Advising Business Clients in the Coronavirus Age

September 25, 2020

Business Interruption Coverage and Claims

Status of Nationwide Litigation

Published on *The National Law Review* (http://www.natlawreview.com) August 21, 2020

COVID-19: Developments in Class Action Litigation Surrounding Business Interruption Insurance Coverage

Article By:
Gavin G. McCarthy
Michael J. Daly
Melanie A. Conroy
Cameron Goodwin

Currently, one of the most prominent areas for class action litigation related to the COVID-19 pandemic is disputes about whether commercial insurance policies cover business interruption losses. Hundreds of businesses have sued a large number of insurance companies arguing that their insurance policies should cover any losses incurred as a result of state and local closure orders during the pandemic. There have already been over 1,000 of these actions filed nationwide, more than half of which have been filed as class actions.

Plaintiff businesses have argued that the terms of their "all-risk" insurance policies, including terms related to Business Income coverage and Civil Authority coverage, cover losses from closures required by state and local pandemic orders. Plaintiffs have asserted causes of action for breach of contract, unjust enrichment, and declaratory judgment under state/federal law. In response, insurers have disputed these allegations, arguing that the insurance policies at issue only cover losses incurred as a result of direct physical damage to property, such as from an earthquake or hurricane, and not losses resulting from business disruptions due to a health emergency. Insurers have also noted that some policies contain explicit exclusions for losses resulting from a virus, indicating that general commercial property insurance terms were not intended to cover the losses claimed.

The Judicial Panel On Multidistrict Litigation Declines To Consolidate Similar Actions

Plaintiffs filed two petitions to the Judicial Panel on Multidistrict Litigation to consolidate the hundreds of business interruption cases pending in federal courts. One petition asked the JPML to consolidate all of the present and future business interruption cases into the Northern District of Illinois, whereas the second petition sought centralization in the Eastern District of Pennsylvania.

Following argument on July 30, 2020, the seven-member JPML ruled on August 12, 2020, denying both petitions. See MDL No. 2942. The JPML noted that there were 263 known related actions in 48 districts, and plaintiffs in more than 175 actions responded to the petitions, supporting centralization in the proposed districts or proposing alternatives, including other districts for nationwide consolidation or consolidation on a state-by-state, insurer-by-insurer, or regional basis.

Defendants also responded and uniformly opposed centralization. The JPML ultimately concluded that industrywide national centralization would not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Noting that there was "no common defendant in these actions," the JPML determined there was "little potential for common discovery across the litigation," which would "involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences," the JPML observed, "will overwhelm any common factual questions."

The hundreds of individual cases will now proceed before the courts in which each of the complaints were filed. Even though the JPML denied consolidation on a nationwide basis, cases may be formally consolidated if they were filed within the same federal district and they may be informally coordinated among the parties and the involved judges. There are many options to increase efficiency available that may minimize the potential for duplicative discovery and inconsistent pretrial rulings, especially on an insurer-by-insurer basis. It is likely that, as a next step in many of these cases, the parties may propose such measures or the assigned judges may urge the parties to propose efficient procedures.

Early and Different Decisions On Dispositive Motions

There are currently at least 18 motions to dismiss pending in these actions. In the complaints at issue, some plaintiffs have argued that the presence of the virus on the property, requiring that surfaces be sanitized, constitutes direct physical harm, while other plaintiffs have argued that the forced closure itself is sufficient by directly affecting use of the property. This key difference has resulted in divergent outcomes in early dispositive motion practice.

In cases where plaintiffs argued the forced closure of business operations was sufficient to support a claim without a showing of property damage, early decisions have favored the insurer defendants. A court in Michigan has sided with the insurers, holding that some physical damage to property was required for coverage under the policy. See Gavrilides Management Co. v. Michigan Insurance Co. (Mich. Circ. Ct. 2020). Similarly, a court in D.C. granted summary judgment to an insurer, holding that there must be some direct damage to the property itself and that loss of use as a result of government shutdown orders was not sufficient for coverage. See Rose's 1, LLC v. Erie Insurance Exchange, No. 2020 CA 002424 (D.C. Super. Ct. 2020). Neither of the complaints in those cases alleged any direct physical loss or damage to the property.

On the other hand, some plaintiffs have asserted that the presence of the COVID-19 virus on their property or other identified dangerous conditions can constitute physical loss or damage to commercial property. One federal court has denied a motion to dismiss on this basis, holding that the insurer wrongfully refused to cover a group of hair salons' and restaurants' losses during COVID-19 shutdowns because the businesses adequately alleged they suffered a covered "direct physical loss." The ruling was the first in which a court allowed a policyholder's COVID-19 coverage suit to proceed following a motion to dismiss. Studio 417 Inc. et al. v. The Cincinnati Insurance Co., No. 6:20-cv-03127 (W.D. Mo. 2020).

There have been only a handful of decisions on dispositive motions among the hundreds of cases filed to date. These early decisions are notable, but

are no guarantee of how other courts may rule on similar claims in the future, and it will be important to continue monitoring how courts across the country assess each individual case in the coming months.

