New Developments in COVID-19 Insurance Coverage Litigation

by Rhonda D. Orin, Daniel J. Healy and Robert M. Horkovich

With another wave of COVID-19 wreaking havoc worldwide, recent insurance coverage litigation decisions have been building upon lessons learned since the pandemic began. Between March and October, more than 1,200 COVID-related lawsuits were filed by policyholders across the country. Many of the plaintiffs were restaurants, bars, hair salons and entertainment venues that had suffered staggering losses during extended government shutdowns.

These cases disputed business interruption claim denials that stipulated that no "direct physical damage" had occurred, or that exclusions for contamination or pollution applied. These early decisions, decided largely on the pleadings, went mostly against the plaintiffs on grounds including:

- In claims triggered by order of civil authority, there was no "direct physical loss of or damage to property."
- In business interruption claims, there was no "direct physical loss of or damage to the property," sometimes expanded to no "structural damage."
- There was no "structural alteration."
- Policies contained a virus exclusion.
- In recent weeks, however, many decisions indicate that the tide is starting to turn in favor of policyholders.

NEW VIEWS OF LOSS OR DAMAGE

A number of courts recently have rejected the narrow interpretation of "direct physical loss of or damage to property" and denied motions to dismiss COVID-19 complaints. This trend began in August in the Western District of Missouri. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, (Aug. 12, 2020), the court denied such a motion, ruling that the complaint had adequately pled a "direct physical loss" because the virus is a physical substance and it allegedly "attached to and deprive[d] plaintiffs of their property..." Other decisions in that district have held the same. An increasing number of courts have been following suit.

Probably the most significant decision in any coverage lawsuit thus far is the October 9 decision of a North Carolina state court to grant partial summary judgment to the policyholder in *North State Deli, LLC v. The Cincinnati Ins. Co.* This court recognized that "loss" and "damage" are different and independent grounds for coverage.

CHALLENGES TO THE VIRUS EXCLUSIONS

In September, the Middle District of Florida questioned whether the word "virus" makes any sense in the context of a mold and bacteria exclusion. In *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., Ltd.*, (Fla. Sept. 24, 2020), the court rejected the insurance company's contention that such an exclusion necessarily bars coverage for COVID-19 losses:

> *Additionally, it is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." (Id.). Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus*

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exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

That court also found that the extraordinary nature of the COVID-19 pandemic rendered all of the precedent cited by the insurance company inapplicable:

Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture.

Other courts have come to similar conclusions. In *Optical Services v. Franklin Mutual Ins. Co.*, (Aug. 13, 2020), a state court in New Jersey held in August that policyholders had alleged a direct covered loss because the shutdown orders produced a "loss of physical functionality." The court denied the insurance company's motion to dismiss on grounds that this is an unprecedented legal issue, with no applicable legal authority. State courts in Ohio and Pennsylvania have ruled similarly.

A LONG ROAD AHEAD

When a major coverage issue arises, such as the environmental and asbestos issues in the early 1980s, it can take decades for the law to become settled. More than 40 years after the filing of the first asbestos coverage dispute, the positions adopted by the courts have changed repeatedly and vary state-by-state. Those epic disputes will likely be dwarfed by the impact of the coronavirus pandemic, given its much broader impact on almost every segment of society and the economy.

The only certainty thus far is that COVID-19 coverage litigation is in its infancy. It is far too early for insurance companies to announce there is no coverage for these claims. It is also too early for policyholders to forego pursuing them. Instead, we should prepare for what is sure to be a long and bumpy ride. ■

Rhonda D. Orin is the managing partner and **Daniel J. Healy** is a partner in Anderson Kill's Washington, D.C. office. They specialize in helping policyholders obtain recoveries from insurance companies, including with regard to COVID-19 claims and have substantial experience in litigating environmental and asbestos coverage disputes. **Robert M. Horkovich** is managing partner and shareholder in the New York office of Anderson Kill and a trial lawyer who has obtained more than $5 billion in settlements and judgments for policyholders from insurance companies.

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