FirstLook

Issues and Developments in Insurance Law

STEPTOE & JOHNSON

Tracking COVID-19 Litigation Trends

MDL Treatment of COVID-19 Business-Interruption Claims

By: Shaina L. Richardson

In the wake of government shutdowns necessitated by the COVID-19 pandemic, insureds filed business-interruption and other claims with their commercial-liability insurers. As insurers denied those claims, insureds filed suit, creating a nationwide spate of cases involving business-interruption coverage. Plaintiffs in many of those cases have attempted to obtain consolidation and centralization of the cases in a multi-district litigation, or MDL.

The Judicial Panel on Multidistrict Litigation ("JPMDL") was created in 1968 to centralize similar litigation pending in different federal district courts.[1] The JPMDL may consolidate civil cases "involving one or more common questions of fact" in one district for pretrial proceedings, provided the transfer would further "the convenience of parties and witnesses" and "promote the just and efficient conduct of such actions."[2] These MDLs are presided over by either a circuit or district court judge.[3] "[A]t or before the conclusion of" pretrial proceedings in the MDL, the JPMDL remands the individual cases to their transferor districts.[4] The JPMDL may transfer and consolidate actions on its own initiative or upon motion filed "by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate."[5]

The JPMDL has considered motions to consolidate more than 600,000 cases and millions of claims across a broad spectrum of litigation categories.[6] In 2020, the JPMDL granted 26 motions for centralization, denied 244 motions for centralization, and issued a total of 473 orders.[7] As of March 15, 2021, 185 MDL dockets were pending in 46 transferee districts.[8] Of these 185 MDLs, approximately 44% contain between 11 and 100 individual pending actions.[9] A small percentage, approximately 9%, contain 1,000 or more individual pending actions.[10] The litigation categories of these pending MDLs vary widely, from products liability (accounting for 33% of MDLs in 2020) to securities (accounting for 2.7% of MDLs in 2020).[11] Of the 185 currently pending MDLs, only 2 involve COVID-19-related business-interruption claims against insurers.[12]

In August 2020, the JPMDL considered two motions to centralize pretrial proceedings for actions involving declaratory judgment and/or breach of contract claims against commercial-property insurers relating to business-interruption losses caused by the COVID-19 pandemic.[13] Although the motions involved only 15 actions, the JPMDL received notice of 263 related actions, which were pending in a total of 48 districts nationwide and named more than 100 insurers.[14] The JPMDL rejected outright the movants' request to centralize all of the actions in an industry-wide MDL, explaining that the differences in defendants, insurance policy language, and state law "will overwhelm any common factual questions."[15]

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The JPMDL also declined to create create regional- or state-based MDLs, for the same reason: these MDLs "still would involve multiple defendants with different policies, coverages, exclusions, and endorsements."[16]

Instead, the JPMDL found persuasive the movants' arguments for MDLs that are limited to a single insurer or group of related insurers.[17] There, the JPMDL explained, the individual actions would likely involve similar policy language, common discovery, and common pretrial motions practice, which would realize the convenience and efficiency benefits of an MDL.[18] Because the proposals for insurer-specific MDLs were not fully briefed, the JPMDL issued show-cause orders for five insurers: Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; the Hartford; Travelers; and Society Insurance.[19]

In early October 2020, the JPMDL denied centralization regarding the first four insurers and granted centralization as to the litigation involving Society.[20] The critical difference for the panel was "Society's status as a regional insurer operating in only six states," which "meant the transferee judge would be tasked with a more manageable litigation than an MDL with a potentially nationwide scope."[21] In December 2020, the JPMDL granted a similar motion as to lawsuits brought against another regional insurer, Erie Insurance Property & Casualty Company.[22] As with the Society MDL, the JPMDL found that the similar factual issues among, and defined geographic scope of, the individual actions meant that centralization of the claims against Erie would "create substantial efficiencies for the parties and the courts."[23]