Class Certification Issues In Business Disruption Insurance Actions

Plaintiffs will need to meet the standards for class certification under Federal Rule 23 or its state law equivalent in order to maintain their claims as class actions. A court may only certify a class if plaintiffs can show, among other things, that there are common issues applicable to the entire class and that their own claims are typical to other class members' claims. Plaintiffs thus far have argued that the core issue common to all of the claims is whether the phrase "direct physical loss or damage" or similar language in insurance contracts covers losses caused by the pandemic. In response, defendant insurers may raise individualized issues, including, but not limited to, the following:

1. Lead plaintiffs' claims may be based on their own individual contracts with their insurers, which may have differing language, terms, and exclusions as compared to other insurance contracts executed by other putative class members.
2. Some lead plaintiff claims may require extrinsic evidence, such as representations that were made to them individually by the insurance company, whereas other putative class members may not need to present such evidence.
3. The relevant various state, municipal, and county orders that required business closures or interrupted business activities may have significant differences, including their duration and to which businesses each applied.
4. State laws concerning insurance contracts can vary greatly from state to state.
5. Lead plaintiffs may have to assert individualized evidence of causation and their own losses during the pandemic, which has the potential to overwhelm any common issues shared with the putative class.

The above list of potential class certification issues is non-exhaustive and highlights how fact-intensive the analysis in each case may be. Because these cases are in their early stages and the factual record in each case has yet to be developed, additional issues and arguments are likely to arise.

Potential Legislative Developments

Business disruption insurance has also been a focus of legislators, with several states, including Massachusetts and New York, considering legislation that would require insurers to cover business interruption losses related to COVID-19, regardless of any exclusions or physical loss requirements in the policy. Proposed legislation would apply to small businesses that had policies in March, with reimbursement opportunities being offered to insurers by each state. New Jersey proposed similar legislation in March, but the bill was subsequently removed from debate in order to allow insurers to propose their own plans. Legislative proposals across the country will be another important area to monitor as the cases that could be potentially impacted by new laws continue to move forward.

National Law Review, Volume X, Number 234
Source URL: https://www.natlawreview.com/article/covid-19-developments-class-action-litigation-surrounding-business-interruption

COVID-19 Business Interruption Insurance Litigation: The State of Play as of August 2020

Kramer Levin Naftalis & Frankel LLP

USA | August 28 2020

Following the outbreak of COVID-19, executive orders forced businesses across the United States to close or severely restrict operations in order to prevent the spread of the coronavirus. Faced with enormous financial losses, business owners have turned to their business interruption insurance policies to seek coverage for lost income and extra expenses resulting from the pandemic. Insurers have generally responded with blanket denials of coverage, citing policy requirements for physical loss or damage to property and/or explicit exclusions for losses caused by viruses or disease. Some policies also provide related "civil authority" coverage for loss of income caused by governmental action that results in a loss of access to property, but those policies typically require that there be physical damage to property in the immediate vicinity of the insured's premises.[1] In prior alerts, we have reported on COVID-19-related insurance litigation and regulatory issues.[2] In this alert, we provide an update on COVID-19-related legislation and coverage litigation in the business interruption area and we highlight several recent decisions that, while not uniform in their results, have tended to favor the insurers.

As reported in previous alerts, a number of states have proposed legislation that would force insurers to cover COVID-19-related claims despite any contrary provisions in their policies. To date, bills have been introduced in California,[3] Louisiana,[4] Massachusetts,[5] Michigan,[6] New Jersey,[7] New York,[8] Ohio,[9] Pennsylvania,[10] Rhode Island,[11] South Carolina[12] and the District of Columbia.[13] The proposed legislation is largely stalled, however, because of vigorous opposition by the insurance industry and widespread criticism that the bills raise concerns about legislative interference with private contracts and potential constitutional issues.[14]

In the meantime, business owners have turned to the courts. Over 1,000 COVID-19-related insurance coverage lawsuits have been filed across the country in state and federal courts.[15] For months, more than 250 federal cases were awaiting determination on whether they would be consolidated in a nationwide multidistrict litigation. On August 12, after hearing oral arguments, the federal Judicial Panel on Multidistrict Litigation decided not to consolidate the cases, finding that they "share only a superficial commonality" and no common defendant, and that the cases could not be consolidated efficiently.[16] Most of these cases will now proceed in the federal courts in which they were first filed, with insurers likely to move promptly to dismiss or for summary judgment. At the same time, other state and federal courts are beginning to reach decisions on business interruption coverage claims.

To meet policy requirements for "direct physical loss or damage to property,"[17] policyholders challenging the denial of coverage generally rely on one of two theories. One is that the virus itself causes physical damage to property, by contaminating surfaces and lingering in the air. The other is that the executive orders restricting access to property cause physical loss by preventing business owners from using their properties for their intended purposes.[18] To this point in the pandemic, a growing number of decisions have reached the merits of these arguments.

