Getting Insurance Coverage for COVID-19 Business Interruption Claims: New Helpful Evidence and A Cautionary Tale

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Hundreds of insurance coverage lawsuits pertaining to losses caused by the COVID-19 pandemic have been filed since the crisis began in early 2020. The majority of these lawsuits relate to claims under property insurance policies for business interruption and civil authority coverage. In essence, the disputes largely concern the requirement in many of these policies of "direct physical loss of or damage to property," with insurers arguing that the Coronavirus and/or COVID-19 does not cause physical loss or physical damage. Insurers also rely on the presence of virus and pollution exclusions when arguing coverage does not exist.

By contrast, insureds argue that the existence of the Coronavirus on their premises constitutes physical loss or damage, a position which the case law supports.[1] Moreover, not all virus and pollution exclusions are created equal, particularly in states where such exclusions may be limited to "traditional" environmental pollution.[2]

While the merits of these arguments have been discussed in the legal press at length,[3] several recent developments warrant further analysis, as does the general state of ongoing litigation . A review of the COVID-19-related business interruption insurance coverage lawsuits filed to date shows that a majority have been brought by restaurants, bars and retail shops using "plaintiffs" law firms that do not specialize in coverage disputes. Many of these insureds are small to medium-sized businesses which need regular and consistent cash flows to keep afloat and are thus vulnerable to being shut down for extended periods of time. Other, perhaps larger, insureds appear to be taking things more slowly given the facts that the COVID-19 crisis is ongoing and that many states and/or local governments have issued renewed shut down orders or are on the brink of doing so.

On July 6, 2020, the World Health Organization (WHO) received an open letter backed by 239 scientists from 32 countries warning of the "potential for airborne spread of COVID-

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[1] *See Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, No. 2:12-cv-04418, 2014 U.S. Dist. Lexis 165232, *19 (D.N.J. Nov. 25, 2014) (holding that the release of ammonia into the air within a facility constituted a physical loss under Georgia law); *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544, 548 (2015) (concluding that "physical loss" included changes perceived only by the sense of smell); *Farmers Ins. Co. v. Trutanich*, 123 Ore. App. 6, 10 (1993) (holding that an odor was "physical" and caused damage to a house).

[2] *See, e.g., Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 489 (Ill. 1997); *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal. 4th 635, 649-56.

[3] *See, e.g.,* https://www.nge.com/News-Events/119708/Client-Alert-Revisionist-Insurance-History-for-Virus-Related-Damage-and-Losses-Dont-Believe-the-Insurance-Industrys-Assertion-That-the-Coronavirus-Cant-Cause-Physical-Loss-of-or-Damage-to-Property.

19."[4] The evidence cited by the scientists suggests that even exhalation and talking cause the release of the virus in microdroplets which "will travel tens of meters" at "typical indoor air velocities" before settling on the floor and other surfaces.[5] This airborne transmission is said to operate "in parallel with the large droplet and fomite [surface to human] routes . . . ."[6] On July 7, 2020, the WHO admitted there is "emerging evidence" of airborne transmission.[7]

Airborne transmission is relevant to the business interruption and civil authority insurance coverage analysis;he airborne spread of the virus shows how easily surfaces of all kinds in insured property can become contaminated. It therefore stands to reason that large portions of insured premises could be contaminated as a result of just a single person infected with COVID-19 being present for a short period of time. Furthermore, the presence of lingering microdroplets in the air could also constitute "direct physical loss of or damage to property" as required under most policies providing coverage for business interruption or civil authority losses. Many courts have reached the same conclusion in similar circumstances.[8] In parts of the country with significant rates of infection, it is likely that any property where a substantial number of people congregate on a daily basis has the virus present.

Most COVID-19 business interruption lawsuits are still in the early stages, but there are two recent trial court decisions. In *Gavrilides Management Co. et al. vs. Michigan Ins. Co.*,[9] a Michigan trial court granted the insurer-defendant's motion to dismiss and found that direct physical loss of or damage to property "has to be something with material existence, something that is tangible . . . . that alters the physical integrity of property."[10] While insurers are likely to attempt to rely on this ruling, the insured's complaint, as the judge noted, *did not allege physical loss of or damage to the restaurant at issue and further stated that at no time had COVID-19 entered the restaurant via employees or patrons*. Rather, the complaint merely alleged loss of business due to executive orders shutting down the restaurant.[11] *The policy also had a particularly robust virus exclusion*.[12] The decision therefore has no applicability to cases in which physical loss of or damage to property is alleged where the Coronavirus or COVID-19 was present in the relevant premises and in cases where the policy contains no virus exclusion. Moreover, the case has no precedential value because the judge only made an oral ruling—there is no written decision and it is still subject to appeal.[13]

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[4] Lidia Morawska, Donald K. Milton, It Is Time to Address Airborne Transmission of COVID-19, *Clinical Infectious Diseases*, July 6, 2020, *available at* https://academic.oup.com/cid/article/doi/10.1093/cid/ciaa939/5867798.

