

November 25, 2020

BUSINESS INTERRUPTION INSURANCE UPDATES

Several prominent North Carolina restaurants scored a victory last month when a Durham County judge ruled that their insurance policies covered their COVID-19-related losses. Plaintiffs' counsel successfully argued that Governor Cooper's executive orders, which restricted access to restaurants and limited the size of group gatherings, caused the plaintiff restaurants to suffer accidental physical losses or damages within the meaning of the policies. Judge Orlando F. Hudson, Jr., agreed with Plaintiffs in his Summary Judgment Order that a "direct physical loss" was not limited to the physical alteration of property but also could be a "scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property." Defendants plan to appeal this ruling.

What can we learn from this case? First, always make a claim. A quick Google search shows numerous articles by insurance companies in which the carriers explain that business interruption policies will not cover COVID-19 losses. Of course carriers are saying this—it's in their financial interest to discourage their policy-holders from filing claims. Don't rely on statements or advice from your carrier. Seek professional legal help and file a claim. What do you have to lose? You paid significant premiums and deserve the benefit of the full coverage afforded by your policy. Professional counsel will ensure that you preserve your claims by meeting any applicable deadlines or can assist with requesting extensions. They also can evaluate your policy and advise on the extent of coverage.

To substantiate your claim, assemble all of your financial records and document when and why you had to close, or limit, your business and for how long. Note whether the closure was due to government-mandated shutdowns, regulations, or COVID-19 exposure. Similarly, if your customers, vendors, or suppliers were impacted by COVID-19, which in turn affected your business, document this as well. Track the impact on your sales and operations, and calculate expenses you incurred in employee pay, decontamination costs, new technology, workplace policy changes, etc.

Keep in mind that not all policies are the same. For example, policy language differs and may include defined exclusions that could carve out COVID-19 losses from coverage. In the restaurant case above, the Plaintiffs argued that they specifically negotiated with their carrier to include virus-related losses as a covered loss, as they had previously seen the impact the norovirus had had on the restaurant industry. Thus, a differently worded and negotiated policy could lead to a different outcome. Further, coverage decisions likely will vary from state to state, and carriers are fighting to avoid paying out under their policies. Popular arguments by defense counsel include: (1) couching COVID-19 losses under an exclusion, such as trying to define the virus as a contaminant, irritant, pollutant, or biological agent; (2) insisting that there must be tangible, physical alteration to property;

and (3) claiming that closure of a business in an effort to prevent the spread of a virus, prevent a potential loss, or out of fear of contracting the virus, does not constitute a direct physical loss.

It will be interesting to see how case law develops—the restaurant plaintiffs argued that:

COVID- 19 alters the physical landscape of the surfaces on which it is present, rendering those surfaces impure and consequently impairing their value and usefulness. While COVID- 19 may be smaller and less visible than rust, mold, or paint, the virus has mass and is necessarily physical in nature, traveling to other objects and causing harm.

There are prior analogous cases in which courts have held that chemical releases, odors, and smoke, while not structurally altering a building, have rendered structures uninhabitable or inappropriate for their intended use, thus constituting a direct physical loss.

While legal uncertainty abounds, the ultimate answer may come from a legislative solution on the federal or state level. We will keep you posted on any developments.

We want to ensure our clients get their full contractual benefits under their policies—carriers have a duty to honor valid claims. To explore filing a claim, or to receive counsel regarding your coverage, contact **Bob Burchette** (704-998-2321); **Kimberly Kirk** (704-998-2318).