



COVID-19: COVERAGE LITIGATION UPDATE

November 9, 2020

While the coronavirus pandemic continues to significantly impact people and businesses throughout the United States and the world, challenges by policyholders, scrutiny from courts, and reexamination by state and federal legislatures are testing all types of insurance products. Most of the pending coverage litigation addresses commercial first-party/business interruption coverage, with policyholders claiming that government-mandated closures constitute direct physical loss or damage to their property, or implicate civil authority provisions. Most—but not all—courts have concluded that these claims fall outside the coverage offered by standard policies. Other pending litigation addresses coverage for coronavirus-related losses under premises pollution liability and other policies. Meanwhile, legislation aimed at facilitating recovery under business interruption policies is pending in the U.S. Congress and several state legislatures. Here, we discuss the early developments in this dynamic new arena of coverage litigation.

Business Interruption Focus

As of late October 2020, insurers have obtained favorable rulings in at least 39 coverage actions pending in Alabama, California, the District of Columbia, Florida, Georgia, Illinois, Iowa, Michigan, Minnesota, Mississippi, New Jersey, Pennsylvania, Texas, and West Virginia. To date, most courts have held that risks and shutdowns stemming from the pandemic generally do not meet the policy’s direct physical loss or damage requirement. This determination often turns on whether the claimant pled a direct, physical loss. So far, most courts have rejected arguments that loss of use or market constitutes direct physical loss or damage to property. Further, courts have applied virus exclusions to preclude coverage.

Significantly, some courts in California, Florida, Missouri, New Jersey, Ohio, Pennsylvania, and Texas have not decided coverage at the motion to dismiss stage, instead permitting the insured to proceed to discovery. One North Carolina court granted summary judgment to the insured, concluding that there is “direct physical loss” where a business owner loses the “full range of rights and advantages of using or accessing their business property,” even if the property has not been structurally altered.

For example, Henry’s Louisiana Grill in Ackworth, Georgia shut down its dining room when the Governor declared a state of emergency, and sought coverage for the resulting lost profits. The U.S. District Court for the Northern District of Georgia granted the insurer’s motion to dismiss,

finding that there was no “direct physical loss or damage to” the restaurant. The court reasoned that the Governor’s order did not have a “direct” effect on the restaurant because the owner’s choice to close was an intervening cause, and the order caused no “physical” change to any part of the restaurant. The court also found that the claim did not trigger the policy’s civil authority coverage, and did not reach the policy’s virus exclusion. *Henry’s Louisiana Grill, Inc., et al. v. Allied Ins. Co. of Am.* (N.D. Ga. Case No. 1:20-cv-2939-TWT) (Oct. 6, 2020 Order).

In contrast, just 20 days later, a Pennsylvania insured claiming similar business interruption losses survived its insurer’s motion to dismiss. A Philadelphia restaurant named Taps & Bourbon on Terrace sought coverage for losses stemming from the pandemic and governmental closure orders. The insurer argued that there was no “direct physical loss or damage to” the restaurant, the civil authority coverage did not apply, and the virus exclusion precludes coverage. A Philadelphia County Court denied the insurer’s motion to dismiss, finding that the insured plead sufficient facts to state a claim, resolution of factual issues would be premature, and “the law and facts are rapidly evolving in the area of COVID-19 related business losses.” *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London, et al.* (Pa. Ct. Com. Pl. Case No. 200700375) (Oct. 26, 2020 Order).

