April 28-May 11, 2021

DTCI DEFENSE TRIAL COUNSEL OF INDIANA

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COVID-19 Business Interruption Litigation: Indiana Weighs In

By Justin K. Curtis

The COVID-19 virus spread throughout the United States (and world) in early 2020 and was quickly classified as a global pandemic. Countries around the globe attempted to combat the spread of the pandemic by issuing "shelter-in-place" orders restricting individual travel and ordering the closure of many business operations. In March 2020, government units across the United States began issuing similar shelter-in-place orders. This applied equally to Indiana, which issued Executive Order 20-2 on March 6, 2020, declaring a public health emergency attributable to COVID-19. On March 24, 2020, all businesses deemed nonessential were required to cease all or a significant portion of their activities.

Many Indiana business owners were forced to close or substantially limit their businesses as a result of the shelter-in-place orders and/or the presence of COVID-19 on the business premises. The resulting economic backlash was severe for business owners, who sought to recover their business losses. Many turned to their business owner insurance or property insurance policies as a potential source to recover their lost income. These claims were nearly universally denied, and several businesses filed lawsuits against their insurers in Indiana state and federal courts seeking to recover their losses.

In order to present a viable claim to recover their lost profits, the businesses needed to establish that COVID-19 and/or the government closure orders caused "direct physical loss" to property covered by their policies of insurance. Most insurance policies preface coverage on the following language or a variation thereof: "We will pay for direct physical loss of or damage to Covered Property." As such, the thrust of the COVID-19 business interruption lawsuits in Indiana and across the country centered on whether the presence of COVID-19 and/or the government closure orders resulting therefrom constituted a "direct physical loss" as defined by the policy.

In denying the COVID-19 business interruption claims, insurers argued that the term *direct physical loss* required a policyholder to establish that covered property sustained some type of physical alteration. Simplifying their position, insurers reasoned that the presence of the COVID-19 virus did not physically alter a structure and, therefore, there was no physical loss to covered property. Policyholders advanced several arguments in opposition, including that the presence of the COVID-19 virus on their premises and/or the government closure orders constituted a "direct physical loss" as defined by their policies. Policyholders argued that the "loss of use" of property was a physical loss.

While policyholders had an uphill battle in establishing a direct physical loss to covered property, many insurers had an even more direct and compelling argument for denying the COVID-19 business interruption claims. In 2006, the Insurance Services Office (ISO) developed the virus and bacteria exclusion in response to the global outbreak of Severe Acute Respiratory Syndrome (SARS). ISO circulated Form CP 01 40 07 06 which contained the language for the exclusion, providing in relevant part:

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

An ISO circular entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria" ("Circular") accompanied the exclusion form. *ISO Circular, Commercial Property* LI-CF-2006-175 (July 6, 2006). The Circular noted that, while "property policies have not been a source of recovery for losses involving contamination by disease causing agents," it was likely that insurers may face claims in which there were efforts to expand coverage to create sources of recovery for losses stemming from the specter of pandemic or other unorthodox transmission of disease-causing agents. *Id.* at 2. In response to the concern, ISO developed the above exclusion to directly exclude from coverage losses or damage resulting from disease-causing viruses or bacteria. *Id.* ISO specifically identified SARS as one of the viruses covered by the exclusion, of which COVID-19 is a variant. *Id.* N. Petrosillo, G. Viceconte, O. Ergonul, G. Ippolito, and E. Petersen, "Covid-19, SARS and MERS: Are They Closely Related?," 26(6) *Clinical Microbiology and Infection* 729-34 (June 2020).

The virus exclusion was cited in hundreds of opinions denying the business interruption claims. In subsequent litigation, policyholders advanced numerous arguments as to why the virus exclusion did not apply to the business interruptions claims, including that their losses were caused by the government closure orders, rather than the virus itself.

As identified above, several business interruption lawsuits were filed in

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Young Lawyer Spotlight

Michael Mullen
Schultz & Pogue

If you would like the DTCI to feature one of your firm's new lawyers, please email the chair of the Young Lawyers Division, Bailey Seng at the Tyra Law Firm, bailey.seng@tyralaw.net. She will take it from there!

Mike, what was the first job you had?

Oh man. Ritter's Frozen Custard. The custard was great. The blue tam hat I had to wear was not.

When did you decide that you wanted to become a lawyer, and why?

