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Continued Development of Business Interruption Insurance Claims in Second Year of Pandemic

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As we enter another year of the pandemic, the legal landscape for COVID-19-related insurance coverage claims continues to evolve. For business interruption claims, this is particularly true, as lawsuits on COVID-19-related business income insurance claims continue to be filed and courts issue varying interpretations of the insurance policies' clauses.

Lawsuits over coverage under commercial policies for "business interruption" claims – claims that focus on lost business income due to shutdowns – began being filed not long after the start of the pandemic. With intermittent and varying degrees of lockdown to prevent the spread of COVID-19, many businesses face increasing losses from the shutdown of their premises, and insurance policies may require lawsuits be filed within a year or two of the alleged loss. Some insureds have already attempted to consolidate claims through a multi-district litigation suit. But on August 20, 2020, the U.S. Judicial Panel on Multi-District Litigation issued an order declining to create the proposed MDL. Thus, state and federal courts continue to interpret policies based on the facts and policies before them.

While the claims and the policies differ, trends may emerge as more courts render decisions on similar policy language. Most policies require some "direct physical loss" in order to trigger coverage for loss of business income. But losses due to COVID-19 orders present unique issues. Is a forced shutdown because of a virus a "physical loss"? Or, is it the virus itself which causes the loss?

Some insureds have argued that the virus physically damages property under the policy's language. In one Louisiana state court case, tried in December, the insured argued that its "all risk" policy covered the virus's presence on the premises which physically damaged the property. The insurer argued conversely that the virus does not harm inanimate objects and can be cleaned, thus it cannot physically damage property. The court has yet to issue a decision in this case, however.

Other insureds have argued that "direct physical loss" under certain policies does not require some physical alteration or "damage" to the property at all, as seen in a federal court case in Ohio currently pending. Instead, these insureds argue that a "physical loss" includes an inability to possess something in the material sense. Plaintiffs in a state court in North Carolina, however, successfully made this argument. In that case, the court agreed that the virus particles on the insured's premises constituted a "physical loss" under the relevant policies. Specifically, the North Carolina court found that the term "physical loss" would be rendered meaningless if interpreted to be the same as "physical damage," thus the loss did not require physical alteration and could instead mean simply a loss of use, distinguishing the term "damage" from "loss."

Adding to the uncertain interpretation of a "direct physical loss," many policies contain a "virus" or "microorganism" exclusion. Even if the policies contain such an exclusion, however, the application of any such virus exclusion may depend on whether the insured argues that it is the virus which caused the physical loss or the governmental orders – which may not be covered by the exclusion – affecting a business that caused the business's loss.

Parties in these lawsuits may encounter yet another policy-specific issue related to the timing of filing rather than coverage. In many policies, there are suit limitation provisions, effectively providing a time limit on when the policyholder may file suit for coverage (notwithstanding any statute of limitations or other law). The effectiveness and applicability of these clauses vary depending on state laws, but at least in some instances, the policyholder could be limited to one or two years to file suit for their business income claim depending on the particular terms of the contract.

With time and increasing decisions from courts, the uncertainty surrounding business interruption or business income insurance claims may dissipate. But for now, it is clear that these claims and trends in this area of insurance litigation will continue.

If you have any questions, please contact [Matt A. Woolf](#) or your Baker Donelson attorney.