Published on *The National Law Review* https://natlawreview.com

COVID-Related Insurance Claims Remain a Focal Point as the New Year Begins

Article By:

Nicole Wixted

Erin M. Turner

Afton J. Paris

At the start of 2021, one thing is clear: COVID-19 will continue to play a major part in insurance coverage litigation trends in the new year. Until now, the main focus has been on claims for lost business income due to shutdowns under various types of policies, commonly referred to as "business interruption" claims. That focus will likely continue through at least the first part of the year, as filings, decisions, and now trials in such cases have and will continue to shape the landscape of similar litigation for some time.

In mid-December, a state court in Louisiana conducted a trial over coverage for a restaurant group's losses due to diminished dining capacity. Plaintiffs brought a now familiar claim — that the "all risk" insurance policy they purchased provided coverage for the COVID-19 virus's presence on the physical surfaces of their premises because that presence constituted property damage. The insurer countered, arguing that the term "physical damage" did not include the effects of the COVID-19 virus because those effects could be cleaned off and therefore could not constitute **damage**.

Although a decision has yet to be issued in the Louisiana case, to date, about 100 decisions have been issued in state and federal court relating to similar lawsuits. Of these, most decisions have trickled down on the side of the insurers, with about 70% of decisions concluding that there cannot be or is not coverage for alleged losses due to the COVID-19 virus. These results are especially clear where the policy in question contains a virus exclusion — policyholders thus far have been extremely unsuccessful at surviving motions to dismiss under such policies.

Policyholders have had some success, however. Approximately 20 cases have proceeded past motions to dismiss and into the discovery phase. Some judges reason that "loss" and "damage," where undefined, have distinct meanings. Thus, the "physical loss" required for coverage could be satisfied even without specifically identifiable physical damage.

A few insureds have been even more successful, winning summary judgment against their insurers. The first decision affirmatively holding that there was coverage was issued in North Carolina state

court, where a group of restaurants brought suit alleging that the meaning of “direct physical loss” did not require physical alteration, and could instead be triggered by loss of use. The judge favored this argument, and the case is currently pending on appeal.

Additionally, there will be several COVID-19 related business interruption multidistrict litigation suits in the forthcoming months. The Judicial Panel on Multidistrict Litigation has created certain insurer-specific MDLs for claims based on loss of business income, as well as an MDL to handle travel insurance cases. The JPML declined to create a nationwide, industry-wide MDL to centralize **all** lost business income cases, however, recognizing that (1) questions of coverage are issues of state law, and (2) variations in policy language matter in deciding such questions.

As COVID-19 continues to dominate the news and people’s lives, it is possible that other coverage trends will emerge if insureds believe their policies should cover additional claims related to the pandemic. All signs indicate that decisions in business interruption cases will continue to shape coverage litigation for the foreseeable future, however, whatever other trends might emerge.

National Law Review, Volume XI, Number 7