

Best's Insurance Law Podcast

[Assessing the Impact of COVID-19 on Business Interruption Claims - Episode #165](#)

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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 attorney Charles “CJ” Haddick Jr. CJ is a shareholder of [Dickie, McCamey, & Chilcote, P.C.](#) and the managing attorney of the firm's Harrisburg office.

He practices in the areas of insurance coverage and insurance backed faith, litigation, insurance fraud, arson, fire and explosion cases, cybersecurity, and cyber insurance coverage and litigation, professional liability, including insurance agency errors and omissions, subrogation, and general liability defense.

CJ is also a member of Dickey McCamey's new coronavirus insurance coverage working group. He is also the author and editor of the insurance blog [www.badfaithadvisor.com](#).

Today's podcast discussion is assessing the impact of COVID-19 on business interruption claims. CJ, for our first question, where are the first battles breaking out with COVID-19 and insurance coverage?

CJ Haddick: The early lawsuits that I have seen and the early requests clients have come to us for were coverage opinions that dealt with this issue of business interruption and whether or not COVID-related downturns in business are covered events under commercial policies, and more specifically the business interruption coverage.

John: CJ, are there any areas where you're seeing intersection of insurance disputes and the COVID-19 pandemic?

CJ: We are. As I said, I think the business interruption is the big one right now. I think there's some other areas that are going to fall in behind and become more common, as well. I'll go from most common to least common.

I think some of the other insurance coverages that are going to be implicated are, for example, general liability coverage. For example, if someone alleges that they were exposed to COVID at someone's business establishment and therefore sustained bodily injury because of failure to take precautions by a business owner.

The general liability aspect of business insurance is potentially in play here. A cousin to that would be workers compensation claims. There has been some early discussion that these are going to be, perhaps, a little difficult because an injured worker is going to have to prove that their exposure to the virus was actually the result of or caused by their employment.

By definition, COVID is airborne, droplet-borne, and you can get it inside, outside, on any surface. There's some thinking there that that could be a difficult burden of proof for workers compensation claimants. In terms of seeing the claims, we're predicting, forecasting we're going to see some claims there, as well.

Maybe a little bit less common, although we're certainly going to see it and I was personally affected by this, is event cancellation and cancellation of concerts, sporting events, etc. I had a nice pair of tickets to a Philadelphia Flyers hockey game for late March. Obviously the NHL ceased operations.

The first thing I thought was not whether I was going to get a refund, but how is this insured, [laughs] which is maybe evidence of my warped legal mind or dark sense of humor. The first thought I had was, "How are so many cancellations going to be processed?"

Companies do write event cancellation coverage. That is more of a highly specific area where you have to read the language of the policies. I've seen some literature so far, already, that says where, for example, closures are mandated by civil authorities some policies require that in order for there to be a coverage trigger.

Then, other event cancellation policies exclude that as a cause of loss. It's a little bit of a wild, wild west out there in terms of cancellations. They tend to be larger policies. They tend to, in my mind at least, go more in the nature of the exotic Lloyds of London policies which insure athletes and so on.

That is certainly going to be impacted. I know that the four major sports leagues are figuring out whether and how they're going to continue, but I do know that some things are certainly going to be cancelled. There is insurance for that, that's going to be between the policy holders and insurers to fight that out.

Of course, you have this issue of a patchwork of civil authorities being involved. There's no federally mandated universal 50 state shutdown and so it's left to the states. Within the states, it's left to local municipalities.

That civil authority closure aspect of it is going to play a big role in the event cancellation area, at any rate.

John: CJ, in the business interruption claims, are there any early themes that are developing?

CJ: Yes. I'll tell you that, by far, the biggest one is the issue of whether a direct physical loss has occurred. In your traditional business interruption claim, you think of a pipe burst, fire, kinds of obvious physical damage to a place of business where, clearly, that impacts the business' ability to continue.

The first question that was raised in this area is, is the COVID virus itself, does that constitute some direct physical loss under the business interruption endorsement? If there is no direct physical loss then the insurance company typically does not owe the coverage.

That, to me, is the first huge issue, direct physical loss. Now, in some of these...I've seen some complaints now, one filed in California, one filed in Louisiana. The insured businesses are alleging that, in fact, the virus itself constitutes direct physical loss because it renders the property not usable for its intended purpose, or the risk of the virus renders the property useless.

The argument's going to be the insureds, on one hand, John, are going to be saying, "This is a direct physical loss. I cannot operate my machinery equipment, restaurant facility, what have you."

