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Client Alert

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Consolidating Business Interruption Coverage Matters Is Neither Appropriate Nor Feasible

Businesses experiencing financial losses due to disruption arising from the COVID-19 pandemic moved quickly to make claims for business interruption insurance. These claims generally have been met with coverage denials on multiple grounds, including, but not limited to, the absence of damage to or destruction of property, the application of a virus exclusion, or other terms, conditions, limits and exclusions contained in the insured's specific policy that precludes coverage.

Undeterred by these adverse coverage determinations, dozens of businesses have commenced lawsuits seeking damages for the denial of their business interruption claims. In so doing, the businesses advance novel theories of coverage. And, in certain well-publicized instances, insureds seek to consolidate business interruption litigation through the use of class action or consolidated litigation – procedural vehicles that are ill-suited for the task of adjudicating these types of claims.

Courts should reject the nascent efforts by insureds to shoehorn claims that are properly addressed through traditional, single-plaintiff coverage litigation into class action or consolidated litigation. Claims for business interruption coverage involve issues that are unique to each insured and must be analyzed under the specific allegations, facts and governing law that applies to each claim. While the desire to have COVID-19 business interruption litigation addressed efficiently is understandable, the movement for consolidation is a misplaced effort to fit a square peg into a round hole.

Requests for Consolidation in Federal and State Court

Several businesses have filed nationwide putative class actions seeking to represent a class of all insureds whose business interruption claims were denied by a particular insurer. At least three of these insureds have taken it a step further, seeking to consolidate all pending business interruption litigation in federal court against every insurer that is or will be named in the future as a defendant into a single multidistrict litigation (MDL) proceeding. One of the three venues that has been proposed for such an MDL is the U.S. District Court for the Eastern District of Pennsylvania.

A similar effort at consolidation also is underway in Pennsylvania state court. A Pittsburgh-area business recently petitioned the Pennsylvania Supreme Court to exercise its rarely invoked extraordinary jurisdiction and King's Bench powers to conduct an immediate review of its claim for business interruption coverage. The petitioner requests that the Supreme Court take the highly unusual step of issuing expedited legal rulings as to certain issues presented by its claim and establish the equivalent of an MDL proceeding for all business interruption claims before a single trial court with instructions to apply the Supreme Court's legal rulings in all cases consolidated before it.

Class Actions/MDL

Insureds seeking to litigate their claims in class action or MDL proceedings argue in favor of consolidation in large measure by pointing to a common question that is inherent in the coverage analysis for business interruption claims. As a general matter, business-interruption coverage is triggered only where there has been "an interruption of normal business operations due to damage or destruction of property from a covered hazard."[1] Therefore, a central question in the litigation will be whether COVID-19 caused damage to or destruction of property and whether that damage resulted in an interruption of normal business operations.[2] These questions cannot be answered on a class-wide basis or in a massive, consolidated litigation.

Class action litigation is neither an appropriate nor a feasible means to address these questions, let alone a venue in which the myriad of other issues specific to each insured can be decided. Each claim for business interruption coverage must be resolved individually based on the particular facts (including the applicable policy language, terms, conditions and exclusions), governing law, and alleged damages at issue. Included among the individualized issues that must be considered are the type of business operations allegedly interrupted for purposes of analyzing if property damage exists, the reason for the interruption (e.g., voluntary closure vs. government-dictated shutdown), and the losses purportedly suffered. As to damages, it is important to note that the claimed losses cannot possibly be measured by a formulaic or mechanical process. Rather, damages can only be ascertained by examining the specific business records and losses of each insured. This inquiry makes the claims unsuitable for class-wide adjudication because it would hopelessly devolve into thousands of mini-trials over damages. Even if insureds could identify a small number of common questions of fact or law, those would be overwhelmed by the multiple individualized issues that must be resolved, rendering class action treatment improper.[3]

A class action also does not provide a superior method for resolving business interruption claims. In addition to each insured's claim being unique for the reasons identified above, the business interruption claims at issue do not seek a small amount of damages that insureds would be unlikely to pursue in individual actions.[4] On the contrary, the insureds assert that they have suffered catastrophic losses of business income due to COVID-19. Indeed, the suggestion that class actions present a superior method for adjudicating business interruption claims is belied by the dozens of individual plaintiff lawsuits that already have been filed and the high volume of individual claims that are sure to follow.

The efforts by a few plaintiffs to establish an MDL for purposes of consolidating all pending and future business interruption claims before a single district court for pre-trial proceedings also is misguided. Generally speaking, the Judicial Panel on Multidistrict Litigation (JPMDL) has demonstrated its reluctancy to consolidate breach of contract claims, even when those claims are brought against the same defendant because such claims do not have sufficient common issues to promote the efficiency an MDL can provide. Here, the petitioning plaintiffs seek to establish a massive MDL that would bring together claims against multiple different insurers for purposes of discovery and pre-trial proceedings. Given that class action litigation against a single defendant is not a viable method to adjudicate business interruption claims, the notion that doing so in an MDL would be appropriate is even further removed from the policy considerations that support consolidation for the sake of efficiency. The claims against the various different insurers, among other things, are based on different allegations, different policy language and provisions and different state laws. Requiring a single, federal district court judge to oversee litigation of this colossal magnitude will only delay and increase the burden associated with the litigation. Simply put, consolidation would run counter to, rather than support, the efficiencies in discovery and the convenience of witnesses and parties that multidistrict litigation is intended to promote.[5]

Pennsylvania State Court Actions

The request that the Pennsylvania Supreme Court expeditiously resolve and consolidate business interruption coverage actions fares no better than the similar efforts made in federal court.

