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Why COVID-19 Insurance Suits Should Not Be Consolidated

By **Adam Fleischer** (May 6, 2020)


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In the most massive policyholder marketing effort in recent memory, counsel have flooded courts, newspapers and airwaves with a common mantra: Small businesses paid premium for business interruption insurance; COVID-19 shelter-in-place orders interrupted their business, and courts must therefore issue blanket rulings that all business interruption policies pay for lost income due to COVID-19.

In painting this mantra, policyholders utilize three weapons to pursue quick, communal rulings: (1) a series of class actions seeking sweeping business interruption rulings; (2) a single federal multidistrict litigation to create and then resolve allegedly common coverage questions; and (3) a petition to a state supreme court to leapfrog lower courts and obtain a one-size-fits-all coverage ruling. This article explores the legal and logical failings in viewing COVID-19 coverage issues as such a homogenous monolith, which they are not.

Class Action: Challenges to Commonality

Over the last eight weeks, there have been over 120 insurance coverage lawsuits filed seeking compensation from insurers for income lost due to COVID-19. Of those suits, almost 40 are class actions, some in federal court and some in state court. These suits include ones filed in California against Topa Insurance Company, in Florida and New York against Lloyd's of London, in Illinois against Society Insurance, in Ohio against Owners Insurance Company, and in Oregon against Oregon Mutual Insurance Company — to name a few.

No matter the jurisdiction, the class actions all generally seek business interruption coverage under one representative policy's provisions for business income, extra expense and civil authority. They allege that businesses had to cease or reduce operations due to a variety of government orders to quell the spread of COVID-19.

They each propose a class that is generally comprised of all persons who purchased business interruption coverage from the defendant insurer, and then suffered a business loss due to COVID-19 governmental orders. In some instances, the putative class even includes policyholders who have not yet made a claim or been denied coverage.[1]

Because a hallmark prerequisite of the various business insurance policies at issue is the requirement of direct physical loss or damage to property, the heart of each class action is a generic allegation: "The presence of any SARS-CoV-2 particles causes direct physical harm to property." This allegation is the foundation upon which the class representative must build the requisite typicality and commonality between all proposed class claims, as required under FRCP 23 or the state equivalent.

However, an examination of the COVID-19 claims within each proposed class reveals that such business interruption claims are indeed unique and individual contract claims, not lending themselves to a true class-wide analysis or treatment.

Individual Evidence of Physical Damage

The sheer range of differently situated policyholders and circumstances is worthy of consideration. For example, a policyholder who presents its insurer evidence of food damaged by documented COVID-19 contamination may require a distinctly different coverage analysis than a policyholder who simply presents evidence that a customer who visited the premises and was known to later test positive for COVID-19.

Similarly, a policyholder who presents evidence of COVID-19 exposure to metal surfaces repeatedly over a prolonged period might require a distinctly different coverage analysis than a policyholder who presents evidence of a suspected one-time COVID-19 exposure to cardboard or paper products, upon which the virus may exist briefly, if at all.[2]

Individual policyholders who present unique evidence of whatever alleged physical damage they believe their business suffered could be differently situated than those policyholders who allege they simply were prevented from operating by a governmental directive, but with no even arguable evidence of contamination that physically altered or damaged their property.

Individual Evidence of Suspended Operations

Many of the business interruption coverage provisions cited in the class action complaints require as a condition of coverage that the direct physical loss at issue caused a necessary suspension of business operations. Whether each putative class member indeed ceased business operations would also inevitably differentiate class members.

For example, policyholders operating restaurants might be differentiated based on some having completely closed due to COVID-19, as opposed to those that remained open for delivery or curb-side pick-up. Similarly, countless boutiques and toy stores have also continued to provide either curb-side pick up or sales over the internet. The extent to which these individual businesses either suspended business, or simply slowed their business, may merit separate analyses.

In fact, the putative plaintiff in one COVID-19 class action is a Minneapolis dentist who was allegedly forced to suspend or reduce her practice. The complaint cites a March 2020 American Dental Association recommendation that dentists nationwide concentrate on emergency dental care, which was the same recommendation adopted the same week in a Minnesota emergency order.

This raises the question as to how different policyholders applied the order. Did some continue office hours for procedures that others considered nonemergency? Did some suspend their practice completely while others only reduced their practice? These factual differences could result in differently situated coverage analyses not common across a class.

Individual Policy Evidence

Of course, a predominant presumption in the class complaints is that all policies issued to all class members by the defendant insurer(s) were the same forms. It remains to be seen whether every business interruption policy issued across a putative class was identical — but it would be unlikely that there were no differences in forms or endorsements across a large and diverse class of types of business, size of business and perhaps even the issuing office or broker.

One veiled effort to obscure the differing circumstances between forms and policyholders is the common class action refrain

The insurer had an opportunity to adopt a 2006 form virus exclusion (CP 01 40 07 06). Because the insurer did not do so, COVID-19 claims are automatically covered, regardless of subtle differences in forms.

This argument ignores the language of the ISO circular that accompanied the 2006 exclusion, which not only states that "[a]n allegation of property damage may be a point of disagreement in a particular case," but also explains that the endorsement clarifies the preexisting intent that viruses are not property damage:

> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent. In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses.

When a claim presents no evidence of physical damage, the presence or absence of a virus exclusion is likely a distinction without a difference, and is not a characteristic that automatically makes all business interruption policies the same or different.

In fact, insurance policies are often issued by brokers or offices located in different states, to policyholders who themselves are located in different states. Determining which state's law applies to the differing nuances of individual insurance coverage claims also weakens the concept of a national class subject to common application of a uniform law.

