A virus walks into a bar…

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Or does it? Where is the proof? Even if it does, where is the property damage? And if it can be proven to be present, but causes no physical damage, is there a case for what courts have called "constructive damage" resulting from the virus rendering the bar useless? But how can the bar be useless when other businesses with the same intruder stay open, like grocery stores and pharmacies? And what if the real reason for shutting down the bar is an order from the civil authorities to prevent the virus from walking in to begin with?

These are just some of the questions that will dominate business interruption claims and lawsuits spreading across the country along the same path as the COVID-19 virus.

Business interruption coverage typically requires a "direct physical loss of or damage to Covered Property at the premises," which "necessarily" causes a suspension or disruption of business operations. The easiest example is a fire that shuts down a business for some time. But what about a virus? While it may land on surfaces, it does no damage to those surfaces. It may damage people on the premises, but there is no "direct physical loss" to the premises.

Courts have dealt with substances that have done no damage. An Ohio court found that mold on the siding of a house does not constitute "physical damage," because it did not affect the structural integrity of the siding and could easily be removed from the surface.[1] Another court found that dust and debris from nearby roadwork did not result in direct physical loss, because it could be removed by cleaning.[2] And the Sixth Circuit has held that under Michigan law, odor from mold in an office building HVAC unit resulted in no "tangible damage to physical property" and did not render the premises uninhabitable, because the smell was only "inconvenient."[3] These cases all supported a denial of business interruption coverage. But maybe it is not that easy.

This is because some courts have expanded the definition of "physical loss or damage to a structure" to include the presence of a substance that renders the premises "useless or uninhabitable." But those cases involved substances that were indisputably present, such as sulfur gases emitted from drywall or E. coli in the building's only water supply.[4] During this pandemic, most businesses did not close because of a known substance detected on the premises that makes those insured premises uninhabitable. Most businesses closed before any employees or patrons experienced any illness. They closed because of an order of the state health director in response to a health emergency.

So, perhaps the first question to be asked in response to a business interruption claim is whether a virus even walked into the bar to begin with. Was the bar shut down by order of the civil authorities before any employee or patron was known to be sick or infected?

There are businesses that may have an easier time answering these questions as they pursue business interruption claims. Meatpacking plants are considered essential services, have not been ordered to close and have even been ordered to stay open. And they may have quite a bit of evidence of the presence of COVID-19, rendering the plant at least temporarily useless. Their evidence may be as simple as an explosion of illness among plant workers who test positive for the virus.

Still, most businesses may have little to no evidence of the presence of COVID-19 before they were ordered to close. Indeed, the very reason states have ordered a shutdown of businesses like restaurants and bars is to avoid the spread of the virus into those premises. Carriers may have a strong argument that the reason businesses were closed was because of actions taken by the civil authorities, not because of a known substance on the premises that caused physical damage or rendered those premises useless or uninhabitable. And as noted above, there are countless examples of essential businesses that continue to operate with a strong statistical likelihood that the virus is in their premises (e.g., warehouses, pharmacies, etc.).

So, while the law concerning virus-based claims for business interruption may take a year or two to clarify, it seems likely that the center of the bell curve of decisions for such claims should favor insurers, at least under the business interruption clause.

The next article will discuss alternative claims asserted under civil authority coverage. What happens when the government walks into a bar?

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[1] Mastellone v. Lightning Rod Mutual Insurance Co., 2008-Ohio-311 (8th Dist.).

[2] Mama Jo's, Inc. v. Sparta Ins. Co., 2018 U.S. Dist. LEXIS 201852 (S.D. Fla., June 11, 2018).

[3] Universal Image Prods. v. Fed. Ins. Co., 474 Fed. Appx. 569 (6th Cir. 2012).

[4] See, respectively, In Re Chinese Manufactured Drywall Prod. Liab. Litg., 759 F. Supp.2d 822 (E.D. La. 2010), and Motorists Mut. Ins. Co. v. Herdinger, 131 F. App. 823 (3rd Cir. 2005).

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