Courts Find Coverage for COVID-19 Business Interruption Losses

Insurance Recovery, Litigation & Counseling Alert

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Policyholders are hailing two recent victories in their pursuit of insurance coverage for COVID-related business interruption losses. A North Carolina court granted a policyholder summary judgment that a commercial property insurance policy covers business interruption losses resulting from COVID-related government shutdown orders. Meanwhile, a Florida federal court determined a "virus exclusion" does not preclude a policyholder from pursuing insurance for COVID-related business interruption loss. These decisions clearly reject the insurance industry's self-serving mantra that COVID-related losses are not covered by insurance.

In *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 20-CVS-02569, filed in North Carolina Superior Court, the operators of sixteen restaurants brought a declaratory judgment action against their insurer for its refusal to cover losses suffered as a result of the coronavirus pandemic and related government shutdown orders, stay-at-home mandates, and travel restrictions. The policyholders had purchased "all risk" property insurance policies, which cover all risks of direct loss unless the policies expressly exclude or limit those risks. The policies define "loss" as "accidental physical loss or accidental physical damage." Because the policies do not define "direct," "physical loss," or "physical damage," the court turned to the ordinary meaning of such terms as defined in different dictionaries. Of particular significance for its ruling, the court cited dictionaries defining "loss" in the context of "losing possession," "privation," and the "state of being deprived." The court concluded "loss" means "the inability to utilize or possess something" and ruled:

In the context of the Policies, therefore, "direct physical loss" describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders.

The insurer argued the definition of "physical loss" requires physical alteration to the property and absent such physical alteration, the policies do not cover "pure economic harm." The court rejected this argument on two bases. First, the court concluded the insurer's definition, at best for the insurer, renders the meaning of "physical loss" ambiguous. Thus, even if the court found the insurer's definition reasonable, the reasonableness of the court's alternative definition renders the term ambiguous.

Because ambiguous terms must be construed against the insurer and in favor of the policyholder, the court's ordinary meaning interpretation prevailed.

The court secondly noted the disjunctive definition of loss – "accidental physical loss ***or*** accidental physical damage" – and found "physical loss" and "physical damage" must have distinct and separate meanings. Because "physical damage" means physical alteration to the property, "physical loss" cannot also mean physical alteration of the property. To apply the same definition to both terms impermissibly reads one of them out of the policy.

The court also rejected the insurer's attempts to invoke various exclusions to coverage, finding the exclusions inapplicable on their own terms. The court concluded, as a matter of law, that the policies provide coverage for loss of income due to the policyholders' "loss of use and access to covered property mandated by Government Orders." This is the first COVID-19-specific ruling finding business interruption coverage as a matter of law for the policyholder. The decision is, however, entirely consistent with New Jersey precedent established by this firm in *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 406 N.J. Super. 524 (App. Div. 2009), where the Appellate Division held that loss of physical functionality and use constitutes a covered loss under a property insurance policy.

In another recent case, a Florida federal court rejected the insurer's motion to dismiss property damage claims in *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Company, Ltd.*, No. 6:20-cv-1174-Orl-22EJK (M.D. Fla.). In early March 2020, the governor of Florida issued an executive order declaring a state of emergency due to the COVID-19 pandemic, which forced the policyholder to close its doors and cease normal operations. The policyholder sought to recover, under an "all risk" insurance policy, the losses resulting to its gynecology practice. The policyholder alleged it suffered loss of use of its property, loss of business income, and loss of accounts receivable, and further incurred additional business expenses to minimize the suspension of business and continue its operations.

The insurer moved to dismiss the lawsuit, arguing the policy expressly excludes losses caused by virus. Specifically, the insurer relied on the policy exclusion for loss or damage directly or indirectly caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungi,' wet rot, dry rot, bacteria or virus," regardless of "any other cause or event that contributes concurrently or in any sequence to the loss."

The court found it "not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses." The exclusion grouped "virus" with *pollutants*, leading the court to distinguish "virus" as used in the exclusion from "the unique circumstances of the effect COVID-19 has had on our society – a distinction this Court considers significant." Indeed, the court noted that the cases relied upon by the insurers involved claims for actual transmission of a virus by the policyholder, damage or injury caused by mold, sewage backup, illness or disease, and found these claims not logically connected to COVID-19's impact. The court held the policyholder's allegations stated a plausible claim and denied the insurer's motion to dismiss.

North State Deli, LLC and *Urogynecology Specialist of Florida* join the growing list of cases favorable to policyholders, including *Optical Services USA/JCI v. Franklin Mutual Insurance Co.*, No. BER-L-3681-20 (N.J. Super. Ct. L. Div.), in which the court rejected an insurer's claim that COVID-related losses cannot qualify as covered losses, and *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-cv-03127-SRB (W.D. Mo.), where the court accepted the policyholder's argument that because COVID-19 deprived plaintiffs of their property, it constituted a direct physical loss to their premises and property. These cases provide a strong rebuttal to the narrative the insurance industry has tried to perpetuate to dissuade policyholders from seeking to validate their rights to coverage for their pandemic-related losses.