Best's Insurance Law Podcast

How COVID-19 is Changing Business Interruption Claims - Episode #177

Posted: Tues., March 9, 2021

Hosted by: John Czuba, Managing Editor
Guest Attorney: Attorney Michael Troisi of Rivkin Radler LLP
Qualified Member in *Best's Insurance Professional Resources* since: 2019

John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources.*

We're pleased to have with us today Michael Troisi. Mike is the leader of Rivkin Radler's Property Insurance Coverage Practice Group, which is part of Rivkin's overall insurance coverage group, and one of the largest of its kind in the nation, representing the country's largest insurers.

With 33 years of experience, Michael represents numerous commercial insurers in evaluating and litigating business interruption claims. Rivkin Radler has been retained by a large commercial insurance company as national coordinating counsel for all of its COVID 19 claims.

The firm has also been retained by other insurers to represent their interests in COVID related matters, including the defense of class action. Michael, thanks so much for joining us today.

Michael Troisi: You're welcome. Thanks for having me, John.

John: Today's discussion is how COVID 19 is changing business interruption claims, and for our first question today, Mike, what are your general observations about COVID 19 business interruption litigation we have seen across the country?

Michael: We've definitely seen a pendulum swing, John, from the beginning, or the onset of the pandemic, until now.

At the beginning, we saw policyholder lawyers bringing suits and alleging the actual presence of the virus in the business, or within the business, and those allegations were made in a very general and conclusory way, almost to say that the virus is everywhere, and therefore, it must be on our premises.

I think that those arguments were by and large rejected by most courts. Those arguments were conclusory and lacked any real substance or basis in fact, and couldn't be proven. Therefore, those cases met with pretty swift dismissal.

What I think we've seen now is we've seen a changeover to adopting the argument that, in order to overcome the direct physical loss requirement that's required and is the trigger of coverage in virtually every property insurance policy, in order to meet that challenge, what the policyholders are now arguing is that the loss of use of the premises is the trigger of coverage.

That is their physical loss, that they either can't use the premises, or the use of the premises has been diminished in a substantial way. Therefore, they've been harmed or damaged. What we're seeing there as well is that the insurance industry in the majority of cases is prevailing on motions to dismiss those pleadings.

I think a little bit later on today, we'll get into the nuts and bolts of that. The other thing that I think it's important to note about the state of the litigation right now is that, early on, policyholder lawyers attempted to establish a multi-district litigation, or what we refer to as an MDL.

MDLs are there to promote efficiency by centralizing cases that have common questions of fact and law, so they can be consolidated into one district before one judge. Back in August, that attempt to create an MDL was heard and was rejected.

Pretty much because the court found that the policies are all different. They contain slightly different language, which can lead to different interpretations. Of course, each policyholder is going to present a somewhat different set of facts to bring to bear and to decide whether or not there is coverage under the policy.

That effort failed on behalf of policyholders, and there was an attempt to create MDLs that were specific to certain insurers. Insurers who had a lot of cases in the Hopper, so to speak, involving COVID 19 business interruption claims.

There, those were largely unsuccessful, too, with the exception of one insurer, Society, where an MDL was created. That's pretty much the state of the litigation right now.

John: Michael, what arguments have policyholders advanced to meet the physical loss requirement?

Michael: The policy, in order to trigger a property insurance policy, and pretty much under any coverage, there must be direct physical loss of, or damage to property. Essentially, what the policyholders are arguing is that the government orders, whether it bars them completely from the premises or simply diminishes their ability to use their business premises, that that is their loss.

Therefore, that triggers coverage. That has been met by an overwhelming majority of the courts by saying, "No, that is just too strained an interpretation." It ignores the words "direct" and "physical," and the policy and the underpinnings of property insurance itself, which requires some type of demonstrable, tangible, physical damage to property.

A fire, water damage, a car running into the building, some physical damage. The case law on that subject across the country, pretty much, is very much in favor of the insurers, I should say. What the policyholders have also done is they've seized on this language of "physical loss of."

Meaning that, well, if you have direct physical loss of something - I've lost my premises. I can't use my premises it's been diminished. The courts have pretty much said that's an absolutely strained reading. If you go to the dictionary, you can't write physical the word "physical" out of this particular coverage grant.

Therefore, the courts have pretty much said, "No, this doesn't qualify as a physical loss." That is an argument that the policyholders have used to try to get coverage. They've been successful in a few jurisdictions, but overwhelmingly, the courts have rejected that.

Interestingly, in a case in the Southern District of New York, Judge Caproni, in a case called Social Life Against Sentinel, summed it up by saying, "Look, a virus can damage your lungs. It can't damage your printing presses."

That quote got a lot of play, but it was interesting that that has been the theme on the direct physical loss argument.

John: Have the courts confronted the question of whether or not there has been direct physical loss?

