As States Begin to Ease COVID-19 Restrictions, How Are Businesses Faring in Business Interruption Coverage Disputes?

Tony Lathrop
04.2021

When state and local governments began issuing shutdown and stay-at-home orders a little over a year ago, it was difficult to fathom how long businesses would be struggling to operate within the boundaries of the unprecedented restrictions. The economy has been hit hard across the board, with the U.S. travel and hospitality industry suffering an estimated $1.1 trillion in direct and indirect losses in 2020, hospitals and healthcare systems losing at least $323 billion in 2020, the NCAA and the four major U.S. sports leagues losing at least $14.1 billion, many major retailers declaring bankruptcy, and millions of small businesses expecting to fold in 2021 under the pressure of sustained business losses. Companies from a broad range of industries have filed claims and subsequent lawsuits seeking reprieve under business interruption insurance policies that purport to cover certain business income losses. As states across the country are lifting restrictions gradually, some courts have issued favorable rulings allowing companies' cases to proceed. Still, a large percentage of cases have left businesses wondering what they've been paying for since their business interruption insurance has not covered the hit from this pandemic.

According to case tracking data, the majority of COVID insurance coverage lawsuits have been filed by food and drink service companies. These cases consistently raise the question of whether the imposition of a shutdown order itself produces the physical loss of or damage to property that is typically required by business interruption policies. The data shows that in the state and federal cases that have reached a ruling on motions to dismiss, most of the cases have been dismissed thus far. Last Fall, restaurants in North Carolina were the first to receive a favorable summary judgment ruling, which has been appealed. And a recent decision has extended a lifeline to hospitality industry businesses by allowing their business interruption claims in multidistrict litigation to survive the insurer's motions to dismiss and motions for summary judgment. In *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation,* the court found that capacity limitations imposed by government shutdown orders could indeed be found by a reasonable jury to meet the physical loss of property requirement.

The *In re: Society Insurance* court rejected the insurance company's argument that the virus does not cause a change to the property and therefore coverage was not required, because the insurance policies at issue apply in the case of "physical loss of" property in addition to "physical damage of" property. The court then focused on what it called the "more challenging interpretive question" of whether the government restrictions on capacity and use could constitute *physical* loss of property. In the court's view, the physical nature of the loss was apparent given the physical limitation imposed, as opposed to a financial limitation, and the businesses' inability to use the physical space of their covered property fully. If a business had the ability to

expand its physical space, it would have the ability to alleviate the impact of the government orders, the court reasoned. In the face of a 25% capacity restriction, "[i]f the restaurant could expand its physical space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical —or at the very least, a reasonable jury can make that finding." The court was given pause by another argument presented by the insurer, but ultimately concluded that summary judgment was not appropriate given that "the scope of the term 'direct physical loss' is genuinely in dispute. A reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation."

In a similarly rare turn, a recent Pennsylvania state case resulted in summary judgment in favor of a dental practice seeking business interruption coverage. The state judge found that "'Plaintiff's loss of use of its property was both 'direct' and 'physical.'" The court reasoned that "[t]he spread of COVID-19, and a desired limitation of the same, had a close logical, causal [and] consequential relationship to the ways in which plaintiff materially used its property and physical space.'"

What will the analysis be when the business seeking coverage actually is treating COVID-19 positive patients and/or has staff who have become infected, like a hospital? Could there be a viable argument that the virus has not physically impacted the premises to the extent necessary to trigger coverage? A couple dozen cases have been filed by hospitals and a couple hundred by outpatient medical service companies. In a recent case, a hospital system that tested nearly 30,000 people for COVID-19 and treated nearly 2,500 COVID-19 positive patients had a communicable disease provision under their policy and still was denied coverage based on the insurer's argument that it was not sure that the virus was on the property. The hospital's motion for partial judgment on the pleadings is pending.

Lawsuits have been filed by additional companies ranging from bridal shops, major restaurant franchisees, and beauty salons to the MLB and league teams, NBA teams and major casinos, like Caesars who recently filed a case seeking nearly $2 billion in coverage from several insurers. As these cases work their way through the trial and appellate processes, it remains to be seen whether property insurance will provide the backstop businesses need to protect against the unprecedented damages wrought by this pandemic.