Although the Society[24] and Erie[25] MDLs are still in their infancy, others will undoubtedly follow on their heels as plaintiffs attempt to find the most efficient means of litigating COVID-related business-interruption claims. Litigants can expect the JPMDL to apply its statutory criteria to determine whether business-interruption claims against a given insurer should be consolidated in an MDL.[26] When determining whether the statutory criteria are satisfied, the JPMDL will likely continue to assess whether the actions sought to be centralized involve a regional carrier or a nationwide insurer;[27] whether the legal and factual allegations in the individual actions are sufficiently similar such that common discovery will be warranted;[28] whether centralization will provide an efficient "route to resolution";[29] and whether the insurer utilizes substantially similar policies.[30]

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[1] *See* 28 U.S.C. § 1407; JUD. PANEL ON MULTIDISTRICT LITIG., Overview of Panel, https://www.jpml.uscourts.gov/overview-panel-0 (last visited Apr. 2, 2021). The JPMDL is composed of seven circuit and district judges designated by the Chief Justice of the Supreme Court of the United States. 28 U.S.C. § 1407(d). No two judges on the JPMDL may be from the same circuit. *Id.* At least four members of the JPMDL must confer to take any action. *Id.*

[2] 28 U.S.C. § 1407(a).

[3] 28 U.S.C. § 1407(b).

[4] 28 U.S.C. § 1407(a).

[5] 28 U.S.C. § 1407(c).

[6] JUD. PANEL ON MULTIDISTRICT LITIG., *supra* note 1.

[7] JUD. PANEL ON MULTIDISTRICT LITIG., *Calendar Year Statistics January through December 2020*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (last visited Apr. 2, 2021).

[8] JUD. PANEL ON MULTIDISTRICT LITIG., *MDL Statistics Report—Distribution of Pending MDL Dockets by Actions Pending (Mar. 15, 2021),* https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-15-2021.pdf.

[9] *Id.*

[10] *Id.*

[11] JUD. PANEL ON MULTIDISTRICT LITIG., *MDL Statistics Report—Docket Type Summary (Mar. 15, 2021)*, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-March-15-2021.pdf; JUD. PANEL ON MULTIDISTRICT LITIG., *supra* note 7.

[12] *See* JUD. PANEL ON MULTIDISTRICT LITIG., *supra* note 11.

[13] *In re COVID-19 Bus. Interruption Prot. Ins. Litig.,* 482 F. Supp. 3d 1360, 1361 (J.P.M.L. 2020).

[14] *Id.*

[15] *Id.* at 1362.

[16] *Id.* at 1363. The JPMDL explained that "[a]ny efficiencies with respect to common discovery and motion practice would be outweighed by the unique discovery and motion practice as to each insurer." *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1364; s*ee also In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2969, __ F. Supp. 3d ___, 2020 WL 7384529, at *1 (J.P.M.L. Dec. 15, 2020).

[20] *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2969, __ F. Supp. 3d ___, 2020 WL 7384529, at *1 (J.P.M.L. Dec. 15, 2020).

[21] *Id.* at *2. By contrast, the JPMDL found that the structure of Lloyd's of London, "an insurance market in which more than 90 'syndicates' agree to accept several liability for a percentage of the coverage provided by a particular insurance policy, would "drastically expand the scope of this MDL." *In re Certain Underwriters at Lloyd's, London, COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2961, ___ F. Supp. 3d ___, 2020 WL 5887416, at *2 (J.P.M.L. Oct. 2, 2020). As to Cincinnati Insurance Company, The Hartford, and Travelers, the JPMDL denied centralization because those actions could be more timely resolved in the transferor courts. *In re Cincinnati Ins. Co. COVID-Bus. Interruption Prot. Ins. Litig.,* MDL No. 2962, ___ F. Supp. 3d ___, 2020 WL 5884791, at *2 (J.P.M.L. Oct. 2, 2020); *In re Hartford COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2963, ___ F. Supp. 3d ___, 2020 WL 5884782, at *2–3 (J.P.M.L. Oct. 2, 2020); *In re Travelers COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2965, ___ F. Supp. 3d. ___, 2020 WL 5884785, at *1–2 (J.P.M.L. Oct. 2, 2020).

[22] *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2020 WL 7384529, at *4.

