

CLIENT ALERT

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BUSINESS INTERRUPTION INSURANCE AND COVID-19 IN ONTARIO

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During the COVID-19 pandemic, most businesses have suffered losses caused by business interruption, whether related to staff falling ill, loss of customers or suppliers, or governments requiring new forms of compliance. Some businesses have made COVID-19 related claims which have been met with resistance by their insurers and are already taking legal action as a result – for example, a nation-wide class action was recently launched in Saskatchewan against several insurance companies in respect of denied claims relating to COVID-19, and a group of Ontario optometrists has started a petition urging their insurers to approve claims resulting from COVID-19. It is important to note that generally speaking, commercial property insurance policies cover losses caused by actual physical damage.

In the past few weeks, the Ontario Superior Court's decision in *MDS Inc. v. Factory Mutual Insurance Company* has made waves throughout the legal and insurance communities. Some interpretations of this decision have suggested that courts may require all-risk and business interruption insurers to cover certain losses caused by COVID-19. However, a closer review of the decision reveals that these interpretations are likely too good to be true for insureds. This decision does not relate directly to COVID-19, nor does it alter the terms of all-risk and business interruption insurance policies as they relate to losses caused by COVID-19.

THE FACTS

MDS Inc. (the "**Plaintiff**") was in the business of buying and selling radioisotopes. A leak occurred at the nuclear reactor facility from which the Plaintiff obtained radioisotopes, causing an unexpected shutdown of the facility. The leak did not cause physical damage to the area of the facility responsible for producing the radioisotopes. The shutdown lasted over a year and prevented the Plaintiff from sourcing these radioisotopes. As a result, the Plaintiff suffered over \$120M in losses.

At the time of the incident, the Plaintiff had an all-risk insurance policy (the "**Policy**") in place with Factory Mutual Insurance Company (the "**Insurer**") for losses from all risk of physical loss or damage, except as excluded by the policy. The Plaintiff made a claim for its losses under the Policy but the claim was denied by the Insurer.

THE REASONING

One of the main issues explored in the decision is the meaning of the term "resulting physical damage" found in the Policy. The Insurer claimed there was no resulting physical damage as physical damage would require *actual* damage to the area where the radioisotopes were produced. The Plaintiff argued for a broader interpretation, suggesting the shutdown caused by the leak should constitute resulting physical damage, as it prevented the facility from being used.

Though the Court ultimately agreed with the Plaintiff, this decision involved specific facts, and an important factor was the language contained in the Policy. The term "resulting physical damage" was not defined in the Policy. As such, the Court turned to a Supreme Court decision that held that the interpretation of the scope of a resulting damage exception should be informed by the specific language of the policy and the relevant factual matrix, including the reasonable expectations of the parties.

The Court applied this principle and spoke to the purpose of all-risk insurance being to provide broad coverage for risks not typically covered by other types of policies. The purpose of the Policy included the compensation of the Plaintiff for interruptions to its supply of radioisotopes caused by unforeseen events.

The Court also conveyed that certain other provisions in the Policy supported the broad interpretation of "resulting physical damage." Though the Court did suggest that physical damage could include the loss of use of certain property despite there being no actual physical damage to such property, this decision was based on a unique fact pattern, and it is unlikely that the decision alone would support the broader notion that physical damage includes intangible harm that restricts the use of property.

CONCLUSION

In this case, the Court adopted a broad interpretation of "physical damage" in light of the purpose of the Policy and the distinctive set of facts before it. While the decision may have some application to future claims involving COVID-19, one should not read the decision as suggesting that business interruption or all-risk insurance coverage will unequivocally extend to interruptions caused by COVID-19.

Some policies may expressly cover business interruption caused by contagious diseases or restrictions imposed by governmental authorities, some may expressly exclude these events (as a result of insurers' experiences with the SARS and H1N1 outbreaks), and some may be entirely silent.

It will be very interesting to see how Courts interpret different types of insurance policies in light of COVID-19 – some may sympathize with claimants, while others may not be willing to shift the burden of uninsured losses to insurers. We also expect different insurers to behave differently in the face of uncertainty with some being more generous and others more aggressive in their approach to covering losses before insurance laws catch up to COVID-19.

If your business has experienced losses caused by COVID-19, Dickinson Wright may be able to assist by reviewing your existing insurance policies and advising in respect of how they relate to potential claims for such losses. Dickinson Wright can also help you navigate disputes with your insurers regarding the same. If you have suffered these types of losses you should act as quickly as possible as your insurance policies may require you to make claims within a certain time period.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.