

Outliers Offer False Hope For Virus Biz Interruption Claims

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In recent weeks, articles in legal publications have suggested a sea change in the way courts are deciding claims seeking coverage for losses from efforts to prevent the spread of COVID-19 under commercial property insurance policies — touting "hope for policyholders"¹ and predicting "the tide might be turning against insurers."²

But in reality, court decisions on these claims have remained remarkably stable — and have continued to overwhelmingly favor insurers. On March 8, 2021, the same day Law360 published an article citing "a growing number of rulings that coverage can be triggered by loss of use of property, as well as visible damage," it published three other articles about court decisions dismissing cases seeking such coverage.

Courts held for the insurers in more than 87% of the decisions on COVID-19 business interruption claims in the first quarter of 2021, about the same percentage as in the fourth quarter of 2020. March 2021 data showed an increase to about 90% of decisions favorable for insurers.³

Despite this stable and overwhelmingly favorable data, predictions of a changed landscape for insureds following outlier decisions are nothing new. Those predictions go back as far as August, when the U.S. District Court for the Western District of Missouri handed down *Studio 417 Inc. v. Cincinnati Insurance Co.*,⁴ allowing a restaurant's claim for business losses from COVID-19 to proceed on narrow grounds following a string of victories for insurers.⁵

These outlier decisions garnered press, but were quickly criticized by other courts. As we predicted would happen at the time,⁶ other courts rejected the court's analysis in *Studio 417*.⁷ Ultimately, even other courts in applying Missouri law reached the opposite conclusion.⁸

Similarly, *In re: Society Insurance Co.*,⁹ cited as hope for policyholders in recent articles, has already been criticized or distinguished by other courts.¹⁰ While the outlier decisions reflect differing views by a minority of courts, none of them has reflected a new way of analyzing the issues that has been broadly adopted by other courts.

The panoply of decisions finding no coverage has predictably led policyholders' lawyers to creatively change their theories. Thus far, these attempts to plead around the substantial body of law favoring dismissal have been unsuccessful.

Courts have nearly unanimously held that policy requirements for direct physical loss or damage are not triggered, whether the insured pleads that its losses were caused by loss of use from government orders or COVID-19 droplets settling on property.¹¹

Why have the overwhelming majority of courts found no coverage? It's not that the courts are insensitive to policyholders' financial hardship. Courts granting motions to dismiss are quick to sympathize, even as they conclude that the law and policy language require a finding of no coverage.

Nor is it that these courts are somehow reviewing poorly or incorrectly pled complaints. A review of the very thorough

and well-reasoned decisions reflects that the courts have rejected every pleading permutation filed by all different size and sophistication of insured and law firm.

For example, courts have considered and rejected arguments that installing plexiglass constitutes a repair of damaged property,¹² that virus exclusions were not intended to apply in a pandemic¹³ and that customers' anxiety over COVID-19 constitutes a direct physical loss or damage.¹⁴

Courts have rejected claims by small local businesses that might be among the most likely to garner sympathy,¹⁵ as well as by larger-scale operations — such as sports leagues and restaurant chains — with funding to hire sophisticated counsel.¹⁶

The reason is simple. The business interruption losses were caused by efforts to mitigate the risk that humans would spread the disease to other humans.

As many courts have explained, the virus harms people; it does not cause physical loss or damage to property.¹⁷ And, while not even necessary to reach, courts that have addressed the issue have also been nearly unanimous in finding that virus exclusions present in the majority of property policies would otherwise bar coverage.¹⁸

Federal and state courts alike have reached this same conclusion. While more federal courts have decided the issue, there are currently almost 40 state court decisions granting case-dispositive motions favorable to insurers. Those cases come from 17 states, including states that are traditionally considered policyholder-friendly jurisdictions — like Texas, Florida and California.¹⁹

In contrast only five state court decisions, in four states, have granted case- or claim-dispositive motions for insureds. Other state courts that have allowed claims to survive the pleading stage have emphasized that, to ultimately recover, the insured must be able to prove the allegations made in its complaint in discovery.²⁰

There are many reasons to think insureds will have a very hard, if not impossible, time making that necessary proof, even if they can get past the pleading stage. Most insureds shut down when government orders required them to do so as a social distancing measure, and reopened when the government allowed them to do so — without regard to whether they believed COVID-19 was on their property.

Broad scientific consensus is that COVID-19 can be cleaned from property through ordinary methods in a matter of days — not the months most insureds are claiming their businesses were interrupted to comply with government social distancing requirements.

In, *Cajun Conti LLC v. Certain Underwriters at Lloyd's of London*, the only case to go to trial on a COVID-19 business interruption claim so far, the Civil District Court for the Parish of Orleans, State of Louisiana, denied the insurers' summary judgment motion, but ultimately issued a bench ruling for the insurer, concluding that the insured could not prove the covered losses alleged in its complaint.²¹

While no federal or state appellate courts have yet decided the issue, the hundreds of federal and state trial courts that have decided the issue have overwhelmingly held for insurers. In the current legal landscape, the prospects of ultimate recovery remain slim, even for those few insureds who manage to survive the pleading stage. That fact has remained a constant, despite claims by policyholder counsel or press of yet another turning tide.