[23] *Id.* at *3.
[24] The Society MDL was transferred to the Northern District of Illinois on October 2, 2020, where it is pending before Judge Edmond E. Chang. *In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, Nos. 20-cv-2813, 20-cv-5981, and 20-cv-2005 (N.D. Ill.) On February 22, 2021, Judge Chang denied motions to dismiss and for summary judgment filed by Society as to Plaintiffs' business-interruption claims. Judge Chang granted certain of Society's motions in some of the bellwether cases involving Section 155 claims, and coverage theories under the Civil Authority and Contamination provisions, as well as the Sue and Labor clause. Society is seeking an interlocutory appeal as to those rulings.
[25] The Erie MDL was officially transferred to the Western District of Pennsylvania on January 7, 2021, where it is pending before Chief Judge Mark R. Hornak. *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 1:21-mc-00001 (W.D. Pa.). As of April 2, 2021, no substantive action has occurred in the case.
[26] Before consolidating actions into an MDL, the JPMDL is required to find that the actions "involve[e] one or more common questions of fact" and conclude that transfer will serve "the convenience of parties and witnesses and . . . promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a).
[27] *See In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2020 WL 7384529, at *2.
[28] *See, e.g., id.* (explaining that the Erie business interruption cases involve a general assessment of whether COVID-19 caused "loss" or "damage" to property and whether any of the policy exclusions apply).
[29] *See id.* at *2 ("[T]his litigation demands efficiency. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders.").
[30] *Id.*

COVID-19 Business Interruption Litigation: An Overview
By: Megan Farrell Woodyard

It has been more than a year since COVID-19 began to disrupt the status quo in the United States. The response led to a radical shift in our personal and professional lives with businesses and schools shuttered, substantial safety and health concerns, and an uncertain financial picture for millions. Widespread government shutdown and stay-at-home orders led many businesses to experience significant economic losses as they were forced to close, reduce capacity, or otherwise limit commercial activity. Many of those affected have sought to recoup their losses by making claims under their business interruption ("BI") insurance policies, with varying degrees of success. As insurers have denied many of these claims, their insureds have resorted to litigation. Since March 2020, nearly 1,600 lawsuits have been filed in state and federal courts regarding the availability of BI coverage.[1] As more of these cases are filed and decided, several trends have developed.

This litigation typically turns on two issues. First, whether there has been "physical loss or damage" as is often required under the policy language, a condition which many insurers argue does not occur when the insured's business is restricted only because of government shutdown orders. Most policies require the business interruption to result from "direct physical loss or damage" to the policyholder's property. If the property is closed due to public health orders related to COVID-19 but the property itself remains habitable, then the direct physical loss requirement likely will not be met. Indeed, many courts across the country have now considered this issue and have held that a direct physical loss or damage requires some kind of tangible damage to the covered property. *See, e.g., Sandy Point Dental, PC v. Cincinnati Ins. Co.,* 488 F.Supp.3d 690 (N.D. Ill. 2020) ("COVID-19 did not physically alter appearance, shape, color, structure, or other material dimension of dentist office so as to constitute direct physical loss under insurance policy, as required for property-damage coverage…The critical policy language here – 'direct physical loss' – unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than the forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure."); *Diesel Barbershop, LLC v. State Farm Lloyds,* 479 F.Supp.3d 353 (W.D. Texas 2020) (granting motion to dismiss because COVID-19 did not cause a "distinct, demonstrable physical alteration of the property" rather than just a detrimental economic impact); *Whiskey River on Vintage, Inc., v. Ill. Casualty Co.*, No. 4:20-cv-185 (S.D. Iowa Nov. 30, 2020) (Court grants Defendant's motion for judgment on the pleadings and concludes "that it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient."); *Soundview Cinemas v. Great American Ins. Group, et al.*, No. 605985/2020 (Sup. Ct. Nassau Cty. New York Feb. 10, 2021) (granting insurer's motion to dismiss, stating while the Court "is sympathetic to the economic consequences" resulting from COVID-19 closure orders, loss of use due to those orders does not constitute "direct physical loss of or damage to the property" required to trigger BI coverage.).