Social Life Magazine, Inc. v. Sentinel Insurance Company Limited[19]

In late April 2020, luxury lifestyle publication *Social Life Magazine* filed a federal lawsuit challenging its insurer's denial of coverage for alleged COVID-19-related losses. The policy covered "direct physical loss of or damage to Covered Property."[20] The magazine claimed COVID-19 caused damage to its main office and interrupted the production of its publication. In its complaint, the magazine alleged that as a result of COVID-19, it "lost access to, use of and/or functionality of plaintiff's property covered by the policy."[21] Further, because its equipment is "specialized and industrial in nature," its employees could not work from home to produce the magazine.[22]

At a telephone hearing held on May 14, the court denied the magazine's request for a preliminary injunction, ruling that even if coronavirus was present in the office, the policy's property damage requirement was not met. Any losses were caused by the state governor's shutdown order and not "any particular damage to [the] specific property."[23] The court expressed sympathy for the plaintiff and other small businesses, but observed, "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. … [T]his is just not what's covered under the insurance policies."[24] The lawsuit was voluntarily dismissed on May 22.

Gavrildes Management Co., LLC v. Michigan Ins. Co.[25]

In early July, in a suit brought by the operator of a local café, a Michigan state court issued a similar ruling. The plaintiff, citing the Michigan governor's shutdown orders aimed at slowing the spread of COVID-19, argued that its policy's requirement of "physical loss of or damage to the property" was met because customers could not dine indoors at its restaurants.

On July 1, via Zoom conference, the court granted summary judgment to the insurer, reasoning that "physical loss of or damage" must be

something with "material existence … something that is tangible" or "alters the physical integrity of the property."[26] The governmental orders restricting access to the property did not meet this standard.

Rose's 1, LLC, et al. v. Erie Insurance Exchange[27]

This month, the District of Columbia Superior Court granted summary judgment dismissing a complaint filed by several well-known D.C. restaurants. Like the plaintiff in *Gavrildes Management Company*, the restaurants sought coverage for lost income and expenses caused by executive orders restricting the use of their properties as dine-in restaurants. They alleged that the "loss of use of their properties" due to the pandemic and the government's shutdown order met their policy's requirement for a "direct physical loss" because they "lost the ability to operate the Insured Properties as dine-in restaurants."[28]

In an order issued on August 6, after the restaurants moved for summary judgment, the Superior Court granted the insurer's cross-motion for summary judgment. The court reasoned: "Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties."[29] Distinguishing many of the cases the plaintiffs cited as precedent, the court explained that "none … stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy."[30]

Studio 417, Inc. v. The Cincinnati Insurance Company[31]

Lest insurers declare complete victory prematurely, a federal District Court in Missouri on August 12 ruled in favor of policyholders, denying an insurer's motion to dismiss. The complaint — initially filed by an owner and operator of hair salons, later joined by local restaurants — alleged that the plaintiffs' premises "likely have been infected with COVID-19" and that the plaintiffs therefore "suffered direct physical loss to property."[32] In moving to dismiss, the insurer argued that the policies were designed to provide coverage only for tangible physical loss, such as in a fire or storm.[33]

The court rejected the insurer's arguments. Noting that the policies did not define direct physical loss and that plaintiffs "allege a causal relationship between COVID-19 and their alleged losses," the court relied largely on dictionary definitions to conclude that the complaint "plausibly alleges a direct physical loss based on the plain and ordinary meaning of the phrase."[34] The court cited a number of pre-COVID-19 decisions that did *not* involve disease or viruses to support its ruling that "direct physical loss" need not mean "actual physical damage,"[35] and it distinguished both *Social Life Magazine* and *Gavrildes Management Company*.[36]

Given the growing number of decisions favoring insurers,[37] policyholders are likely to try to modify their theories, in an effort to state a basis for coverage and distinguish their claims from the ones rejected in the decisions noted above. A complaint recently filed in the New York State court is illustrative.

Abruzzo DOCG d/b/a Tarallucci e Vino, et al. v. Acceptance Indemnity Ins. Co., et al.[38]

On August 4, a group of New York City restaurants, cafés and bars filed a complaint challenging their respective insurers' denial of coverage for losses resulting from restrictions mandated by city and state executive orders. Each of the plaintiffs had an all-risk commercial property insurance policy with business interruption coverage that required "direct physical loss of or damage to" insured property.[39] The plaintiffs claim they suffered loss or damage from "physical, detrimental alterations" they were forced to make to their properties in order to comply with executive orders issued by the city and state.[40] With respect to the initial shutdown orders, the plaintiffs claim:

The restrictions … detrimentally altered and directly and physically impaired Plaintiffs' properties. Dining rooms were physically blocked off or reconfigured as staging areas for take-out, delivery, or other drastically reduced services. Collectively, vast amounts of square footage in Plaintiffs' properties were rendered fully or partially nonfunctional for their intended purposes.[41]

The restaurants that remained open for take-out or delivery service through the shutdown executive orders had to "physically manipulate tables [and] chairs," "install plexiglass or other makeshift barriers," and place markers throughout the property to encourage six feet of separation by customers as they entered the properties to pick up their orders.[42]

With respect to the more recent directives from the city and state, which permitted limited outdoor dining as of June 22, the plaintiffs claim:

Restaurants reopening for outdoor dining service must make a number of detrimental physical changes to their outdoor spaces, including (i) moving each table at least six feet away, …or erecting physical barriers where distancing is infeasible, (ii) physically demarcating six feet of spacing in any customer lines, and (iii) providing physically separate entrances and exits for customers and employees, where possible.[43]

