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Are business losses for COVID-19 covered?

■ *Washington has a reputation as a policyholder-friendly state when it comes to insurance coverage and COVID-related losses.*

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Washington policyholders have a better shot at obtaining coverage for COVID-related losses than policy holders in other states around the country, continuing a trend and reputational status for Washington as a generally pro-policyholder state when it comes to coverage interpretation.

Ten months ago, construction, real estate, and insurance coverage lawyers from all over the country started receiving phone calls from clients frantic with questions over how to handle a host of issues caused by COVID shutdowns. At the time, no one was certain as to how the courts would eventually resolve inevitable disputes between contractor/owner, landlord/tenant, or insurer/insured.

The wheels of justice turned even more slowly in 2020, with courts limiting operations and most folks navigating how to work from home; however, there is now a decent sample size of litigation to examine as it relates to insurance coverage for COVID-related losses. The legislative branch is also getting in on the action, albeit with slightly different COVID-concerns in mind. The insurance industry had hoped for legislation that would shield their insureds from COVID-related litigation as they continue to operate during the pandemic and hoped the GOP would advocate for their agenda. As Senate control is now with the Democrats, such legislation is unlikely based on pressure from unions, consumer protection organizations and even trial attorneys who have urged Democrats to reject the proposed corporate shield.

As of Jan. 15, the Hunton Andrews Kurth COVID-19 Complaint Tracker shows a total of 7,962 COVID-related lawsuits have been filed since March 20 of last year. The University of Pennsylvania's Carey Law School maintains a more narrowly focused litigation tracker which provides updates on COVID-related insurance disputes. As of the week of Dec. 7, the Carey tracker shows that dispositive motions (e.g., motions to dismiss and motions for summary judgment) were filed in 1,432 of the COVID-related insurance cases on record. Of those, 92% of cases involved recovery of business-income losses, with the food services (restaurant and bar) making up the largest number of claimants.

Motions to dismiss in insurance disputes are commonly filed by insurers, asking the court to determine that the complained-of losses are not covered by the subject policy. Penn's Carey Law School found that in cases where motions to dismiss were filed, 62% resulted in full dismissal with prejudice, 18% resulted in dismissal without prejudice, and only 20% survived, with the motion to dismiss being denied. Only three policyholders have won summary judgment rulings obligating insurers to pay their pandemic-related losses.

Closer to home, Carey Law School reports 51 COVID-related cases have been filed in Washington. To date, dispositive motions were decided in two of the 51 cases, both, interestingly, in state rather than federal court. As opposed to what appears to be the trend across the nation, the Washington courts in both cases sided with the insured/policyholder.

In *Perry Street Brewing Company LLC v. Mutual of Enumclaw Insurance Co.*, the court granted the plaintiff/policyholder's motion for partial summary judgment, concluding that plaintiff's business insurance policy did cover the plaintiff's business income losses. Under the terms of the policy, the court considered whether the business income losses resulted from "direct physical loss of or damage to" property. Noting that the policy did not define "direct physical loss of or damage to," the court applied the ordinary (dictionary) definitions of the terms as meaning "loss," including "destruction, ruin or deprivation." The court found that, "at a minimum," the plaintiff had a "deprivation" of its business property, explaining that the interruption of plaintiff's business operations as a result of the governor's stay-at-home orders meant the property could not physically be used for its intended purpose, and that plaintiff suffered a loss therefrom.

The defendant/insurer in *Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co.* moved to dismiss the plaintiff's claims, arguing they failed to state a claim for "direct physical loss of or damage to" the covered property. Once again, the policy did not define "direct physical loss," and thus the court looked to the "plain, ordinary, and popular" meaning of the terms. Like in Perry Street Brewing, the court applied the same dictionary definition of "loss," including "destruction, ruin, or deprivation." Acknowledging that while the plaintiff/policyholder did not allege any physical alteration of the property, "physical loss or damage" was still susceptible of more than one interpretation, and thus dismissal was not appropriate.

At present, Washington policyholders are beating the national odds, and Washington maintains its reputation as a policyholder-friendly state when it comes to insurance coverage and COVID-related losses.

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