COVID-19 Business Interruption Battle Continues: Florida Insureds File Suit Joining the Fight for Coverage

By Gregory D. Podolak, Kelly A. Johnson and Ashley McWilliams

Several businesses have commenced litigation in Florida against first-party commercial property insurers seeking coverage for business interruption losses resulting from state and local government orders enacted to mitigate the spread of COVID-19. Most recently, on April 1, 2020, Florida Governor Ron DeSantis issued Executive Order 20-91 requiring all nonessential businesses to close for a period of 30 days subject to extension. Three coverage cases have since been filed, all by businesses deemed "nonessential," under the Order – i.e., a sports bar, a scuba shop, and a restaurant group. These are the first COVID-19 coverage cases to be filed by policyholders in Florida, and while they all take the same general position that business interruption coverage applies to their coronavirus-related losses, each policyholder's pleading asserts a slightly different twist on the reasoning as to why.

Prime Time Sports Grill, Inc. d/b/a Prime Time Sports Bar v. Certain Underwriters at Lloyd's London, Case No. 8:20-cv-00771, in the U.S. District Court for the Middle District of Florida:

In the first COVID-19 coverage case commenced in Florida, Prime Time Sports Bar in Tampa filed suit against its carrier seeking a declaration as to the insurer's obligations under its commercial property policy. Prime Time alleges that all risks are covered under the policy unless specifically excluded. The commercial property policy contains coverage for business interruption losses incurred due to an act or order of civil authority prohibiting access to the business property. Prime Time alleges that its loss of business income and operating expenses is covered due to governmental suspension of business activities, as a result of COVID-19, is not specifically excluded in the policy.

Like most commercial property insurance policies, Prime Time's policy requires "direct physical loss of or damage to the covered property" to trigger coverage. And, like most other COVID-19 coverage cases filed to date in other states, the insurer denied Prime Time's claim for business interruption and civil authority coverage on the basis that neither Prime Time's property, nor the properties adjacent to it, sustained the requisite direct physical loss to trigger coverage. For reasons that are unclear on the face of the complaint, Prime Time does not address whether its property (or any other property) sustained direct physical loss or damage as a result of COVID-19 and/or the related government-ordered shutdown of its business operations to mitigate the spread of the deadly virus. For now, it appears this policyholder is primarily relying on the absence of a pandemic exclusion in its all-risk policy to support this claim for coverage.

Mace Marine Inc., d/b/a Conch Republic Divers v. Tokio Marine Specialty insurance Company, Case No. 20-CA-000120-P, in the Circuit Court of the 16th Judicial Circuit in and for Monroe County, Florida:

The second COVID-19 coverage case in Florida was brought by a scuba shop in the Florida Keys, Conch Republic Divers, against its commercial property insurance carrier. In the complaint filed, Conch Republic seeks a declaratory judgement as to its property insurer's obligations, under the policy, in addition to damages for breach of contract and statutory bad faith claims. Conch Republic asserts entitlement to indemnification under the policy for its business losses and extra expenses incurred as a result of the COVID-19-related civil authority orders precluding it from opening and operating its dive shop business. The insurer denied Conch Republic's claim on the grounds that the requisite "direct physical loss of or damage to property" had not been satisfied in order to trigger coverage for business interruption losses under the policy.

Once again, the commercial property policy at issue insures all risks of direct physical loss of or damage to covered property. However, in notable contrast to the preceding Florida policyholder's claim for coverage, here Conch Republic alleges that as a tourist-driven business, serving customers from around the world with no reliable way of knowing whether any of them are infected with COVID-19 and capable of contaminating the scuba shop just by being present, Conch Republic's inability to use the property because of the risk of contamination from COVID-19 is tantamount to "direct physical loss" of that property triggering coverage under the policy. More succinctly, this policyholder appears to be advancing the position that the *potential* contamination of business property from COVID-19 exposure should itself be considered a sufficient "physical loss" covered by the policy.

El Novillo Restaurant d/b/a DJJ Restaurant Corp., et al. v. Certain Underwriters at Lloyd's London, et al., Case No. 1:20-cv-21525, in the U.S. District Court for the Southern District of Florida:

In the third COVID-19 coverage action, a Florida-based restaurant group has preemptively filed a class action suit against its commercial property insurer, Certain Underwriters at Lloyd's London. The class plaintiffs/policyholders allege that they each purchased, from the insurer, "standard uniform all-risk commercial property insurance policies" which cover loss or damage to the covered premises from all risks, unless specifically excluded, and which includes lost business income and extra expense coverage. They assert that the policies do not contain an exclusion for a viral pandemic.

The class plaintiffs/policyholders seek a declaration, among other things, that the orders put in place by civil authorities to stop the spread of COVID-19 caused physical loss or damage to cover commercial property as required to trigger coverage under their respective policies. This reflects the broadest interpretation of the "direct physical loss or damage" requirement asserted amongst the Florida policyholders in all three cases – i.e., that the requirement encompasses not only tangible damage, but also impairment of use or function. Here, the insureds argue that the inability to access the property, due to the actions of civil authority *in and of itself*, is a direct physical loss under the policy.

The class action is preemptive in that it includes a cause of action for anticipatory breach of contract in the second count of the complaint. The policyholders allege that the insurer intends to refuse performance under policies by denying coverage for business income losses and/or extra expenses incurred, due to the measures put in place by civil authorities, to stop the spread of COVID-19. The insurer has not formally denied any COVID-19 business interruption claims submitted by class plaintiffs to date.

Key Takeaways

The decisive coverage issue in the COVID-19 business interruption battle remains whether the direct physical loss or damage requirement to trigger coverage under commercial property policies is satisfied by the threat of contamination and/or acts of civil authority precluding access to business properties and resulting in the suspension or curtailment of business operations. Policyholders should be weary of the insurance industry's efforts to push the narrative that because there is no tangible physical damage to the business property, there can be no coverage for business interruption losses under these policies. A broader interpretation of the "direct physical loss or damage" requirement, encompassing both tangible physical damage and impairment of use or function, is also reasonable and should be advanced by policyholders in opposition to the insurance industry's narrower view.

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Since the writing of this article, a new case was filed on April 20, 2020. Café International Holding Company LLC v. Chubb Ltd. et al., case number 1:20-cv-21641, in the U.S. District Court for the Southern District of Florida.