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Attorneys Comment on The Morning Show Suit Over BI
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In late July, the company that produces the TV show "The Morning Show" filed a COVID-19 related business interruption lawsuit against a Chubb Ltd. unit claiming breach of contract and bad faith. The case is *Always Smiling Productions LLC. v. Chubb National Insurance Co.*

Always Smiling Productions LLC produces The Morning Show and filed the suit in U.S. District Court in Los Angeles. The suit charges that Chubb National Insurance Co. refused to pay its business interruption claim in connection with COVID-19 related shutdowns beginning in March of 2020 because the production company had not suffered "direct or physical loss or damage."

The production company said in the lawsuit that the policy provided $125 million in cast coverage and $1 million each for imminent peril, civil or military authority, and ingress and egress coverages. The policy did not contain a virus exclusion.

According to the lawsuit, under the ingress and egress coverages in the policy, Chubb agreed to pay for the actual production losses incurred during the impairment of an insured production when access to a location is prevented due to direct physical loss or damage to property at the premises.

The suit says that Chubb paid Always Smiling $1 million under its civil authority coverage, despite the losses exceeding $44 million. It also said that Chubb refused to renew its policy past November 2020.

Michael Miguel, Principal at McKool Smith offered the following comments on the suit.

"The "Morning Show" lawsuit (Always Smiling Productions v. Chubb Insurance Co.) filed in Federal Court in California presents issues not squarely dealt with in the other COVID-related coverage cases that have been filed around the country, since the wordings involved in "cast coverage" differs from the business interruption or general liability coverages under which previous policyholders have sued (or been sued). The purpose of "cast coverage" is to reimburse producers for losses or extra expenses necessary to complete production due to death, injury or sickness of the director, actors and identified "key" employees. The Morning Show producers allege covered losses in excess of $44 million for these types of losses. Chubb paid the sub-limit under its Civil Authority coverage part, but has denied the remainder of the claim on the grounds that the actual or threatened presence of the virus does not constitute direct physical loss or damage. In so doing, Chubb seeks to interpose findings in the COVID cases dealing with business interruption claims, where policy language specifically requires physical property damage, to a situation where the policy contains no such requirement. The plain meaning of the "cast coverage" requires "death, injury or sickness" of a covered person affecting production.

Chubb is one of the leaders in providing production-related insurance to the entertainment industry. While this is not the first coverage case in the industry, it is the first to raise the issue of whether an insured must await actual death, injury or sickness to seek coverage, or whether mitigation measures that prevent the injury in the first place should be covered. For decades courts have allowed policyholders to recover for mitigation measures in environmental damage cases for cleaning up their own property, even though the general liability policy—on its face—only covers third-party property damage. The same reasoning might enable The Morning Show producers to recover even in the absence of actual death, injury or sickness. On the other hand, the Court might require a showing that a covered person actually suffered sickness or injury from COVID in order to find coverage. It is a question of first impression.

To date, insurers have the clear upper hand in terms of decisions of COVID insurance claim lawsuits, with a majority of rulings finding the absence of "actual physical damage" to property defeats coverage. It will be interesting to see how a court grapples with the prospect of requiring a production company, faced

with a pandemic that caused 600,000 deaths, ceased operations before such severe personal injury could affect its key employees.

Micah E. Skidmore, a partner in Haynes Boone's Insurance Recovery Practice Group, provided the following commentary on the case.

Since early 2020, thousands of lawsuits have been filed by policyholders seeking to recover a variety of business losses arising out of the COVID-19 pandemic. Most of these suits have been brought under commercial property insurance policies offering business interruption coverage in the event of "physical loss or damage" to covered property. With some notable exceptions, the majority of federal courts hearing such cases have granted insurers' motions to dismiss on the grounds that (1) state, county and other governmental lockdown and quarantine orders suspending non-essential business operations; and (2) the actual or potential contamination of insured premises with the SARS-CoV-2 virus do not qualify as "physical loss or damage" as required to trigger the operative coverage. State courts have proven to be more receptive to policyholders' allegations substantiating "physical loss or damage," and as more cases work their way through the appellate courts, an increasing number of policyholders have urged certification to state supreme courts for guidance on the controlling issue of the meaning of "physical loss" under state law.

The Always Smiling case is unique because the operative Cast coverage does not require "direct physical loss or damage" to property. Instead, Chubb's Cast coverage insures "the actual production loss you [Always Smiling] incur due to the inability of an essential element or other declared person to commence, continue or complete their duties or performances in an insured production as a result of a covered cause of loss of such essential element or other declared person." For purposes of this coverage, a "covered cause of loss "includes "death, injury, sickness, kidnap or compulsion by physical force or threat of force." Chubb refused to acknowledge Always Smiling's claim under the Policy's Cast coverage on the grounds that "there were no reported cases of 'death, injury, sickness, kidnap, or compulsion by physical force or threat of physical force.'" Setting aside the fact that the Policy's terms do not expressly require an actual sickness as opposed to a potential sickness in any declared person, Chubb's position ignores the fact that production losses were compelled by the "threat of force" posed by COVID-19 to any and all declared persons, had production continued in spite of the pandemic and in spite of the civil authority orders Chubb has otherwise acknowledged as offering limited coverage under the circumstances. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 487 F. Supp. 3d 834, 841 (N.D. Cal. 2020) ("Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. *SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time — is no less a "physical force "than the "accumulation of gasoline" in Western Fire or the "ammonia release [which] physically transformed the air" in Gregory Packaging.*" (emphasis added)). Given the policy terms and the reality of COVID-19's physical threat, not only to property but to all declared persons, Chubb's wrongheaded position should be rejected. If the district court agrees, this case could provide welcome precedent for other media and entertainment companies seeking coverage under policies with similar terms.

Michael Miguel, is a Principal at McKool Smith and Micah E. Skidmore is a partner in Haynes Boone's Insurance Recovery Practice Group. The views are the author's own.