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Q&A: Insurance attorney Michael S. Levine on COVID-19 coverage issues

By Michael S. Levine, *Hunton Andrews Kurth LLP*

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Thousands of lawsuits have been filed by businesses seeking coverage for COVID-19-related interruption. Michael S. Levine of Hunton Andrews Kurth LLP is one of several lawyers representing Las Vegas' Circus Circus Hotel & Casino in a lawsuit against its insurer, AIG Specialty Insurance Co. He answers questions about the suit, potential legislation and a proposal to consolidate business interruption litigation.

Thomson Reuters: Tell us about the Circus Circus case and how the Nevada governor's stay-at-home orders affected your client's operations.

Michael S. Levine: The case arises from AIG's refusal to pay the business income loss sustained by Circus Circus due to the direct physical loss of and damage to property. The stay-at-home orders issued by Gov. Steve Sisolak required, among other things, that all casinos in Nevada close at midnight on March 17. Those orders were issued as a direct result of the COVID-19 pandemic and the direct physical loss and damage that COVID-19 was causing to property, both at Circus Circus and elsewhere. The orders, the pandemic and the actual physical damage caused when virus renders property unusable are all covered causes of loss under the terms of the AIG policy.

TR: Your complaint cites the policy's pollution exclusion and its definition of pollutants or contaminants as "any solid, liquid, gaseous or thermal irritant or contaminant ... which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances." Why doesn't the coronavirus fit within this exclusion?

ML: First, no matter what substance is at issue, under the terms of the AIG policy, there must be a "release" of that substance for it to qualify as a pollutant or contaminant. That there must be a "release" has significance in the context of insurance; it makes clear that the pollutants or contaminants for which coverage is precluded under the policy had been in a contained state and then became uncontained, resulting in damage. This is most frequently seen with industrial pollution, but it could be the case in other instances, too, such as where fuel oil is released from a storage tank or, I suppose, where a virus is released in a lab or research facility.

Second, but similar to the definition of "pollutants or contaminants," the contamination exclusion also contains language that requires a "release, discharge, escape or dispersal." There was no "release, discharge, escape or dispersal" with coronavirus. It is a naturally occurring virus that is globally present. Thus, the exclusion does not apply both by its terms and the incorporated definition of "pollutants or contaminants."

TR: Thousands of COVID-19 coverage lawsuits have been filed. Which cases are you watching?

ML: We are watching all of them. Although each case necessarily turns on its own specific facts and circumstances including the law that governs the insurance contract at issue, some common issues and arguments are worth watching. These include how courts will treat coronavirus and COVID-19 and whether they will find that the virus and disease cause either direct physical loss or damage to property and how courts will apply exclusions like the contamination exclusion mentioned above. Anything other than a strict reading of the exclusion and its incorporated terms would be a deviation from the settled rules of insurance contract interpretation, which require that exclusions be read narrowly and generally in favor of the policyholder.

Most interesting to me however, is that to my knowledge, not one insurer has accepted coverage for a COVID-19 business interruption claim no matter what the facts of loss, and no matter what the policy language and the controlling law says. This is unlike any other mass casualty or catastrophic loss that I can think of. For that reason alone, it is worth watching every case, big or small, to see how the insurers justify their uniform position across all submitted claims and without regard to the specific facts and circumstances of each case.

TR: What will be the biggest hurdle that policyholders will have to overcome to win these cases?

ML: Perhaps the biggest hurdle is the insurance industry's attempt to influence outcomes by taking to the press and other media. Op-eds by insurer CEOs, circulars sent to major brokers and other sorts of publicity have helped to fuel a notion that COVID-19-related

business interruption claims may not be covered. But the insurance industry's motivation is obvious and self-serving. The challenge for policyholders is to maintain focus on the policy wording and force an interpretation of that wording that is consistent with precedent and the accepted rules of insurance policy construction.

TR: Will state and/or federal legislation provide a solution? What legislation, state or federal, would you like to see enacted?

ML: I am not optimistic that there will be any legislative solution for the present COVID-19 claims. First, most of the proposed legislation would affect companies with fewer than 150 employees. Second, most of the proposed legislation entails effectively rewriting a contract, which raises a host of constitutional and other legal issues. So, even if some legislation manages to become law, it is most certainly going to be challenged on constitutional grounds.

More likely, we may eventually see a federal backstop enacted to assist insurers when they become obligated by the courts to begin paying the outstanding claims. Likewise, looking ahead, we may see a system similar to the Terrorism Risk Insurance Act to assist insurers with future virus and pandemic risks.

TR: Do you support the proposal to consolidate COVID-19 business interruption coverage lawsuits before the Judicial Panel on Multidistrict Litigation?

ML: No. Consolidation of COVID-19 business interruption coverage lawsuits either in an MDL or as class actions is a mistake and not likely to lead to the efficient or just resolution of those cases.

Unlike cases that are suitable for consolidation, insurance coverage disputes turn on unique facts and circumstances that are individual to each claim. These unique factors include the facts of the loss, the nature of the insured's business, its locations and the operations at each location, and the applicable law, since insurance policies are contracts and subject to the substantive rules of contract interpretation, usually from the state in which the insured business is located or where the policy was issued.

Another critical factor is each insurance policy's terms. Commercial policies are specifically underwritten for each insured, endorsed to address specific features of each insured business and often modified or supplemented to further contour to the particular insured business and its operations. The significance that attaches to the underwriting of each policyholder's unique business and risk would be lost in a consolidated proceeding.

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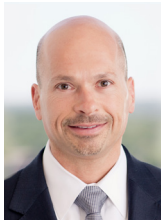
ABOUT THE AUTHOR



Michael S. Levine is a partner in **Hunton Andrews Kurth LLP**'s Washington office and a member of the firm's insurance recovery team. He has more than 20 years of experience litigating insurance disputes and advising clients on insurance coverage matters involving property and business income losses.