COVID and Coverage in the Case Law

By Dennis J. Wall, Esquire[1]

I. INTRODUCTION

Cases of claimed loss of business property continue to multiply as a result of COVID-19, and have proliferated since the beginning of 2021.

To people unfamiliar with insurance coverage litigation, there is the *appearance* of a growing consensus of cases across the United States that business interruptions caused by COVID-19 "do not involve the physical loss of or damage to property necessary to trigger coverage under a first-party commercial insurance policy."[2] If this article suggests benefits that reaching beyond the judicial consensus can bring to policyholders and insurance companies alike in resolving these disputes, it will have done the work it was intended to do.

II. COVERAGE INTERPRETATION DURING A PANDEMIC

A. Generally Accepted Rules

1. Overview

There are a variety of generally accepted rules that govern the interpretation of insurance policies, including among them claims of coverage for losses from COVID-19, even in the absence of physical alteration of property.

2. Burdens of Proof

One of these generally accepted rules relates to burdens of proof. Certain burdens of proof are so universally recognized in federal and state courts in the United States that they do not even require citation to prove that they exist.

To begin with, the policyholder or other party claiming insurance coverage has the burdens of pleading and proving coverage. The carrier has the burden of pleading and proving the applicability, if any, of an exclusion from coverage once the coverage claimant has met its own burden to establish coverage.[3]

3. Ambiguity

Another accepted rule related to ambiguity. "A policy is ambiguous if it is 'capable of two or more constructions, both of which are reasonable.' "[4] On this,

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[2] Or so a carrier argued, in Henderson Rd. Rest. Sys's, Inc. v. Zurich Am. Ins. Co., No. 1:20 CV 1239, 2021 U.S. Dist. LEXIS 9521, at *19 (N.D. Ohio Jan. 19, 2021).

[3] *See* Protégé Rest. Partners LLC v. Sentinel Ins. Co., No. 20-cv-03674-BLF, 2021 U.S. Dist. LEXIS 24835, at *8 (N.D. Cal. Feb. 8, 2021).

[4] *Protege Rest. Ptrs. LLC*, at *7–8 (stating California law; citations to California cases omitted).

courts generally agree. An undefined term in an insurance policy is not ambiguous simply because it is not defined in the policy.[5] On this, courts once again generally agree, but they tend to part company on other questions involved in finding an ambiguity in an insurance policy in the first instance.

One view has it that when forced to choose between two competing interpretations, a court must choose the interpretation that gives effect to all of the language in the entire policy.[6]

On the other hand, when an ambiguity is affirmatively found to exist in a policy of insurance, other courts hold that any resulting ambiguity means that the carrier must establish that the policy is "fairly" capable of only one reasonable construction, which is the interpretation that the carrier favors in the given case.[7]

III. ESTABLISHED RULES OF INTERPRETATION APPLIED TO PANDEMIC CLAIMS

A. Two Key Issues: "Direct Physical Loss or of Damage to Property" and Virus Exclusions

Two issues that have decided cases in the short span of just four weeks before this article was written (in February 2021) will be discussed here, in turn: first, the question of whether the policy requires "direct physical loss of or damage to property," and if so, what that phrase means in any given case. And, second, the applicability of virus exclusions by whatever name they may be identified in the policies at issue.

B. "Direct Physical Loss of or Damage to Property"

The question of whether a given insurance policy requires "direct physical loss of or damage to property," and if so, what that term means in any given case, ties in directly to how to find an ambiguity in an insurance policy and, once found, how to interpret that ambiguous policy language.

It has been held, in a seminal case recently decided under Ohio law, *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*,[8] that direct physical loss includes loss *of* property, and covered loss under such language is not limited to physical loss *to* property.[9] In *Henderson Road Restaurant Systems*,

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To like effect: Kahn v. Pa. Nat'l Mut. Cas. Ins. Co., ___ F. Supp. 3d ___, No. 1:20-cv-781, 2021 U.S. Dist. LEXIS 23090, at *10–11 (M.D. Pa. Feb. 8, 2021) (case involves Pennsylvania substantive law).

[5] *Kahn*, 2021 U.S. Dist. LEXIS 23090, at *11.

[6] *See Kahn*, 2021 U.S. Dist. LEXIS 23090, at *15 (stating Pennsylvania law in this case).

[7] *Henderson Rd. Rest. Sys's, Inc*., 2021 U.S. Dist. LEXIS 9521, at *25–26 (stating Ohio law).

[8] Henderson Rd. Rest. Sys's, Inc. v. Zurich Am. Ins. Co., No. 1:20 CV 1239, 2021 U.S. Dist. LEXIS 9521 (N.D. Ohio Jan. 19, 2021). This case was decided on competing motions for summary judgment by the federal district court judge, Hon. Dan Aaron Polster, who is presiding over the National Prescription Opiate Multi-District Litigation.

