COVID-19 Insurance Claims Update

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It has been approximately six months since COVID-19 first began to impact our daily lives significantly, changing how we interact with each other and how we interact with businesses as consumers. The cancellation of major league and college sports in mid-March was one of the first signs that this pandemic was something we, as a society, had not experienced in our lifetimes. Business shutdown orders followed thereafter, resulting in substantial lost revenue for businesses, particularly those involved in food service and entertainment industries. Many of the orders have been lifted allowing businesses to resume operations, but in numerous cases, only in a limited fashion.

During those same six months, some businesses have sought to address losses they associate with COVID-19 by seeking coverage under their insurance policies. The Wimbledon tennis tournament made worldwide news when it was reported that it was to receive a payout of approximately $142 million due to the cancellation of the tournament under a pandemic insurance policy it had started purchasing after the SARS outbreak in 2003. However, very few businesses have purchased event cancellation or pandemic insurance. Rather, most coverage claims were being made under provisions of their business insurance policies, most notably business interruption coverage. These claims, generally, have been denied by insurers on multiple bases. The primary basis for the denial of the COVID-19 claims is that they do not constitute direct physical loss or damage. Additionally, exclusions for loss of use and loss of market, losses caused by governmental ordinances and for virus-related losses have also been cited.

There has been a proliferation of declaratory judgment actions being filed across the country over the last six months by insureds (primarily small businesses and restaurant owners) seeking a determination of whether their business policies afford them coverage for COVID-19 related losses. Several cases have been filed in Indiana, including claims by Café Patachou, the Indiana Repertory Theater, and clothier Tom James Company. To date, no Indiana court has issued a substantive order opining on the coverage issue. However, some orders have been issued in other jurisdictions, confirming the policies do not provide coverage.

In one of the first COVID-19 coverage related decisions, a Michigan state court determined that there was no coverage under a business interruption policy because the properties did not sustain a direct physical loss.[1] The Court noted that "under their common meanings and under federal case law as well, … direct physical loss of or damage to the property has to be somethWing with material existence … something that alters the physical integrity of the property." The Texas Western District Court similarly dismissed an insured barbershop's claim for coverage for interruption losses incurred due to COVID-19 related "shutdown" orders, determining that the insured had failed to plead a direct physical loss and that even if it had found direct physical loss to the property, coverage would have been precluded by a virus exclusion.[2] The Eastern District of Michigan recently dismissed a claim for coverage by a chiropractor office for losses incurred due to a COVID-19 executive shutdown order because the insured had failed to demonstrate any tangible damage to the property and the claim was also barred

by a virus exclusion.[3] Likewise, the Southern District of New York denied a magazine publisher's motion for a preliminary injunction on the basis that the insured would likely be unable to demonstrate direct physical loss noting that "New York law is clear that this kind of business interruption needs some damage to property."[4] The Southern District of California also recently dismissed a barbershop's COVID-related coverage claim on the basis that a governmental shutdown order did not constitute direct physical loss.[5]

The Western District of Montana recently allowed COVID-related coverage claims by a hair salon and restaurants to survive a motion to dismiss, holding that the insureds adequately alleged a direct physical loss under the policies.[6] The court relied upon the insureds' allegation that COVID-19 particles attached to and damaged their properties, which the insureds argued made their premises unsafe and unusable. However, multiple courts have already distinguished that decision.[7] The Florida Southern District Court, in granting an insurer's motion to dismiss a restaurant owners' COVID-19 coverage claim on the basis that no direct physical loss or damage was alleged (a governmental closure order never made the restaurant uninhabitable or substantially unusable), distinguished the caseon the basis that its determination relied upon the fact that COVID-19 was alleged to be physically present on the premises.[8]

It will be some time before Indiana courts provide any substantive guidance on these coverage claims, particularly as one can expect any trial court orders to be appealed. Additionally, the differences in applicable language in policies could require rulings in multiple cases. Insurance coverage provides another example of how the pandemic has impacted business operations and we can expect responses by insureds, insurers, and the government moving forward. Though the SARS outbreak resulted in responses by insurers and insureds with respect to their insurance coverage, given the much more significant impact of COVID-19, one can expect a significant increase in the purchase of event cancellation/pandemic coverage.

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1 *Gavrilides Management Co., LLC v. Michigan Insurance Co.*, 2020 WL 4561979 (Mich. Cir. Ct., July 21, 2020).

2 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *7 (W.D. Tex., Aug. 13, 2020).

3 *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich., Sept. 3, 2020).

4 *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 1:20-cv-03311-VEC (S.D.N.Y., Apr. 28, 2020).

5 *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *5 (S.D. Cal., Sept. 11, 2020).

6 *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo., Aug. 12, 2020).

7 *See Turek Enterprises* at *7 and *Pappy's Barber Shops* at *5, n. 2.

8 *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *7 (S.D. Fla., Aug. 26, 2020).