



French Laundry Spices Up COVID-19 Business Interruption Debate

By Jeffrey J. Vita and Melanie A. McDonald

On March 26, 2020, Michelin-rated Napa Valley restaurants, French Laundry and Bouchon Bistro, and their celebrity chef, Thomas Keller, filed the second known coronavirus-related declaratory judgment (DJ) lawsuit by a restaurant. The restaurants filed their DJ against Hartford Fire Insurance Company just seven days after Napa County issued a Shelter at Home Order.¹ Chef Keller's suit comes on the heels of the first such suit by a restaurant seeking to recover business income losses, filed by iconic New Orleans French Quarter restaurant Oceana Grill² on March 17, just four days after the Louisiana governor issued an order prohibiting gatherings of more than 250 people.³

As local governments seek to protect their citizens and prevent an onslaught of cases in area hospitals, they are issuing various "stay home," "shelter at home," and similar orders to force social distancing and to help flatten the curve of the growth in COVID-19 cases. Restaurants nationwide are especially hard hit by these orders, as many of these orders contain size limitations on gatherings, which have required that restaurants and bars limit capacity (as in the March 13th Louisiana order). Other such orders require non-essential businesses to "cease all activities in the County" (as in the Napa County Shelter at Home order). The Napa County order does not exempt restaurants as "essential businesses," except when providing food for take-out or delivery. Other orders, still, directly address restaurants and require them to cease allowing public consumption of food and beverages (as in the subsequent, March 17th Louisiana order).

Restaurants, of course, are experiencing huge losses in revenue. Some, like French Laundry may not be particularly geared towards take out. Many restaurants have had to shut down and furlough employees. As reflected by these two restaurant-filed lawsuits, businesses affected by the coronavirus are looking at their commercial insurance policies for possible coverage for business

¹Other California counties did the same. And, on March 19, California's governor issued a statewide stay home order.

²See our article on this suit at https://sdvlaw.com/insights_view.asp?key=2291

³As the number of cases in Louisiana rose dramatically, especially in New Orleans where Oceana Grill is located, the governor issued subsequent orders. His March 17th order limited gatherings to no more than 50 and ordered all restaurants to cease allowing on-premises food and beverage consumption (while allowing take-out, drive-thru and delivery service to continue).

interruption a/k/a business income and civil authority, as well as coverage for the extra expenses incurred in maintaining operations.

The French Laundry DJ allegations look very similar to the allegations in the Oceana Grill DJ action, and for good reason. The same attorneys, John W. Houghtaling and Jennifer Perez, of the Metairie, Louisiana firm Gauthier Murphy & Houghtaling, represent both restaurants. The complaints share the following identical allegations:

[] While some rogue media outlets have called the 2019-2020 Coronavirus an exaggerated mass hysteria that will unlikely create significant physical damage, the scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage.

[] The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, "fomites," for up to twenty-eight days.

[] China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

Both complaints allege that the Coronavirus is causing physical damage and loss to public and private property and state that "any effort by [the insurance company] to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public."

The key coverage issue will be whether the Coronavirus causes direct physical damage and/or loss, as most commercial property policies that provide coverage for business interruption, extra expenses, and losses due to civil authority require "direct physical loss of or damage to covered property." The insurers are expected to raise lack of physical damage or loss as a defense to coverage. Similarly, in order to invoke the policy's "civil authority" coverage, the restaurants will need to establish that the virus has caused physical loss and/or damage to a property in the immediate area. Policy language differs on what is the "immediate area." Some policies are silent, while others designate an area, such as 1000 feet, or one mile. The French Laundry complaint alleges:

Under the policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the scheduled premises is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of plaintiffs' scheduled premises. This additional coverage is identified as coverage under "Civil Authority."

The French Laundry suit further alleges that the Hartford policy "does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus."

The French Laundry suit was filed on the same day as the California Insurance Commissioner's order⁴ directed at all insurers providing commercial insurance in California. The March 26th order requires

⁴<http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Business-Interruption-Survey-Final.pdf>

all such insurers to submit data to the California Department of Insurance by April 9 regarding “the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage, and supply chain coverage the Insurer wrote that has not lapsed as of the date of this letter.”

As the coverage litigation arising out of COVID-19 ramps up, these early DJ's will prove pivotal in framing the key coverage battlegrounds and fleshing out the parties' respective positions. SDV will continue to monitor these rapidly evolving nationwide developments.

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