related claims. We have already seen some states start to take action, like New Jersey's bill aimed at eliminating the effect of virus exclusions in property policies, or New York's Department of Financial Services' directive to insurers to send explanatory briefings to their commercial property insureds concerning their coverage.

These are uncertain times, and business around the world are reacting to the potentially significant economic impact of this pandemic. It isn't that surprising that insurers are looking for ways to protect their bottom line, but ultimately policyholders may need to push back.

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¹For more backstory on the ISO 2006 changes, see Randy Maniloff's article, "Iso Excluded Coronavirus Coverage 15 Years Ago" available at <https://www.whiteandwilliams.com/resources-alerts-ISO-Excluded-Coronavirus-Coverage-15-Years-Ago.html>