As these excerpts show, the plaintiffs' theory of property damage in this latest complaint relies largely on the physical alterations to their property that were required in order to comply with governmental restrictions, rather than on loss of access to the property. Whether other plaintiffs will follow suit, and whether this approach gains any traction with the courts, remains to be seen. The outcome is likely to depend on, among other things, (i) whether physical alterations that are not themselves caused by the virus, but rather are made voluntarily by an insured in order to facilitate continued operations, are held to constitute "direct" physical damage, and (ii) whether the nature and extent of the alterations are sufficient to constitute physical damage or loss (e.g., are the alterations permanent, irreversible structural changes or simply the temporary rearrangement of tables and chairs or installation of plexiglass dividers?). Ultimately, it may not matter that the plaintiffs' premises were rendered "nonfunctional for their intended purpose" if the court finds, as the courts did in *Social Life* and *Gavrildes*, that even a complete loss of access is not enough to overcome the physical damage hurdle. Kramer Levin continues to monitor this action and others, as well as COVID-19-related legislative developments throughout the country.

Insurers rack up early wins in lawsuits over COVID-19 'business interruption' coverage

Debra Cassens Weiss

Insurance Law

September 2, 2020, 1:11 pm CDT

Court decisions on "business interruption" coverage are so far favoring insurers as they fight claims for lost income during the COVID-19 pandemic.

Courts have ruled for insurance companies in state courts in California, Michigan and the District of Columbia, as well as in federal courts in Texas and California, the Wall Street Journal reports, citing information from a COVID-19 litigation tracker at the University of Pennsylvania Carey Law School. The Chicago Tribune also had coverage in a story published in August.

Two other judges indicated that they would rule against COVID-19 claims by a Miami restaurant and a magazine publisher. The publisher, Social Life Magazine, dropped its case before a Manhattan federal judge issued a written opinion.

Lawyers for policyholders aren't giving up hope, however. They note that many suits are awaiting a decision, and appeals courts have yet to rule. And plaintiffs lawyers were said to be "energized" by a Missouri federal judge's Aug. 12 ruling allowing business interruption claims to proceed, Law.com reports.

Many business interruption policies require "direct physical loss or damage" to property for coverage to apply. Others specifically exclude coverage for damage caused by viruses. The policy in the Missouri case did not exclude virus damage but did require a direct physical loss.

The plaintiffs in the Missouri case had argued that the coronavirus is a physical substance that attached to and damaged their properties, and their all-risk policies should cover lost income.

Insurers argue that policies are intended to cover business losses caused by physical damages to property from events such as fires, and COVID-19 causes no physical damage.

The Insurance Information Institute said the federal government, rather than insurers, should help.

"We don't want to put funds at risk for something that was never underwritten by the industry in the first place," said Sean Kevelighan, CEO at the Insurance Information Institute, in an interview with the Chicago Tribune.

As court losses mount, a coalition of small businesses is backing a House bill, the Business Interruption Relief Act. The bill would create a voluntary program for insurers to pay claims and obtain reimbursement from the federal government.

See also:

ABAJournal.com: "Coronavirus pandemic prompts wave of 'business interruption' lawsuits by restaurants"

ABA Journal: "Coronavirus cancellations mean revenue loss, potential liability"

ABAJournal.com: "Insurance company's suit says it has no duty to cover Geragos firm's COVID-19 business losses"

Big Win for Business Interruption Policyholders as Courts Start Issuing COVID-19 Decisions

Under a ruling out of Missouri, demonstrating that the virus has a physical presence and that it caused deprivation at the property would be sufficient to invoke coverage.

By David J. Marmins and Rebecca Lunceford Kolb August 14, 2020

We are monitoring the coronavirus (COVID-19) situation as it relates to law and litigation. Find more resources and articles on our COVID-19 portal. For the duration of the crisis, all coronavirus-related articles are outside the Section of Litigation paywall and available to all readers.

A recent decision out of the Western District of Missouri supports policyholders' arguments for business interruption coverage for loss from COVID-19. *See Studio 417, Inc., et al. v. The Cincinnati Ins. Comp.,* No. 20-cv-03127-SRB, Order Denying Mot. to Dism., issued Aug. 12, 2020 (W.D. Mo.) (the Order). The district court denied The Cincinnati Insurance Company's (referred to hereafter as "Cincinnati") motion to dismiss based on the now ubiquitous argument that the virus causing COVID-19 cannot satisfy the requirement that "direct physical loss or damage" caused the loss.

Cincinnati took the same position as nearly all insurance companies—that there must be tangible or structural damage to property, such as storm damage, to satisfy the physical loss or damage requirement in practically all business interruption policies. Rejecting this argument, the court reasoned that the coverage trigger is physical loss *or* damage, and that it "must give meaning to both terms." To adopt Cincinnati's argument, the court decided, would conflate physical loss with physical damage.

Cincinnati and its brethren certainly hoped for a quick end to this case providing persuasive authority, and powerful leverage, in similar cases simmering around the country as the pandemic continues. Instead, the decision provides a boon to policyholders across the country in their fight for coverage.