Multidistrict Litigation: Challenges to Commonality

On April 20, plaintiffs in two federal lawsuits filed against Admiral Indemnity Company in the Eastern District of Pennsylvania served a petition under U.S. Code Title 28 Section 1407 to create a national MDL for federal COVID-19 coverage claims.[3] The petition argues that there exist related actions in federal courts across at least nine states, which should all be consolidated for pretrial purposes in the U.S. District Court for the Eastern District of Pennsylvania.

The common theme of the nine federal cases, according to the Pennsylvania plaintiffs, is that all cases seek business interruption insurance arising from various shelter-in-place orders at the national, state, county and local levels. The plaintiffs cite President Donald Trump's April 10 comments to the press to argue the imminence and national importance of finding business interruption coverage through these suits:

> You have people that have never asked for business interruption insurance [payouts] and they've been paying a lot of money for a lot of years for the privilege of having it. And then when they finally need it, the insurance company says "we're not going to give it." We can't let that happen.

The MDL petition argues that the question of COVID-19 coverage should be addressed in "a uniform manner as opposed to potentially disparate treatment by different courts throughout the country." It cites the existence of one common legal question: Do the governmental orders trigger coverage under the business interruption insurance policies and do any exclusions apply?

The petition continues: "This central question is too important to the survival of the insured businesses ... to leave to various courts across the country that could reach divergent and conflicting results." The petition summarily concludes that this central issue will be the same across all cases.

A consideration here is that the central issue will not be the same across all cases. An MDL would bring together a variety of policyholders from dissimilar industries such as hospitality, retail, manufacturing, real estate, professional services and more. The questions and evidence of alleged physical damage can expectedly differ from one industry to the next. Furthermore, such a national MDL also must combat the nuanced differences between the hundreds of shelter-in-place orders, and whether they can really lend themselves to a common discovery approach.

Significantly, there are no predominating issues of federal law that pervade the hypothetical COVID-19 MDL, as may exist in MDLs addressing federal Racketeer Influenced and Corrupt Organizations Act claims, or federal Controlled Substances Act claims or the like. The COVID-19 coverage claims are rooted in the individualized factual and contractual analysis and discovery, likely guided by differing state law.

For example, Ohio law has concluded mildew on the exterior siding of a residence is not direct physical loss"because it doesn't impact the structure and is capable of being wiped clean.[4]

Other rulings, such as in North Carolina, have found that the inability to conduct business due to constrained access, or the suspension of business for reasons other than actual physical damage to the business, does not constitute a covered business interruption claim.[5]

In Colorado, one federal court predicted that state law would find a policyholder's economic losses cannot constitute direct physical loss or damage"to property without evidence of a distinct, demonstrable physical alteration to the property.[6]

The nuances of state law would likely be the centerpiece of both factual and legal inquiries of coverage on a case-by-case basis, which may render a national MDL more of a political effort to avoid the appropriate analyses rather than to properly conduct it.

Pennsylvania Supreme Court: Challenges to Commonality

Last week, on April 29, the insured in a putative Pennsylvania state court class action took the unusual step of filing an emergency application for extraordinary relief to the Pennsylvania Supreme Court.

In the application, restaurant owner Joseph Tambellini argues that the Pennsylvania Supreme Court should exert immediate jurisdiction over the coverage lawsuit against Erie Insurance Company, thereby allowing the court to issue a fast-tracked coverage ruling against Erie on all COVID-19 business interruption claims in the state.

The unspoken sentiment is that, if the Pennsylvania Supreme Court can issue such breakneck rulings on all Erie Insurance policies without seeing the policies or the supporting evidence, then it may do the same to the COVID-19 business interruption claims against other insurers.

The Pennsylvania Supreme Court has the right to snatch a pending lawsuit from any lower

state court based mainly on state statute Title 42 of Pa. Consolidated Statutes Annotated Section 726. Section 726 allows the court to exercise extraordinary jurisdiction over any case that presents an issue of immediate public importance.

Such jurisdiction has been exercised in election-related lawsuits, state constitutional issues or criminal matters involving imminent execution. In 112 published opinions by the Supreme Court of Pennsylvania analyzing its extraordinary jurisdiction, none have involved insurance coverage.

As with the class action and MDL prospects discussed above, the petition to the extraordinary jurisdiction of a state supreme court is a transparent effort to judicially drape a generic political solution over insurance contracts that are riddled with individual issues of fact, contract law interpretation, and intent. Erie will file its response to the application on May 13.

Conclusion

It is ironic that many of the class actions accuse the insurer defendants of inappropriately issuing blanket coverage positions without tending to the specific elements of each policyholder's unique claim — which is exactly the same collective approach now sought by some policyholder suits.

While COVID-19 business interruption claims may indeed share a broad question of whether insurance was intended to pay for the economic cost of slowing the spread of COVID-19, the determination of that issue is likely addressed through the facts, policy provisions and state law raised by the varying claims themselves.

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[1] The inclusion within a proposed class of those policyholders who have not yet made claims, or been denied coverage, also raises serious questions as to whether such class members present a "justiciable controversy" within the requirements of various declaratory judgment statutes under which the class claims are brought.

[2] https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext.

[3] A second MDL petition was filed on April 21, 2020 seeking a COVID-19 coverage MDL in the Northern District of Illinois, and a third MDL petition was filed on April 24, 2020 seeking an MDL in the Southern District of Florida.

[4] Mastellone v. Lightning Rod Mut. Ins. Co., 884 N.E.2d 1130 (Ohio Ct. App. 2008).

[5] Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp., 486 S.E.2d 249 (N.C. Ct. App. 1997).

[6] Hasan v. AIG Prop. Cas. Co., No. 16-cv-02963-RM-MLC, 2018 WL 10335670 (D. Colo. Aug. 2, 2018), aff'd, 935 F.3d 1092 (10th Cir. 2019).