On the other hand, some courts have ruled in favor of claimants after finding that policy language is sufficiently ambiguous and must be construed in favor of the insured. In January 2021, an Oklahoma state court granted the Cherokee Nation's motion for partial summary judgment in a BI coverage case versus Lexington Insurance Company.[2] The policy provided coverage for "all risk of direct physical loss or damage" but did not define that phrase.[3] The Court found the phrase to be "susceptible to two interpretations from the standpoint of a reasonably prudent layperson" and therefore, ambiguous, resulting in a finding for the plaintiffs on the basis that if their property could not be used for its intended purpose, their losses were covered even without physical alteration of the property.[4]

Also, in Ohio, a federal court granted summary judgment for plaintiffs on their coverage issues against Zurich American Insurance Company even where the parties stipulated that the insured's restaurant premises were not closed because of the presence of COVID-19 or any infected person, or because of any physical alteration of or damage to the premises.[5] The Court found that the policy language covering "direct physical loss of or damage to 'real property'…" ambiguous because it could be reasonably interpreted to mean that physical loss of the real property is something different than *damage* to the real property.[6] Plaintiffs argued they lost the real property when the government ordered that the properties could no longer be used for their intended purposes as dine-in restaurants.[7] Under Ohio law, if a policy is reasonably susceptible to more than one interpretation, it must be construed strictly against the insurer and in favor of the insured. [8]

In a similar interpretation, the federal court for the Eastern District of Virginia denied State Farm's Motion to Dismiss a massage parlor's claims for BI losses when orders from the CDC and Virginia's governor closed all massage parlors.[9] The Court found that Elegant Massage made a plausible claim that it suffered a "direct physical loss" triggering BI coverage when its property was deemed "uninhabitable, inaccessible, and dangerous to use" because of the risk of COVID-19 by the government orders, even though there was no physical damage.[10] The Court noted that various other courts have interpreted the phrase "direct physical loss" in a variety of ways, and found it plausible that the plaintiff suffered such a direct physical loss because "the facts of this case are similar to those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss."[11]

The second recurrent issue is whether the policy includes a virus exclusion, a widespread insurance industry change made after the 2002-2003 SARS outbreak in Asia, which resulted in millions of dollars of claims for BI losses.[12] As a result of the lessons insurers learned in the aftermath of SARS, many commercial policies now include exclusions for losses caused by viruses and bacteria. The existence of such an exclusion has been fatal to many COVID-19-related BI claims. See, e.g., *Riverside Banquets v. Travelers Casualty Ins. Co. of America*, 1:20-cv-03768, Order Granting Insurer's Motion to Dismiss (N.D. Ill., Jan. 7, 2021) (Court dismissed claim with prejudice where "the plain language of the Virus Exclusion is dispositive" and unambiguous with "clear, sweeping, and all-encompassing" language that covered "any virus" and all claims arising "directly or indirectly" from a virus.); *Digital Age Marketing Group, IMC v. Sentinel Ins. Co. Lmtd. d/b/a the Hartford*, 20-cv-61577, Order Granting Insurer's Motion to Dismiss (S.D. Fla. Jan. 8, 2021) (holding that virus exclusion which barred direct or indirect damage caused by a virus was unambiguous and barred coverage). The virus exclusion has been upheld even in cases where the plaintiffs argue that the virus is not the proximate cause of their losses, rather they have been economically damaged by the shutdown orders. See, e.g., *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (Court finds virus exclusion applies and defeats coverage, refuting Plaintiff's contention that closure order was the cause of its business losses rather than the coronavirus. "The only reasonable conclusion is that the Order – and, by extension, Plaintiff's business interruption losses – would not have occurred but for COVID-19."); *accord Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-1869, 2020 WL 7395153, at *8 (E.D. Pa. Dec. 17, 2020) ("In an attempt to circumvent this exclusion, the insureds argue that the cause of their losses and damages is the shutdown orders, not the COVID-19 virus. This effort fails."); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020) (where the policy excluded loss or damage "caused directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," holding that, because the plaintiff's dental practice's damages "resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a 'Covered Cause of Loss' under the plain language of the policy's exclusion").

