Tuesday 14th April 2020

Concordia Consultancy Ltd ®

Coronavirus - Can the presence of the virus on surfaces in a building be classed as property damage?

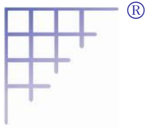
"Wash Your Hands, Wash Your Hands." How many times have we heard that in the last couple of months? As Coronavirus continues to spread to every corner of the world, so does our fear of surfaces and possible contamination.

It appears that the invisible enemy is everywhere, such that populations are now taking personal hygiene very seriously. Businesses and property owners are reacting similarly, with a raft of measures being deployed, ranging from a bottle of sanitiser in a lift, to teams of workers in protective clothing spraying disinfectant and performing "deep cleans" in affected areas throughout shops and public places.

Studies show that Coronavirus is particularly resilient on some surfaces and can survive for up to 28 days, but that it can be neutralized within minutes if the surface is properly disinfected.

The Coronavirus pandemic is threatening the safety and financial security of the world`s population and as a result is creating challenging times for the insurance market. Globally, we have come to expect an uncompromising safety net from the insurance sector in the toughest of times, and yet as we endure precisely such an occasion, Coronavirus is exposing possible shortcomings in wording and prior advice. "Invisible" damage to property produces difficulties for all parties.

The subject of Coronavirus and Business Interruption Insurance is receiving increasing publicity in recent times, even at senior government level in the UK (see



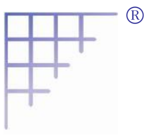
our article on Business Interruption here). Cover provided by standard Business Interruption policies is usually triggered by damage to the property insured. Yet the "invisible enemy" of the Coronavirus leaves no visible trace of its presence, except for its subsequent devastating effect on humans.

Does the presence of the virus on surfaces within a building constitute "damage to property"? If the answer is "yes", then Insurers will face Material Damage claims for cleaning and decontamination, and Business Interruption claims for the resulting financial losses.

In analogous circumstances, Courts have found that the presence of harmful substances at or in a property can constitute "property damage". In the U.S, for example, in 2014, in *Gregory Packing, Inc. v. Travelers Property Casualty Co. of America*, a federal Court in New Jersey found that "property damage" as required under the policy had occurred when ammonia was accidentally released into a facility, rendering the building unsafe until remedial measures were taken.

In reaching its decision, the Court stated that "*property can sustain physical damage without experiencing structural alteration*." Similar, subsequent decisions elsewhere in the U.S. have found property damage in the absence of structural damage.

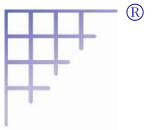
An alternative view can be found in an English Court decision that to succeed with a claim for "damage to property", a molecular change must exist. In *Blue Circle Industries Plc v. Ministry of Defence*, 1998, the claimant's land was contaminated by radioactive waste overflowing from the defendant's site. In this case, the Court of Appeal held there was damage to property, stating that the land itself was physically damaged when the plutonium seeped into the soil, thus changing the chemical composition of the land.



Looking ahead, it seems likely that an English Court will be asked to consider whether the presence of surface virus particles has created “damage” to the property they are attached to. Inanimate objects, such as office furniture and manufacturing machinery and equipment, are unlikely to have been altered at a molecular level. The value of the property itself will not be affected, particularly as, in many cases, all that is required to eradicate the virus is routine cleaning, albeit more extensive (and expensive) than normal.

Consider, for example, a major supermarket chain (“essential service”) remaining open. As a precaution against (a) the business being closed due to the presence of the virus, and (b) the risk of virus deposits in the premises affecting shoppers/employees/members of the public, the supermarket decides to commission a “deep clean” every night. A failure to do so could leave the business open to liability claims from users of the premises, as the virus, left on surfaces, is likely to cause harm. Recovery of the “deep clean” costs is dependent on the policy wording. The supermarket’s Property Damage Insurers may say, “no damage to property” and their Public Liability Insurers might say that the costs are those of a prudent insured taking reasonable precautions (at their own expense). It is possible, though, that the cost of such reasonable precautions and mitigation measures may be covered by a “Sue & Labour” type of wording.

A thorough investigation will enable the facts and circumstances to be collated, such that the Policyholder and their Insurer can make an informed decision on policy liability.



This “thorough investigation” must answer at least these three main questions:

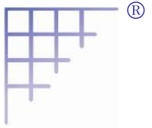
1. Is there evidence to indicate the presence of the virus in the premises?
2. If the answer to (1) is “yes”, are the costs of virus removal/cleaning recoverable under the policy/policies in force?
3. Again, if the answer to (1) is “yes”, does the insured have a legal liability to employees and third parties if, say, the cleaning is inadequate?

Legal precedent may not stop the determined claimant from pursuing their case, arguing that there was physical alteration of the property by the deposition of hazardous biological material (Coronavirus particles) on the surfaces.

Indeed, there may be endorsements, clauses and specific wording designed for circumstances such as those associated with Coronavirus. Every claim is fact-sensitive: in relation to the circumstances (e.g., virus in the premises or neighbourhood, “stay at home” order, or closure order by government), and in relation to the wording of the policy under which indemnity is sought.

Some modern BI wordings we are seeing provide cover for the insured’s *“inability to use the premises as a consequence of a government order during the period of insurance following ………… an occurrence of a notifiable human disease…….”.*

To underline the importance of the wording, we see from the quoted clause that the cover is triggered by “an occurrence of a notifiable human disease” as opposed to “an occurrence of a notifiable human disease **at the premises**”. In all cases, the specific wording of the policy is key.



Existing English law, the lack of cover, the uncertainty of interpretation, and the fear of "opening the floodgates" may see the insurance market resisting most Coronavirus claims, but subject to the specific policy wording, the resolute policyholder and their advocates may well prevail. Where loss adjusters are involved, they will assist to establish the facts and provide practical and experienced views on policy interpretation.

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