

Business Interruption and Civil Authority Insurance Coverage

JUNE 2020 UPDATE

Over the last few months, in response to the COVID-19 pandemic, state governments have issued orders mandating the closure of non-essential businesses, and have urged citizens to stay home and practice social distancing. Although states have slowly begun to re-open their economies by lifting the restrictions on non-essential businesses, such as bars, restaurants, hair salons, and other industries, the issues surrounding COVID-19 are continuing to make their way to courthouses and legislatures around the country, including Ohio.

This update provides an overview of the various lawsuits filed in May 2020, in both Ohio state and federal courts, which involve insured business owners' claims for insurance coverage for losses connected with the closing of their respective businesses as a result of COVID-19. Insureds are seeking coverage under Business Interruption Coverage, which protects the insured business from losses of business income and earnings typically resulting from physical damage arising from a covered loss. Insureds are also seeking Civil Authority Coverage, which protects the insured business from losses as a result of governmental action that impairs or prohibits access to the insured business. Additionally, this update includes an overview of the business interruption legislation introduced in Ohio, under [Ohio House Bill No. 589](#), as well as in the federal system, under the [Business Interruption Insurance Coverage Act of 2020](#) and [Never Again Small Business Protection Act of 2020](#).

Business Interruption Developments in Ohio Courts

During the month of May, a multitude of new lawsuits were filed in Northeast Ohio Courts of Common Pleas against insurers related to business interruption and/or civil authority coverage as a result of the COVID-19 pandemic. Of these lawsuits, filed in May 2020, three were filed in Cuyahoga County, five were filed in Stark County, and four in Summit County.

The plaintiffs have filed similar claims for declaratory relief, breach of contract, and bad faith against the insurance companies, all focused around the central argument that COVID-19 and the Ohio Governor's orders have caused businesses to sustain "property damage" and direct physical loss that comes within the grant of coverage for business interruption and civil authority insurance coverage.

A majority, if not all, of these cases allege that COVID-19 is a virus, which is a physical substance, that can and/or does live on and remain on the floors, walls, furniture, and other fixtures and property located at the plaintiffs' places of business, which renders the plaintiffs' places of business unsafe, impairs their value, and results in loss of use and function. Additionally, the plaintiffs allege that the Ohio Governor's executive orders, which required non-essential businesses to cease operations and implemented the social distancing procedures, is a civil authority as contemplated by the insurance policies. The plaintiffs repeatedly seek a declaration, including, but not limited to, the following:

1. They have sustained direct physical loss or damage as a result of COVID-19;
2. Physical loss under the policies do not require tangible physical damage;
3. COVID-19 is a covered cause of loss under the policies;
4. The losses incurred by the plaintiffs resulting from the Ohio Governor's executive orders are covered losses under the policies' civil authority coverage;
5. They are entitled to coverage for business interruption, business income loss, and/or extra expense as a result of COVID-19; and
6. They are entitled to coverage for losses due to the Ohio Governor's executive orders.

The contested issues in these cases will be whether or not the insured property has actually suffered a "direct physical loss" or "property damage" caused by COVID-19, whether a "Virus Exclusion" or a "Mold, Fungus, and Bacteria Exclusion" will apply to remove any potential coverage, and whether or not there is coverage under the "Civil Authority" coverage provision in the policies.

Additionally, for those businesses deemed to be essential businesses and which stayed partially open during the quarantine and social distancing period, it will be important to see whether the Ohio trial courts follow the Northern District of Ohio's recent decision, in [*Hastings Mut. Ins. Co. v. Mengel Dairy Farms, LLC, U.S.D.C., N.D., Case No. 5:19CV1728*](#), which found that "necessary suspension" requires complete shutdown of all business activities to trigger lost business income coverage.

The following cases were filed in the Cuyahoga County Court of Common Pleas in May 2020:

- ***Retina Specialists of Ohio, LLC v. Selective Ins. Co. of America*** , Case No. CV-20-932506 (optometry offices forced to close business facilities as a result of COVID-19, seeking declaratory judgment as to insurance coverage for losses incurred due to a "necessary suspension" of its operations and for civil authority).
- ***Saucy Brew Works LLC v. The Cincinnati Ins. Co.***, Case No. CV-20-932532 (class action lawsuit in which bar/restaurant seeks declaratory judgment as to insurance coverage for losses incurred due to COVID-19, including physical loss to property and loss of use of the property).
- ***iAthlete & Fitness, LLC v. The Cincinnati Ins. Co.***, Case No. CV-20-932683 (fitness center seeking declaration that business income and extra expense losses incurred as a

result of ceasing business activities, due to COVID-19, as well as loss due to the actions of the Ohio Governor, are insured losses under the policy).