[5] *Id.*

[6] *Id.*

[7] https://www.nytimes.com/2020/07/07/health/coronavirus-aerosols-who.html.

[8] *See Gregory Packaging, Inc.*, 2014 U.S. Dist. Lexis 165232, *19; *Mellin*, 167 N.H. at 548; *Trutanich*, 123 Ore. App. at 10.

[9] *Gavrilides Management Co. et al. vs. Michigan Ins. Co.*, Case No. 20-000258-CB (Circuit Court of Ingham County, Michigan).

[10] Transcript of Oral Argument, *Gavrilides Management Co. et al. vs. Michigan Ins. Co.*, Case No. 20-000258-CB (Circuit Court of Ingham County, Michigan July 1, 2020).

[11] *Id.*

[12] *Id.*

[13] See *Detroit v. Qualls*, 434 Mich. 340, 360 n.35 (1990) ("[I]t is only opinions issued by the [Michigan] Supreme Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis" in Michigan") (citing MCR 7.215(C)).

The case of *Social Life Magazine Inc. v. Sentinel Ins. Co. Ltd.*,[14] previously pending before the United States District Court for the Southern District of New York, has also made the news. Social Life Magazine was forced to shutter its operations due to the COVID-19 pandemic. Its subsequent claim for business interruption coverage was denied on the basis that the policy required that the "suspension must be caused by the direct physical loss of or physical damage to property." Social Life Magazine then filed a declaratory judgment action *and sought a preliminary injunction* requiring Sentinel to pay its business interruption loss. The insured argued, among other things, that its suspension of operations was necessitated by property damage caused by COVID-19. The court granted Sentinel's motion for summary judgment on the request for preliminary injunction, ruling that Social Life Magazine had not shown the requisite physical damage to property.[15]

The *Social Life Magazine* decision is likewise unworthy of precedential value. For starters, requests for preliminary injunctions involve a much higher bar for the party seeking the injunction as compared to a regular coverage action.[16] Moreover, the court specifically noted that COVID-19 was alleged to be "everywhere" in New York and found there to be a lack of compelling evidence that demonstrated the presence of the Coronavirus in the insured's building in such a way which necessitated the building's closure. The court drew a distinction between the facts of the insured's case and cases where Legionella bacteria is present in a "building causing [it] to be shut down."[17] A written decision was not issued and there will be no appellate ruling due to the dismissal of the case. In both *Gavrilides Management* and *Social Life Magazine*, representation of the policyholder was by lawyers who do not specialize in insurance coverage disputes.

Many courts have held that things such as fumes, gases and odors can cause "physical loss of or damage to property."[18] Others still have concluded that a tangible alteration to property is not necessary for coverage to exist with respect to policies requiring "physical loss of or damage to property" when dangerous materials are present throughout a building in such a manner as to render it unusable.[19] These decisions may provide a roadmap for insureds now that there is emerging evidence of airborne COVID-19 transmission. It is too early to tell how courts will rule if and when they are presented with allegations of physical loss or damage in disputes involving policies without specific virus exclusions in cases that do not involve the higher preliminary injunction standard. Nevertheless, these early decisions demonstrate the importance for both policyholders and insurance companies to hire experienced coverage counsel to represent them in novel and complex insurance coverage disputes.

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[14] *See Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, Case No. 20 Civ. 3311 (VEC) (S.D.N.Y.)

[15] Transcript of Oral Argument, *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, Case No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020).

[16] "A plaintiff seeking a preliminary injunction pursuant to Fed. R. Civ. P. 65 must establish that: (i) he is likely to succeed on the merits; (ii) he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in his favor; and (iv) an injunction is in the public interest." *H2O v. Town Bd. of E. Hampton*, 147 F. Supp. 3d 80, 95 (E.D.N.Y. 2015) (cleaned up).

[17] Transcript of Oral Argument, *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, Case No. 20 Civ. 3311, at 7:22 – 8:5.

[18] *See* n 1, *supra.*

[19] *See, e.g.*, *Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

If you have any questions regarding COVID-19 business interruption claims or other insurance policyholder issues, please contact Angela Elbert, aelbert@nge.com, Paul Walker-Bright, pwalkerbright@nge.com, Nicholas Graber, ngraber@nge.com.

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