At least one trial court has even found that virus exclusions do not exclude coverage for COVID-19 because a virus is not the same as a pandemic, and if the insurer "intended for a 'pandemic' to be excluded from coverage," then it should have "explicitly excluded" pandemics from coverage. *McKinley Development Leasing Co. Ltd., et al. v. Westfield Ins. Co.*, 2020-cv-00815, Order Denying Insurer's Motion to Dismiss (Stark Cty Ohio Feb. 9, 2021).

Although there are more than 200 COVID-19 BI cases which have been dismissed on the merits in federal court[13], there is still some degree of unpredictability for the future of such litigation. A number of cases have been dismissed without prejudice, leaving plaintiffs the opportunity to amend their complaints and try again to assert claims which will survive the dismissal standards.[14] Seeking clarity given the number of cases filed and the disparity in rulings across the courts, some state courts have sent certified questions to their appellate courts to make rulings on issues of coverage.

For example, an Ohio judge certified the following question to the Ohio Supreme Court: "Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?"[15] In her ruling, Judge Benita Pearson noted that "dozens if not hundreds" of insurance coverage claims for COVID-19 related losses were pending in Ohio courts and suggested the Ohio Supreme Court should "bring uniformity to the application of state law" to the policy language commonly at issue in these disputes.[16] As discussed elsewhere in this newsletter, the JPML has certified several MDLs to consolidate certain claims, and state and federal legislatures are evaluating the need for legislation to respond with uniformity to the business losses suffered by their constituents. The Insurance Company Team at Steptoe & Johnson PLLC continues to monitor the status of COVID-19 business interruption insurance cases and will provide further updates as developments occur.

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[1] Per the Covid Coverage Litigation Tracker, a multi-sourced database tracking data on insurance coverage cases related to the Covid 19 pandemic, created by the Insurance Law Center and University of Pennsylvania Carey Law School, 1,572 cases have been filed as of April 2, 2021. The total number of cases filed may exceed what is tracked by the CCLT, due to limits of data available online, especially from state courts. See, cclt.law.upenn.edu/cclt-case-list/ (last accessed April 2, 2021).

[2] *The Cherokee Nation, et al., v. Lexington Ins. Co., et al.,* Case No cv-2020-140, Order and Opinion granting Plaintiff's Motion for Partial Summary Judgment (Cherokee Cty, Okla., Jan 29, 2021).

[3] *Id.*

[4] *Id.*

[5] *Henderson Road Restaurant Systems, Inc., dba Hyde Park Grille, et al., v. Zurich American Ins. Co.*, Case No. 1:20CV1239 (N.D. Ohio Jan. 19, 2021).

[6] *Id.*

[7] *Id.*

[8] *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380 (Ohio 1988)

[9] *Elegant Massage LLC v. State Farm Mut. Auto. Ins. Co. et al.*, No. 20-cv-265, Order, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).

[10] *Id.*, at pp 19-20.

[11] *Id.* at p. 20.

[12] "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage.", The Washington Post, April 2, 2020.

[13] Covid Case Litigation Tracker, http://cclt.law.upenn.edu (last accessed April 2, 2021).

[14] For example, in Pennsylvania federal court, an insurer's motion to dismiss was recently denied even though the coverage claim failed under the policy as written because there was no direct physical loss or damage to the property. In its Complaint, the policyholder alleged that it had reasonable expectations that the policy would provide coverage if its business was forced to shut down and the Court found these allegations "plausibly allege facts which could give rise to a basis to afford coverage." *Human & Resources LLC, d/b/a Cadence Restaurant v. Firstline Nat'l Ins. Co.*, No. 20-cv-2152, 2021 WL 75775, Memorandum and Order Denying Insurer's Motion to Dismiss (E.D. Pa. Jan. 8, 2021).

[15] *Neuro-Communication Services, Inc. v. Cincinnati Ins. Co., et al.*, Case No. 20CV01275, Order Certifying Question to the Supreme Court of Ohio (N.D. Ohio Jan. 21, 2021).