The following cases were filed in the Stark County Court of Common Pleas in May 2020

- ***Basement Group LLC, et al. v. Illinois Casualty Co., et al.* , Case No. 2020CV00816** (plaintiffs, a group of businesses engaged in the restaurant and bar business under a trade name, seeking declaration regarding insurance coverage, due to having to completely shut down or continuing operations with substantially less business, as a result of COVID-19 and Ohio Governor's orders).
- ***Carpe Diem Coffee v. The Cincinnati Ins. Co.* , Case No. 2020CV00814** (coffee shop seeking declaration regarding business interruption coverage and civil authority coverage due to COVID-19).
- ***Gervassi 1700 LLC v. National Trust Ins. Co., et al.* , Case No. 2020CV00818** (owner of group of businesses, including vineyard, restaurants, and hotels, seeking declaration regarding insurance coverage for physical loss or damage as a result of COVID-19 and civil authority coverage as a result of Ohio Governor's orders).
- ***McKinley Dev. Leasing Co., Ltd. v. Westfield Ins. Co., et al.* , Case No. 2020CV00815** (real estate development and leasing companies seeking declaration as to insurance coverage under loss of business income including rental value coverage, extra expense coverage, and coverage for loss due to actions of a civil authority, as a result of COVID - 19).
- ***Sylvester & Sylvester, Inc. v. State Auto Mut. Ins. Co.* , Case No. 2020CV00817** (restaurant seeking declaration as to insurance coverage under business income, extended business income, extra expense, business income limited extension for food-borne illness, and civil authority coverages for having to completely shut down its business, including hosting guests in its restaurant or providing carry-out service, due to COVID-19).

The following cases were filed in the Summit County Court of Common Pleas in May 2020:

- ***357 Turkeyfoot Lake LLC v. Illinois Casualty Co., et al.* , Case No. CV-05-1549** (restaurant and bar business, which has had to completely shut down or has done substantially less business, seeking declaration as to insurance coverage under business income, extended business income, extra expense, and civil authority coverages due to COVID-19).
- ***Ethan Austin Ltd., et al. v. Illinois Casualty Co., et al.* , Case No. CV-05-1552** (restaurant and bar business, which has had to completely shut down or has done substantially less business, seeking declaration as to insurance coverage under business income, extra expense, and civil authority coverages due to COVID-19).
- ***Lakeside Pub LLC v. Illinois Casualty Co., et al.* , Case No. CV-2020-05-1551** (restaurant and bar business, which has had to completely shut down or has done substantially less business, seeking declaration as to insurance coverage under business income, extended business income, extra expense, and civil authority coverages due to

COVID-19).

Weston Hurd will continue to monitor these cases, as well as newly filed cases, and provide timely updates as these cases, arguments, and court opinions develop.

Business Interruption Developments in the Federal Courts

Federal Multidistrict Litigation

In April 2020, a coalition of Plaintiffs' law firms initiated an action before the Judicial Panel for Multidistrict Litigation ("JPML") seeking transfer of pending federal business interruption coverage cases to the JPML in order to centralize the litigation in a single action. (JPML MDL No. 2942). If allowed, a consolidated action would pull together dozens of pending class actions against dozens of insurers and allow for additional tag-along cases. Plaintiffs' liaison counsel argue that centralization is warranted, for the following reasons:

Here, all of the Actions, and any tag-along actions, will require a determination of whether the various COVID-19 Governmental Orders trigger coverage under plaintiffs' business interruption policies and if so, whether any exclusions apply. Section 1407 does not require a majority of common factual issues as a condition for transfer, only that there are common questions presented which justify consolidation and coordination.

(Plaintiffs' brief in support of motion for transfer, Doc. 1-1 at 7-8).

In a subsequent motion for transfer, Plaintiffs' counsel further argue that

The near identity of claims means that any court tasked with resolving one of these lawsuits would face the same basic legal and factual issues. Indeed, each of the cases filed to date turns on two basic questions, the same two questions necessarily raised by any potential complaint alleging that an insured can recover property damage and business interruption losses caused by COVID-19: (1) Whether COVID-19 causes "physical damage or loss to property" as that phrase is used in property insurance policies; and (2) whether COVID-19 was present on the insured property or on property sufficiently connected by proximity or in other ways to the insured property such that coverage is triggered.

(Brief in support of subsequent motion for transfer, Doc. 4-1 at 4).

The JPML set a briefing schedule on the propriety of transfer and consolidation, with responses due on June 5, 2020, and replies due June 15, 2020.

The insurers will likely argue that a consolidation of the actions would complicate an already complicated issue, given the likely variation of policy language among insurers and between policy holders, differences in state government stay-at-home orders issued at different times by different states, and differences pertaining to the various industries of the policyholders. We will continue to monitor the MDL proceedings and provide updates as the matter proceeds.