In the coming months, state and federal courts across the country will continue to consider business interruption claims like those of Henry’s Louisiana Grill and Taps & Bourbon on Terrace. Set forth below is a summary of rulings to date from around the country:

| MOTION TO DISMISS GRANTED | | |
|---------------------------|--|---|
| State | Case Name | Docket Number |
| Alabama | <i>Hillcrest Optical v. Continental Casualty Co.</i> | S.D. Ala. Case No. 1:20-cv-00275 |
| California | <i>Franklin EWC, Inc., et al. v. Hartford Financial Services Grp., Inc., et al.</i> | N.D. Cal. Case No. 3:20-cv-04434-JSC |
| | <i>Pappy’s Barber Shops, Inc., et al. v. Farmer’s Group, Inc., et al.</i> | S.D. Cal. Case No. 3:20-cv-00907-CAP-BLM |
| | <i>Mark’s Engine Co. No. 28 Restaurant, LLC v. Travelers Indem. Co. of Conn., et al.</i> | C.D. Cal. Case No. 2:20-cv-04423-AB-SK |
| | <i>Travelers Casualty Ins. Co. of Am. v. Geragos and Geragos</i> | C.D. Cal. Case No. 2:20-cv-03619 PSG (Ex) |
| | <i>O’Brien Sales and Marketing, Inc. v. Transportation Ins. Co.</i> | N.D. Cal. Case No. 3:20-cv-02951-KAW |
| | <i>10E, LLC v. Travelers Indemnity Co. of Conn., et al.</i> | C.D. Cal. Case No. 2:20-cv-04418-SVW-AS |
| | <i>The Inns by the Sea v. California Mutual Ins. Co.</i> | Cal. Super. Ct. (Monterey County) Case No. 20CV001274 |
| | <i>Mudpie, Inc. v. Travelers Casualty Ins. Co. of Am.</i> | N.D. Cal. Case No. 4:20-cv-03213-JST |
| | <i>Founder Inst. Inc. v. Hartford Fire Ins. Co., et al.</i> | N.D. Cal. Case No. 20-cv-04466-VC |
| | <i>Boxed Foods Co., LLC, et al. v. California Cap. Ins. Co.</i> | N.D. Cal. Case No. 20-cv-04571-CRB |

| MOTION TO DISMISS GRANTED | | |
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| State | Case Name | Docket Number |
| | <i>Plan Check Downtown III, LLC v. AmGuard Ins. Co.</i> | C.D. Cal. Case No. Cv 20-6954-GW-SKx |
| | <i>Mortar & Pestle Corp. v. Atain Specialty Ins. Co.</i> | N.D. Cal. Case No. 3:20-cv-03461-MMC |
| | <i>West Coast Hotel Mgmt., LLC, et al. v. Berkshire Hathaway Guard Ins. Co., et al.</i> | C.D. Cal. Case No. 2:20-cv-05663-VAP-DFMx |
| District of Columbia | <i>Rose's 1, LLC, et al. v. Erie Ins. Exch.</i> | D.C. Super. Ct. Case No. 2020 CA 002424 B |
| Florida | <i>Malaube, LLC v. Greenwich Ins. Co.</i> | S.D. Fla. Case No. 1:20-cv-22615-KMW |
| | <i>Mace Marine Inc. v. Tokio Marine Specialty Ins. Co.</i> | Fla. Cir. Ct. (Monroe County) Case No. 20-CA-000120-P |
| | <i>Horizon Dive Adventures v. Tokio Marine Specialty Ins. Co.</i> | Fla. Cir. Ct. (Monroe County) Case No. 20-CA-000159-P |
| | <i>Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's, et al.</i> | M.D. Fla. Case No. 8:20-cv-01605-JSM-AEP |
| | <i>Mauricio Martinez, DMD, P.A., v. Allied Ins. Co. of Am.</i> | M.D. Fla. Case No. 2:20-cv-00401-JLB-NPM |
| | <i>Harvest Moon Distrib., LLC v. Southern-Owners Ins. Co.</i> | M.D. Fla. Case No. 6:20-cv-1026-Orl-40DCI |
| | <i>Raymond H Nahmad DDS PA, et al. v. Hartford Cas. Ins. Co.</i> | S.D. Fla. Case No. 1:20-cv-22833-BLOOM/Louis |
| Georgia | <i>Henry's Louisiana Grill, Inc., et al. v. Allied Ins. Co. of Am.</i> | N.D. Ga. Case No. 1:20-cv-2939-TWT |
| Illinois | <i>It's Nice Inc. v. State Farm Fire & Cas. Co.</i> | Ill. Cir. Ct. (DuPage County) Case No. 2020-L-000547 |
| | <i>Sandy Point Dental, PC v. Cincinnati Ins. Co.</i> | N.D. Ill. Case No. 20-cv-2160 |
| Iowa | <i>Oral Surgeons PC v. Cincinnati Ins. Co.</i> | S.D. Iowa Case No. 4:20-cv-00222-CRW-SBJ |
| Michigan | <i>Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.</i> | Mich. Cir. Ct. (Ingham County) Case No. 20-000258-CB |
| | <i>Turek Enterprises, Inc., d/b/a Alcona Chiropractic v. State Farm Mut. Auto. Ins. Co., et al.</i> | E.D. Mich. Case No. 1:20-cv-11655-TLL-PTM |
| Minnesota | <i>Seifert et al. v. IMT Ins. Co.</i> | D. Minn. Case No. 2:20-cv-1102 (JRT/DTS) |
| Mississippi | <i>Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Cas. Ins. Co.</i> | S.D. Miss. Case No. 2:20-cv-00087-KS-MPT |
| New Jersey | <i>Mac Property Group LLC, et al. v. Selective Fire & Cas. Ins. Co.</i> | NJ Super. Ct. Law Div. (Camden County) Case No. L-2629-20 |
| | <i>FAFB LLC v. Blackboard Ins. Co.</i> | NJ Super. Ct. Law Div. (Mercer County) Case No. L-000892-20 |