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1. <https://www.law360.com/insurance/articles/1358935/1-year-in-policyholders-see-hope-in-virus-coverage->

- [battles?nl_pk=e642edb6-a584-4ad0-834f-b74cb9c32221&utm_source=newsletter&utm_medium=email&utm_campaign=insurance&read_more=1.](https://www.law.com/ctlawtribune/2020/12/04/attorneys-tide-might-be-turning-against-insurers-in-business-interruption-lawsuits/)↵
2. [https://www.law.com/ctlawtribune/2020/12/04/attorneys-tide-might-be-turning-against-insurers-in-business-interruption-lawsuits/.](https://www.law.com/ctlawtribune/2020/12/04/attorneys-tide-might-be-turning-against-insurers-in-business-interruption-lawsuits/)↵
 3. [https://cclt.law.upenn.edu/judicial-rulings/.](https://cclt.law.upenn.edu/judicial-rulings/)↵
 4. No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020).↵
 5. [https://www.law360.com/articles/1319456/insurer-friendly-covid-19-case-law-is-no-silver-bullet.](https://www.law360.com/articles/1319456/insurer-friendly-covid-19-case-law-is-no-silver-bullet)↵
 6. [https://www.law360.com/articles/1304939/restaurant-virus-coverage-ruling-is-an-outlier.](https://www.law360.com/articles/1304939/restaurant-virus-coverage-ruling-is-an-outlier)↵
 7. *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, ECF No. 30 (N.D. Cal. Sept. 11, 2020) (transcript); *Gilreath Family & Cosmetic Dentistry Inc. d/b/a Gilreath Dental Assocs. v. The Cincinnati Ins. Co.*, No. 1:20tc1609 (N.D. Ga. March 1, 2020); *Bluegrass Oral Health Center, PLLC v. The Cincinnati Ins. Co.*, No. 1:20-cv-00120 (W.D. Ky. Mar. 18, 2021).↵
 8. *Ballas Nails & Spa LLC v. Travelers Cas. Ins. Co. of America*, No. 4:20-cv-1155, 2021 WL 37984 (E.D. Mo. Jan. 5, 2021).↵
 9. *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20 C 02005, 2021 WL 679109, at *1 (N.D. Ill. Feb. 22, 2021).↵
 10. *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, No. 20-22832-CIV, 2021 WL 768273, at *5 (S.D. Fla. Feb. 26, 2021); *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 20-CV-3418 (JGK), 2021 WL 860345, at *4 (S.D.N.Y. Mar. 6, 2021).↵
 11. *Carrot Love, LLC d/b/a Carrot Express v. Aspen Specialty Ins. Co.*, No. 1:20-cv-23586-RNS, 2021 WL 124416 (S.D. Fla. Jan. 12, 2021).↵
 12. *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. 20-3033, 2021 WL 131657 (E.D. Pa. Jan. 14, 2021).↵
 13. *Boxed Foods Co. LLC v. California Capital Ins. Co.*, No. 3:20-cv-04571, 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020).↵
 14. *Café Plaza de Mesilla Inc. v. Continental Cas. Co.*, No. 2:20cv354, 2021 WL 601880 (D.N.M. Feb. 16, 2021).↵
 15. See, e.g., *Roundin3rd Sports Bar LLC v. The Hartford*, No. 2:20-cv-05159, 2021 WL 647379 (C.D. Cal. Jan. 14, 2021); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5847570 (S.D. Cal. Oct. 1, 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020).↵
 16. See e.g., *Legal Sea Foods LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass. Mar. 5, 2021); *Chattanooga Professional Baseball LLC v. National Cas. Co.*, No. 2:20-cv-01312, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020).↵
 17. See e.g., *Uncork and Create, LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020).↵
 18. See e.g., *The Riverwalk Seafood Grill Inc., d/b/a Riverside Banquets v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-cv-03768, 2021 WL 81659 (N.D. Ill. Jan. 7, 2021).↵
 19. *Vstyles Inc. v. Continental Cas. Co.*, No. RIC2003415 (Riverside Cnty. Ct. Dec. 23, 2020); *New Am. Bar & Grill LLC v. Certain Underwriters At Lloyd's London*, No. 20-CA-005810 (Hillsborough Cnty. Cir. Ct., Fla. Dec. 22, 2020); *Ybarra Investments Inc., d/b/a Gringo's Mexican Kitchen v. Scottsdale Ins. Co.*, No. 200-25079, 2020 WL 7416720 (Harris Cnty. Dist. Ct., Tex., Dec. 10, 2020).↵
 20. See e.g. *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 N.J. Super. Unpub. LEXIS 1782; *Boardwalk Ventures CA, LLC v. Century Nat'l Ins. Co.*, No. 20STCV27359 (L.A. Super. Cnty. Ct., CA Mar. 18, 2021).↵
 21. *Cajun Conti, LLC v. Certain Underwriters at Lloyd's London, et al.*, No. 2020-02558, 2020 WL 6993790 (Orleans Parish Dist. Ct. Nov. 4, 2020).↵

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