

In The News

Business Interruption Lawsuits Are Not Going Tenants' Way

09.03.20

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Coronavirus insurance disputes levied by commercial real estate tenants and landlords have filled up court rosters over the past six months.

U.S.-based bars, restaurants, retailers and other businesses have filed more than 1,000 lawsuits since March, asking courts to interpret portions of their commercial liability policies, including business interruption insurance, and rule that insurance companies must pay out for losses from the coronavirus shutdown.

Though court decisions are still extremely limited, so far these suits aren't falling in these businesses' favor.

Business interruption insurance offers financial offsets when a company loses income during a covered, insurable event.

Early on in the pandemic, the insurance industry warned many types of coverage, including business interruption, likely would not apply. But restaurants and other tenants and landlords have kept pushing the issue, looking for loopholes to force insurance carriers to pay out to make up for income losses sustained when having to shut down their businesses to prevent the spread of the virus.

A tool operated by the University of Pennsylvania Carey Law School that tracks coronavirus-related litigation found 948 out of 1,092 virus-related lawsuits on file nationwide as of Aug. 14 relate specifically to business interruption insurance disputes. Another 837 cases dispute the contract's extra expense insurance coverage, while 815 cases involve disagreements over civil authority clauses. The tracker trails live court filings by about two weeks and covers filings with the court from March 16 to Aug. 14.

"The early cases were predominantly restaurants, but you are lately seeing a lot of other businesses now begin to pay attention and to bring these claims," Munsch Hardt attorney Michael Huddleston said.

Restaurants in Manhattan were hit particularly hard by the pandemic and now have advocates like NYC Hospitality Alliance Executive Director Andrew Rigie pushing for business interruption insurance to be paid out, while also asking for the government to step in where a backstop is needed.

Rigie said most of the restaurants he represents had no idea a pandemic could be covered differently than other insurance triggers like storms. Their claims are being routinely denied, he said.

"Across the board, [insurance companies] are saying they don't cover civil shutdowns. They don't cover the pandemic. They don't cover viruses. There are various different reasons [given for the denial] based on the individual policies but really across the board they are all being denied," Rigie said.

That denial so far is being repeated when the case goes to court. While only a handful of the 1,092 lawsuits filed have had preliminary rulings, courts have shown a penchant for siding with the insurer and enforcing exclusions in the insurance contracts that block virus or pandemic coverage.

"There have been fewer than 10 decisions that have come out at this point," said Goldberg Segalla partner Jared Greisman, who works specifically on first-party property insurance coverage and has been studying the issue since the pandemic broke out in March.

"We are probably up to six or seven — all except one have been favorable to the insurer's position."

Several of the courts have said in their preliminary rulings that actual property damage is required before business interruption coverage kicks in, Greisman said.

One such case is a federal lawsuit out of San Antonio involving Diesel Barbershop and other businesses. The plaintiffs suing for business interruption coverage in that case failed to survive an insurer's motion to dismiss when the court found the virus did not create actual physical damage to the property, the Insurance Journal reports.

Courts in Michigan, Washington, D.C., and a federal court in California all reached similar conclusions and dismissed actions brought by businesses trying to rely on business interruption coverage, The Future of American Insurance & Reinsurance reported.

So is it worth it to pursue these claims at all?

It depends, Greisman said. Before doing so, the insured should have an attorney review its insurance contract, because the likelihood of a suit continuing or being dismissed will probably come down to the exact wording and presence (or lack thereof) of a few specific phrases.

Huddleston said that to date, cases decided against the insureds on business interruption coverage have uniformly included language in which the contract requires "direct physical loss or damage to the insured's property."

"That is quite a bit different from one that says it covers physical loss of or damage to the property," Huddleston added. "The battleground is how do you give 'loss of' meaning if you as the insurance companies are urging for there to be a deformation or physical alteration to the property."

In these instances, there is room for an attorney to argue that the phrase "physical loss of property" does not mean damage is required to trigger the business interruption coverage, just loss of use of the property because of the virus, according to Huddleston.

He said the Diesel Barbershop case had two important distinctions in the wording of the contract that contributed to its denial. For starters, the language of the contract on its face requires actual physical damage to be present as opposed to the more ambiguous "loss of property" language in some contracts. The insurance agreement also had what he refers to as a "draconian" exclusion policy that is drastically different from the 75 to 80 insurance contracts Huddleston has reviewed over the past six months.

Greisman said courts in the few cases already reviewed for dismissal have generally agreed that when an alleged financial loss from the coronavirus fails to show actual physical damage to a property, the business interruption coverage is not triggered.

One case that stands out involves a series of businesses that sued insurers to enact their business interruption coverage in Kansas City.

In that case, the judge agreed to let the plaintiffs' lawsuit continue against the insurance companies even though the insurers claimed the policy required actual physical damage to the property for the coverage to kick in, the Kansas City Star reports. The contract involved in that case was distinctive in that it did not include a policy exclusion for virus coverage.

Even though there is some debate as to whether a 2006 form exclusion barring virus losses from coverage altogether is effective in protecting insurance companies from coronavirus claims, Greisman said courts have so far shown a tendency to bar coverage outright when a virus exclusion is in place.

"If a business owner, tenant or property owner's policy includes the exclusion for losses due to the virus, there is no decision or indication out there at this time that they can secure coverage," Greisman said. "And it seems to me it would be hard for someone to justify investing in such a lawsuit."

Some see impetus for lawsuits in the lack of transparency from the insurance industry.

"The insurance company is engaged in a public relations campaign to blur the reality," Rigie said. "Not all policies have these exclusions, but restaurants do not know. They are paying their premiums for business interruption [insurance], and they now have a shutdown related to this situation and have gone to file claims and are being denied."

More than individual contracts and payouts could be at stake in this wave of lawsuits. The fate of commercial liability coverage overall hangs somewhat in the balance as well, insurance and actuarial experts say. Legislatures or courts could at any point require insurance companies to pay for pandemic coverage that they specifically excluded or never collected premiums for prior to the pandemic.

"On the assumption that the coverage was not there, and it wasn't charged for [in premiums], then it would be dangerous to the insurance mechanism and in the long run not a good idea," American Academy of Actuaries senior property/casualty fellow Richard Gibson said when asked about the risk of legislatures forcing coverage.

It's also highly unlikely pandemic coverage will be offered by insurers in the future without some type of government backstop or federal Band-Aid to effectively cover the risks.

"I think it's possible that it would be unaffordable," Gibson said. "I think there is a really good likelihood the cost of coverage would be so high that people would not want to buy it."

The full article can also be viewed [here](#).

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