[16] *Id.*, at p. 4.

Attempted Legislation to Change Meaning of Clear Contractual Language: COVID-19 Business Interruption Claims and Insured Indemnity

By: R. Mitch Moore, Esq.

The COVID-19 pandemic has provided businesses with a level of uncertainty that, until the events of the last year, had never been faced before. From governmental Orders mandating business closure, to navigating the waters of employee sick leave, unemployment benefits, small business loans, contact tracing, supplying personal protective equipment, and so much more, COVID-19 has introduced an unmatched level of precariousness and inconsistency. Of course, at the center of these "uncertain times" is a concern among businesses and individuals as to how to financially recover from closures and losses relative to COVID-19 – both regarding business interruption and claims of personal injury for the contraction of the disease. For many, the first place they turn for compensation is their commercial insurer; "am I covered for this?"

While an insured's first instinct may be to seek coverage, the plain language of most commercial policies clearly excludes losses relative to COVID-19. Indeed, many insurance policies contain provisions excluding losses relative to biological agents, viruses, acts of God, etc. However, just as COVID-19 has presented uncertainty for the consumer, the pandemic and reactive legislation have muddied the waters relative to an insurer's responsibility to indemnify for business interruption and commercial loss claims relative to COVID-19. This article seeks to provide some clarity in an uncertain situation, examining state legislation in Ohio, Pennsylvania, and West Virginia relative to Business Interruption Claims and COVID-19 liability immunity.

Business Interruption Legislation

Demonstrative of the uncertainty in whether business interruption claims are covered under a typical business interruption policy are two recent cases from the United States District Court for the Northern District of Ohio – in which two different judges presented with similar factual circumstances made opposite rulings on the duty of an insurer to cover a business interruption claim arising out of COVID-19.[1] This uncertainty has triggered multiple state legislatures to propose legislation clarifying, if not creating, an obligation of an insurer to cover business interruption claims.[2] Specifically, the legislative bodies in Pennsylvania and Ohio have proposed legislation on this point.[3]

i. Ohio

The Ohio Legislature was quick to propose legislation early in the COVID-19 pandemic, introducing House Bill 589 on March 24, 2020; a mere 11 days after the Federal Government declared a nationwide emergency relative to COVID-19.[4] House Bill 586 was proposed to "require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics and to declare an emergency."[5] The bill mandated that "every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption . . . shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency."[6] However, the legislation only applied to a business with 100 or fewer employees, and provided the insurer with an avenue to recover paid claims from a fund collected and maintained by the State's Superintendent of Insurance.[7]

HB 589 failed to pass a committee vote in the House's Insurance Committee, and no further action on the bill was taken.[8] The Ohio Legislature has yet to introduce subsequent legislation to replace HB 589, but the recent decisions in *Santo's Italian Café, LLC v. Acuity Ins. Co.* and *Henderson Road Restaurant Systems, Inc. v. Zurich Am. Ins. Co.*[9] may prompt the legislative body to provide clarity to the courts sitting within the state as to whether business interruption policies operate to indemnify for a loss sustained as a result of COVID-19 closures.

ii. Pennsylvania

The Pennsylvania General Assembly introduced legislation in 2020 as Senate Bill 1114, which was designed to provide coverage for business interruption insurance during the COVID-19 emergency.[10] SB 1114, like Ohio HB 589, died in the Banking and Insurance Committee during the last legislative session.[11]

Subsequently, though, the General Assembly introduced Senate Bill 42 on January 20, 2021, demonstrating interest from at least some legislators in the Assembly to mandate payment for COVID-19 business interruption claims.[12] SB 42 states "[a]lthough businesses may have insurance to account for losses related to business interruptions, they are prohibited from making such claims because of a 'virus exclusion' to covered perils related to global virus transmission and pandemic."[13] Seeking to override those bargained-for policy exclusions, SB 42 provides "a policy of insurance insuring against a loss related to property damage, including the loss of use and occupancy and business interruption, shall be construed to include among the covered perils coverage for loss or property damage due to COVID-19..."[14] SB 42 appears to have stalled in committee, having no activity on the bill since its referral to Banking and Insurance on January 20, 2021.[15]

