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Coverage for COVID-19: How Are Insurance Policyholders Faring So Far With Claims and Litigation?

Litigation

Insurance Counseling & Recovery

The stark effects of the coronavirus pandemic are conspicuously clear in downtown Chicago: Shuttered businesses that once catered to throngs of commuters and office workers loom over bare sidewalks, while trains fly by with a volume amplified by quiet streets.

Back in April, when our national emergency “Spring Break” morphed into a new way of life, companies quickly started to look for relief from the losses they were suffering. Federal stimulus programs such as the CARES Act, creator of the PPP program, and the Main Street Lending Program, took center stage. For many businesses, though, this was not enough. Even those lucky enough to have received grants or loans from their industries, or their mayor’s office, now face the possibility that the slow season has just begun.

Enter insurance. Most companies have some form of it, but coverage varies widely. The reach and effects of the COVID-19 pandemic are new to all, and they often fail to fit neatly within the terms of a policy that was written without the virus in mind. What counts as an insurable event when one avoids the virus itself but nonetheless suffers its consequences in the form of economic loss? Cases winding their way through the courts ask the same question.

Our [Policyholder Insurance Coverage Practice](#) so far has identified two trends: insurers are more often than not winning dismissals of claims for coverage based on a narrow definition of “property damage,” and the courts’ analyses of coverage is extremely fact intensive.

Business Interruption Coverage Is an Uphill Battle

So far, business interruption insurance is the primary vehicle for insureds litigating coverage. Business interruption insurance covers a business’s lost income where the business cannot operate at full capacity (or at all) due to a disaster. Unfortunately, most business interruption coverage requires physical damage to property.

Courts have dismissed these cases more often than not. A review of recent cases shows courts have held:

- No physical damage where policyholders can’t show that the virus was present on their property (*Social Life Magazine v. Sentinel Insurance Co.* (S.D.N.Y. May 14, 2020)),
- A requirement of a distinct, demonstrable alteration of the property (*Diesel Barbershop v. State Farm Lloyd’s* (W.D. Tex. Aug. 13, 2020)), (*Sandy Point Dental P.C. v. The Cincinnati Insurance Co.* (N.D. IL. Sept. 21, 2020) (Gettleman, J.)),
- A requirement of tangible damage for any claim of direct physical loss (*Turek Enterprises, Inc. d/b/a Alcona Chiropractic*, Case No. 20-11655 (E.D. Mich. Sept. 3, 2020)),
- A lack of evidence that an order of closure caused direct physical loss or damage to property (*Pappy’s Barber Shops Inc. et al. v. Farmers Group Inc. et al.* (S.D. Cal. Sept. 11, 2020))
- A rather obvious though devastating observation that the virus injures people, not property (*Social Life Magazine, infra.*).

However, on that last point, there is some difference of opinion: a federal judge in Missouri has denied two insurers’ motions to dismiss on the grounds that a policy that does not define “physical loss” or “physical damage” might cover the presence of a virus

that “attaches” to the property and deprives the policyholder of its use. See *Blue Springs Dental Care LLC et al v. Owners Insurance Co.* (W.D. Mo. Sep. 21, 2020) and *Studio 417 Inc. et al. v. Cincinnati Insurance Co.* (W.D. Mo. August 12, 2020).

In both of these cases, the insureds did not plead that there was a known case on their respective properties. In *Studio 417*, the lawsuit merely stated that the premises “likely have been infected with COVID-19” because the “first death from COVID-19 occurred as early as February 6, 2020 – weeks earlier than previously reported, suggesting that the virus had been circulating in the United States far longer than previously assumed. (*Id.* (Dkt. No. 1) ¶ 50). The lawsuit concluded it “likely” that “customers, employees and/or other visitors to the insured property over the last two plus months were infected with COVID-19 and thereby infected the insured property with COVID-19.” *Id.*

While these cases may be good news for policyholders, for now, they are outliers; additionally, their policies do not include virus exclusions. Depending on how terms are defined, a virus exclusion can bar a claim. See *10E LLC v. Travelers Indemnity Co. of Connecticut et al.* (C.D. Cal Aug. 28, 2020), *Diesel Barbership, infra.*, at Dkt. (where the judge found that the policy's virus exclusion barred relief, even where the policyholders argued that it was the closure that caused its losses, since the policy read that the virus exclusion applied “whether other causes acted concurrently or in any sequence within the excluded event to produce the loss.”)

Finding the Right Words

When deciding whether to dismiss a case at the outset, the law doesn't allow for consideration of the insurer's advertised offerings, the insured's priorities in coverage, or other extraneous details. Whether a policyholder has its day in court will hinge on how it pleads the policy – including its definitions, terms and clauses. Where terms are left undefined, courts will look to the plain meaning of the word, sometimes by consulting a dictionary. In a case pending before the U.S. Court of Appeals for the Seventh Circuit *Masallah, Inc. et al. v. West Bend Mutual Insurance Company*, the policyholder dissected the policy language in its claim for coverage to argue that the definition of “damage” is separate from that of “loss,” and that both were insured under the policy:

“In the Policies, “loss” is used in the alternative to “damage.” Thus, there is coverage provided for both “loss” and “damage,” either alternatively or collectively, because “loss” coverage is different from, and in addition to, “damage” coverage. Property “loss” refers to, among other things, being deprived of a property’s function, while “damage” refers to, among other things, the impairment of property or a reduction in its functionality. The adjective “physical,” among other things, distinguishes between the tangible, material aspects of an object and those that are purely intangible, such as sentiment, emotion, or imagination. In addition, under a plain grammatical reading of the phrase “direct physical loss of or damage to” property (or “direct physical loss or damage to” property), the words “direct” and “physical” can be reasonably construed as modifying only “loss” coverage—not “damage” coverage.”

Masallah, Inc. et al. v. West Bend Mutual Insurance Company (N.D. IL. Sept. 15, 2020) (Dkt. 1) (Kocoras, J.)

In essence: words matter in insurance coverage litigation and policyholders can look not only to the plain meaning of terms in their insurance policies, but also how those meanings are complicated by context. Under the law, ambiguities in policies favor the insured.

Developing a Theory Early

Depending on whether your business suffered losses because of government closure, a COVID-19 case onsite, an ill business owner, a general fear of COVID-19 or civil unrest, you may have a viable argument for insurance coverage. How did you get here? What really happened to cause your loss? Your claim for coverage should be more than a recitation of the policy and the law.

Next Steps

1. Find your business' insurance policies. There may be more than one. They may overlap in coverage. In a global pandemic, being over-insured may be a good thing. Industry-specific coverage is often more generous, so examine every policy.
2. Ensure that you communicate with your insurer in the event you have a triggering event. This may preserve your rights, as policies often contain notice requirements.
3. Speak to insurance counsel. As the growing body of case law shows, insurers are not simply handing out checks. Experienced counsel can help you craft the strongest argument for relief under your policies.