MOTION TO DISMISS GRANTED

| State | Case Name | Docket Number |
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| | <i>N&S Restaurant LLC v. Cumberland Mut. Fire Ins. Co.</i> | D.N.J. Case No. 1:20-cv-05289-RBK-KMW |
| Pennsylvania | <i>Wilson v. Hartford Cas. Co., et al.</i> | E.D. Pa. Case No. 2:20-03384-ER |
| Texas | <i>Vandelay Hosp. Group LP v. Cincinnati Ins. Co.</i> | N.D. Tex. Case No. 3:20-cv-01348-D |
| | <i>Diesel Barbershop, LLC, et al. v. State Farm Lloyd's</i> | W.D. Tex. Case No. 5:20-cv-461-DAE |
| | <i>Ilios Production Design, LLC v. Cincinnati Ins. Co.</i> | W.D. Tex. Case No. 1:20-cv-857-LY |
| | <i>Vizza Wash, LP d/b/a The Wash Tub v. Nationwide Mut. Ins. Co., et al.</i> | W.D. Tex. Case No. 5:20-cv-00680-OLG |
| West Virginia | <i>Uncork & Create LLC v. Cincinnati Ins. Co., et al.</i> | S.D. W. Va. Case No. 2:20-cv-00401 |

MOTION TO DISMISS DENIED

| State | Case Name | Docket Number |
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| California | <i>Best Rest Motel Inc. v. Sequoia Ins. Co.</i> | Cal. Sup. Ct. (San Diego County) Case No. 37-2020-00015679-CU-IC-CTL |
| Florida | <i>Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co. Ltd.</i> | M.D. Fla. Case No. 6:20-cv-1174-Orl-22EJK |
| | <i>Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.</i> | Fl. Cir. Ct. (Pinellas County) Case No. 20-002221-CI |
| Missouri | <i>Blue Springs Dental Care LLC, et al. v. Owners Ins. Co.</i> | W.D. Mo. Case No. 20-cv-00383-SRB |
| | <i>Studio 417 Inc. et al. v. Cincinnati Ins. Co.</i> | W.D. Mo. Case No. 4:20-cv-03127-SRB |
| | <i>K.C. Hopps, Ltd. v. Cincinnati Ins. Co.</i> | W.D. Mo. Case No. 4:20-cv-00437-SRB |
| New Jersey | <i>Optical Services USA/JC1 v. Franklin Mutual Ins. Co.</i> | N.J. Super. Ct. (Bergen County) Case No. BER-L-3681-20 |
| Ohio | <i>Somco LLC v. Lightning Rod Ins. Co.</i> | Ohio Ct. Com. Pl. (Cuyahoga County) Case No. 20-cv-931763 |
| | <i>Francois Inc. v. Cincinnati Ins. Co.</i> | Ohio Ct. Com. Pl. (Lorain County) Case No. 20-cv-201416 |
| Pennsylvania | <i>Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.</i> | Pa. Ct. Com. Pl. (Philadelphia County) Case No. 200501093 |
| | <i>Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London, et al.</i> | Pa. Ct. Com. Pl. (Philadelphia County) Case No. 200700375 |
| Texas | <i>Independence Barbershop, LLC v. Twin City Fire Ins. Co.</i> | W.D. Tex. Case No. A-20-CV-00555-JRN |

