

## Employer Resources from May 20, 2020 webinar *Leading Through COVID-19*



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During our last session, I talked about recent filings related to insurance denial claims in the COVID-19 era. Specifically, we discussed the lawsuit that Beast restaurant owner Naomi Pomeroy filed against her insurance company for denying coverage for losses she sustained when she closed her restaurant in response to Governor Brown's order. Three take away lessons from this lawsuit are: (1) many of these lawsuits are being filed as class actions, so it's not just a dispute between the individual policyholder and the insurance company, but could implicate all similarly situated policyholders; (2) policyholders need to act quickly and file a claim if they think they have business losses related to COVID-19 that should be covered by their insurance (many policies require that claims are filed within 30 days of the loss); and (3) an insurance company or a broker is not necessarily the final arbiter of coverage questions—a policyholder can always pursue internal appeals or even file a lawsuit seeking a ruling from the court that their claim should have been covered. I also include a recent article from Law360 that provides more context on this developing area of the law. In sum, this is a nuanced area that requires quick action. If you have questions, do not hesitate to reach out to me. Our team would be happy to help.



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## Major Trends In COVID-19 Business Interruption Lawsuits

By Lee Siegel and Ryan Maxwell (May 14, 2020, 5:19 PM EDT)

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The COVID-19 crisis has dominated the American legal, political and business landscape for the better part of the past two months. During that time, by our unofficial count, there have umpteen thousand articles and blog posts filled with analysis, recommendations, predictions and primers, with the requisite handwringing and even vitriol, especially when it comes to business interruption coverage.

We are even guilty of adding to the cacophony. A recent Google search for "COVID-19 Business Interruption Insurance" returned more than 1.3 million hits, with authors on the topic ranging from Akin Gump Strauss Hauer & Feld LLP to Zelle LLP.

As national coordinating counsel for several insurance companies, however, we identify and track COVID-19 business income lawsuits across the country. From our vantage point, we can step back from the theoretical and examine the panorama of policyholder pleadings.

### **By the Numbers**

Even with many state courts temporarily closed to new filings, there are already at least 167 complaints — 166 brought by policyholders and one carrier-initiated declaratory judgment action (thank you, Travelers Insurance Co.). Putative class actions are fashionable, with just under one-third (50) brought as either national or state-wide class actions.

There even are competing multidistrict litigation filings, one in the U.S. District Court for the Northern District of Illinois and the other in the U.S. District Court for the Eastern District of Pennsylvania. Almost all the complaints are styled as declaratory judgments actions and some also seek breach of contract damages; but only a minority, about one-quarter, assert a breach of the duty of good faith and fair dealing.

So far, 28 states, plus the District of Columbia, are represented. The Keystone State edges out the Golden State for the lawsuit lead, 20 to 19, respectively; Illinois (15), Washington (14) and Ohio (13) trail close behind. There are 12 actions in Florida, while Texas and New York both have nine. Louisiana, Missouri and Wisconsin round out the top spots, each with six business interruption actions.

Not unexpectedly, restaurateurs are a plurality of the plaintiffs with 76 suits nationwide. Interestingly, the second most frequent policyholder demographic to file suit are dentists with 13 actions in Washington state alone.

The Hartford is by far the number one target of policyholders, standing as a defendant in 29 separate actions. Its Connecticut neighbor, Travelers, is second among carriers as a party in 17 business income lawsuits. We're sure that this is one time Travelers is happy to take a back seat to its cross-town rival.



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Tied with Travelers in the second slot is midwestern niche restaurant insurer Society Insurance Company, also staring down 17 suits. Among the remaining top policyholder targets are Cincinnati Insurance Co. (15), Lloyd's of London (9), Erie Insurance Exchange (7), Zurich Insurance Group AG (6), Liberty Mutual Insurance Co. (5), with American International Group Inc., Aspen Insurance Holdings Ltd., and Farmers Insurance Group Inc. rounding out the list with three lawsuits each.

## By the Pleadings

Recall Robert Frost's famous words, "Two roads diverged in a yellow wood, And sorry I could not travel both." Or, put another way: To plead the virus as property damage or not to plead the virus as property damage, that is the question.

As you can imagine there are many similarities among the complaints but there is far from a uniformity of approach. Policyholder lawyers face a difficult dilemma: How to plead the property damage element of a business income claim in a COVID-19 context? To date, we've identified three pleading trends: (1) the virus as property damage, (2) the virus as loss of use damage, and (3) pleading around the virus entirely.

Let's first be reminded what the typical business income (and extra expense) coverage form, (CP 00 30 10 12), provides in the grant of coverage at Section A.1:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by *direct physical loss of or damage to property* at premises which are described in the Declarations ... [Emphasis added.]

Likewise, the civil authority grant of coverage, Section A.5.a., equally includes a property damage element:

When a Covered Cause of Loss causes *damage to property* other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises ... [Emphasis added.]

The majority of pleadings tackle the damage to property question head-on. These policyholders assert that the presence of COVID-19 is property damage, whether claiming a direct loss of business income or a civil authority theory of lost revenue.