While no legislation relative to an insurer's duty to indemnify for a business interruption claim caused by COVID-19 has passed in Ohio or Pennsylvania, the uncertainty of splits among judges in the United States District Court for the Northern District of Ohio, matched with a prolonged pandemic now in its 13th month of business closures, layoffs, and shutdowns is reason to continue to monitor proposed legislation on this point.[16]

COVID-19 Immunity

While issues relative to first party business interruption claims are a focus for many insurers, concerns of third-party claims for the contraction and spread of COVID-19 while in a commercial setting – a restaurant, business, hospital, nursing home, etc. – are also areas of interest for the general liability insurer of those commercial enterprises.[17] To mitigate these concerns and to provide businesses and their insurers with some certainty in forecasting for claimed losses, many states have either proposed or enacted legislation to afford commercial entities immunity from claims for losses and damages relative to COVID-19.[18] West Virginia was one of the first to pass such a bill, providing one of the broadest immunity statutes on the issue of COVID-19 claims.

West Virginia SB 277 states that it was enacted to "[e]liminate the liability of businesses, entities, . . . health care providers, [and] health care facilities, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19."[19] The liability protections contained within the Act, which are retroactive as of January 1, 2020, apply "to any cause of action accruing on or after that date."[20] The law is clear, "there is no claim against any person, essential business, business, entity . . . for loss, damage, physical injury, or death arising from COVID-19. . . ."[21] And, while the legislation does contain an exception where the actor "engaged in intentional conduct with actual malice," this newly enacted legislation serves to thwart nearly any legal claim that an individual may have relative to the contraction of COVID-19.

The COVID-19 pandemic is still ongoing and still posing a public health crisis, but state legislative bodies have begun to answer the call of attempting to provide clarity in an otherwise unclear situation. Legislation providing broad immunity for personal injury and damages claims relative to the contraction and spread of COVID-19 is beginning to become codified as state law throughout the country, and it appears at this time that reactive legislation attempting to change the meaning of policy language in business interruption policies and the various exclusions therein has reached a stalemate.[22] Steptoe & Johnson PLLC will continue to closely monitor developments relative to the issues discussed in this article. If you would like to discuss COVID-19 legislation, feel free to contact a member of the Insurance Company Team.

[1] *Santo's Italian Café, LLC v. Acuity Ins. Co.*, No. 1:20-CV-01192 (N.D. Oh., Dec. 20, 2020) (holding that the "virus exclusion" in a policy operated to exclude coverage for a claimed loss); *Henderson Road Restaurant Systems, Inc. v. Zurich Am. Ins. Co.*, 1:20-CV-1239 (N.D. Oh., Jan 19, 2021) (holding, in part, that "Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders.")

[2] *State Legislatures Seek to Protect Insureds From COVID-19 Business Interruption,* A. Levin, E. Schreffler, JDSUPRA, available online at https://www.jdsupra.com/legalnews/state-legislatures-seek-to-protect-7482411/.

[3] Pa. SB 1114 (April 15, 2020); Pa. SB 42 (Jan. 20, 2021); OH HB 589 (March 24, 2020).

[4] *COVID-19 Emergency Declarations,* FEMA, available online at https://www.fema.gov/press-release/20210318/covid-19-emergency-declaration (last visited April 2, 2021).

[5] Oh. HB 589

[6] *Id.* at § (B).

[7] *Id.* at § (D)(2);(E).

[8] *See, House Bill 589*, The Ohio Legislature, available online at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-589 (last visited April 2, 2021).

[9] *See supra*, n. 1.

[10] Pa. SB 1114 (April 15, 2020)

[11] *See* Bill Information Regular Session 2019-2020 Senate Bill 1114, Pennsylvania General Assembly, available online at https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1114 (last visited April 2, 2021)

[12] Pa. SB 42 (Jan. 20, 2021).

[13] *Id.* at § 2(7).

[14] *Id.* at § 4(a).

[15] *See supra*, n. 11.

