White and Williams LLP

Decided Yesterday: Federal Court's Lesson For COVID-19 Business Interruption Insurance

***Insurance Coverage and Bad Faith Alert* | May 20, 2020**

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For the past two-plus months the insurance coverage world has been laser-focused on a single question — are business interruption losses, on account of the COVID-19 pandemic, covered under property policies? Dozens of declaratory judgment actions, recently filed from sea to shining sea, are poised to answer this question.

In the meantime, until courts have their say, insurance coverage lawyers, of all stripes, have weighed in on the question. The debate has been fierce. Madison- and Hamilton-like. Predictable opinions abound.

In much of this lawyer-driven commentary, concerning the availability of business interruption insurance, the described scenario has involved an insured's business being shut down — in total — by the pandemic. But that often is not the case. This is an important — and sometimes overlooked — factor when addressing the potential availability of COVID-19-based business income losses.

Yesterday an Ohio federal court issued a decision, ruling on coverage under a business interruption policy, which made this point. The opinion may impact such coverage for some businesses facing COVID-19-caused financial losses.

Across the country, some businesses, where permitted, have found ways to keep open during the pandemic. Restaurants have been operating take-out and delivery services and retail stores have offered online shopping with curbside pick-up of purchases. Indeed, COVID-19-related civil authority orders in many states explicitly have allowed, if not encouraged, such operations to continue. In Florida, for instance, Governor DeSantis's March 20, 2020 order states that "establishments may operate their kitchens for the purpose of providing delivery or take-out services." In Louisiana, Gov. John Bel Edwards carved out a similar proviso in his March 16, 2020 order.

For all businesses, much has been written about some of the issues in play concerning the potential availability of business interruption coverage, including the insured's requirement to prove direct physical loss of or damage to covered property (or nearby property for civil authority coverage) as well as the virus exclusion. But, for policyholders operating take-out, delivery, or other limited services, still another obstacle exists — the requirement to prove a "necessary suspension" of operations caused by that physical loss or damage.

A federal court in Ohio – yesterday – addressed coverage for a dairy farm seeking business interruption coverage. It failed, on account of the inability to prove the "necessary suspension" requirement. That ruling, in *Hastings Mutual Insurance Company v. Mengel Dairy Farms*, 2020 U.S. Dist. LEXIS 87612 (N.D. Ohio May 19, 2020), may prove troubling for policyholders seeking business interruption coverage while, at the same time, continuing take-out, delivery, or other limited operations.

In *Mengel*, the dairy farm sued its commercial-property insurer for business interruption coverage for the farm's "loss of livestock, milk production, and profits," caused by what was discovered to be a "stray electric current" which "caused the cows to stop eating and production to fail." 2020 U.S. Dist. LEXIS 87612, *2-3. The farm's policy, in the business income and extra expense section, stated in pertinent part that "[w]e will pay for the actual loss of business income . . . you sustain due to the necessary suspension of your operations during the period of restoration." *Id.* at *15.

After surveying cases in several other jurisdictions, the *Mengel* court concluded that "a complete cessation of business activity is required to constitute a 'necessary suspension.'" *Id.* at *17. Further concluding that the farm "has not provided evidence suggesting it entirely stopped its operations," the *Mengel* court granted the insurer's motion for summary judgment and dismissed the farm's business interruption claim. *Id.* at *18.

The court in *Mengel* found "compelling," and therefore applied, decisions by numerous courts which "overwhelmingly held that the term requires a complete cessation, even if temporary, as opposed to a mere slowing down of business before coverage is triggered." *Id.* at *15-16 (citing *Apartment Movers of Am., Inc. v. One Beacon Lloyds of Tex.*, 170 F. App'x 901 (5th Cir. 2006) (per curiam); *Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062, 1065 (E.D. Mo. 1998), *aff'd*, 175 F.3d 1023 (8th Cir. 1999) (unpublished table decision); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 991 (D. Kan. 1995); *Broad St., LLC v. Gulf Ins. Co.*, 37 A.D. 3d 126, 131-32 (N.Y. App. Div. 2006); *Buxbaum v. Aetna Life & Cas. Co.*, 126 Cal. Rptr. 2d 682, 687-94 (Cal. Ct. App. 2002)).

Besides the many cases cited by the *Mengel* court, other courts have interpreted the phrase "necessary suspension," in business interruption policies, to require a complete cessation, as opposed to partial cessation, of operations caused by a covered loss. *See, e.g., Forestview the Beautiful, Inc. v. All Nation Ins. Co.*, 704 N.W.2d 773, 775-76 (Minn. Ct. App. 2005) ("The 'vast majority' of courts that have considered whether the definition of 'suspension of operations' for purposes of business-income coverage includes a partial suspension of operations have held that similar policies 'require[] a cessation of operations to trigger coverage.'"); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 U.S. Dist. LEXIS 201852, at *26-27 (S.D. Fla. June 11, 2018) ("Plaintiff cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations . . . . The restaurant remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant.").

Relatedly, an insured carrying on at least some operations, such as take-out, delivery, or curbside pick-up, also may not satisfy the "prohibits access" requirement in the civil-authority section of business interruption policies. *See, e.g., S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140-41 (10th Cir. 2004) (discussing cases in which "a 'civil authority' provision was similarly denied . . . where the civil authority order had only the indirect effect of restricting or hampering access to the business premises"); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, L.L.P. v. Nat'l Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 64849, at *22 (M.D. La. Aug. 2, 2007) ("The unambiguous language of the contract requires that access to the insured premises be 'prohibited' by civil authority. 'Prohibited,' as explained in *Southern Hospitality* means more than mere hampering or limitation, it means to 'formally forbid' or 'prevent.'").

On account of the requirement that a complete cessation of business activity is needed to constitute a "necessary suspension," policyholders continuing take-out, delivery, or other limited operations, face an additional obstacle to

tapping business interruption coverage for COVID-19-related financial losses.

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As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.