Foster Garvey

Update: Business Disruption Due to COVID-19: Possible Insurance Solutions for the Hospitality Industry

Legal Alert
June 16, 2020

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Thanks again for all of you who signed up for our April 9, 2020 webinar regarding insurance for business interruption due to COVID-19. Following the webinar, I promised to update you on developments in this area, particularly around the progress of class actions by policyholders looking for business interruption coverage.

Back in April, only a handful of proposed class actions had been filed. But since then, more than 100 lawsuits, including a great many would-be class action lawsuits, are on file all over the country, including several in King County, Washington. The list of plaintiffs includes restaurants, casinos, dental practices, a children's clothing boutique and more.

No federal court has yet decided whether any of these individual lawsuits should be granted class action status. The key issue will be whether the issues that individual claims have in common "predominate" over other issues. Policyholders will focus on the common structure and similar terms in various insurance policies; insurers will emphasize the different language employed by different policies.

Meanwhile, several policyholders are seeking to transfer all federal court lawsuits into a single "multi-district litigation" ("MDL") proceeding in either Chicago or Philadelphia. This requires demonstrating that the lawsuits involve one or more common questions of fact and that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." Plaintiffs argue that the lawsuits present many common issues, which will be more efficient to investigate and decide in one proceeding. Insurers argue that differences between insurance companies, policies and governing state law overwhelm any commonalities, and

render an MDL proceeding unmanageable. A hearing on whether to transfer the lawsuits will probably take place at the end of July.

Class actions and transfer to a single MDL proceeding each may serve the interests of many businesses with small claims, small pocketbooks or both. But in Washington, many policyholders may be better off going at it alone, so they can take advantage of Washington laws that are highly favorable to policyholders. Among other items, Washington law authorizes an attorney fee award to any policyholder who successfully sues for coverage, and in certain cases, authorizes up to three times the policyholder's damages. These features may also make outside litigation funding feasible for many businesses.

Finally, two setbacks for policyholders have been widely reported, but neither should have much long-term impact. Here's why:

In the first reported setback, the Pennsylvania Supreme Court rejected a request for "extraordinary relief," which asked the high court to assume jurisdiction over all Pennsylvania state court lawsuits in order to decide the issues these lawsuits present. The court rejected the request rapidly and without explanation. It would be a mistake to read this decision as a commentary on the merits of the claims by policyholders, especially since the court provided no such commentary. Rather, the decision was almost certainly driven by procedural factors or a sense that each lawsuit might present too many individualized features to justify consolidating all the lawsuits before a single court.

In the second reported setback, a New York federal court denied a magazine publisher's emergency motion for a preliminary injunction requiring the insurer to begin paying business interruption insurance proceeds. In so doing, the court opined that the policy in question did not cover the loss because viral contamination was not physical property damage. Though hardly encouraging, four elements about this decision are noteworthy:

1. The standard for granting preliminary injunctions is very high—courts frequently describe it as "an extraordinary and drastic remedy"—much higher than what it takes to win the lawsuit itself, which put the publisher at a distinct disadvantage.
2. The court was asked to decide the motion within 10 days of filing, and less than a day after all written arguments were submitted, leaving the court very little time to consider the issues presented.
3. The publisher did not rely heavily on the policy's civil authority coverage, which left an opening for the insurer to argue that there was no evidence of damage to the publisher's own premises. But, as I mentioned during the webinar, one benefit of civil authority coverage is that it does not require loss or damage to the insured premises.
4. The court applied New York law, which frequently differs from insurance law here in the Pacific Northwest.

For all of these reasons, most local readers should not give too much weight to the court's decision in deciding whether and how to pursue an insurance claim.

So that is where things stand as of mid-June. I hope this update finds you and your families safe, healthy and well. Take care out there!