Background of Coverage Disputes

Commercial property policy holders have submitted claims throughout the country for business interruption based on closures from COVID-19. The claims are generally for business income loss and extra expense incurred due to closure of the premises because of the presence of the virus or government orders. Insurance companies have almost universally denied the claims,

stating that the presence or risk of the presence of the virus does not meet the requirement that there be "direct physical loss or damage" at the covered property (or, for coverage based on closures as a result of government orders, around the covered property). This has led to hundreds of insurance coverage lawsuits, including many putative class actions. Some plaintiffs are seeking consolidation of the federal lawsuits in multidistrict litigation. *See IN RE: COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942 (J.P.M.L., filed Apr, 20, 2020). The Judicial Panel on Multidistrict Litigation heard argument for consolidation on August 6, 2020, and is expected to issue a decision in the coming weeks.

Of the court decisions to date, most have sided with insurance companies, indicating that the risks posed by COVID-19 would not meet the direct physical loss or damage requirement. A judge from the Southern District of New York bluntly stated, "[The virus] damages lungs. It doesn't damage printing presses." *See Social Life Magazine v. Sentinel Ins. Co., Ltd.,* No. 1:20-CV-03311-VEC, May 20, 2020 Hearing for Prelim. Inj., Dkt. No. 24 at 5:3-4 (S.D.N.Y. 2020). Other decisions out of Michigan and Washington, D.C., have shown similar leanings. *See Gavrilides Management Co. LLC v. Michigan Ins. Co.,* No. 20-258-CB, 2020 WL 4561979, at *1 (Mich. Cir. Ct. July 21, 2020); *Rose's 1, LLC et al., v. Erie Ins. Exh.,* No. 2020-CA-002424-B, Order Denying PL.'s Mot. for S.J. & Granting Def.'s Mot. for S.J., issued on Aug. 6, 2020 (D.C. Super. Ct.).

The new *Studio 417* decision provides a well-reasoned counterpoint to those decisions.

Studio 417 Decision

In *Studio 417,* a hair salon and several restaurants brought a putative class action for breach of contract and declaratory judgment against Cincinnati based on its denial of their claims for loss caused by the COVID-19 pandemic. The plaintiffs submitted claims under several different coverages in their policies, including business income loss and extra expense incurred based on

- the suspension of operation from physical loss or damage at the plaintiffs' premises (Business Income Coverage);
- government orders based on physical loss or damage around their premises causing a suspension of operation at their premises (Civil Authority Coverage);
- a "dependent property," or a property on which the policyholder relies for materials or services, not providing the material or services to the policyholders based on physical loss or damage at the dependent property (Dependent Property Coverage); and
- the prevention of "existing ingress or egress" at the policyholders' premises based on physical loss or damage at a "contiguous" location (Ingress and Egress Coverage).

Each of the coverages requires a showing of direct physical loss or damage at some location. Notably, the plaintiffs' policies in *Studio 417* do not have a virus exclusion. Many other policies do have this exclusion which, if present, provides a separate and formidable hurdle to coverage. Without the virus exclusion, the plaintiffs in *Studio 417* focused on establishing direct physical loss.

The retail plaintiffs alleged that it was likely that persons infected with COVID-19 entered the relevant premises within the past several months and, as a result, infected the premises with the virus. To show this would constitute physical loss, plaintiffs alleged that the virus "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is "emitted into the air." (Order at 4.) Additionally, plaintiffs alleged that the presence of the virus "renders physical property … unsafe and unusable" and that plaintiffs "were forced to suspend or reduce business" at the covered premises. (*Id.*) In response, Cincinnati Insurance argued that the policies provide coverage "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease." (*Id.* at 5.)

The court sided with the hair salon and restaurants, denying Cincinnati's motion to dismiss and sending the case to discovery. Applying the maxim of contract law that a court must give meaning to all the words in an agreement, including both direct physical *loss* and direct physical *damage* in the insurance policies, the court turned to the dictionary definitions of *direct*, *physical*, and *loss* to determine the "plain and ordinary meaning" of the phrase "direct physical loss." (Order at 8.) As the court explained,

- *direct* means, in part, "characterized by a close, logical, causal, or consequential relationship";
- *physical* means "having material existence perceptible especially through the senses and subject to the laws of nature"; and
- *loss* is "the act of losing possession" and "deprivation."

Id. Relying on these definitions, the court ruled that plaintiffs had provided sufficient allegations of the virus's physical presence at the premises such that the property was unsafe and unusable. This satisfied the requirement of direct physical loss.

Conclusion

It remains to be seen if other courts will adopt this position and, if so, what facts sufficiently establish direct physical loss. But, at least under this ruling, showing that the virus has a physical presence and that it caused deprivation at the property would be sufficient to invoke coverage. This is a win for retailers looking for any means to recover COVID-19 losses.

David J. Marmins is a partner and Rebecca Lunceford Kolb is a senior associate with Arnall Golden Gregory LLP, Atlanta, Georgia.

