



COVID-19: COVERAGE LITIGATION UPDATE

February 25, 2021

McDonald's Corp., et. al. v. Austin Mut. Ins. Co., Case No. 1:20-cv-05057 (N.D. Ill.)

On Monday, the U.S. District Court for the Northern District of Illinois held that a third-party liability insurer has a duty to defend McDonald's against claims brought by employees allegedly exposed to coronavirus on the job. This marks a significant development – the first finding of a duty to defend a COVID-19 claim in the third-party liability context.

As we noted in our [November 2020 update](#), on August 27, 2020, McDonald's and its franchisees ("McDonald's") filed a declaratory judgment action seeking defense and indemnity under commercial general liability (CGL) policies issued by Austin Mutual Insurance Company ("Austin Mutual"). The underlying lawsuit alleges that McDonald's decision to remain open during the pandemic without enhanced health and safety standards was negligent and constituted a public nuisance. At least three of the underlying plaintiffs allegedly contracted, or experienced symptoms consistent with, COVID-19. The underlying lawsuit seeks injunctive relief requiring McDonald's to provide its employees with adequate personal protective equipment, preclude the reuse of face masks, supply hand sanitizer, require customers to wear face masks, monitor employee COVID-19 infections, and provide the plaintiffs with accurate information about COVID-19.

Austin Mutual moved to dismiss, alleging that McDonald's complaint failed to state a claim because the underlying lawsuit does not seek damages because of bodily injury. The court denied the motion, finding that the underlying lawsuit raises a potential for coverage sufficient to trigger the duty to defend under Illinois law. The court found that the costs of complying with a mandatory injunction are "damages" for the purpose of the insurance policies at issue. In addition, the court reasoned that "because of" requires only "but for" causation, and that but for the plaintiffs contracting COVID-19, McDonald's would not face the costs of complying with a mandatory injunction.

The court noted that contracting COVID-19 indisputably constitutes a "bodily injury," but

questioned whether compliance with a mandatory injunction would serve to remediate injuries suffered by the plaintiffs. The court highlighted that under Illinois law, exposure to potentially harmful contaminants, even absent manifestations of sickness or disease, can constitute “bodily injury.” Thus, the court reasoned that money spent by McDonald’s to comply with a mandatory injunction, which would potentially aid in eliminating or mitigating the spread of COVID-19, could potentially remediate “bodily injury.”

Notably, the court rejected Austin Mutual’s argument that liability policies are meant to cover damages paid to a third party, rather than damages to the insured. The court characterized the argument as untethered to any specific policy language, and contrary to Seventh Circuit precedent in *Cincinnati Ins. Co. v. H.D. Smith, LLC*, 829 F.3d 771, 774 (7th Cir. 2016) (state’s costs to address the opioid epidemic were because of bodily injury even though state did not sustain bodily injury).

We note that the court highlighted the lack of a virus exclusion in the CGL policies at issue in reaching its conclusion, suggesting that the exclusion may preclude coverage for similar third-party claims. In addition, the court did not reach Austin Mutual’s argument that the employer’s liability exclusion applied, concluding the argument was waived.

This ruling is a significant development because it recognizes a potential for COVID-19 claims to implicate a duty to defend in the third-party liability context. Ultimately, whether an insurer has a duty to defend against a third-party COVID-19 claim such as the one pled by the McDonald’s employees will depend on the particular policy language at issue and the factual circumstances of the individual claim.

Moving Forward

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