

Presented by PLUS Diamond Sponsors



An Update on Business Interruption Cases

June 15, 2021

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MEET YOUR PRESENTERS



Hon. Rubén Castillo (Ret.)

U.S. District Court, Chief Judge, N.D. Illinois
FedArb, and Chair of Ackerman Bench
Chicago/NY/Florida



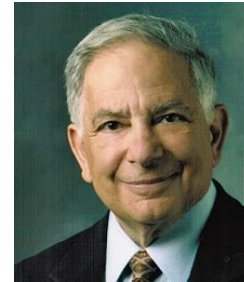
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Agenda

- Background/Current Environment
- Framework of Coverage Issues
- Recent Case Law – Updates
- Key Takeaways
- Q&A

Background/Current Environment

- Economic—Trillions in damages
- Political—national desire to help businesses and put people to work
 - Legislation. Numerous states are considering laws that
 - would require insurers to cover pandemic-related losses under business interruption policies
 - would permit insurers to obtain reimbursement for coverage payouts from proposed insurer-funded pools
 - Louisiana (SB477; SB495; HB858)
 - Massachusetts (SD2888)
 - Michigan (HB5739)
 - New Jersey (A-3844)
 - New York (A10226B; S8211A)
 - Ohio (HB589)
 - Pennsylvania (HB2372; HB2386; HB2759; SB1114)
 - Rhode Island (H8064)
 - South Carolina (SB1188)
- Legal—most cases now surviving pleadings but more (not all) are failing on the merits
- Update since our last panel in September –9 months ago

Framework of Coverage Issues

- Commercial Property “Damage Trigger”
- Commercial Property Civil Authority—stand-alone v. tied to covered peril
- Loss of Business Income Policies and Event Cancellation Policies
- Other Policies with Loss of Business Income as Consequential Damage
- Various Exclusions, such as
 - Pollution
 - Virus

“Property Damage” Trigger

- Coverage disputes arising from the pandemic generally involve the hotly contested issues of “direct physical loss of or damage to property” or “all risk of direct physical loss”.
 - Policies are not cookie cutter. There will be categories of issues, but the results will be specific to policy language.
 - “Tangible” not a requirement in property insurance.
 - Bad Faith considerations under review.

What proof of damage needs to be alleged to survive a motion to dismiss?

- Many courts continue to rule that C-19 virus does not cause “physical” damage to property. E.g., *Glacial Cryotherapy v. Evanston Ins.*, USDC, WD Wash. (no “physical alteration”; detriment to health, not to property).
- Some courts have found, on the other hand, that a virus is like other air borne substances that courts have ruled can cause physical damage, such as asbestos fibers, smoke, etc. E.g., *Port Authority of New York and New Jersey v. Affiliated FM Insurance*, 311 F.3d 226 (3d Cir. 2002) (court noted that “when the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner.”)
- Insureds are increasingly stressing that the virus is physical and has a physical impact by being in the air and on surfaces within the covered property. Some complaints refer to expert declarations explaining the tangible nature of the virus and that the damages caused by the virus (injuries to users and reduced usability of property) are analogous to recognized forms of damage.

What proof of damage needs to be alleged to survive a motion to dismiss?

- Policies at issue often cover damage to such “intangibles” as computer programs, electricity service, etc. Such coverages arguably indicate intent to insure causes of damage analogous to the C-19 virus.
- Insureds stress that the burden of proof on motions to dismiss is on the movant to establish that plaintiff fails to allege facts sufficient to make a prima facie case, taking the reasonable allegations to be true.

Mohawk: Specific language re “communicable disease”

- Court failed to afford meaning to specific language contained in the policy’s two communicable disease sections, each of which specifically contemplate that “communicable disease” can cause loss and damage to property.
- Compare Thor Equites.

Choctaw Nation—“Direct physical loss”

- Insurance companies are to define physical loss.
- Covers loss of use.
- Physical loss does not require structural alteration.
- “All risk of direct physical loss” is broader than direct physical loss.
- The exclusions do not apply unless there is a pandemic exclusion.
- Insurance industry has had years to develop language.
- More to these policies than was readily apparent.

- Seifart Case (Minn.)—virus exclusion was superseded by civil authority orders.
- Direct cause of loss was government mandates.