Advising Business Clients in the Coronavirus Age

September 25, 2020

Waivers and Assumption of the Risk

Forms of Acknowledgments and Waiver

1. **General Contractor**

2. **Training/Education**

3. **Sports League**

ACKNOWLEDGMENT, AGREEMENT AND RELEASE AS TO
GENERAL CONTRACTOR, LLC

I, _____, am an employee of or independent contractor under contract with _____ in relation to a certain commercial construction project in which GENERAL CONTRACTOR, LLC is the General Contractor. In that capacity, I perform on site construction related services, distribute and/or supply construction materials. In the performance of my duties, I come in contact with co-employees, contractors, servants and workman providing similar or related services on site.

I acknowledge the current outbreak of the COVID-19 coronavirus pandemic and the potential for spread of the disease. I acknowledge and assume the risk that I could potentially come in contact with the virus during the performance of my services. I further acknowledge receipt of GENERAL CONTRACTOR, LLC's policies and procedures relating to the prevention of disease and the maintenance of a healthy work environment including the implementation of "social distancing" and use of protective gear (which it is my responsibility to provide). I agree to at all times comply with the these policies and procedures and understand that the failure to do so may result in my removal from the site or preclusion from providing further services at the site.

I agree to promptly notify both my employer (if an employee) and GENERAL CONTRACTOR, LLC in the event I test positive for or believe I may be infected with the COVID-19 coronavirus or in the event I begin to exhibit any signs or symptoms of infection including but not limited to fever, cough, headache, fatigue, loss of taste or loss of smell.

I agree to release and hold harmless GENERAL CONTRACTOR, LLC, together with all of its' affiliated entities, directors, officers, agents and employees, from and against any claim, damages or liabilities, including injury or even death, which may be in any way related to actual or potential infection with the COVID-19 coronavirus while at the work site or in the performance of my duties or services at the work site. This release is not intended to and does not release any claim available to me under any statute for the protection of workers and contractors such as any applicable workers' compensation act, or state or federal statute governing the health and safety of the workplace, including OSHA. I agree that this acknowledgement, agreement and release is not intended to and does not create an employment relationship as between me and GENERAL CONTRACTOR, LLC.

Intending to be legally bound, I execute this Acknowledgement as of the date set forth below.

Dated:_____

_____
Employee/Subcontractor Signature

_____
Print Name

ACKNOWLEDGEMENT, WAIVER AND RELEASE OF LIABILITY

I hereby affirm to COMPANY (the "Company") the following:

1. I have not, in the last 14 days, been exposed to someone with COVID-19.
2. I have not, in the last 72 hours, been exposed to anyone with symptoms of COVID-19.
3. I have not, in the last 14 days, traveled outside the United States or traveled to a domestic COVID-19 hotspot, as defined by the CDC, local or state authorities.
4. I do not have any COVID-19 symptoms (for example, shortness of breath, fever over 100.4°F, chills, cough, difficulty breathing, or new loss of taste or smell).

_____ _____

Date Participant

In consideration of being allowed to participate in the classes offered by the Company, I acknowledge, appreciate and agree that:

1. Participation includes the possible exposure to and illness from infectious diseases, including but not limited to the COVID-19 virus.
2. I will comply with all local, state and federal guidelines regarding COVID-19, including those that may be imposed by the site at which the training takes place and the Company, or relating to the prevention of disease and the maintenance of a healthy environment including the implementation of "social distancing" and use of protective gear (which it is my responsibility to provide). I agree to at all times comply with the these policies and procedures and understand that the failure to do so may result in my removal from the facility/site or preclusion from the future participation.

With full awareness and appreciation of the risks involved, I, for myself and on behalf of my family, spouse, estate, heirs, executors, administrators, assigns and personal representatives, hereby release, waive, discharge and agree not to sue the Company, its shareholders, officers, employees, agents, representatives, independent contractors, affiliates, successors and assigns (collectively, the "Released Parties") from any and all liability, claims, damages, actions, and causes of action whatsoever, directly or indirectly arising out of or related to any loss, damage, or injury, including death, that may be sustained by me related to COVID-19 whether caused by the negligence of the Released Parties or otherwise.

If any portion of this Acknowledgement is held to be invalid or unenforceable, such provision will be stricken, but, the balance will continue to be enforceable.

I HAVE READ THIS ACKNOWLEDGEMENT, WAIVER AND RELEASE OF LIABILITY, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

_____ _____

Date Participant

ASSUMPTION OF RISK / WAIVER OF LIABILITY / RELEASE AGREEMENT

In consideration of _____ (the **"Association"**) permitting my participation in _____, and related events and activities, the undersigned acknowledges, appreciates, and agrees that:

1. Participation includes possible exposure to and illness from infectious diseases including but not limited to MRSA, influenza, and COVID-19. While particular rules and personal discipline may reduce this risk, the risk of serious illness and death does exist;

2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE OF THE RELEASEES (defined below) or others, and assume full responsibility for my participation;

3. I willingly agree to comply with policies and procedures relating to the prevention of disease and the maintenance of a healthy environment including the implementation of "social distancing" and use of protective gear (which it is my responsibility to provide). I agree to at all times comply with the these policies and procedures and understand that the failure to do so may result in my removal from the facility/site or preclusion from the future participation. If I observe any unusual or significant hazard during my presence or participation, I will immediately remove myself from participation and bring the same to the attention of the nearest official, coach, or employee or representative of the Association; and

