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Covid-19 and the CGL Pollution Exclusion: The Next Coverage Battlefield?

They have not arrived yet, at least not in force, but inevitably they will, and likely in legions. "They" are liability claims against business owners – restaurants, bars, hotels, public pools, stadiums, universities, *et al* – which have re-opened, perhaps prematurely, and against whom customers or guests will allege that safe practices like requiring masks and social distancing to prevent Covid-19 infections were not employed.

To date, insurers have principally faced Covid-related business interruption claims under first-party property policies, where the main coverage defenses are that (i) the presence of the virus is not the predicate physical damage required for business interruption coverage and (ii) a "Virus or Bacteria" exclusion excludes coverage for the loss.[1] But with the inexorable flood of *liability* claims, will CGL insurers be able to rely on pollution exclusions to bar coverage?[2]

Not surprisingly, this is an open question. As yet, there are no reported decisions on the applicability of the CGL pollution exclusion to Covid-19 liability claims but this issue has been raised in recently filed coverage actions.[3] Analogous cases, however, do provide some guidance. While there is some case law supporting application of CGL pollution exclusions to virus-driven liability claims, other case law does not and even within the same state there can be divergent results. The critical and determinative term in the standard CGL policy's[4] pollution exclusion is "pollutant," which typically is defined as "any solid, liquid, gaseous or thermal *irritant or contaminant*, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (Emphasis supplied.)

Decisions in Florida, a state currently experiencing a surge in Covid-19 infections arguably owing to lifting of restrictions for certain types of businesses, illustrate how courts have reached different conclusions in applying the pollution exclusion – in particular the "irritant or contaminant" requirement – to virus or bacteria claims. For example, in *First Specialty Ins. Corp. v. GRS Management Associates, Inc.*, 2009 WL 2524613 (S.D. Fla. Aug. 17, 2009), the insured homeowners association sought coverage under a CGL policy for a resident's bodily injury claim The resident contracted the Coxsackie virus after using a swimming pool operated and maintained by the insured. The Florida federal court (applying Florida law) held that the policy's pollution exclusion barred coverage for the claim, explaining: "As defined under the plain language of the policy, the meaning of the term "pollutant" includes "contaminant" . . . . Clearly, the record evidence demonstrates that the substance in the swimming pool was a viral contaminant and a

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[1] For more information, see *ISO Virus Exclusion – Drafting History* published on our firms' Covid-19 Response webpage on April 28, 2020 at https://www.londonfischer.com/covid-19-response/coverage-for-business-interruption-from-covid-19/ISO-Virus-Exclusion-Drafting-History.pdf.

[2] There are other standard liability and coverage defenses insurers will be able to raise, e.g., causation, no Occurrence, Expected/Intended, etc. In addition, some CGL policies may include the ISO "Communicable Disease Exclusion" (CG 21 32 05 09) endorsement, whose broad scope likely would exclude Covid-19 liability claims. We focus here only on the pollution exclusion.

[3] See, e.g., *Tony Williams Dance Centre LLC v. Hartford Fire Ins. Co.*, 2020 WL 3968159 (D. Mass., Complaint filed on July 13, 2020)(challenging insurer's denial of a COVID-19 claim which was based, in part, on a pollution exclusion).

[4] We refer to the ISO CGL Form 00 01 04 13 as the standard CGL policy.

harmful microbe. Thus, the pollutant exclusion applies here."[5]

In contrast, in *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337 (M.D. Fla. 2010), the insured hotel sought coverage for bodily injury claims asserted by hotel guests who contracted Legionnaires' disease (a bacterial infection) when they inhaled heated water vapor from guest room showers and in the hotel spa. The federal court (applying Florida law) held that the pollution exclusion did not apply, positing: "The Policy does not explicitly define "contaminant," but the words modifying "contaminant" and the stated examples of "pollutants" unambiguously show that Legionella bacteria are not "pollutants" . . . . Although Legionella bacteria may be contaminants in the abstract, they are living organisms and not readily classified as "solid, liquid, gaseous, or thermal" substances, which are the only contaminants defined as "pollutants" under the Pollution Exclusion." *Id*. at 1344.[6]

These disparate decisions illustrate that application of the pollution exclusion to Covid-19 liability claims is unpredictable. As in *First Specialty*, a court may find that Covid-19 is a "viral contaminant" or, as in *Westport*, it may find that Covid-19 is not a "solid, liquid, gaseous or thermal substance" and thus is not a contaminant within the meaning of the pollution exclusion. Since Covid-19 is a *novel* virus whose characteristics scientists continue to study and debate, its classification as an "irritant or contaminant" for purposes of the pollution exclusion may have to await a more developed scientific record.

A corollary question arises if the *CGL* pollution exclusion bars coverage for Covid-19 liability claims: do *pollution liability* policies cover COVID-19 claims that the CGL pollution exclusion bars? At least at their inception, pollution liability policies were designed to cover what CGL pollution exclusions excluded. This intriguing topic is for a future article. Stay tuned.

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[5] Other courts in Florida and elsewhere have applied the pollution exclusion to virus/bacteria claims. See, e.g., *Williams v. Employers Mut.*, 845 F.3d 891, 906 (8th Cir. 2017)(coliform bacteria contamination of insured's drinking water supply); *James River Ins. Co. v. Epic Hotel*, 2013 WL 12085984, at *4 (S.D. Fla. Jan. 9, 2013)(Legionnaire bacteria at hotel spa); *Nova Cas. v. Waserstein*, 424 F.Supp.2d 1325, 1333-34 (S.D.Fla.2006) (applying the pollution exclusion to a claim by employees who were exposed at work to "living organisms," "microbial populations," "airborne and microbial contaminants," and "indoor allergens."); *Figuli v. State Farm*, 304 P.3d 595 (Colo. Ct. App. 2012)(bacteria and parasites in sewage); *Certain Underwriters v. B3, Inc.*, 262 P.3d 397, 400-401 (Okla. Ct. App. 2011)(water containing "bacteria (including E. Coli) [and] viruses."); *U.S. Fire Ins. v. City of Warren*, 87 F. App'x 485 (6th Cir. 2003)(sewage containing "pathogens, carcinogens, and disease carrying organisms including but not limited to HIV viruses, *e. coli* bacteria, hepatitis (all strains), and other bacteria").

[6] Other courts have declined to apply the pollution exclusion to virus/bacteria claims. See, e.g, *Keggi v. Northbrook*, 199 Ariz. 43 (Ariz. Ct. App. 2000)(bacteria-contaminated drinking water); *Williams v. Employers Mut.*, 2015 WL 892556, at *10 (E.D. Mo. Mar. 2, 2015), *aff'd*, 845 F.3d 891 (8th Cir. 2017)(coliform bacteria in water supply); *Paternostro v. Choice Hotel*, 2014 WL 6460844, at *14 (E.D. La. Nov. 17, 2014), opinion clarified on denial of reconsideration, 2015 WL 471784 (E.D. La. Feb. 4, 2015)(Legionella bacteria and Pseudomonas aeruginosa); *Connors v. Zurich*, 365 Wis. 2d 528, (Wisc. Ct. App. 2015)(inhalation of legionella pneumophila bacteria).