

COVID-19 Business Interruption Lawsuits Begin: Iconic Oceana Grill in New Orleans Files Insurance Coverage Lawsuit

On Monday, the iconic New Orleans restaurant, Oceana Grill, filed the first Coronavirus-related business interruption insurance coverage lawsuit in a US jurisdiction. The declaratory judgment action styled Cajun Conti, LLC, et. al. d/b/a Oceana Grill v. Certain Underwriters at Lloyd's, London was filed in Louisiana state court for the Parish of Orleans. As a direct result of the government-mandated closures and restrictions on public gatherings implemented by the City of New Orleans and State of Louisiana, Oceana Grill's petition anticipates a significant loss of business income.

Based on allegations in the petition, there are several aspects of Oceana Grill's policy that make this a good test case for business interruption coverage stemming from the Coronavirus. Although the specific policy language is not quoted in the petition, coverage provisions are categorically identified throughout.

As a preliminary matter, the policy at issue appears to be written on an "all risks" basis, meaning the insuring agreement of the policy would likely be triggered generally by all risks of "physical loss or damage" unless specifically excluded. This basis for coverage, which is common in property policies, is advantageous to policyholders, as it limits the insured's burden of proof to establishing that there was physical loss or damage while leaving the burden of applying any more specific exclusion to the insurance company.

Although the "all risks" insuring agreement is advantageous for Oceana Grille, it is mitigated somewhat for Coronavirus-related risk. This is because the "physical loss or damage" component of the "all risks" policy language is expected to be a significant hurdle for businesses seeking business interruption coverage. The insured will need to prove that the presence of the virus on property constitutes "physical loss or damage." Courts around the country have reached different results on this issue when faced with similar situations. In support of Oceana Grill's argument, Louisiana may be a favorable jurisdiction given the ruling in Widder v. Louisiana Citizens Property Insurance Corporation, 82 So.3d 294 (La. App. Ct. 2011), where the court held that the intrusion of a contaminant rendering a home unusable and/or uninhabitable constituted "direct physical loss" to property.

Relatedly, the scope of Oceana Grill's civil authority coverage will be a key coverage battle. Civil authority coverage typically requires direct physical loss or damage to premises within a certain distance of the insured premises. In the case of the COVID-19 pandemic, this will likely involve a scientific determination of the extent to which the virus contaminates or damages nearby property and the duration of such damage. Scientific evidence suggests the virus can live on surfaces or products anywhere from hours to weeks depending on weather and temperature conditions as well as the type of surface infected.

Significantly, Oceana Grill's policy apparently does not include an exclusion "due to losses to business or property, from a virus or global pandemic." Many domestic property policies issued in the last decade contain virus exclusions as ISO propounded a standard form virus exclusion in or around 2006.

The Oceana Grill suit is the first of many coverage cases expected to be filed regarding business interruption coverage stemming from the Coronavirus. These cases will involve many different industries and will likely seek coverage under many types of policies, both first party and third party. SDV will continue to monitor these rapidly evolving nationwide developments.

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