By operation of the Pennsylvania Constitution and statute, the Supreme Court possesses extraordinary jurisdiction and King's Bench powers.[6] Under the extraordinary jurisdiction power, the Court "may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done." The King's Bench authority, in turn, can be utilized when there is no underlying action pending in a lower court. This power is "generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law."[7]

A petitioner requesting that the Supreme Court invoked its extraordinary jurisdiction or King's Bench powers bears an extremely heavy burden. Indeed, given their unique nature, these special powers are "sparingly" invoked.[8] When the Court does exercise these authorities, it typically does so in those rare cases that involve substantial constitutional issues, separation of powers concerns, or extreme judicial abuses of power or misconduct in a lower tribunal that are of such importance to the public that they require immediate resolution by the Commonwealth's highest court.

There is no valid reason for the Supreme Court to invoke

its extraordinary powers to adjudicate business interruption claims. Although the claims raise issues of importance to the businesses who bring them, they do not rise to the level of substantial public importance that is required for the exercise of the Court's extraordinary powers. Moreover, the Court cannot, as a practical matter, expeditiously address and resolve the legal issues presented by business interruption claims in a manner that would be generally applicable to all business interruption cases, let alone do so in a way that comports with the defendants' due process rights. As discussed above, business interruption claims can only be resolved on the specific factual allegations and policy provisions as applied to each insured. For similar reasons, the request for a Commonwealth wide MDL-type proceeding consolidated in a single county also is unworkable and should be rejected.

To the extent that insureds rely on the Supreme Court's recent decision in Friends of *Danny DeVito v. Wolf*, to support their argument for the exercise of extraordinary powers, such reliance is misplaced.[9] *Friends of Danny DeVito* addressed the constitutional authority of Governor Wolf to issue emergency orders that placed restrictions on all individuals and businesses in the Commonwealth in response to the public health crisis created by the spread of COVID-19. As such, the Supreme Court confronted a very different set of issues in finding a matter of substantial public importance existence, especially when contrasted with the private contractual rights of businesses and insurers that are raised by business interruption claims.

Conclusion

The courts should not countenance efforts to bring business interruption claims in class action or consolidated litigation. These claims, by their very nature, require a specific factual inquiry and application of the governing policy language and law in order to be properly and fairly adjudicated. The individualized issues inherent in business interruption litigation substantially overwhelm any common questions that may be presented, thereby rendering business interruption lawsuits inappropriate for litigation on a class-wide or consolidated basis.

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[1] COUCH ON INS. § 167:9 (3d ed. 2019).

[2] *See, e.g., Complaint ¶ 53, Billy Goat Tavern, Inc., et al. v. Society Insurance*, No. 1:20-cv-02068 (E.D. Ill.), filed Mar. 31, 2020 (alleging that "COVID-19 rendered the covered property at the premises . . . unsafe and inaccessible for dine-in customers"); Second Motion to Transfer, In *re COVID-19 Business Interruption Protection Insurance Litigation*, No. 2942 (J.P.M.L.) (arguing all cases filed to date involve the following two questions: "(1) Whether COVID-19 causes "physical damage or loss to property" as that phase is used in property insurance policies; and (2) whether COVID-19 was present on the insured property or on property sufficiently connected by proximity or in other ways to the insured property such that coverage is triggered.").

[3] *See Fed. R. Civ. P. 23(b)(3)* (subject to the other requirements of Fed. R. Civ. P. 23, class certification permissible "if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.").

[4] *See Amgen Inc. v. Connecticut Retirement Plans, ____ U.S.___, ____, 133 S.Ct. 1184, 1202, 185 L.Ed.2d 308 (2013)* ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

[5] 28 U.S.C. § 1407(a) (stating that action may be transferred if (1) the actions sought to be transferred share common factual questions; (2) the transfer would result in convenience for the parties and witnesses; and (3) the transfer would advance "the just and efficient conduct of the actions.").

[6] Pa. Const. Art. V, § 2(a); 42 Pa.C.S. §§ 502, 726.

[7] *Commonwealth v. Williams*, 129 A.3d 1199, 1205–06 (Pa. 2015)

[8] *See Board of Revision of Taxes, City of Phila. V. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010)

[9] ___ A.3d ____, 2020 WL 1847100 (Pa. April 13, 2020)

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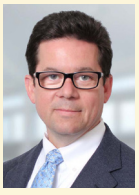

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