4. I, for myself and on behalf of my heirs, assigns, personal representatives and next of kin, HEREBY RELEASE AND HOLD HARMLESS the Association, its officers, officials, coaches, agents, and/or employees, other participants, sponsoring agencies, sponsors, advertisers and, if applicable, owners and lessors of premises used to conduct the event ("**RELEASEES**"), WITH RESPECT TO ANY AND ALL ILLNESS, DISABILITY, DEATH, or loss or damage to person or property, WHETHER ARISING FROM THE NEGLIGENCE OF RELEASEES OR OTHERWISE, to the fullest extent permitted by law.

I HAVE READ THIS ASSUMPTION OF RISK / WAIVER OF LIABILITY / RELEASE AGREEMENT, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IF FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

Name of participant (Print): _____

Participant signature:_____

Date signed: _____

FOR PARTICIPANTS OF MINORITY AGE (UNDER AGE 18 AT THE TIME OF REGISTRATION)

This is to certify that I, as parent/guardian, with legal responsibility for this participant, have read and explained the provisions in this agreement to my child/ward including the risks of presence and participation and his/her personal responsibilities for adhering to the rules and regulations for protection against communicable diseases. Furthermore, my child/ward understands and accepts these risks and responsibilities. I for myself, my spouse, and child/ward do consent and agree to his/her release provided above for all the Releasees and myself, my spouse, and child/ward do release and agree to hold harmless the Releasees for any and all liabilities incident to my minor child's/ward's presence or participation in these activities as provided above, EVEN IF ARISING FROM THEIR NEGLIGENCE OF RLEEASEES, to the fullest extent provided by law.

Name of parent/guardian (Print): _____

Parent/guardian signature: _____

Date signed: _____

Advising Business Clients in the Coronavirus Age

September 25, 2020

Forms for Voluntary Dissolution

1. **Plan of Complete Liquidation and Dissolution**

2. **Written Consent of the Member**

3. **Notice to Creditors**

COMPANY

Plan of Complete Liquidation and Dissolution

The following Plan of Complete Liquidation and Dissolution (the **"Plan"**) of **COMPANY** (the **"Company"**), a Pennsylvania limited liability company, is intended to provide for the complete liquidation and voluntary dissolution of the Company in accordance with the provisions of Subchapter G of the Pennsylvania Uniform Limited Liability Company Act of 2016 (the **"Act"**) and all other applicable laws of the Commonwealth of Pennsylvania and the United States of America.

1. Approval of Plan. The Plan shall be effective upon its approval and adoption by the Sole Member (**"Member"**) to terminate and dissolve the Company pursuant to §8871(a)(2) of the Act. The date upon which the Member so approves and adopts the Plan shall be the effective date of the Plan (the **"Effective Date"**).

2. Payment of Obligations. After the Effective Date, the Company shall make provisions for the payment of all obligations of the Company (collectively **"Obligations"**), if any, to the extent possible, and shall take such other action as may be necessary to wind up and settle the affairs of the Company, all in accordance with the Act. The Member of the Company shall have discretion to the fullest extent permitted by law to exercise her best judgment to accomplish the foregoing actions.

3. Wrapping Up and Dissolution. As soon as practicable, the Company shall:

(a) Prepare and deliver all documents necessary for the dissolution of the Company under the Act;

(b) Cause notice of the winding up of the Company's business to be mailed to each known creditor and claimant of the Company and to each municipality required by the Act and cause to be published such notice as is required by the Act;

(c) Liquidate the assets of the Company;

(d) Pay or make provision for the payment of all Obligations of the Company, if any, pursuant to Section 2 above and, if such payment and discharge of, or provision for the payment and discharge of Obligations cannot be accomplished within a reasonable period because any Obligation or other liability is unliquidated or contingent, the Company may set aside a reserve fund or reserve funds for the payment thereof;

(e) Make one or more distributions of its assets, if any, to the Member which distribution(s) shall be made to the Member in complete cancellation or redemption of all of his membership interest in the Company, and only after the payment or provision for payment of all claimants in accordance with the Act; and

(f) Withdraw from jurisdictions in which it is qualified to do business, if deemed by counsel necessary to do so.

4. Dissolution. At such time as the Company shall determine and, in any event, within a reasonable period of time after its winding up and liquidation, the Company shall take any and all action necessary to formally dissolve in accordance with the provisions of Subchapter G of the Act effective as of the close of business on the Effective Date. The Member is hereby authorized to file last and final tax returns on behalf of the Company, as and when appropriate to do so.

5. Amendments to and Abandonment of Plan. Notwithstanding the fact that this Plan shall have become effective on the Effective Date, the Member may, in her discretion and without further action on behalf of the Company, amend, modify and supplement the Plan in such manner or in such particulars as may be required or as may be deemed desirable in order to qualify the Plan as a complete liquidation of the Company under the Internal Revenue Code of 1986, as amended; provided, however, that no such amendment, modification or supplement shall affect the rights of the Member hereunder without the Member's express written consent. This Plan may be abandoned by election and consent of the Member in accordance with the Act, in which event no further action shall be taken by the Member to consummate the Plan.

