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COVID-19 business interruption suits won't be interrupted soon

The nation has been in various stages of pandemic shelter in place and slowed down operations for many businesses, with some industries such as restaurants and travel facing severe impacts. As affected businesses look for sources of recovery, one area they have focused has been on their insurance policies. This column focuses on some of the litigation that has been filed in recent months.

Lettuce Entertain You

Jenner & Block recently filed a lawsuit on behalf of its clients, *Lettuce Entertain You Enterprises, Inc., et al. v. Employers Insurance Company of Wausau, et al.,* 20 L 8099. Unlike the typical lawsuit filed against insurers, alleging civil authority and business interruption, the *Lettuce* lawsuit has three counts: declaratory judgment, breach of contract and unjust enrichment.

A companion case also was filed by Jenner in New York. The count for declaratory judgment is for the court to reject the arguments of the insurers that the shutdown and reopening orders did not cause direct physical loss or damage. The breach of contract counts are related to the insurers' "improperly denying [their] coverage obligations" and the unjust enrichment focuses as an alternative theory on the excess premiums collected by the insurers for the time the plaintiffs were shut down or substantially impaired if there is no coverage. We will be watching this local case closely.

4-1 in early innings

In the first lawsuit alleging coverage, New Orleans restaurant Oceana Grill sued its insurer, Lloyd's of London, in *Cajun Conti LLC v. Certain Underwriters at Lloyd's London, Civil District Court for the Parish of Orleans, La.* The case argues the civil authority provision of its insurance policy was invoked because of restrictions and bans by local authorities.

The Grill alleged that the COVID-19 virus meets the definition of physical loss because "the global pandemic is exacerbated by the fact that the deadly virus physically infects and stays on the surface of objects or materials, 'fomites,' for up to twenty-eight days, particularly in humid areas below eighty-four degrees." The complaint also alleges that it is "clear that contamination of the insured premises by the Coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment."

Hundreds of cases have since been filed. Many of the lawsuits to date have involved restaurants and bars, but other industries have sued as well. Most suits to date have focused on themes similar to the *Cajun* suit. To date, the insurers have an early lead, 4-1, on matters directly related to business interruption and COVID-19. The five cases are:

- *Gavrilides Management Co. LLC v. Michigan Insurance Co.* (Michigan: insurer victory)
- *Rose's 1 LLC v. Erie Insurance Exchange* (D.C.: insurer victory)
- *Diesel Barbershop v. State Farm Lloyds* (Texas: insurer victory)
- *Studio 417, Inc. v. Cincinnati Insurance* (Missouri: policyholder victory)
- *Malaube LLC v. Greenwich Insurance Co.* (Florida: likely insurer victory)

If you have an opportunity, watch the *Gavrilides* arguments and decision. The defense counsel dominates arguments and the judge ruled against the plaintiff. Judge Joyce Draganchuk rejected the central argument made by plaintiff's attorney that the government order that restricted business to dine-in only amounts to a physical loss because the order effectively blocks public entry to the property. She responded, "That argument is simply nonsense." The judge also noted that the complaint states that the virus was never even on the property. The judge found:

"There has to be something that physically alters the integrity of the property. There has to be some tangible, i.e. physical, damage to the property."

The judge refused to allow a revised pleading, finding the lack of physical damage was dispositive.

In *Rose*'s, the court granted the defendant insurer's motion for summary judgment, reading the definition of direct and physical and loss and finding the weight of case law authority supported the defendant's interpretation of "direct physical loss."

In the third insurer win, *Diesel*, the court granted the motion to dismiss filed by State Farm, holding:

The Policies expressly state that State Farm does not 'insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]'

The court noticed that plaintiffs suffered damages from COVID-19, but that State Farm was not responsible, concluding:

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"While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims."

To date, only one court has found for the insured and that was on a motion to dismiss. That is the *Studio 41* decision. In that case, the court found that plaintiff had alleged sufficient facts to survive on its various counts, stating:

"Defendant's reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss…. Defendant relies on *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd*…. Defendant argues that 'Social Life famously states that the virus damages lungs, not printing presses.' …But the present case is not about whether COVID-19 damages lungs, and the presence of COVID-19 on premises… is not a benign condition…. Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable."

The court referred to its decision in *Studio 41* to deny insurer's motion to dismiss in a similar case. Last week, in Malaube, a magistrate judge recommended the U.S. district court reject a COVID-19 business interruption coverage case filed by a restaurant, but also addressed in detail the *Studio 41* case.

Conclusion

Like many coverage litigation, the facts involved, the policy language and how the jurisdiction has decided similar insurance questions will be very important. There is much left to play in the enormous coverage battle, and litigation around business interruption likely is not to be interrupted anytime soon.

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