[16] For a more comprehensive analysis on common law developments relative to COVID-19 and business interruption claims, see *COVID-19 Business Interruption Litigation: An Overview* by Megan Farrell Woodyard.

[17] *Businesses could face billions of dollars in lawsuits from employees who brought Covid-19 home to relatives,* NBC News, Reuters, available online at https://www.nbcnews.com/business/business-news/take-home-lawsuits-over-covid-infections-could-be-costly-u-n1241230 (last visited April 2, 2021); *Liability Immunity Laws for Business May Impact Insurance Industry*, American Bar Association, Thomas F. Morante, Yani R. Contreras, available online at https://www.americanbar.org/groups/business_law/publications/blt/2020/07/liability-immunity-laws/ (last visited April 2, 2021).

[18] *See States Take the Lead With Business COVID-19 Immunity Statutes*, Bloomberg Law, Erica James, Raymond Krncevic, available online at https://news.bloomberglaw.com/class-action/states-take-the-lead-with-business-covid-19-immunity-statutes (Oct. 23, 2020).

[19] W. Va. Code § 55-19-2(b)(1).

[20] *Id.* at § 55-19-9(a).

[21] *Id.* at § 55-19-4.

[22] *See Supra* n. 18.

Steptoe & Johnson PLLC's Insurance Company Team

Team Leaders
Laurie C. Barbe, *Member* Morgantown
304.598.8113 laurie.barbe@steptoe-johnson.com

Melanie Morgan Norris, *Of Counsel* Wheeling
304.231.0460 melanie.norris@steptoe-johnson.com

Team Members - West Virginia
W. Randolph Fife, *Member* Charleston
304.353.8115 randy.fife@steptoe-johnson.com

Ancil G. Ramey, *Member* Huntington
304.526.8133 ancil.ramey@steptoe-johnson.com

Michelle E. Gaston, *Member* Charleston
304.399.8842 michelle.gaston@steptoe-johnson.com

Andrew P. Smith, *Member* Huntington
304.526.8084 andrew.smith@steptoe-johnson.com

Hannah Curry Ramey, *Of Counsel* Huntington
304.526.8126 hannah.ramey@steptoe-johnson.com

R. Mitch Moore, *Associate* Morgantown
304.598.8153 mitch.moore@steptoe-johnson.com

Shaina Richardson, *Associate* Morgantown
304.598.8122 shaina.richardson@steptoe-johnson.com

Megan Farrell Woodyard, *Associate* Huntington
304.399.8838 megan.woodyard@steptoe-johnson.com

Team Members - Kentucky
Benjamin L. Riddle, *Of Counsel* Louisville
502.423.2045 benjamin.riddle@steptoe-johnson.com

Gregory A. Jackson, *Associate* Lexington
859.219.8226 greg.jackson@steptoe-johnson.com

Team Members - Texas
Jason R. Grill, *Member* The Woodlands
281.203.5764 jason.grill@steptoe-johnson.com

Ed Wallison, *Member* The Woodlands
281.203.5766 ed.wallison@steptoe-johnson.com

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More than 50 areas of practice

90 lawyers recognized in The Best Lawyers in America®

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Top ranked by Chambers USA in a number of areas including Real Estate Law, Corporate/ Commercial Law, and Litigation

14 attorneys listed as leaders in their field by Chambers USA

Three Fellows of the American College of Trial Lawyers

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Steptoe & Johnson Insurance Company Team

Steptoe & Johnson's Insurance Company Team has more than 100 years of experience providing legal service and advice to the insurance industry. Our attorneys possess a wealth of knowledge and understanding of insurance issues. We are prepared to manage insurance carriers' complex legal issues and defend insurance companies during claim investigations.

How We Have Helped

- Preparing insurance coverage opinions
- Developing successful strategies used in federal and state courts to resolve complex insurance claims
- Defending first party cases involving bad faith claims, unfair claim settlement practices, and general first party responsibilities
- Providing advice regarding the regulatory aspects of insurance
- Insurance claim handling training
- Compliance issues, including the Unfair Trade Practices Act
- Investigating fraudulent fire and theft claims, including examinations under oath
- Investigating insurance losses for subrogation potential