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Fla. Court Refuses to Apply So-Called 'Virus Exclusion' in COVID Insurance Lawsuit

As COVID-19 litigation has progressed across the country regarding insurance coverage for business interruption, insurers have cited an array of so-called "virus exclusions" to avoid their contractual obligations.

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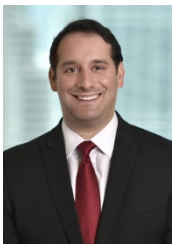

As COVID-19 litigation has progressed across the country regarding insurance coverage for business interruption, insurers have cited an array of so-called "virus exclusions" to avoid their contractual obligations. Simply stated, insurers have made an industrywide practice of discouraging and combating lawsuits by relying on any exclusion that has the word "virus" in it. The law in many jurisdictions, including Florida, provides that an exclusion only applies when it is clearly and unambiguously intended to bar coverage for the risk in question. But if this is true, is it appropriate for carriers to avoid coverage by citing exclusions drafted decades ago to address things like industrial pollution and fungus? One Florida court has now answered this question in favor of policyholders.

Urogynecology Specialist of Florida v. Sentinel Insurance, involved a medical office that was forced to temporarily close its doors due to the pandemic and civil authority orders. After the practice notified Sentinel of its business interruption losses, the insurer denied coverage because its policy purportedly excluded losses caused by a virus. In its motion to dismiss the policyholder's ensuing lawsuit in the Middle District of Florida, Sentinel argued that any COVID-19 losses were unambiguously excluded by its "Limited Fungi, Bacteria or Virus Coverage." This provision barred coverage for the "[p]resence, growth, proliferation, spread or any activity of fungi, wet rot, dry rot, bacteria or virus." The insured, in contrast, argued that an ambiguity in the insurance policy required the court to construe its terms in favor of coverage.

In denying Sentinel's motion, the court fundamentally rejected the premise that an insurer can avoid coverage by shoehorning COVID-19 losses into exclusions that are plainly not intended to address this type of pandemic. As the court found, "it is not clear that the plain language of the policy unambiguously and necessarily excludes the plaintiff's losses." The exclusion at issue stated 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.'" "Denying coverage for losses stemming from COVID-19, however, does not logically align with the groupings of the virus exclusion with the other pollutants such that the policy necessarily anticipated and intended to deny coverage for these kinds of business losses."

This opinion highlights the insurance industry's greatest weakness in attempting to apply "virus" exclusions: the overwhelming majority of exclusions cited by carriers to avoid coverage for COVID-19

losses *have nothing to do with a pandemic*. Rather, they were demonstrably drafted years ago to address risks entirely unrelated to the transmission of a virus. *Sentinel* exemplifies insurers' broader misguided efforts to equate COVID-19 to a fungus or rot caused by the elements over time. Attempts to apply "fungus" exclusions and other imprecise language quickly lose all credibility when analyzed under the law governing exclusions. In Florida—as in most jurisdictions—exclusions are strictly construed and insurers are responsible for clearly defining what's excluded. Carriers also bear the burden of demonstrating that a policyholder's losses are solely and entirely within the exclusion and that the exclusion has no other reasonable interpretation. This is an extremely high standard, particularly considering that many of the policies presently in dispute were issued *after* COVID-19 began spreading around the world. These insurers had every opportunity to include an express exclusion addressing the pandemic and chose not to do so. Under these circumstances, it strains credulity to believe that insurers intended to bar coverage for COVID-19 losses through common exclusions directed at fungi, rot, bacteria, or some generic form of "pollution."

For the majority of policy provisions that insurers now label as "virus exclusions," this term is a misnomer. Even the most cursory historical review confirms that they were developed and incorporated for reasons having nothing to do with virus transmission, much less the current pandemic. Courts and litigants must bear in mind that, regardless of which exclusion a carrier attempts to apply, the operative question is not whether the policy language can be interpreted to bar coverage. Nor is it whether the word "virus" appears somewhere in the exclusion. Rather, under the law of most jurisdictions, it is whether the insurer's interpretation of the exclusion clearly bars coverage for the losses at issue and is the *only* reasonable interpretation. If not, the policy is ambiguous and must be construed in the insured's favor.

Insurers' efforts to grasp at straws will only continue as courts further deconstruct their inapposite defenses. Indeed, in the first decision of its kind, a North Carolina court has now ruled as a matter of law that COVID-19 losses are covered because government orders caused policyholders to lose the physical use of and access to their businesses. *North State Deli v. Cincinnati Insurance,* No. 20-CVS-02569 (N.C. Sup. Ct., Cty. of Durham, Oct. 7, 2020). As more cases progress to the summary judgment and trial stages, the suggestion that "fungus" exclusions and other irrelevant provisions bar coverage will be further undermined. Policyholders that continue to weigh the merits of filing suit should not be misled by the rhetoric surrounding alleged "virus exclusions," and litigants must be prepared to expose insurers that are repeatedly misapplying policy language to avoid their obligation to pay.

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