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# COVID-19 Business Interruption Claims: The Current Lay of the Land

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Do "all-risk" property insurance policies cover business interruption losses stemming from the COVID-19 pandemic? That is the multimillion-dollar question, and it is unfortunately one whose answer is not yet entirely clear. As a threshold matter, it depends on the language of the property insurance policy, and, specifically, whether or not the policy contains an exclusion for losses resulting from "viruses". It also depends on whether losses resulting from governmental orders or other actions are excluded, and whether the losses at issue can be characterized as relating to the virus or to a governmental stay-at-home order attributable to the virus. The language of the particular insurance policy is accordingly of paramount importance, and should be studied carefully with the aid of an experienced attorney.

Despite the foregoing uncertainty, some clarity has emerged in the months since the pandemic began. At the state level, various states, including New York, have introduced legislation seeking to shift to insurers some amount of responsibility for covering COVID-19 property insurance losses. Whether such legislation is ultimately enacted, and what it looks like when it emerges from the committee process, still remains to be seen. Also unclear is whether and to what extent states will distinguish, for the purpose of such legislation, between policies with virus exclusions and those without, an answer which may vary from state to state. In New York, Assembly Bill A-10226B, styled "AN ACT in relation to requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic," was introduced on March 27, 2020, and remains in committee. At the federal level, H.R. 7412, styled "A BILL To establish a temporary voluntary program for support of insurers providing business interruption insurance coverage during the COVID-19 pandemic, and for other purposes," was introduced on June 29, 2020, and likewise remains in committee. While New York's A-10226B focuses on ensuring that insurers provide coverage relating to COVID-19-related losses, the focus of H.R. 7412 is to provide a financial incentive for insurers to settle certain COVID-19 property insurance claims early.

While the foregoing and other state bills remain in committee, several decisions have come down in recent months signaling how courts, in the absence of such legislation, may treat COVID-19 business interruption claims. They are far from uniform. On the one hand, in *Studio 417 v. The Cincinnati Ins. Co.*, the Western District of Missouri denied a motion to dismiss which had been predicated on the insurer's argument that COVID-19 did not amount to direct physical loss or damage to property. No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Notably, the policies at issue in *Studio 417* did not contain virus exclusions. Accordingly, the court's focus was solely on whether COVID-19 amounted to a direct physical loss or damage to insured property. Distinguishing between direct physical "loss" and "damage" to premises, as used in the policy, the court concluded that the plaintiffs had stated a claim that the presence of COVID-19 in the insured premises was a covered loss,

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and denied the motion to dismiss. Id. at *5. In *Blue Springs Dental Care v. Owners Insurance Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020), the court expanded on the rule of *Studio 417* by denying the defendant insurer's motion to dismiss a complaint asserted by a series of dental practices with offices that had been forced to close, or whose operations had been curtailed, as a result of the pandemic, both because of the presence of COVID-19 in their insured premises, and because of governmental orders impacting on their business. Notwithstanding that certain aspects of the plaintiffs' practices were deemed "essential" under the relevant governmental orders, and that certain of the office closures had been voluntary, the court denied the insurer's motion to dismiss.

On the other hand, decisions from state and federal courts in Michigan, Washington, D.C., California, Texas, Illinois, Florida and Mississippi have gone the other way. In *Gavrilides Mgmt. Co v. Michigan Ins. Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020), the court granted the defendant insurer's motion for summary disposition without comment. In *Rose's I v. Erie Ins. Exchange*, No. 2020 CA 002424 (D.C. Super. Ct. Aug. 6, 2020), the court denied the plaintiffs' motion for summary judgment and granted the defendant insurer's motion for summary judgment, but based on a governmental order of exclusion; not because COVID-19 was not, itself, a covered peril under the policy. The courts reached similar conclusions in *Pappy's Barber Shops v. Farmers Grp.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020), *Mudpie v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *Franklin EWC v. Hartford Fin. Servs. Grp.*, No. 20-CV-04434 JSC, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020); *Diesel Barbershop v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020); *Turek Enters. d/b/a Alcona Chiropractic v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Know as Syndicate PEM 4000*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020); and *Real Hospitality v. Travelers Cas. Ins. Co. of America*, No. 20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020), although, notably, in each of these cases, the plaintiffs' alleged losses were solely as a result of governmental "stay-at-home" orders; not as a result of the physical presence of COVID-19 in their insured premises, and a number of the policies at issue also contained virus exclusions.

> At the state level, various states, including New York, have introduced legislation seeking to shift to insurers some amount of responsibility for covering COVID-19 property insurance losses.

