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Top Insurance Cases of 2020: Part 1-Business Interruption

The start of a new year gives us an opportunity to highlight some of 2020's most notable coverage decisions.

By Michael S. Levine, Latosha M. Ellis and Matthew Revis
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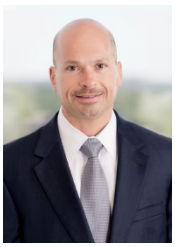

Not surprisingly, COVID-19 business interruption insurance disputes dominated media headlines for most of 2020. Nonetheless, there were a number of other insurance rulings that will undoubtedly shape the coverage landscape. Policyholders enjoyed a number of significant wins including significant victories related to COVID-19 business interruption cases. The start of a new year gives us an opportunity to highlight some of 2020's most notable coverage decisions.

COVID-19 Business Interruption

Insurance companies' widespread blanket denials of policyholders' claims for business interruption due to COVID-19—for companies ranging in size from small mom-and-pop shops to large retailers— prompted a flood of litigation in both state and federal courts. Although 2021 shows promise for gaining control over the disease, the resulting insurance disputes are certain to remain center stage. While insurers may be winning by the numbers, policyholders hold the advantage in the more thoroughly-reasoned decisions. Nonetheless, much still remains to be seen, likely for years to come, as appellate courts consider the trial court rulings. We highlight a few notable COVID-19 decisions from 2020 below.

- Court Concludes that COVID-19 Losses Can Qualify as "Direct Physical Loss. (https://www.huntoninsurancerecoveryblog.com/2020/08/articles/business-interruption/courtconcludes-that-covid-19-losses-can-qualify-as-direct-physical-loss/#more-12389)" *Studio 417, Inc., et al. v. The Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020).

In *Studio 417*, a federal district court found that COVID-19 can cause physical loss under business interruption policies. The case marked the first victory for policyholders in the COVID-19 context. The court rejected the argument often advanced by insurers that "all-risks" property insurance policies require a physical, structural alteration to trigger coverage. This decision shows that, with correct application of policy interpretation principles and strategic use of the pleadings and evidence, policyholders can defeat the insurance industry's "party line" arguments that business-interruption insurance somehow cannot apply to pay for the unprecedented losses businesses are experiencing from COVID-19, public-safety orders, loss of use of business assets, and other governmental edicts.

Notably, the court explicitly declined to follow the early COVID-19 decision trumpeted by insurers in *Social*

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Life Magazine, Inc. v. Sentinel Insurance Co., No. 1:20-cv-03311-VEC (S.D.N.Y. 2020). In *Social Life*, the insurer argued that *Social Life* had alleged that "the virus damages lungs, not printing presses," but the *Studio 417* court swiftly dismissed that position, reasoning instead that the policyholders had plausibly alleged that malign COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable. *Studio 417* also specifically differed from two prior seemingly pro-insurer decisions, *Gavrilides Mgmt. Co. v. Michigan Insurance Co.*, No. 20-258-CB-C30 (Mich. Co. Ct. July 1, 2020), and *Rose's 1 LLC, et al. v. Erie Insurance Exchange*, No. 2020-CA-002424-B (D.C. Super. Ct. Aug. 6, 2020) (which we have previously discussed here (https://www.huntoninsurancerecoveryblog.com/2020/08/articles/covid-19/d-c-decision-finding-no-direct-physical-loss-for-covid-19-closures-iis-not-without-severe-limitations/#more-12377)), where the trial courts held that the policyholders in both *Gavrilides* and *Rose's*, unlike those in *Studio 417*, failed to allege or proffer evidence that COVID-19 was present at or had physically damaged their properties. The *Studio 417* decision underscores that, in pursuing business interruption coverage for COVID-19 losses, it is key for policyholders to tie the elements of the coverage to the facts of the damage and loss, allegations that a court can use in denying facile arguments by insurers that somehow business-interruption coverages cannot be triggered.

