

Coverage for COVID-19? - Louisiana Business

Interruption Claims

COVID-19 has torn across the world, creating a health crisis and leaving a devastating economic wake. Governors across the United States have issued varied emergency proclamations, nearly all of which remain in effect in varying degrees across the country. As a result of the general health risk caused by the pandemic and government “shut-down orders” in response to the crisis, millions of businesses were forced to cease or reduce operations for periods of time. In fact, bars remain closed in Louisiana and many other categories of businesses, such as hair salons, spas, and athletic clubs, remain shuttered across the country because they are deemed to be “high risk” for virus transmission. Given the vast economic impact COVID-19 has had on businesses, business owners are looking to their insurance carriers for reimbursement of their losses under business interruption policies. In turn, insurers have generally denied these claims based on the applicable policy language. The purpose of this article is to generally analyze this coverage concern and how it is being addressed in Louisiana.

Business interruption insurance is generally purchased as part of an “all risk” property insurance policy or is provided via an endorsement within a “named perils” policy. All risk property policies are, of course, the broadest form of property insurance available because they cover all losses the policyholder suffers unless the peril causing the loss is specifically excluded. Conversely, a named perils policy provides coverage only for those types of losses identified within the policy.

Policy language is often identical across the industry because insurers use the same policy forms prepared by the Insurance Services Office, Inc. (ISO). Moreover, even where the policy language related to business interruption insurance is not part of an ISO Form, most (if not all) insurers provide language requiring that the insured premises suffer physical damage. One of the largest domestic national insurers, for example, utilizes its own (non ISO) policy endorsement entitled “LOSS OF INCOME AND EXTRA EXPENSE.” This endorsement provides that it will pay for loss of income “caused by direct physical loss at the described premises” and that “[t]he loss must be caused by a covered cause of loss.” Notably, this standard insuring language establishes a two-prong test that must be met for coverage to be provided: (a) physical property damage and (b) damage caused by a covered peril.

The latter issue, whether there is a covered peril, is controlled by the type of policy at issue--i.e., all risk or named perils and, particularly, whether the policy includes a "Virus" exclusion. This is a commonly used ISO form endorsement¹ that ISO sought and secured approval of in response to the 2006 SARS Outbreak². The Virus Exclusion provides that insurers "will not pay for loss or damage resulting from any virus, bacterium, or other microorganism..."

Accordingly, the primary question is how courts are responding to arguments that COVID-19 and/or the related government shut-downs constitute "physical property damage." As could be anticipated, the Louisiana Plaintiff bar has raised inventive and colorful arguments in an effort to circumvent the policy language. For instance, in one New Orleans suit entitled *Cajun Conti, LLC, et al v. Certain Underwriters at Lloyd's, London, et al*, the plaintiff-insured contends that the governmental closures and general contamination of its business location sufficiently constitute "property damage" and, moreover, "[a]ny effort by [the insurer] to deny the reality that the virus causes physical damage and loss would constitute a false and potentially fraudulent misrepresentation that could endanger policy holders and the public."³ There are undoubtedly numerous similarly pending claims in courts across Louisiana, none of which to our knowledge have rendered a ruling on the issue.

However, other state courts have issued rulings providing some guidance. A case pending in the U.S. Court of Appeals for the Second Circuit was voluntarily dismissed by the plaintiff-insured after the Judge denied his emergency application, noting that the law and policy language were clear: "I feel bad for your client. I feel bad for every small business...But New York law is clear that this kind of business interruption needs some damage to the property ...You get an A for effort, you get a gold star for creativity, but this is not what's covered under these insurance policies."⁴

More recently, a Michigan Court squarely addressed the issue and granted a motion for summary judgment⁵ in favor of the insurer defendant, ruling that a restaurant was not entitled to its claims for business interruption losses as a result of COVID-19 because the property did not

¹ ISO Form CP 01 40 07 06

² See <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>.

³ See Plaintiff's Petition for Declaratory Judgment filed in matter of *Cajun Conti, LLC, et al v. Certain Underwriters at Lloyd's, London, et al*, Case No. 2020-02558, Civil District Court Parish of Orleans.

⁴ A transcript of the hearing can be found at:

<https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Social%20Life%20Hearing.pdf>

⁵ Referred to in Michigan as a "Summary Disposition."

suffer direct physical damage. The Court noted that physical damage must take a tangible form and somehow alter “the physical integrity of the property.” Further, the Court specifically described the plaintiff’s argument that the governmental shutdown constitutes physical damage because the business and patrons were physically restrained from conducting business as “simply nonsense.”⁶

The Michigan ruling, while favorable to the insurance industry, provides a caveat in that the Court twice references the fact that the Plaintiff admitted that the restaurant did not experience any confirmed cases of COVID-19 at the insured location. Accordingly, it is unclear whether this would serve as the distinguishing factor between claims—namely, whether confirmed cases within the insured premises would meet the physical damage requirement under the policy. While this issue may be irrelevant for those policies that include a Virus Exclusion, this factor may prove to be an important distinction for other policies should courts find that proof of the virus at the insured premises constitutes physical damage.

In addition to the ongoing litigation, the Louisiana Legislature has been actively responding to the pandemic. Act 162 signed by Governor Edwards on July 11, 2020 ratified the Governor’s various Emergency Proclamations related to the pandemic and confirmed the Governor’s extension of prescription (statute of limitations) and similar legal deadlines. In this regard, any deadline that fell between March 17, 2020 and July 5, 2020 was extended through July 6, 2020.

In addition, the Legislature introduced Senate Bill Nos. 477 and 506 seeking to expand insurance coverage regardless of the terms of the policy. SB 506, which failed in committee, sought to require that all property insurance policies provide coverage for the costs of disinfectant fumigation of homes and commercial buildings. More importantly, SB 477 would have mandated retroactive and prospective coverage for business interruption losses as a result of COVID-19. Essentially, the Legislature would have attempted to rewrite the terms of a policy by legislatively defining the virus impact and shutdowns as a covered loss. The bill failed in committee after testimony from the Louisiana Insurance Commissioner and various objections to its constitutionality. Nevertheless, several similar bills are pending in state legislatures across the country, including New Jersey, Massachusetts, and New York. This issue is continuing to evolve and we will continue to monitor legislative and court action in Louisiana and other jurisdictions.

⁶ Oral argument and the Court’s ruling can be viewed at: <https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be>

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