JUDGMENT ON THE MERITS IN FAVOR OF INSURED

| State | Case Name | Docket Number |
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| North Carolina | <i>North State Deli LLC, et al. v. Cincinnati Ins. Co.</i> | N.C. Gen. Ct. (Durham County) Case No. 20-CVS-02569 |

Efforts to consolidate the ballooning number of COVID-19 coverage cases are underway. The federal Judicial Panel on Multidistrict Litigation refused to consolidate all COVID-19 business interruption coverage disputes, holding that the differences among the many insurers would overwhelm any common factual questions and hinder efficient management of the litigation. See *In Re COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942 (J.P.M.L., filed Apr, 20, 2020). However, the Panel consolidated thirty cases against Society Insurance Company before Judge Edmond E. Chang in the Northern District of Illinois. The Panel reasoned that a consolidated action against Society was manageable because, unlike the nationwide cases faced by other insurers, the lawsuits against Society were limited in geographic scope and implicated only the insurance law of six states. More efforts to consolidate related groups of COVID-19 coverage cases are expected.

Legislation

Nine state legislatures and the U.S. Congress have introduced legislation designed to facilitate recovery under business interruption policies for coronavirus claims. Bills are in committee on the federal level and in seven states (Louisiana, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and South Carolina). The bills introduced in California and New Jersey were pulled and have not been re-introduced. Most of the pending legislation would effectively prevent an insurer from denying a business interruption claim arising from the pandemic and/or the resulting governmental closure orders on the basis that there is no physical damage to property. Several pending bills also would prohibit insurers from relying on virus exclusions to deny coverage. The bills pending at this time are set forth below:

| State | Bill | Key Terms |
|---------------|---------------------|--|
| Louisiana | H.B. 858 / S.B. 477 | Requires property insurers to cover business interruption due to the COVID-19 pandemic for the duration of the declared public health emergency. Applies insureds with less than 100 full-time employees. |
| Massachusetts | S.D. 2888 | Rewrites certain business interruption policies in place on March 10, 2020 to include the COVID-19 pandemic as a covered cause of loss despite any virus exclusion. Applies to insureds with 150 or fewer full-time employees. |