On the other hand, the insurance companies who haven't necessarily foreseen COVID in particular, are going to say, "There's no damage to your property. Restaurants still have the ability to operate, but at a reduced capacity."

That, to me, is the first skirmish of the first battle on business interruption is whether there is a direct physical loss. That will be hotly contested.

The pleadings that I've seen far, the complaints, at least show me a recognition that the plaintiff's lawyers handling those cases have a sense that that's going to be an obstacle for them, that they have to explain to a court, to a judge, how the COVID constitutes a direct physical loss.

John: Some business policies have all risk coverage and/or endorsements covering business interruptions caused by civil closure orders. Have there been any developments on that front, CJ?

CJ: John, before we started recording I told you I wanted to get my hands on a complaint. This one's, it's kind of a twist on the business interruption claim. There's a case, a complaint's been filed recently in California. The name of the case, it's French Laundry Partners versus Hartford Fire and Insurance.

In that suit, there was an additional coverage offered by the insurer. It is an extra expense coverage endorsement caused by civil closure. Now, in a sense, it's a second bite at the apple or a sub-coverage where the restaurant is saying not only do we have coverage under the business interruption, but under this endorsement.

The restaurants within this particular county or jurisdiction have been closed or customers have been limited. It's a sort of a second avenue for insureds to try to get at the business interruption piece of the coverage.

Interestingly, you wind up back at the same dilemma as you do with your standard business interruption endorsement because under either of these, the civil closure extra expense endorsement in that Hartford case or your business interruption endorsement.

In either case, you come back to this problem of direct physical loss and whether or not the virus or the civil closure constitutes a direct physical loss.

The way the insureds are handling it in the California case, at least early, based on my reading of the complaint, is they are alleging that the closure of their business or the limitation of their business by a civil authority itself constitutes a direct physical loss because it, again, prevents use of the property.

The argument you would make to a jury would be this...Insurance coverage cases rarely go to a jury. Let me rephrase that and say the argument you might make to a judge is, "Judge, this is no different than a fire or a flood. I cannot use my restaurant, establishment, business, manufacturing facility, whatever. I can't use it because it's been closed or limited."

So far, anyway, we're seeing this constant reversion back to this issue of, is there a direct physical loss? I'm sure there'll be other things as it develops, but right now that seems to be the key one.

John: CJ, have you seen anything yet in terms of legislation or legislative action attempting to restrict insurers from denying coverage or, conversely, mandating acceptance of COVID claims?

CJ: I have read and seen some proposed legislation -- I think it's in the state of New Jersey -- that discuss the possibility of either forcing insurers to cover COVID related claims in some way or limiting their ability to exclude COVID claims. Functionally, it's the same thing.

Essentially, the legislative action which would mandate the insurance industry to cover or not exclude COVID claims. Obviously, a huge can of worms presented by that and very dangerous, I think, for the industry because, again, essentially insurers would be, in that case, forced to cover exposures that they never contemplated and certainly never priced into their policies.

There's no federal legislation yet, but when I first started looking into the issue, my thought was that insurers never contemplated having to provide that coverage. Do they simply then just get in line behind the airlines, or the cruise ship industry, and the hospitality industry and ultimately get backstopped or, for lack of a better term, bailed out by the federal government anyway?

Essentially, they're being forced to cover exposures or are prevented from avoiding exposures that they never underwrote. It's too early in the process, legislation, it's in the early stages. Certainly in New Jersey, I think it was only brought up in one of the two state houses there.



At this point, to me, Congress seems to be focused on the bailout phase and the small business aid. They haven't taken it up yet, but my view is, at some point, the legislature is going to look at this, at least examine it. I'm not sure whether there'll be legislation on it, but it's at least come up in one statehouse. I think Delaware may have taken it up, as well. I'm not certain on that.

It's a concern for clients of mine, insurance companies, because of the feel of it that they may be forced to cover risks despite exclusions like mold and fungi type exclusions. It begs the question, then, of, are they entitled to a bailout as the airlines would be, or any of the other industries?

There is some legislation and that's in the early stages. I think the litigation has started with respect to the business interruption coverage. The legislative aspect of this, John, will take a little bit longer to play out.

John: CJ, thanks so much for joining us today. Stay well in these challenging times with COVID-19. I'm sure the legal landscape is changing on a daily basis.

CJ: It is, John. I appreciate your time and letting me come on. The same to you, certainly. You and your family stay safe. Hopefully we'll talk soon.

John: You, too, CJ. Thanks again so much. That was Charles "CJ" Haddick Jr., shareholder of [Dickie McCamey, & Chilcote, P.C.](#) and the managing attorney of the firm's Harrisburg office. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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