- First Judgment Upholding Coverage for COVID-19 Business-Interruption Losses. (https://www.huntoninsurancerecoveryblog.com/2020/10/articles/business-interruption/firstjudgment-upholding-coverage-for-covid-19-business-interruption-losses/) *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C. Sup. Ct., Cty. of Durham, Oct. 7, 2020).

In a resounding victory for policyholders, a North Carolina court granted summary judgment to the policyholder and ruled, as a matter of law, that "all-risk" property insurance policies cover the business-interruption losses suffered by 16 restaurants during the COVID-19 pandemic.

The *North State Deli* court held that government orders mandating the suspension of business operations and prohibiting "all non-essential movement by all residents" caused "physical loss" of the policyholders' property under the policies. The policies at issue promised to pay for loss of "business income" and for "extra expenses" caused by "direct 'loss' to property … caused by … any Covered Cause of Loss." They defined "loss" as "accidental physical loss or accidental physical damage" to property. The policyholders moved for partial summary judgment that their losses were covered because the government orders caused them to lose the physical use of and access to their restaurants.

- Elegant Massage Leaves Virginia Policyholders Feeling Good in COVID Lawsuits (https://www.huntonak.com/en/insights/elegant-massage-leaves-virginia-policyholders-feelinggood-in-covid-lawsuits.html) and Federal Court Provides Soothing Comfort for Spa's COVID-19Business Income Claim. (https://www.huntoninsurancerecoveryblog.com/2020/12/articles/business-interruption/federalcourt-provides-soothing-comfort-for-spas-covid-19-business-income-claim/) *Elegant Massage, LLCv. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, *12-13 (E.D. Va. Dec. 9, 2020).

The U.S. District Court for the Eastern District of Virginia refused to dismiss a majority of the policyholder's breach of contract claim and its request for bad faith damages, declaratory judgment and class certification, all stemming from the insurers' denial of coverage for COVID-19 related business

income losses. The court explicitly found that a fortuitous event that renders an insured's property inaccessible can constitute a "direct physical loss" of that property even absent physical or structural damage and plaintiff's loss of use of its property – caused by the government shutdown orders issued to prevent the spread of the deadly COVID-19 virus – could constitute a "direct physical loss."

In reaching this outcome, the court found the phrase "direct physical loss" to be the subject of "a spectrum of legal definitions," which the court ultimately determined to require a finding of ambiguity. The court found that other judges had reasonably determined "direct physical loss" to have differing meanings, concluded the phrase was ambiguous, and construed coverage in favor of the insured.

In addition, the court held that the insurer failed to meet its burden to show that a Fungi, Virus, or Bacteria Exclusion applied because the insurer had not established a direct connection between the exclusion and plaintiff's claimed loss. More specifically, the court held that the anti-concurrent causation language did not exclude coverage, and would only apply where a virus had spread throughout the property, consistent with rulings from other federal courts. The court ultimately concluded that the exclusion required that the virus be the immediate cause of the chain of loss, which was not the case.

The court also addressed other exclusions commonly asserted by insurers in COVID-19 claims, finding that the Ordinance and Law Exclusion did not apply because the governmental orders restricting business due to the pandemic were not ordinances or laws and that the Acts or Decisions Exclusion could not preclude coverage because it was so ambiguous and broad that it could not be taken literally under its plain meaning.

Stay tuned for Part II, covering the other top insurance cases of 2020.

Michael S. Levine *is a partner in the firm's insurance coverage group in the firm's Washington office. Mike has more than 20 years of experience litigating insurance disputes and advising clients on insurance coverage matters. He can be reached at +1 (202) 955-1857 or mlevine@HuntonAK.com.*

Latosha M. Ellis *is an associate in the firm's insurance coverage group in the firm's Washington D.C. office. From advising clients at policy renewal and through the claims process to representing clients in litigation or alternative dispute resolution of coverage disputes, Latosha delivers comprehensive end-to-end counsel. She can be reached at +1 (202) 955-1978 or lellis@HuntonAK.com.*

Matt Revis *is an associate in the firm's insurance coverage group in the firm's Washington D.C. office. He can be reached at +1 (202) 419-2125 or mrevis@HuntonAK.com.*