Cinemark: Illustration of decision-making at the threshold level

- US district court, ED Texas, ruled on May 5, 2021 that allegation that virus was “present” in air of insured movie theaters and “damaged” property by changing content of air is sufficient to deny motion to dismiss.
- Court distinguished decision of March 15, 2021 by same district court in *Selery*, where complaint that relied on a government order to stop using the insured property due to C-19 was dismissed, noting that that complaint failed to allege virus was present in property insured.
- Court noted proof that the virus was actually present in insured property in allegation that 1700 of insured’s employees contracted C-19 or evidenced its symptoms soon after having worked at its sites.
- *Cinemark* also relied on alternative ground that policy provided coverage for “communicable disease,” noting that the insurance company conceded that the virus had caused such a disease. This ruling does not deal with fact that many policies exclude “contamination” – defined to include disease caused by a virus. Nor does it deal with possible limits on recovery for communicable disease.

7th Circuit Case -Cincinnati Insurance Case

Dental office seeks to recover lost revenues during pandemic.

- Issue: Did lower court wrongly interpret the phrase “ direct physical loss” to conclude government closure did not constitute property damage.
- Appeals Courts—Stay tuned
 - 4th Circ., 7th Circ., 8th Circ. (argued), 9th (argument scheduled for August 11th) and 11th Circ. 7th Circ., 8th Circ. (argued), 9th and 11th Circ.
 - Expect ruling after Sept./Oct.
- State Supreme Courts will also weigh in,

Civil Authority

- Other viable sources of recovery: “civil authority” coverage
 - A standard provision
 - Generally provides coverage for business income losses when a government order prohibits access to covered property as a result of “direct physical loss or damage to” nearby property that is not covered under the policy.
 - Coverage may still require physical loss or damage to property
 - Some of the stay-at-home or other government shutdown orders explicitly provide that they have been issued to address existing property damage

Exclusions

- Exclusions: for pollution, contamination, and/or virus
 - Exclusions may apply only to traditional environmental pollution.
 - Policyholders contend that their losses were caused by government shutdown orders, not by the coronavirus itself. Restaurants owners have raised this argument in coverage lawsuits in the U.S. District Court for the Eastern District of Pennsylvania and Washington D.C. Superior Court.
 - Policyholders should argue that standard principles of policy interpretation require courts to narrowly construe the exclusion against the insurers and in favor of coverage.
 - Burdens of Proof.

Explicit Coverage and Damages for Viral Coverage

- Provisions that cover viral damage either expressly, or generically by covering “Communicable Disease,” make it easier to get past pretrial motions and to secure some coverage. But these provisions often require proof of various elements, or limit the potential damages available, such as by capping coverage at a modest amount.
- An example of this is suggested in *Cinemark*. While the policy at issue in one section related to “communicable disease” says that it covers “the Actual Loss Sustained and extra expense incurred,” another section “covers the reasonable and necessary costs incurred by the Insured . . . for the . . . cleanup, removal and disposal of the actual not suspected presence of communicable diseases from the insured property.” This leaves the amount of coverage in doubt.
- Some policies expressly cover virus damage, but simply limit the amount of such damage that can be recovered during the policy period.
- Some policies require proof of a government order to vacate the premises and/or the “actual presence” of the virus in the insured property.
- Number of occurrences.

International Issues

- FCA Discussion UK Supreme Court - Financial Conduct Authority v Arch Insurance (UK) Ltd [2020];
- Irish High Court case - Hyper Trust Limited t/a The Leopardstown Inn v FBD Insurance plc [2021] IEHC 78
- High Court of England and Wales - TKC London Limited v Allianz Insurance Plc [2020] EWHC 2710 (Comm);
- High Court of England and Wales - Rockliffe Hall Limited -v- Travelers Insurance Company Ltd [2021] EWHC 412
- London Covid 19 BI List—Special section of the commercial court to handle BI cases
- No way that prolonged contamination/prolonged loss of use = loss of property

Key Takeaways

- Intense scrutiny on the Pleadings in the context of a Motions to Dismiss
 - Strict reading of “Physical Loss” and “Physical Damage”
 - Plaintiffs attaching expert opinions re physical damage
 - No Appellate Opinions yet
- Gov’t Orders are complicated and will depend on policy language
- Policy Exclusions will be a major factor
- Explicit Coverage language will limit or expand recovery
- International Cases may prove instructive

Questions

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Thank you!