Some contend that the virus is a contaminant; some argue that the virus causes the formation of organisms known as fomites, which adhere to surfaces for varying periods of time; while some boldly make a naked assertion of property damage. Interestingly, however, we are not aware of a single complaint alleging the established presence of COVID-19 at a particular location.

Many pleaders rely on statements from public health organizations to establish property damage, such as: "[the] World Health Organization has recognized that the Coronavirus is a cause of real physical loss and damage." Or, "[the] County Administrator for Broward County, Florida, found (scientifically) and ordered that COVID-19 'is physically causing property damage due to its proclivity to attach to surfaces for a prolonged period of time.'"

In one of the first business interruption actions, the famed Napa Valley restaurant French Laundry alleges that, "The [civil authority] Order specifically states that it is being issued on evidence of physical damage to property ... in the immediate area of the Insured Properties."

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Another complaint cites that a governor's executive order "specifically referenced that it was being issued based on the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property." Many, quite technically, assert that COVID-19 is a physical substance capable of remaining active on inert, physical surfaces, causing direct physical loss or damage and rendering property unsafe.

Another popular approach focuses on loss of use as property damage. Policyholders assert that covered physical loss includes the loss of use, arguing that COVID-19 denies access to the property, and prevents customers from physically occupying the policyholder's premises. "[COVID-19 is] causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises," one complaint asserts.

Another complaint similarly alleges that, "the presence or danger of COVID-19 on property renders that property unusable and non-functioning until such time as the property is sanitized." An Illinois pleader contends that Illinois law holds that the presence of a dangerous substance (such as the COVID-19 virus) constitutes physical loss or damage.

However, on the road less traveled, a minority of policyholders attempt to avoid the entire virus as property damage conundrum. One group of plaintiff's attorneys, responsible for at least four putative national class actions, argue that their clients' loss is not due to the virus; the effect of the closure orders, without concern for whether the virus was actually present, is the efficient proximate cause of the lost business income.

"Rather, the efficient proximate cause of the Plaintiff's, and other Class Members' losses, were precautionary measures taken by the governments of their respective counties and states to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiff's insured property," proclaims one complaint.

Accordingly, the direct physical loss of and damage to policyholder property stems, the theory goes, from a loss of use of the property for its intended purpose. One North Carolina complaint similarly asserts that the five plaintiff-policyholders' losses are as a result of public fear, not the virus.

A tact of some Alabama and Louisiana pleadings is to avoid taking any position. These complaints assert that the policyholders have all-risk policies and, therefore, it's the carriers' burden of proof to establish that their revenue losses result from an excluded cause of loss. Another side-step pleading approach is for policyholders to point out that the phrase "direct physical loss of or damage to property" is undefined and ambiguous, thus requiring a finding of coverage for COVID-19 business income loss.

Our favorite pleading approach, without a doubt, we call "But Mom Said So." In these complaints, policyholders rely on the weight of President Donald Trump's comments to persuade that coverage is owed. The president is directly quoted in many complaints as having said:

I'm very good at reading language. I did very well in these subjects, OK? I don't see pandemic mentioned. Now, in some cases it is; it's an exclusion. But in a lot of cases I don't see it. I don't see reference that they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair. And I know what's fair. I can tell you really quickly.

## **But the Virus Exclusion**

Notwithstanding the variety and creativity of pleadings, there remains the virus exclusion. The exclusion of loss due to virus or bacteria (CP 01 40 07 06) provides that an insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

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Policyholder pleadings either confront this exclusion as a shield held by insurers or, alternatively, use its absence as a sword wielded against an insurer who should have known better. Some, flippantly, declare it inapplicable without more, in a damn-the-torpedoes approach.

Policyholders, such as in one Wisconsin case against Society Insurance Inc., argue that the insurance industry was aware in drafting the virus exclusion that "[t]he presence of virus or disease can constitute physical damage to property."

These policyholders demand coverage from policies lacking the virus exclusion, arguing that since industry leaders acknowledged property damage might result from a virus when drafting the exclusion, an insurer's decision not to schedule the virus exclusion permits coverage for loss or damage to property caused by COVID-19, under an all-risk policy.

But just because the virus exclusion is present doesn't mean that the policyholders have surrendered. For example, in a New Jersey class action against Chubb International, despite the inclusion of ISO's virus exclusion, the policyholder argues that the exclusion is inapplicable because the "losses were not caused by" the virus.

The "precautionary measures taken by the State of New Jersey to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiff's property," was the efficient proximate cause of loss. The policyholder argues that the "direct physical loss of or damage to property" experienced is the physical loss of use of and access to its property, such that a government order — rather than the virus itself — caused the loss.

## **Conclusion**

While the similarities in pleading still far outpace the differences, there are a significant number of novel COVID-19 pleadings, demonstrating that there is certainly more than one way to seek coverage even under the standard ISO coverage forms. The success or failure of these theories, and the response to them by insurers, remains to be seen. With our ears to the ground and an understanding of the arguments asserted today, we chart the course forward.

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