Federal Business Interruption Coverage Complaints

In addition to ongoing proceedings before the JPML, the month of May saw a deluge of business interruption coverage complaints against insurers in the federal courts around the United States. Twenty-six complaints, ten of which are nationwide class actions, were filed around the country. Similar to the state court complaints described above, the federal plaintiffs maintain that they are entitled to coverage for their business income losses and extra expenses, variously arguing that they have sustained physical loss; that property need not be physically altered to constitute "physical loss or damage"; that virus or bacteria exclusions do not apply, as stay-at-home orders were the proximate cause of loss; and that civil authority coverage and/or business interruption coverage and/or extra expense coverage applies.

Business interruption coverage nationwide class actions filed in the month of May include the following:

District of New Jersey (4)

- *Colby Restaurant Group Inc. v. Utica National Insurance Group, et al.* , Case No. 1:20cv02957
- *The Eye Care Center of New Jersey v. The Hartford, et al.*, Case No. 2:20cv5743
- *J.G. Optical Inc. v. The Travelers Companies, et al.* , Case No. 2:20cv02754
- *Beniak Enterprises v. Chubb Ltd. et al.*, Case No. 2:20cv05536

Southern District of New York (2)

- *Starjem Rest. Corp. v. Liberty Mutual Ins., et al.* , Case No. 1:20cv03672
- *Food for Thought Caterers Corp v. The Hartford Financial Services Group, et al.* , Case No. 1:20cv03418

Southern District of Alabama (1)

- *Homestate Seafood LLC v. The Cincinnati Insurance Company* , Case No. 2:20cv649

Central District of California (1)

- *Kingray Inc. v. Farmers Group Inc.* , Case No. 5:20cv963

Southern District of California (1)

- *Pappy's Barber Shops v. Farmer's Group Inc., et al.* , Case No. 3:20cv907

District of Oregon (1)

- *Sero, Inc. v. Berkley North Pacific Group, LLC.* , Case No. 3:20cv776

No answers have been filed in the above-referenced cases to date, and in several

cases service has not yet been perfected. Weston Hurd will continue to monitor these cases and any new business interruption coverage complaints and provide updates when important developments occur.

State and Federal Legislation Relating to Business Interruption Coverage for COVID-19 Related Losses

Ohio House Bill No. 589

Since the onset of the COVID-19 pandemic, various state legislatures, including Ohio, Louisiana, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and South Carolina, have introduced bills that would require insurers to provide business interruption coverage to certain policy holders for income losses due to COVID-19.

The [Ohio House Bill 589](#) was introduced on March 24, 2020 by Rep. Jeffrey Crossman and Rep. John M. Rogers. The bill was referred to committee on May 5, 2020, but has seen no further action. If enacted, the law would establish the following:

Notwithstanding any other law or rule to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in this state on the effective date of this section, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency.

The coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the state of emergency.

The rule would apply to insured Ohio businesses located in the state with 100 or fewer employees with a policy in force on the effective date. The bill would create a Business Interruption Insurance Fund. Insurers who provide BI coverage payments pursuant to the law, would be entitled to seek reimbursement from the state.

The bill is in committee at this time. We will provide updates on any important developments when they occur.

Business Interruption Legislation at the Federal Level

Two separate bills have been introduced by the United States Congress. On April 14, 2020, Rep. Mike Thompson (D-CA) introduced H.R. 6494, entitled [Business Interruption Insurance Coverage Act of 2020](#). As summarized in the bill, the law's purpose is "to make available insurance coverage for business interruption losses due to viral pandemics, forced closures of businesses, mandatory evacuations, and public safety power shut-offs, and for other purposes." If enacted, it would void "any exclusion in a contract for business interruption insurance that is in force on the date of the enactment of this Act... to the extent that it excludes losses specified in section 2(1)." The specified losses in section 2(1) are losses resulting from "any viral pandemic;...any forced closure of businesses, or mandatory evacuation, by law or order of any government...; or any power shut-off conducted for public safety purposes." The Thompson bill contains no provision for reimbursement to carriers that make payments to insureds pursuant to the

law's requirements.

Also on April 14, 2020, Rep. Brian K. Fitzpatrick (R-PA) introduced H.R. 6497, titled "[Never Again Small Business Protection Act of 2020](#)." The stated purpose of the law is "to make available insurance coverage for business interruption losses due to national emergencies, and for other purposes." The Fitzpatrick bill would likely have a much narrower effect than the Thompson bill, as the Fitzpatrick bill would only prevent insurers from denying business interruption coverage to their insureds based on an exclusion for "national emergency." Further, the proposed law anticipates reimbursement to the insurer, as it would only take effect "[u]pon a determination that there is in effect a Federal backstop mechanism to reinsure insurers for excessive losses under coverage made available pursuant to section 2 of this Act."

Following their introduction on April 14, 2020, neither bill has seen debate or further action.

Weston Hurd will continue to monitor the progress of this proposed legislation and provide updates as important developments occur.

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