BUSINESS INSURANCE

Lost Income Claim Disputes Evolve Further
Business Insurance
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Shortly after businesses suspended operations during government-mandated lockdowns that began last March the first suit seeking business interruption coverage for forced closures was filed.

A few months later, courts began issuing rulings in the cases and in most instances favored insurers, but policyholders have also scored several victories.

Policyholders are likely to start winning more COVID-19-related business interruption cases, but a clear picture of the litigation landscape will not fully emerge before appeals courts start to rule in the cases, many experts say.

About 80% of court rulings to date have been in insurers' favor, with many of the pro-policyholder rulings issued by state courts.

Policyholder attorneys say the early tilt in favor of insurers may in part be because many of the initial cases, which were often on behalf of small businesses such as restaurants, were filed by attorneys who do not specialize in insurance law.

But as more cases are filed by larger companies that are represented by specialized insurance attorneys, the win-loss ratio is likely to shift, although rulings will also depend on the court and jurisdiction.

Two factors that may determine the outcome of the cases are whether a court considers COVID-19 to inflict property damage, which tends to weigh in favor of coverage, and if the policy includes a virus exclusion, which could weigh against it.

Meanwhile, despite the current emphasis on business interruption, some experts believe other COVID-19-related issues, such as employment practices liability and cyber liability, will become a greater focus of pandemic-related litigation (see related story below).

"The tide has already turned" toward policyholders, said policyholder attorney Michael S. Levine, a partner with Hunton Andrews Kurth LLP in Washington, discussing insurer victories.

"There are a lot of cases that were brought either prematurely or based on policies that don't provide coverage or are based on pleadings that don't adequately allege the salient facts, and those cases are being dismissed, but that was expected."

Insurers may start to encounter additional obstacles, said Daniel A. Rabinowitz, an insurer attorney with Kramer Levin Naftalis & Frankel LLP in New York.

Policyholders have had success in arguing virus exclusions do not apply, he said, although each case must be evaluated individually.

However, Jeffrey M. Wank, an insurer attorney with Kelley Kronenberg LLP in Fort Lauderdale, Florida, said the courts have, for the most part, ruled correctly.

"Most courts have found, based on science and based on what we know of the virus, that it does not cause actual physical damage" and therefore does not trigger coverage, he said.

The litigation picture will come more fully into focus once higher courts, including federal appeals courts and state supreme courts and perhaps ultimately the U.S. Supreme Court, weigh in, and these rulings may begin to be issued this year, experts say.

Appellate court rulings "will help the parties on both sides to better understand the legalities of the policy language" and "help streamline the process and minimize the litigation because it will allow the parties to resolve the claims," Mr. Levine said.

The issues of whether there has been physical damage and whether a policy has a virus exclusion will remain key, experts say.

Micah E. Skidmore, a partner with Haynes & Boone LLP in Dallas, said, "The trend seems to be that courts are persuaded by the argument that if you can document the presence of the virus on your property," if you had employees, patrons or others who you can say were infected and came onto the premises, "that seems to be among the more compelling arguments" for determining there has been a physical loss, although "it's hard to generalize."

Tyrone R. Childress, insurance recovery practice leader with Jones Day LLP in Los Angeles, said, "The battlefield is a little more level" between policyholders and insurers when there is not a virus exclusion.

Michael John Miguel, a principal with McKool Smith in Los Angeles, said it's too early to tell whether COVID-19 business interruption litigation will be like legal fights over insurance coverage for Y2K remediation costs, which ended within a few years of the millennium turning, or more like disputes over coverage for asbestos liability, which have been raging for decades.

Some observers believe that, although it cannot be cited as a precedent in U.S. courts, a United Kingdom ruling in favor of many policyholders on the business interruption issue may influence U.S. decisions.

The U.K.'s highest court ruled in a test case that some policies provided coverage under various disease or loss of access clauses.

"I think courts are going to look at the U.K. decision and say, 'That makes a lot of sense,'" said R. Hugh Lumpkin, a partner with Reed Smith LLP in Miami.

Attorneys say future rulings will depend on factors including the judge and jurisdiction involved.

Observers say there has been a mixed reaction by insurers regarding changes to their policy language to more clearly avoid litigation stemming either from COVID-19 or future pandemics.

Jonathan B. Sokol, a policyholder attorney with Greenberg, Lusker, Fields Claman & Machtinger LLP in Los Angeles, said, "I would assume the ones that haven't are certainly going to be when these policies come up for renewal."

Litigation set to expand

While much of the focus of COVID-19-related litigation to date has been on business interruption claims, lawsuits are also being filed on other pandemic-related issues, including bodily injury, employment practices liability and other specialty risks, observers say.

"While there's been a huge amount of focus, obviously, given the number of lawsuits filed" related to business interruption, there are broader COVID-19 issues beginning to emerge, said Tyrone R. Childress, insurance recovery practice leader with Jones Day LLP in Los Angeles.

Bodily injury cases have already been filed by cruise lines passengers, among others, said R. Hugh Lumpkin, a partner with Reed Smith LLP in Miami.

Employers may also face suits filed by employees who are required to work and become sick, he said.

In addition, directors and officers liability suits have been filed against companies, such as suits alleging companies made unfulfilled promises about their ability to somehow profit from the pandemic.

Daniel A. Rabinowitz, an insurer attorney with Kramer Levin Naftalis & Frankel LLP in New York, said that although the cases will not be a “slam dunk,” there is likely to be less litigation over policy language as there has been in business interruption cases, which hinge on interpretation of physical loss and damage.

Robin Cohen, chair of Cohen Ziffer Frenchman & McKenna LLP in New York, said that while other types of claims will evolve, “these business interruption claims are very, very large.”

As a result, “while there’s going to be other claims that are going to come out of this, I wouldn’t underestimate the importance, or the significance, of the business interruption claims.”