Michael: Yes, and as I said, in most of these cases, they've said there has not been direct physical loss. What it sort of does is it turns the equation around when that argument is made. The policyholder is required to demonstrate direct physical loss or damage to their property that results in a suspension of their business in order to quality for business interruption coverage.

Here, they've flipped it around, and many courts have observed this by saying, "I've had a suspension of my business, and therefore, I've been damaged." What the courts have noted is it's purely economic in nature. This is purely an economic damage, but it's not a physical damage. You have not sustained an accidental, direct physical loss.

John: Mike, what arguments have policyholders advanced to address the virus exclusion?

Michael: That's the real, the second hurdle that obviously policyholders face. Even if they get past the coverage grant and establish accidental, direct physical loss of or damage to property, the damage has to be caused by a covered cause of loss.

Then obviously, they're faced with the virus exclusion. As you may know, the virus exclusion was adopted and included in response to the SARS virus outbreak in early 2000s, around 2003 or 2004, I believe. It's pretty broad, and it has been ruled to be unambiguous in most cases.

In these particular cases, when faced with a motion to dismiss, Courts are simply going right to the virus exclusion and saying, "We don't really have to decide the coverage grant, because it doesn't matter. The virus exclusion is clear. It's unambiguous, and we're going to enforce it."

What policyholders have attempted to argue and for the most part, unsuccessfully - is that the proximate cause of their loss is the government shutdown and not the virus. Many courts have said, "Well, wait a minute."

Even if you take an efficient proximate cause analysis of this, what you find is, but for the virus, there would have been no order limiting or shutting down a business, so that argument really doesn't ring true. Also, many of the virus exclusions contain language that says something to the effect of, "If the virus causes a loss or damage, either directly or indirectly..."

Here, I would argue, it's directly, but even if it's not directly, it is excluded. Then even some policies have what we call anti concurrent causation language, or ACC language, which will say that it doesn't matter. This loss is excluded if caused by a virus, and it doesn't matter the order in which the sequence of events occurs that results in your loss.

If virus was part of that sequence of events, or the existence of the virus, it is not going to be covered. What we have seen is that the courts have taken a look at this virus exclusion and said, "Yeah, this is unambiguous and applies to these losses."

There was an outlier down in the Middle District of Florida, the urogynecology case. I believe it was against Sentinel. The court there ruled that the exclusion was somewhat ambiguous. Again, I believe the language in that was not the...If I remember correctly, I don't think it's the typical ISO language. Again, that case was an outlier. Pretty much the virus exclusion has been upheld by most of the courts.

John: How have the courts interpreted the virus exclusion?

Michael: Like I said, they've taken a look at it, and they've said that it is unambiguous, and that it should apply to these cases. The courts have not been receptive to the argument that it was not the virus that caused the loss, but it was the government shutdown.

Many of the courts even point out that the briefs in support or in opposition to these motions to dismiss talk about the existence of the virus and the obvious effects that it's had on businesses and everything. Then, by the same token, argue later in the brief that it wasn't the virus that caused it, it was the government shutdown.

I think that, again, it's a very tough road for policyholders to get over. Number one, the physical loss component of the coverage grant, and then number two, the virus exclusion.

John: Michael, what's the status of legislative efforts in various states to mandate that insurers pay business interruption claims?

Michael: We saw that, particularly at the beginning of the pandemic. We saw several state legislatures try to introduce bills that would essentially rewrite the insurance policies, or write out the virus exclusion, and mandate that insurers cover business interruption claims that are submitted as a result of the COVID 19 virus.

That obviously, I can tell you that we're not aware, as of this date, of any state that has passed such legislation. I think a lot of them have been stalled in the state legislatures, New York included. I think that part of the reason for that is likely that it is well known that there will be a challenge to that, based on the contracts clause to the US Constitution.

Essentially, prohibiting the government from interfering or rewriting a contract. Whether or not they can do that, and there have been cases where state governments have tried to do that, and the courts engage in a balancing test as to whether or not the law proposed by or enacted by the state government operates as a substantial impairment of a contractual relationship.

Well, this one here, they would be rewriting the contract, and whether the law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. That obviously would involve a balancing act and would invite, I'm sure, very strenuous, very hard fought litigation from the insurance industry.

Obviously, this is not something they have underwritten. It's not something they had planned for, because they specifically attempted to write these types of losses out of their contracts. I think probably the state governments are aware of that, and there's probably a lot of debate still going on as to whether or not that would be a prudent course to take.

John: Mike, thanks so much for joining us today.

Michael: Thank you, John. It was a pleasure.

John: That was Michael Troisi from the law firm Rivkin Radler LLP, and special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for "Best's Insurance Law Podcast."

To subscribe to this audio program go to our webpage www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com.

I'm John Czuba, and now this message.

Transcription by CastingWords