I did not have an "a-ha" moment. It was a career I always considered because it seemed to be a challenging and influential profession. I picked up an LSAT book when I was taking summer classes at IU, did all right on the practice tests and took the leap.

As a medical malpractice defense attorney, what is your favorite thing about your practice?

The quality of counsel. I interact with excellent attorneys daily, on the plaintiff and defense side, which forces me to improve. This practice area also scratches a competitive itch.

What has been your most notable experience as an attorney?

I don't consider this a personal accomplishment, but it is a noteworthy experience. Three months into my tenure at Schultz & Pogue, I second chaired a two-week medical malpractice trial. The two defendants were represented by two of my (now) partners who have very different but equally effective styles. I've since "borrowed" tactics from both.

What do you like to do in your time off?

My wife and I stay busy trying to wear out our sons (ages 4 and 2). We chauffeur them to practices, parks, and playdates. Time to myself is best spent sipping a double IPA and spinning a Prince record.

If you were not a lawyer, what would you be?

I'd still be Mike Mullen, but I'd probably work as an air traffic controller. My dad was a career controller and we have similar personalities, so I think that would have been a good fit.

What is the last great book you read for pleasure?

I recently finished "American Kingpin" by Nick Bilton. It is an excellent retelling of the rise and fall of the creator of The Silk Road, which (for those who are pretending not to know) was a marketplace on the dark web.

Earlier this year, you reached a significant milestone in your career when you were elevated to partner at Schultz & Pogue, LLP. What advice would you give to a young attorney?

The first few years in a new area of practice are frustrating because everyone knows more than you. If you take ownership of your files, study the Trial Rules, and resist becoming a jerk, you'll come out on the other side.

How has DTCI helped you in your career?

The acquaintances I've made at the annual conferences opened doors for publication opportunities and, more often, good information on expert witnesses.

Tell us something most people do not know about you.

I have taken a few BBQ classes over the last couple years. I'm no pitmaster, but I'm probably one of the best backyard BBQ'ers on the north side of Indianapolis.•

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Indiana, along with the rest of the country. Insurers moved to dismiss several of these lawsuits, arguing that the interpretation of the policy was a question of law for the courts. The first decision on a COVID-19 business interruption claim was issued by Michigan's 30th Circuit Court on July 1, 2020, finding that the policyholder failed to establish a direct physical loss under the policy, thereby barring coverage. *See, e.g.*, *Gavrilides Mgmt. Co. et al. v Michigan Ins. Co.,* Case No. 20-258-CB-C30, Ingham County, MI, July 1, 2020 Hearing, oral ruling available at https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be.

Since the first ruling, courts across the country have come to varying and contradictory conclusions as to whether the COVID-19 business interruptions claims should be summarily dismissed or permitted to proceed on their merits. The question went unanswered in Indiana until the District Court for the Southern District of Indiana issued Indiana's first opinion on a COVID-19 business interruption claim.

MHG Hotels, LLC v. Emcasco Insurance Co., Inc.

On March 8, the United States District Court for the Southern District of Indiana issued its opinion in *MHG Hotels v. Emcasco Insurance Co., Inc.,* 1:20-cv-01620. The MHG case involved 24 separate hotel entities suing their insurers in response to the denial of their business interruption claims. As background, the hotel properties submitted claims to their insurers in March 2020, seeking coverage for their business income losses. On April 24, 2020, all the claims were denied when it was determined that no claim was submitted for "direct physical loss" to the hotel properties, and further, that the hotels' losses were barred under the policies' virus exclusions.

The hotels filed an amended complaint against their insurers on July 23, 2020, alleging that the presence of COVID-19 on or around their hotel properties rendered the hotels unsafe for their intended purposes, thereby causing physical damage to their properties. The hotels further argued that the government closure orders issued in response to COVID-19 severely restricted access to their properties, causing a limitation of their operations, triggering coverage under the policies.

The insurers moved to dismiss the complaint arguing, consistent with their coverage positions, that the hotels had failed to advance a claim for physical loss to their properties, and that even if they had sustained a physical loss, the policies' virus exclusion would bar coverage. The District Court for the Southern District of Indiana recently issued its opinion dismissing the hotels' lawsuit.

