BELLNUNNALLY

EMERGING COVID-SPECIFIC BUSINESS INTERRUPTION LITIGATION ISSUES IN TEXAS

May 08, 2020

Posted: May 8 at 1:30 PM

Many lawyers predicted that COVID-19 would lead to a wave of litigation, particularly in the area of business interruption insurance. Those early predictions are starting to manifest here in Texas, based on the filing of several recent Texas cases.

Businesses have sustained considerable economic damage stemming from the COVID-19 pandemic. When analyzing claims to cover these losses, some insurers have taken a hard-nosed approach, often denying coverage under various provisions within the respective policy. Some speculate that this approach was to discourage business owners from even attempting to file lawsuits over their policies. But, their heavy-handed response may have backfired as many businesses have filed lawsuits in recent weeks in Texas and across the country, contesting insurers' decisions to not provide coverage relating to the COVID-19 pandemic. As we are all learning the true effects and collateral ramification of the virus, this is only the beginning. We anticipate insurers will continue tightening their belts, leading to more litigation of this nature. This article focuses on several key issues we have seen move into litigation in various Texas courts in recent weeks.

The majority of cases allege that the insurer breached its contract with the insured (*i.e.*, the policy and the provisions within it). The alleged breaches focus on contractual provisions relating to issues such as coverage for Civil Authority, Extra Expense and Business Income. In order to prove the elements required for breach, some insureds also ask the court to declare that the alleged damage occurred and is covered by the respective policy.

In addition to those causes of action, some plaintiffs claim that the insurer and adjuster breached their respective duties of good faith and fair dealing, as well as provisions of the Texas Insurance Code.

The vast majority of cases aimed at an insurer's failure to provide coverage under a policy explain how important the language of the underlying policy truly is when adjudicating these disputes. This article also examines the emerging themes in the cases filed in various Texas state and federal courts so far.

Exclusions and Endorsements

No two policies are identical, and it is important to know what exclusions and endorsements your specific policy does or does not have. A few key provisions have been the focal point of litigation.

Virus or Bacteria Exception

Plaintiffs are pouncing on the lack of a virus or bacteria exclusion in certain policies. For example, in *Risinger Holdings, LLC v. Sentinel Insurance Co., Ltd.*, Civil Action No. 1:20-cv-00176, in the U.S. District Court for the Eastern District of Texas, the owner of buildings housing orthodontist practices, as well as an orthodontic specialist in Beaumont, sued its insurer and parent company for denying coverage. The complaint explains how the SARS outbreak in 2003 led the Insurance Services Office (ISO), the insurance industry drafting arm, to prepare and issue a circular recommending that insurers adopt a new form titled, "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." The circular noted that ISO did not believe that the pollution exclusion adequately addressed or excluded loss due to viral or bacterial contaminations. Additionally, the circular specifically found that buildings and personal property could become contaminated by these viruses and bacteria, thereby causing direct physical loss or damage to the property.

Pandemic Endorsements

A federal lawsuit in Houston highlights issues that arise when an insurer refuses to cover damage under a specific endorsement. In *SCGM, Inc. d/b/a Star Cinema Grill, Hollywood Palms Cinema, District Theater, and State Fare Restaurant v. Certain Underwriters at Lloyd's*, Civil Action No. 4:20-cv-01199, in the United States District Court for the Southern District of Texas, a movie theater chain sued Lloyd's for its failure to cover damages under a Pandemic Event Endorsement included within the policy. Plaintiff alleged that Lloyd's marketing materials indicated its business interruption insurance "will cover business interruption along with extra expenses with crisis management that is crucial during pandemic events." Plaintiff added the Pandemic Event Endorsement, which provided up to $1 million of coverage for Pandemic Events, to its policy. The complaint further notes that the World Health Organization has declared the COVID-19 outbreak a pandemic, and that declaration has been adopted by local and federal officials in the United States. In accordance with public health recommendations and directives from officials, Plaintiff announced it would close its locations until the appropriate authorities determine the danger from the pandemic has passed. Per the allegations, Lloyd's anticipatorily repudiated the coverage by stating that COVID-19 is "not covered under the Pandemic Event Endorsement as it is not a named disease on that endorsement." Plaintiff's petition elaborates that COVID-19 has been referred to as SARS-CoV-2 and, while that specific strain is not listed, the endorsement covers mutations and variations of the several enumerated pathogens, including "Severe Acute Respiratory Syndrome-associated coronavirus (SARS-CoV) disease."

Was the Investigation Reasonable?

