

Status of COVID-19 Business Interruption Claims - A Tale of the Tape

By: David Group, NY Partner

There are now over 1,300 COVID-19 business interruption insurance coverage cases filed nationally in federal and state courts. At this time, there are more than 30 reported decisions. These decisions have primarily supported the insurers' position that there was no physical loss or damage to property as a result of COVID-19 and/or upheld the virus exclusion contained within certain policies.

In fact, insurers have prevailed on motions to dismiss in 26 cases, while there is 1 favorable decision to policyholders out of State Court in North Carolina as well as 7 cases where policyholders avoided early dismissal. In 3 Ohio state court cases, the insurer's motions to dismiss were converted to motions for summary judgment so that discovery could be completed by the parties.

There have been insurer-favorable decisions on motions to dismiss in federal courts out of Texas, Florida, Kansas, California, Iowa, Pennsylvania, Michigan, Illinois, Georgia and Minnesota and in state courts in Illinois, Michigan, Florida, California and the District of Columbia. Reading the terrain, even where policyholders avoid early dismissal, they will likely face significant obstacles in an effort to obtain business interruption or civil authority coverage.

Based on the reported decisions, the majority of courts have been taking the position that "loss of use alone is insufficient to establish a direct physical loss to property". As examples, *Malaube, LLC v. Greenwich Ins. Co.* (S.D. Fla. August 26, 2020), *Jurek Enterprises, Inc. d/b/a Alcona Chiropractic v. State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company* (E.D. Mich. September 3, 2020) and *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.* (S.D. Cal. Sept. 11, 2020) have all held that loss of use resulting from government shutdown orders was not a direct physical loss where the virus was not alleged to be on site.

Furthermore, in *10E LLC v. Travelers Indemnity Co. of Connecticut* (C.D. Cal. Sept. 2, 2020) (amended), the court held that "losses from inability to use property do not amount to direct physical loss of or damage to property within the ordinary and popular meaning of that phrase," as physical loss or damage "occurs only when a property undergoes a distinct, demonstrable, physical alteration."

We also expect courts to uphold and enforce the virus exclusion contained within certain policies, as was the case in *Mauricio Martinez, DMD, P.A. v. Allied Insurance Company of America* (M.D. Fla. Sept. 2, 2020), where the court ruled that the virus exclusion expressly excluded coverage for losses allegedly resulting from the Governor's executive order.

The first major pro-policyholder decision was just reported in *North State Deli, LLC d/b/a Lucky's Delicatessen, et al., v. The Cincinnati Insurance Company*, Case No. 20-CVS-02569 (Superior Court, North Carolina, Durham County), where partial summary judgment was granted to a group of restaurants, finding that income loss from various governmental closure orders does constitute a physical loss. The court accepted the policyholders' argument that the governmental closure orders forced them to lose the physical use of and access to their properties which was sufficient under the policies. The court also observed that the policies did not contain any applicable exclusions (such as a virus exclusion).

In our view, the decision in *North State Deli, LLC d/b/a Lucky's Delicatessen* appears to be somewhat result-oriented as the court fails to address any of the above-referenced decisions (or others) which contradict it. As such, while we expect the decision to be cited by policyholders, its precedential value may be limited in outside jurisdictions.

At this point, it appears that the vast majority of COVID-19 coverage cases will not be subject to multi-district litigation (“MDL”), although 30 lawsuits against Society Insurance Company were recently centralized. In re Soc’y Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litigation, 20 U.S. Dist. LEXIS 183678 (J.P.M.L. Oct. 2, 2020).

Finally, we note that while new cases are still being filed, we understand the number of new filings is declining in recent months. Of course, new decisions impacting the status of the law could embolden policyholders to initiate litigation.