[9] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *28 (emphasis by the court).

the court considered dictionary definitions of terms not defined in the Zurich policy, including "physical" and "loss."[10] The plaintiff restaurants in *Henderson* showed that they suspended business operations in response to government orders, and that they lost business income as a result.[11]

The restaurants prevailed on their coverage claim in this case by offering the interpretation that "direct physical loss of includes an inability to possess something in the real, material, or bodily world, and that the government orders caused plaintiffs to lose their property in this manner."[12] The court viewed the policy at bar as "susceptible of more than one interpretation,"[13] and so "the Policy must be construed liberally in Plaintiffs' favor."[14]

Research on PACER (Public Access to [Federal] Court Electronic Records) reveals that the same policy language that was at issue in the *Henderson Road Restaurant Systems* case in Ohio was also at issue in California in the case of *Protege Restaurant Partners LLC v. Sentinel Insurance Co.*[15] Although the policy language has not been found in the California federal court's opinion, it was found on PACER.

In both cases, the policy form extends coverage to "direct physical loss *of* or damage *to* property" unless excluded.[16] The undefined policy language, "direct physical loss of," has apparently received a settled interpretation in California insurance law as meaning "a 'distinct, demonstrable, physical alteration of the property' or a 'physical change in the condition of the property.' "[17]

Another federal judge in the Northern District of Ohio took a different tack on the same date that the *Henderson Road Restaurant Systems* case was decided in that district. Before making a ruling on the merits of the coverage claim on different policy language but involving a question of "direct physical damage" in Neuro-Communication Servs. v. Cincinnati Ins. Co., No. 4:20-CV-1275, 2021 U.S. Dist. LEXIS 20069, at *3 (N.D. Ohio Jan. 19, 2021), Judge Benita Y. Pearson granted a motion to certify the question to the Ohio Supreme Court. As of February 17, 2021, the answer is pending.

[10] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *36.

[11] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *34–36.

[12] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *12.

[13] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *33.

[14] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *34.

[15] Protégé Rest. Partners LLC v. Sentinel Ins. Co., No. 20-cv-03674-BLF, 2021 U.S. Dist. LEXIS 24835 (N.D. Cal. Feb. 8, 2021).

[16] *Compare* Protege Restaurant Partners LLC v. Sentinel Insurance Co., Doc. No. 1-1, p. 31 of 156, Sentinel Insurance Policy, filed June 2, 2020 (N.D. Cal. Case No. 5:20-cv-03674-BLF) (italics supplied), which the Court in that case referred to simply and repeatedly as a "business interruption policy," *with* Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co., Doc. No. 12-1, p. 168 of 380, Zurich's Business Income Coverage Form (Including Extra Expense), ¶ A. COVERAGE, filed October 27, 2020 (N.D. Ohio Case No. 1:20 CV 1239) (italics supplied).

[17] *See Protege Rest. Ptrs*., 2021 U.S. Dist. LEXIS 24835, at *10.

It is the weight of the case law that made this language unambiguous in the eyes of the *Protege Restaurant Partners* court in California. "In light of this abundance of caselaw, the Court finds as a matter of law that the Policy is unambiguous."[18]

These judicial conclusions have implications throughout courts in the United States. In *Henderson Road Restaurant Systems*, unlike the situation in *Protege Restaurant Partners*, the ruling contended by the insurance carrier was barred by the law of ambiguous policy interpretation. The way that the federal judge in Ohio saw the question, insurance coverage law includes the rule of document interpretation that "[i]f a term is not defined in the policy, the Court must look to the plain meaning of the words, not persuasive authority from other courts."[19]

C. Virus Exclusions

In decisions initially reported in 2021, courts reached similar conclusions concerning the applicability of virus exclusions to any given coverage claim as they did when they addressed issues of whether there is coverage in the first place. One set of observations is made by courts in cases in which the judges have already determined that there is no coverage, and having already made that determination, judges in these cases have tended to state their views, albeit in seeming dicta, that the virus exclusion in the case at bar would unambiguously exclude coverage for losses related to COVID-19.[20]

In another set of cases, the courts involved have looked to the language in the particular virus exclusion at issue in the given case. If the parties stipulated, for example, that "COVID-19 did not contaminate the Plaintiffs' premises," then an exclusion of response costs arising out of any order "in any way to respond to" the effects of microorganisms simply could not apply.[21] Although not the primary basis for the ruling, the court took note of evidence in the record that the insurance carrier asked the State Insurance Commissioner to approve the exclusion because "they were seeking to avoid coverage for 'viral and bacterial contamination' of properties."[22]

Once again, the outcome of an insurance coverage case is most often determined by the specific language of the policy at issue.

IV. CONCLUSION

The results in the case law concerning insurance coverage for business losses resulting from COVID-19 are not necessarily dependent on majority and minority views. Judges do not write insurance policies, they interpret them. Accordingly, practitioners are advised always to closely examine the language of the policy.

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[18] *Protege Rest. Ptrs.*, 2021 U.S. Dist. LEXIS 24835, at *12.

[19] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *33.

[20] *See, e.g.*, *Protege Rest. Ptrs.*, 2021 U.S. Dist. LEXIS 24835, at *24–25; *Kahn*, 2021 U.S. Dist. LEXIS 23090, at *25–26.

[21] *See Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *44.

[22] *Henderson Rd. Rest. Sys's*, 2021 U.S. Dist. LEXIS 9521, at *42.