Some insureds have expressed belief that their insurance company has decided to deny all coverage relating, in any way, to COVID-19, with little or no actual investigation. For example, in *Lombardi's, Inc. v. Indemnity Insurance Company of North America*, Cause No. DC-20-05751, in the 14th District Court of Dallas County, Texas, the insured provided a notice of claim on March 18, 2020. On the same day, a Chubb adjuster allegedly indicated that Chubb was going by the "black and white" written words in the policy and there was no physical damage triggering payment. The following day, the adjuster indicated that Chubb would be sending a reservation of rights letter that "would not be a hard 'no.'" Two and a half weeks later, Chubb sent a coverage position letter, stating it was denying coverage. In addition to other aspects of the letter, plaintiff took issue with the assertion that Chubb even completed a factual investigation. The petition notes that Chubb never made a request for documents or information relating to the claim. Moreover, Chubb initially denied coverage on the day the claim was presented and could not have completed a proper or thorough investigation during the several hours that passed.

Attacking Adjuster Conduct

Other plaintiffs have lodged allegations at not only the insurer, but also the adjuster. For example, in *MB2 Dental Solutions, LLC v. Zurich American Insurance Company*, Cause No. DC-20-06249, in the 134th District Court of Dallas County, Texas. MB2 Dental sued its insurer, as well as the adjuster assigned to investigate the claim. MB2 Dental alleged the adjuster failed to comply with various provisions of the Texas Insurance Code by making misrepresentations regarding the types of damage that would lead to coverage under certain provisions of the policy, failing to include all covered properties in the claim, and "setting out to conduct an outcome-oriented investigation and adjustment which has and will result in an inequitable settlement of Plaintiff's claim." MB2 Dental also alleged the adjuster and insurer conspired to intentionally make sure that the investigation would result in avoiding payment of all damages to MB2 Dental's property. The allegations further demonstrate a belief that the adjuster sent a reservation of rights letter in an attempt to delay the claim decision so that the insurer would have more time to collectively deny all of its policyholders' claims for business interruption

Civil Authority

Most of these cases include disputes regarding whether the insured suffered a cessation of business that would trigger coverage under the Civil Authority clause. The Civil Authority clause in a policy indicates whether the insurer will pay for business income losses when a civil authority prevents the policyholder from accessing the covered premises. Generally, insurers have argued that a government lockdown does not trigger business interruption coverage. In response to that position, plaintiffs have consistently cited government decrees and orders finding that the presence of COVID-19 resulted in property loss or damage to businesses within the respective area.

For example, in *Salum Restaurant Ltd. d/b/a Salum Restaurant v. The Travelers Indemnity Company*, Civil Action No. 3:20-cv-01034, in the United States District Court for the Northern District of Texas, orders from various authorities forced a downtown Dallas restaurant, like others in the county, to drastically change operations. Specifically, in addition to orders from Governor Greg Abbott, Dallas County Judge Clay Jenkins issued a "Stay Home Stay Safe" shelter-in-place order that went in effect on March 23. The order noted that, "The COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time." Under the order, restaurants without drive-in or drive-through services could

provide only take-out or delivery services. Additionally, the order prohibited public events where catering services might be used. As a result of Jenkins' order, Salum was required to stop all dine-in services and catering services. Salum notes in its petition that it did not have a drive-through and has never had a take-out or delivery service or clientele. Effectively, the executive order resulted in suspension of Salum's business. However, Travelers denied coverage under the Civil Authorities clause, and the parties have found themselves in the U.S. District Court for the Northern District of Texas.

Issues Specific to the Healthcare Industry

Plaintiffs who provide health care services have cited industry-specific concerns in pleadings. For example in *Christie Jo Berkseth-Rojas DDS v. Aspen American Insurance Company*, Civil Action No. 3:20-cv-00948, in the U.S. District Court for the Northern District of Texas, plaintiff filed a potential class-action suit. Plaintiff owns a family dental center in Minneapolis. In addition to federal and local orders entered during the pandemic's spread in the United States, the plaintiff cites for support orders from other associations. Specifically, plaintiff explained that the American Dental Association (ADA) recommended that "dentists nationwide postpone elective procedures in response to the spread of the coronavirus disease, COVID-19, across the country." As a result, dental professionals following this guidance were able to provide only emergency dental care. As a result of plaintiff's compliance with orders and the ADA's guidance, plaintiff lost Practice Income and Extra Expense allegedly provided for in the policy. Shortly after the insurer denied coverage, plaintiff filed suit in Dallas.

Conclusion

While there are various legal issues to address, there is a benefit to considering all options when coverage is denied. Some businesses have lost a fortune due to the events of the past few months, endangering their financial health going forward. That harm should not be compounded by a wrongful denial of insurance coverage provided for in a policy.

If you have questions about whether your business's insurance policy includes or should have included coverage for COVID-19-related business interruptions, please contact Brent Turman or Ross Williams.

Related Practices

Litigation

Practice Area Contact

Brent A. Turman
Ross Angus Williams