6. Authority of the Member. The Member is authorized to do and perform such acts, to execute and deliver such deeds, bills of sale, instruments of transfer, applications, certificates and other documents and to engage the services of such agents, attorneys, accountants, brokers, appraisers, and other persons as the Member may deem necessary or advisable in order to consummate this Plan.

7. Execution. Upon the adoption of the Plan by the Member, the Member is directed to execute the same for and on behalf of the Company for the purpose of identifying the plan as the Plan which has been adopted on behalf of the Company.

8. Binding Plan. This Plan shall be binding upon the Company, and its successors and assigns, and shall be binding upon and inure to the benefit of the Member and her heirs, administrators, successors and assigns.

IN WITNESS WHEREOF, the undersigned, as Member of the Company, has hereunto set her hand and affixed the corporate seal of the Company.

COMPANY

By:_____

_____, Sole Member

Dated: September 25, 2020

COMPANY

Unanimous Written Consent of Sole Member to Corporate Action

The undersigned, being the Sole Member of **COMPANY** (the **"Company"**) does hereby consent to the adoption of the following Preamble and Resolutions to the same extent as though such action had been authorized at a meeting of the Member held pursuant to notice, wich notice is hereby waived:

WHEREAS, the Sole Member believes that it is in the best interests of the Company to dissolve and liquidate the Company in accordance with the provisions of Subchapter G of the Pennsylvania Uniform Limited Liability Company Act of 2016 (the "Act") and pursuant to that certain Plan of Complete Liquidation and Dissolution attached hereto and made part hereof (the **"Plan"**).

NOW, THEREFORE, BE IT RESOLVED, that the Sole Member of the Company does hereby authorize, approve and confirm all actions required by the Sole Member and officers, acting for and behalf of the Company, to dissolve and liquidate the Company pursuant to that certain Plan of Complete Liquidation and Dissolution and in accordance with the Act, and to cause notice of said dissolution to be sent and/or published as recommended by the Company's counsel.

FURTHER RESOLVED, that the sole Member of the Company is hereby authorized and directed, acting for and on behalf of this Company, to execute the Certificate of Termination, and such other documents as may be necessary or appropriate to complete the dissolution of the Company pursuant to the Plan and the requirements of the Act.

_____

_____, Sole Member

Date: September 25, 2020

AMM Antheil Maslow & MacMinn, LLP

Peter J. Smith, Esq.
Partner
psmith@ammlaw.com

September 25, 2020

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

CREDITOR
1234 Out of Luck Boulevard
Anywhere, PA 19088
Attn: _____

Re: CORPORATION
Notice of Dissolution Pursuant 15 PA. C. S. §1975(b)
Account No.: _____

Dear Sir/Madam:

On behalf of CORPORATION (the "corporation"), a Pennsylvania corporation with its registered office at _____, Pennsylvania 19088, we hereby notify you, in accordance with Section 1992 [*or 1975(b) as applicable*] of the Pennsylvania Business Corporation Law of 1988, as amended (the "Act") that the corporation has ceased doing business as of August 31, 2020 and that the Board of Directors of said corporation is now engaged in winding up and settling the affairs of the corporation so that its corporate existence shall be ended with the filing of a Certificate of Dissolution with the Department of State of the Commonwealth of Pennsylvania. All persons having a claim against the corporation, whether such claims are now existing or contingent, conditional or unmatured, are requested to and must present these claims in writing to the corporation at the office of Antheil Maslow & MacMinn, LLP, 131 West State Street, Doylestown, Pennsylvania 19006, Attention: Peter J. Smith, Esquire. All claims so presented must contain sufficient information to inform the corporation of the identity of the claimant, and the amount and substance of the claim. **All claims must be received by the corporation no later than December 7, 2020**. Failure to present claims in a timely manner may adversely effect and prejudice a claimant's rights and opportunity to receive payment, if any, with respect to such claims. A claimant's right to pursue claims or exercise remedies against the corporation or its directors, officers or shareholders may be limited in accordance with Section 1979 of the Act.

The receipt of this notice or submission of a claim provides no guarantee of payment. The corporation will wind up its affairs, liquidate its assets and discharge its liabilities in accordance with the Act. The giving of notice hereunder shall not revive any barred claim or

constitute acknowledgment by the corporation that any person or entity to which this notice is sent is a proper claimant and shall not operate as a waiver of any defense or counterclaim in respect of any claim asserted by any person or entity to whom such notice is sent. The corporation may make distributions to other claimants or interested persons without further notice to any claimant.

Sincerely,

Peter J. Smith

PJS/ps
c: CORPORATION (via regular mail)

AUTHORIZATION

This confirms that you have my authorization on behalf of CORPORATION to discuss our account and any other matters related to our account with Peter J. Smith, Esquire, _____, CPA and the law firm of Antheil Maslow & MacMinn, LLP. This includes providing them with any correspondence, statements or other documents and each have the authority to negotiate on our behalf.

CORPORATION

By:_____
_____, President