In addressing the motion to dismiss, the court first concluded that the hotel properties did not sustain a direct physical loss as defined by the policy. As outlined above, the hotels argued that their loss of use of their properties stemming from the governmental closure orders constituted a physical loss under their policies. The court determined that "the phrase 'direct physical loss' refers to a loss that requires the insured to repair, rebuild, or replace property that has been tangibly, physically altered — not the insured's loss of use of that property." Ultimately, the hotels' argument that the government closure orders caused their loss was detrimental to their claim because the orders did not constitute a physical condition.

The court next determined that coverage was never triggered under the policies' civil authority provisions. In short, for coverage to be triggered under a civil authority provision, there must be (1) damage to property, other than the insured's property, caused by one or more covered causes of loss; (2) resulting in a civil authority prohibiting access to the insured's property; and (3) the civil authority action is taken in response to dangerous physical conditions resulting from damage. The hotels argued that the government closure orders prohibited access to their properties, therefore triggering coverage under the civil authority provision. The court found that a "direct physical loss" was necessary to trigger coverage, which it determined was not satisfied in this case. While the court could have stopped there, it continued to find that the hotels also failed to satisfy the second prong of the civil authority analysis, in that they failed to show access to their properties was prohibited. Plaintiffs argued the term *prohibit* was ambiguous and, therefore, coverage should be extended if the government closure orders were found to cause difficulty in persons reaching their properties. The court rejected the hotels' arguments, finding that the term *prohibit* was not ambiguous, and further that it did not matter because Indiana's closure order deemed hotels "essential businesses," meaning that access to their properties was never prohibited in any fashion.

Finally, while unnecessary, the court addressed the policies' virus exclusion. As noted above, the virus exclusion excludes from coverage loss or damage caused by any virus capable of inducing physical distress. The hotels attempted to avoid this exclusion by arguing that they were not damaged by COVID-19, but rather by the government closure orders requiring individuals to avoid nonessential travel, which caused the limitation or suspension of the hotels' business operations. The court dismissed this argument, concluding that COVID-19 is, in fact, the reason for the government closure orders being issued — the orders arose only because of the spread of COVID-19. Therefore, the root cause of the hotels' losses was the COVID-19 virus and, accordingly, the policies' virus exclusion operated to exclude coverage.

Indiana state courts have similarly dismissed COVID-19 business interruption claims

The court's opinion in the MHG case set a strong presumption that COVID-19 business interruption claims would be unsuccessful in Indiana. The court decided not only to dismiss the hotels' lawsuit under the virus exclusion but chose also to examine the remaining issues presented in the dispositive motion. The court's thorough analysis of all aspects of the claim provided a clear roadmap for Indiana state courts faced with COVID-19 business interruption lawsuits.

Four days after the MHG opinion, the Indiana Commercial Court, sitting in Marion County, entered summary judgment in favor of an insurer in *Indiana Repertory Theatre, Inc. v. Cincinnati Casualty Co.*, 49D01-2004-PL-013137 (IRT). This ruling is significant for insurers for several reasons. First and most significantly, the policy in IRT contained no virus exclusion, thereby focusing the court's decision on whether COVID-19 and/or the closure orders resulted in "direct physical loss." Courts across the country have issued mixed opinions on this issue, however the Indiana Commercial Court determined that no direct physical loss occurred, precluding coverage. Specifically, the court determined that the phrase *direct physical loss of or damage to* was not ambiguous, irrespective that some courts have permitted policyholders to advance beyond the motion to dismiss stage. The court concluded that IRT was required to establish some type of direct and physical loss and loss of use has no physical impact on property.

Conclusion

The decisions in MHG and IRT strongly support the presumption that COVID-19 business interruption claims in Indiana will not advance beyond the motion to dismiss stage. Not only has the majority position (*viz.*, that the virus exclusion bars coverage for these claims) been affirmed, both Indiana's federal and state courts are in agreement that COVID-19 and the government closure orders do not constitute a "direct physical loss" triggering coverage.

Justin K. Curtis *is a partner in the Hammond office of HeplerBroom and is a former chair of the Insurance Coverage Section of the DTCI. Opinions expressed in this article are those of the author.*

2021 CALENDAR

All events are held in Indianapolis unless otherwise noted.

Aug. 19
Board of Directors Meeting
11 a.m. Location TBA

Nov. 18-19
DTCI Annual Meeting & Conference
French Lick Resort

For details about any of these events or ***information about possible cancellations due to COVID-19,*** *please e-mail* ***lmortier@dtci.org.*** *For the latest changes, notices and additions, check the events calendar on the DTCI homepage at* ***www.dtci.org.***

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