It is still too early to draw any definitive conclusions about the availability of business interruption coverage for COVID-19 related losses. However, to the extent that a pattern *may* emerge from the foregoing cases, it tends to suggest that the cases which, at this point, have been most likely to survive motions to dismiss are those in which (a) the policy does not contain a virus exclusion, and (b) the plaintiff is able to allege with some specificity that portions of its losses stem from the physical presence of COVID-19 within the insured premises. See, e.g., *Malaube v. Greenwich Ins. Co.*, No. 20-22615-Civ-Williams/Torres, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020) (distinguishing *Studio 417* on the ground that it involved losses arising from the presence of COVID-19 within insured premises, and suggesting that such losses, if they had been present in *Malaube*, could have amounted to "physical harm"); *Seifert v. IMT Ins. Co.*, Civ. No. 20-1102 (JRT/DTS), 2020 WL 6120002, at *3, n.5 (D. Minn. Oct. 16, 2020) (same). That being said, there are also certain decision tending to suggest that even the presence of COVID-19 within insured premises may, in certain cases, be insufficient to survive a motion to dismiss. In *Plan Check Downtown III v. AmGuard Ins. Co.*, No. 20-CV-6954-GW-SKX, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020), the court concluded that the physical loss or damage to property that was necessary to trigger coverage under the applicable insurance policy required a physical alteration of the property, since to conclude otherwise would be a departure from established California law. In *Social Life Magazine v. Sentinel Ins. Co., Ltd.*, the U.S. District Court for the Southern District of New York went a step farther, noting, albeit at oral argument on a motion for a preliminary injunction that was seemingly withdrawn before a formal decision was ever rendered, that COVID-19 "damages lungs. It doesn't damage printing presses." (20-cv-03311-VEC). As indicated, *Social Life Magazine* is of questionable precedential value, but it suggests that even the presence of

COVID-19 *within* insured premises may be insufficient to trigger coverage in certain circumstances. See also *Uncork and Create v. The Cincinnati Ins. Co.*, No. 20-cv-00401, 2020 WL 6436948 (S.D. W.Va. Nov. 2, 2020).

Beyond the foregoing cases, certain litigation for which Multi-District Litigation (MDL) status has been requested also bears note. On Aug. 12, 2020, the U.S. Judiciary Panel on MDL (the Panel) rejected two separate petitions for MDL treatment of COVID-19 business interruption cases, one of which would have consolidated such cases under a single judge in the Eastern District of Pennsylvania; another would have consolidated them under a single judge in the Northern District of Illinois. In denying the request for MDL treatment nationally, the Panel also rejected the request for MDL treatment by geographic region, but left open the question of whether MDL treatment might be permissible on an insurer-by-insurer basis. The Panel has since issued several decisions with opposite conclusions. The Panel concluded that MDL treatment was appropriate against Society Insurance Company, and ordered the consolidation of the pending COVID-19 property insurance claims against it, identified on a schedule to the decision, to be transferred to the Northern District of Illinois and consolidated. See *In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2964, 2020 WL 5887444, at *3 (J.P.M.L. Oct. 2, 2020). Conversely, the Panel concluded that "centralization … is not warranted," and denied the request for MDL treatment of the claims against Lloyds of London, Hartford, Cincinnati Insurance Company, and Travelers. See *In re Certain Underwriters at Lloyd's, London, COVID-19 Business Interruption Prot. Ins. Litig.*, MDL No. 2961, 2020 WL 5887416 (J.P.M.L. Oct. 2, 2020); *In re Hartford COVID-19 Business Interruption Prot. Ins. Litig.*, MDL No. 2963, 2020 WL 5884782 (J.P.M.L. Oct. 2, 2020); *In re Cincinnati Ins. Co. COVID-19 Business Interruption Prot. Ins. Litig.*, MDL No.2962, 2020 WL 5884791 (J.P.M.L. Oct. 2, 2020); *In re Travelers COVID-19 Business Interruption Prot. Ins. Litig.*, MDL 2965, 2020 WL 5884785 (J.P.M.L. Oct. 2, 2020).

The individual cases covered by the foregoing decisions are numerous, and, to the extent not consolidated, remain pending in various jurisdictions, including in the U.S. District Courts for the Southern, Eastern, and Western Districts of New York, where pending cases are at various stages of briefing on insurers' motions to dismiss, with many currently scheduled to be fully-briefed by late November or early December. Once the motions are decided, such cases may provide further guidance as to how courts within the Second Circuit may treat the question of whether COVID-19 losses are covered under "all-risk" business interruption policies. Included among the cases currently pending in federal courts in New York are cases involving losses attributable to the presence of COVID-19 within insured premises, cases involving policies without virus exclusions, and cases involving plaintiffs whose businesses were deemed either "essential" under applicable state and city orders, or for which certain aspects of their businesses were deemed "essential" under such orders. Resolution of the foregoing motions will hopefully provide further clarity as to whether federal courts within New York will follow the approach of those in California and Florida, or whether they will follow the approach of the U.S. District Court for the Western District of Missouri.

It is still too early to say definitively how the courts will treat COVID-19 property insurance claims, and the answer may change depending on what legislation is ultimately enacted at the state and federal level (if any).

In sum, it is still too early to say definitively how the courts will treat COVID-19 property insurance claims, and the answer may change depending on what legislation is ultimately enacted at the state and federal level (if any). Current trends suggest, at a minimum, that for clients whose policies do not contain virus exclusions, whose losses relate to the presence of COVID-19 within insured premises, and who have timely filed their property insurance claims, there may be a glimmer of hope, but it remains to be seen how different states which have yet to meaningfully weigh in on this issue will proceed.