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A Year in Review: COVID-19 Business Interruption Coverage Disputes

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March 13 will mark one year to the day from when the COVID-19 pandemic was declared a national emergency in the United States. Around that time, the pandemic spurred widespread state and local government shutdown orders requiring the full or partial closures of businesses across the country. These government-mandated shutdowns, of course, resulted in substantial economic losses.

Not surprisingly, many business owners looked to their property-casualty coverage to offset their losses, even if policy language did not clearly support a claim. To date, hundreds of business interruption coverage disputes are winding their way through the judicial system.

Unlike in the U.K., where its Supreme Court issued a more sweeping interpretation of policy language in January, procedural efforts in the U.S. by plaintiffs to consolidate these claims in multidistrict litigation against large carriers have met with limited success. To add to the

uncertainty, some states have even considered legislation that would shift losses to carriers regardless of whether the policy excludes coverage, though these efforts also have largely failed to gather steam. This has led to a patchwork of rulings and different outcomes across the country.

Most Decisions To Date Are In Favor of Insurers

On the whole, most substantive decisions to date have been in favor of insurers based on the fact that insureds are simply unable to allege or prove the type of direct physical loss required for coverage under most policy language.

For example, in Rose's 1, LLC et al. v. Erie Insurance Exchange (D.C. Superior Court, Aug. 6, 2020), the trial court granted summary judgment upholding the denial of a restaurant group's business interruption claim. The court found that the District of Columbia's shutdown order standing alone did not constitute a direct physical loss under the policy. The decision stated that "in the context of property insurance, the term 'direct loss' implies some form of direct physical change to the property." The decision has been appealed.

Courts from New York to California have followed similar reasoning:

- Social Life Magazine v. Sentinel Insurance Company Ltd. (Southern District of New York, May 20, 2020) dismissed the insured publisher's claim because the virus "damages lungs [and] doesn't damage printing presses."
- Legal Sea Foods, LLC v. Strathmore Insurance Company (District of Massachusetts. March 8, 2021) dismissed restaurant's claim because the virus does not affect the structural integrity of the property and thus does not constitute "direct physical loss of or damage to" property.
- Gavrilides Management Company LLC v. Michigan Insurance Company (Michigan Circuit Court, July 21, 2020) granted summary judgment to the insurer because shutdown orders were not a physical loss that "alters the physical integrity of the property."
- Diesel Barbershop, LLC et al. v. State Farm Lloyds (Western District of Texas, Aug. 13,

- 10E, LLC v. Travelers Indemnity Company of Connecticut et al. (Central District of California, Aug. 28, 2020) dismissed the restaurant owner's claim because physical loss or damage only occurs with a “distinct, demonstrable, physical alteration."

These decisions make sense in the context of the longstanding precedent that “direct physical loss or damage" requires an actual physical alteration of property in a way that impairs value. It is difficult to argue that any virus particles would satisfy such a requirement. Moreover, in many cases, plaintiffs have not even alleged the coronavirus was present at the business location prior to or during the shutdown.

The Trend Is Likely To Continue With Some Limited Exceptions

A few recent decisions, have raised some doubts as to whether all insurers will avoid COVID-19 business interruption claims.

For example, in Studio 417, Inc., et al. v. The Cincinnati Insurance Company (Western District of Missouri Western Division, Aug. 12, 2020), the court denied a motion to dismiss a hair salon's putative class action. According to the decision, the plaintiff adequately alleged that COVID-19 was a physical substance that attached to property making it “unsafe and unusable, resulting in direct physical loss to the premises and property." The court also found that the term “direct physical loss" could include “when the property is uninhabitable or unusable for its intended purpose."

The court recognized that some case law supported the requirement of physical alteration, but it found that those decisions turned on particular facts and could not be applied at the dismissal stage.

In North State Deli, LLC et al. v. The Cincinnati Insurance Company (Superior Court of Durham County, North Carolina, Oct. 9, 2020), another court took things a step further against the same insurer and granted partial summary judgment for the insureds based on similar reasoning. The court found that the plain definition of “direct physical loss" includes an “inability to utilize or

possess something in the real, material, or bodily world" and “described the scenario where business owners [and others] lose the full range of rights and advantages of using or accessing their business property." Thus, the court held that the relevant policies did provide coverage.

There are several important caveats to note before reading too much into decisions against the insurer in these cases, which are likely to remain outliers from the broader trend.

First, the policy language at issue in these cases covered “direct loss to Covered Property." This does not resolve the question of whether coverage would exist where the policy only provides for “direct physical loss or damage" instead. Second, the plaintiffs in these cases alleged the virus was physically present. Third, unlike many similar policies, the terms did not include an express virus exclusion. And, finally, these decisions are subject to appeal and may be overturned.

Indeed, in another case against the same insurer, Neuro-Communications Services, Inc. v. The Cincinnati Insurance Co. et al. (Northern District of Ohio, Jan. 20, 2021), an Ohio federal district court recently noted the “differing interpretations" that have arisen as business interruption cases have wound “through the various court systems."

In seeking to bring more uniformity to the application of Ohio law to business interruption coverage questions, the district court certified a question to the Ohio Supreme Court: “Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at the premises?" Similar questions about policy language are also pending before supreme courts in California and Pennsylvania.

The same day, another Ohio federal district court judge rejected the dismissal of a business interruption coverage suit against another insurer in Henderson Road Restaurant Systems Inc. v. Zurich American Insurance Co. (Northern District of Ohio Jan. 20, 2021). To reach this result, the decision involved a more strained interpretation of policy language, including a microorganism

For more on that decision, please see the analysis, "Wow! Another COVID Decision in Ohio Favoring the Insured," by Chris Boggs, Big "I" executive director of risk management and education.

Key Takeaways

At this point, dozens of decisions—most in favor of insurers and some in favor of insureds—have been appealed. Until more cases and appeals have been decided, coverage questions will remain somewhat uncertain.

In the meantime, while the trend remains that most courts find claims are not covered, it is clear that each claim still needs careful consideration based on the specific policy language and factual circumstances at issue. It is also increasingly important to be mindful of any suit limitations period in the relevant policy, which may require initiation of legal action within a certain amount of time, for example. as soon as 12 months after inception of a loss.

The specific language and triggering event for any limitations period will vary by policy. Although some states may have overriding statutes of limitations, some policyholders will have to initiate a coverage action or enter into a tolling agreement sooner than others. If they fail to do so in a timely manner, policyholders risk forfeiting coverage regardless of whether or not a court might have found coverage for a claim based on the substantive merits.

If you have any questions about these issues, please feel free to contact Chris Boggs, Scott Kneeland or Eric Lipton.

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