

Article

Matters To Consider: Sorting Out Business Interruption Insurance in the Midst of a Pandemic

04.29.20

Dallas Business Journal

The developments and news stories regarding business interruption claims for restaurants have been dizzying to say the least. Do not believe everything you read in the press and on the internet. The insurance industry has been very aggressive in getting the word out that there is no coverage for business interruption claims arising out of recent events. The most important message is to have your policy language carefully reviewed by someone knowledgeable about this very special type of coverage. Free advice from those affiliated with the insurance industry is likely to be suspect.

So, why are there so many lawsuits and what are they about? We have seen a recent spate of class actions and a federal multi-district litigation (“MDL”) action filed. These cases and most of the initial suits are targeting one special subset of business interruption coverage, civil authority income loss coverage. This coverage is focused on government orders barring the ordinary operations at insured locations. It is typically limited to 30 days of business interruption. As a result, it is considered by many to be more of a low-hanging fruit that could help, but not really solve the bigger problems of restaurateurs.

Other suits, including one recently filed in Dallas County by Lombardi’s Family Concepts against a Chubb affiliate, Indemnity Insurance Company, is an example of the broader recoveries that can be sought. Suits like this seek basic business interruption coverage, which has higher limits of liability available and is not limited to 30 days of coverage. These suits make the point that settling for just civil authority coverage is seeking less than half a loaf. The requirements for establishing broader coverage are generally the same.

Both claims for basic business interruption and claims for civil authority coverage require proof of a damage trigger. Most policies require a “direct physical loss of or physical damage to” insured property. Not surprisingly, spokesmen for the industry try to make these provisions look like they only apply where the property is physically altered, such as a physical deformation or destruction. No one is correcting them, pointing out that their policies cover “loss of property” not just property damage that physically alters the property.

Most of the cases currently on file do not involve any of the numerous virus or microorganism exclusions. The Lombardi’s suit makes a direct attack on the Insurance Services Office “virus” exclusion. Insurance companies and their representatives are vigorously marketing to the insurance public in the midst of this crisis that this is a pandemic exclusion. Members of the insurance industry have emphasized in marketing appearances and in the media that these are pandemic exclusions. They are not. Words like pandemic and “widespread” are simply not used in the vast majority of these exclusions. They tend to be awkward attempts by the insurance industry to deal with and exclude narrow categories of scientific concepts. There will likely be regulatory and fair notice issues raised on these exclusions. In addition, they may be contrary to public policy because they penalize insureds who comply with necessary orders and business practices intended to preserve lives and protect property. Don’t take just anyone’s word for it; have the language in your policy reviewed to see if there is a worthwhile route to coverage.

The recent legislative attempts to deal with business interruption are yet another battleground for misinformation. Starting with New Jersey, a number of jurisdictions have tried to legislatively mandate business interruption coverage be accepted. The insurance industry is trying to cast this as an attempt to attack freedom of contract, urging it would be unconstitutional to legislatively rewrite insurance contracts. The lead in a recent Wall Street Journal article stated: "Restaurants and their allies are lobbying President Trump and Congress to press insurance companies to cover 'business interruption' claims stemming from the coronavirus, even where restaurants have policies that exclude losses from pandemics." As noted above, there are no "pandemic" exclusions. In short, the proposed legislation recognizes that the primary arguments presented by the industry are not meritorious. The legislation seeks to prevent carriers from dragging insureds, who are already financially strapped, into protracted litigation.

Will legislation on a state or federal level ultimately solve some of these problems? It is possible that the Louisiana proposal for a 9-11 type fund might work. The key will be the basis of the determination of the risk, for which the carriers will have to contribute in order to get immunity from further suits. It should not be limited to just their potential exposure for civil authority claims. That would be another proposed solution that would deliver only half a loaf to the restaurant industry. The best course is to become actively involved in analyzing your precise policy terms, and making sure that the full scope of recovery is clear and made a part of the conversation. If the task is left up to others, with a wait and see approach, your individual interests and ultimately that of the restaurant industry as a whole will not be served.

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