| State | Bill | Key Terms |
|----------------|--|---|
| Michigan | H.B. 5739 | Requires policies with business interruption coverage to include coverage for business interruption due to COVID-19 for duration of Michigan's State of Emergency. Applies to insureds with fewer than 100 full-time employees. |
| New York | Bill A10226 | Requires insurers to indemnify for loss of business or business interruption for duration of the State of Emergency due to COVID-19; allows insurers to apply to the Superintendent of Financial Services for relief and reimbursement. Applies to insureds with fewer than 100 full-time employees. |
| Ohio | H.B. 589 | Policies insuring against loss or damage to property, including loss of use and occupancy and business interruption, shall be construed to include coverage for business interruption due to COVID-19; insurers may be reimbursed through a Business Interruption Insurance Fund. Applies to insureds with 100 or fewer eligible employees. |
| Pennsylvania | H.B. 2372 | Casualty and property insurance policies shall be construed to include coverage for business interruption due to global virus transmission or pandemic. Applies to insureds with fewer than 100 full-time employees. |
| | S.B. 1114 | Policies insuring against a loss related to property damage shall be construed to include among the covered perils coverage for loss or property damage due to COVID-19 and coverage for loss due to a civil authority order related to the COVID-19 pandemic. Defines "property damage" as direct physical loss, damage or injury to tangible property, as a result of a covered peril, including, but not limited to: (1) the presence of a person positively identified as having been infected with COVID-19; (2) the presence of at least one person positively identified as having been infected with COVID-19 in the same municipality of the Commonwealth where the property is located; and (3) the presence of COVID-19 having otherwise been detected in the state. |
| South Carolina | Bill S.1188 | Requires insurers covering loss of use and occupancy or business interruption to cover claims directly or indirectly resulting from COVID-19; prohibits insurers from denying claims on the following grounds: (1) that COVID-19 is a virus, even if the relevant insurance policy excludes losses resulting from viruses; (2) that there is no physical damage to the property of the insured; and (3) orders issued by any civil authority, or acts or decisions of a governmental entity. Applies to insureds with 150 or fewer full-time employees. |
| Federal | Business Interruption Insurance Coverage Act of 2020 (H.R. 6494) | Requires all policies providing business interruption insurance to cover losses resulting from: (1) any viral pandemic; (2) any forced closure of businesses, or mandatory evacuation, by law or order of any government or governmental officer or agency; or (3) any power shut-off conducted for public safety purposes. Voids any exclusion that precludes coverage for losses resulting from any of these three causes. |

Other Insurance Products Tested

Policyholders have also filed declaratory judgment actions seeking coverage under other insurance products. On August 27, 2020, McDonald's and its franchisees sought defense and

indemnity coverage under various business owner policies for an underlying lawsuit alleging negligence and seeking injunctive relief for the mismanagement of safety protocols in four Chicago restaurants, causing a “public nuisance” and thus endangering public health from COVID-19. The insurer denied coverage because the underlying lawsuit does not seek damages because of “bodily injury.” In its pending motion to dismiss, the insurer asserts that the underlying complaint does not seek money the insureds must allegedly expend to remedy “bodily injury” incurred by third persons, but rather seeks only declaratory and injunctive relief. The case is *McDonald’s Corp. et al. v. Austin Mutual Insurance Co.*, case number 1:20-cv-05057, pending in the U.S. District Court for the Northern District of Illinois.

On July 24, 2020, Northwell Health, Inc., a system that operates 23 hospitals, filed suit seeking coverage under a healthcare premises pollution liability policy for costs incurred in response to the pandemic. Northwell sought to recover the costs of treating the respiratory effects of COVID-19, suspending elective procedures, closing physicians’ practices, and reducing admissions. Northwell alleges that these are “remediation costs,” “emergency response costs,” and “decontamination costs” arising out of “pollution conditions” or a “facility-borne illness event.” Northwell also seeks business interruption losses that it asserts are directly attributable to a covered “pollution condition.” The insurer moved to dismiss, alleging that any coronavirus contamination is not traditional environmental pollution that could constitute a “pollution condition,” nor is it a “facility-borne illness event” because the pandemic is not sourced to a covered facility. Northwell filed in the Supreme Court of New York, but the defendants removed the case to the U.S. District Court for the Southern District of New York, *Northwell Health, Inc. v. Illinois Union Insurance Company*, case number 1:20-cv-06893.

These are expected to be the first of many cases to test the scope of coverage in the context of pandemic-related claims under commercial general liability policies.

Moving Forward

Nicolaides Fink Thorpe Michaelides Sullivan LLP is dedicated to exclusively representing the interests of the insurance industry around the world. Our attorneys understand the issues that arise under a wide variety of insurance products. We address emerging risks and evaluate complex insurance issues. As such, we are uniquely prepared to assist the insurance industry as it faces the challenges presented by the COVID-19 pandemic. For more about the nature and scope of our insurance coverage practice, please visit www.nicolaidesllp.com.