Litigation Alert
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COVID-19 Insurance Litigation Yields Diverse Results

As the COVID-19 pandemic stretches into the second year, there are hopeful signs on many fronts, from vaccine rollouts and declining numbers of cases and hospitalizations in many areas to signs of economic recovery and the American Rescue Plan, the $1.9 trillion stimulus package. Despite the prospect of better days ahead, many businesses are still struggling with lost revenue from past or current shutdown orders and reduced-capacity limitations, and they are turning to their insurance coverage to find an avenue for recouping some of their losses.

As we noted in our last alert, insurance companies are steadfastly rejecting claims for insurance coverage for economic losses resulting from the pandemic and government shutdown orders, and litigation continues to be on the rise as policyholders and insurers are looking to the courts to resolve coverage disputes.

One key COVID-19 coverage question in litigation is whether the inability of a business to fully operate due to pandemic-related shutdown orders or other restrictions satisfies the threshold requirement in property policies that lost revenue resulting from a suspension of operations be caused by "direct physical loss of or damage to" property. Policyholders are pressing claims that it does; insurers are uniformly asserting it does not.

Courts are issuing mixed decisions on the issue.

In a highly anticipated and landmark U.K. decision favoring insureds with business interruption coverage, the British Supreme Court has found in favor of the Financial Conduct Authority against eight insurers with 21 different policy wordings. Despite the variations in the coverage language of the policies before it, the court ruled that coverage exists for policyholders forced to close their businesses because of the outbreak of an infectious disease without having to show physical damage to their property. The only requirement is that the insured's business be located in a specified radius of an outbreak, typically 25 miles. Because numerous London Market carriers write considerable insurance in the United States, the U.K. court's holding will likely be vigorously used to bolster arguments in favor of coverage on both sides of the pond.

Even without the U.K. decision, U.S. policyholders are already gaining some footholds.

In multidistrict litigation (MDL) in federal court in the Northern District of Illinois, a judge ruled in favor of policyholders in three consolidated cases against one insurance company. The three sets of plaintiffs included restaurants, bars and theaters in Illinois, Wisconsin, Minnesota and Tennessee. All had been denied coverage under their policies on the grounds that "no tangible alteration to physical property" had taken place. The court was not persuaded by the insurer's interpretation of the policy language, noting that damage and loss are distinct concepts and holding that a jury could find that pandemic

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shutdowns and other restrictions could constitute a direct physical loss to the plaintiffs' property.

The court allowed all three sets of policyholders to pursue claims under the lost business income provisions of their policies, and it also allowed two of the three to pursue bad-faith denial-of-coverage claims against the insurer.

This is not the only large-scale case against insurers. At least one more MDL is ongoing in the Western District of Pennsylvania, involving more than two dozen cases brought by policyholders against one insurance carrier. Attempts to consolidate policyholder cases in an industrywide docket have been unsuccessful, however, because of the diversity of insurers, policies, policy language and applicable states' laws.

Recent court cases have not been uniformly pro-policyholder, however. In fact, a split of sorts is beginning to form in courts across the country.

A New York state court has joined a growing number of other courts in finding that insurers are not responsible for business interruption losses—in this case, sustained by a chain of movie theaters—because the claimant could not prove direct physical damage to its premises. Similarly, a California federal court has joined other courts in finding that no coverage exists for COVID-19 losses claimed by a San Diego-based business because there was no direct physical damage to its premises, and a Georgia federal court found in favor of the insurer and against its insured on the very same issue.

New Jersey federal courts are all over the lot. Courts there have denied relief to a group of hotel owners and restaurant franchisees because they could not establish direct physical losses to their premises, permitted a putative class action brought by a chiropractic center to continue based on the same issue and dismissed an action brought by a gymnasium because of a virus exclusion in its policy.

The diverse decisions from courts across the country are likely to keep coming as litigation intensifies, and we may have a long wait to see how this coverage issue shakes out as cases make their way through the court system.

Insurers are also citing virus exclusions in denials of coverage, but exclusions may not automatically support a denial of coverage, depending on the language of the policy and state law applicable to the claim. Courts in "proximate cause" states have found coverage for business operation losses based on government shutdown orders, ruling that such orders are the "proximate cause of the loss." Other courts in "concurrent cause" states have agreed with policyholders that any one of multiple causes could be the culprit. Of course, the insurance industry has responded with "anti-concurrent cause" language in support of its virus exclusions. These provisions must be carefully analyzed and compared with applicable state law.

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