Lawyer Insights

Construing Ambiguities: Insurers Cannot Meet Their Burden in COVID-19 Cases

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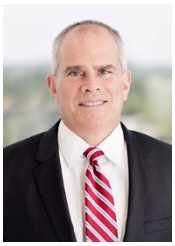
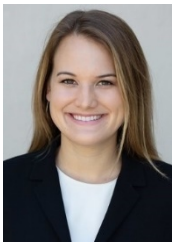
By Walter J. Andrews and Casey L. Coffey
Published in Daily Business Review | December 7, 2020

COVID-19 insurance litigation has steadily increased as policyholders seek recovery for their unprecedented losses arising from the pandemic and governmental orders. Across the country, courts continue to come down on opposite sides of the coin on whether COVID-19 constitutes "physical loss or damage" to property. Florida law is clear that ambiguity in the policy's language should be construed in favor of coverage. Given this clear requirement, courts should broadly construe coverage grants and strictly construe exclusions to resolve the dispute over what constitutes "physical loss or damage" in favor of policyholders. This is particularly true in light of the clearly reasonable alternative findings by multiple courts on this issue.

On one side, insurers have systematically refused to provide coverage for business-interruption claims and losses attributable to COVID-19. They have done so by asserting that COVID-19 does not constitute "physical loss or damage" and that the policies at issue contain so-called "virus" exclusions that preclude coverage for such loss. Policyholders, on the other hand, point to the clear physical nature of the virus and highlight that the "physical loss" threshold has been met: coronavirus particles that cause the highly contagious COVID-19 disease have forced closures by attaching to and damaging their property.

We previously discussed the groundbreaking case of *Studio 417 v. The Cincinnati Insurance,* one of the first opinions to hold that COVID-19 can cause "physical loss" under an all-risk commercial property policy. In *Studio 417*, the plaintiffs sought coverage for losses sustained when the pandemic and various closure orders forced them to shut down their hair salons and restaurants. The federal district court rejected the insurer's claim that the policyholders failed to adequately plead a "physical loss" because "direct physical loss requires actual, tangible, permanent, physical alteration of property." In a landmark victory for policyholders, the court found that the plaintiffs had "plausibly alleged that COVID-19 particles attached to and damaged their property." Refusing to conflate the terms, the court gave meaning to both "loss" and "damage" and reasoned that "loss" is "the act of losing possession." Here, the policyholders alleged that COVID-19 was a physical substance that attached to surfaces and rendered the property "unsafe and unusable," thus meeting the "physical loss requirement." Applying policy interpretation principles, the court concluded that the policyholders adequately stated a claim for "direct physical loss" and denied the insurer's motion to dismiss.

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Studio 417 is not alone in its decision. Now, at least 20 cases have been decided in favor of policyholders. For instance, as recent as Nov. 23, another court concluded that the policyholder suffered a direct physical loss arising from the pandemic. In *Perry Street Brewing v. Mutual of Enumclaw Insurance*, the court reasoned that the undefined phrases of "loss of" and "damage to" property are distinct from each other and must be given their plain meaning. The court found one reasonable interpretation of "loss" is the interruption of business operations due to governmental orders. The court correctly construed the policy in favor of coverage and held the policyholder suffered a loss when they lost the ability to use their property for its intended use.

These cases lead to one inescapable conclusion: that policyholders' interpretation of the "physical loss or damage" requirement is at least facially reasonable with respect to the COVID-19 pandemic. This is of critical importance for the countless coverage cases that will be decided in this state. Florida law is well settled that insuring agreements must be construed in the broadest possible manner to grant the greatest extent of coverage. If the policy language is susceptible of two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous and must be construed in favor of the insured without resorting to extrinsic evidence.

Under settled law, a policyholder's ultimate burden is not to demonstrate that its interpretation of an insuring agreement or an exclusion is the "correct" one. It need only demonstrate that its interpretation is reasonable. The fact that COVID-19 constitutes "physical loss or damage" has been validated around the country by over a dozen *judges* who have agreed with and adopted this approach. That has to be a per se determination of reasonableness. What could be better proof that the policyholders' interpretation is reasonable than the fact that so many judges have adopted the same interpretation? On an equal playing field, courts facing this question for the first time might reach different conclusions as to how the plain policy language should be applied. However, the field is not equal. Florida law is intentionally deferential to policyholders and ensures the availability of coverage so long as a reasonable interpretation supports it. Given that judges nationwide have found that COVID-19 satisfies the "physical loss or damage" requirement, it is difficult to see how any insurers could now credibly argue that this position is anything other than reasonable.

While policyholders' interpretation of "physical loss or damage" is the correct one under a plain reading of the policy language, their interpretation need only be reasonable under Florida law. At worst, the meaning of "physical loss or damage" is ambiguous and courts are bound to construe the policy in favor of coverage. Therefore, Florida courts should be reaching policyholder-favorable decisions in the COVID-19 coverage cases.

Walter J. Andrews *is a partner in the firm's insurance coverage group in the firm's Miami office. Walter's practice focuses on complex insurance litigation, counseling and reinsurance arbitrations and expert witness testimony. He can be reached at +1 (305) 810-6407 or wandrews@HuntonAK.com.*

Casey L. Coffey *is a clerk in the firm's insurance coverage group in the firm's Miami office. She can be reached at +1 (305) 536-2707 or ccoffey@HuntonAK.com.*