

Case Law update: Business Litigation in the time of COVID-19

Business Interruption coverage:

- Generally trending adverse to insured, tied to policy language of direct physical impact and virus exclusion
- Aggregation generally rejected

Studio 417, Inc. v. Cincinnati Insurance Company

United States District Court, W.D. Missouri, Southern Division. August 12, 2020---
F.Supp.3d ----2020 WL 4692385

Potential outlier case, denied dismissal on direct physical loss because Plaintiff pleaded that COVID-19 was actually present in its physical plant.

Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Company

United States District Court, E.D. Michigan, Northern Division. September 3, 2020 Slip
Copy 2020 WL 5258484

*Chiropractic clinic claim of loss of income and extra expense, dismissed with prejudice
No direct physical loss and virus exclusion—no COVID-19 on premises. Differentiates in dicta between direct physical loss and direct physical loss or damage language, and distinguishes Studio 417, below*

Malaube, LLC v. Greenwich Insurance Company

United States District Court, S.D. Florida August 26, 2020 Slip Copy 2020 WL 5051581

Restaurant closure case. Mag judge rec dismissal. Discusses direct physical loss and direct physical damage, Governor's shutdown did not amount to physical loss. Distinguishes other cases where surroundings or situation created physical loss; ex, presence of asbestos. Distinguishes Studio 417.

Diesel Barbershop, LLC v. State Farm Lloyds

United States District Court, W.D. Texas, San Antonio Division. August 13, 2020Slip
Copy2020 WL 4724305

Barbershop closure case, order of dismissal. Good discussion of difference between being rendered unusable by direct physical event versus government order, interesting consideration of hurricane closure cases.

Rose's 1, LLC v. Erie Ins. Exchange

Superior Court of the District of Columbia August 6, 20202020 WL 4589206

Restaurant case, order granted SJ, concluding that a government edict does not amount to direct physical loss or damage due to threat of COVID.

MDL/aggregation:

re COVID-19 Business Interruption Protection Insurance Litigation

United States Judicial Panel on Multidistrict Litigation. August 12, 2020--- F.Supp.3d ----
2020 WL 4670700

MDL/regional MDL rejected by the panel

“The proponents of centralization identify three core common questions: (1) do the various government closure orders trigger coverage under the policies; (2) what constitutes “physical loss or damage” to the property; and (3) do any exclusions (particularly those related to viruses) apply. These questions, though, share only a superficial commonality. There is no common defendant in these actions—indeed, there are no true multi-defendant cases, as the actions involve either a single insurer or insurer-group (*i.e.*, related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases 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 will overwhelm any common factual questions.”

Joseph Tambellini Restaurant v. Erie Insurance Exchange. Law 360 article, PA state court, 16 cases aggregated against Erie.

Force Majeure

In re Hitz Restaurant Group

United States Bankruptcy Court, N.D. Illinois, Eastern Division. June 3, 2020
2020616 B.R. 37468 Bankr.Ct.Dec. 221

Early case discussing force majeure, crafted remedy—the takeout and delivery options

Richards Clearview, LLC v. Bed Bath & Beyond, Inc.

United States District Court, E.D. Louisiana. July 13, 2020
Slip Copy 2020 WL 3960372

Judge Fallon determined that federal court would apply expedited eviction procedures available under Louisiana state law

Richards Clearview, LLC v. Bed Bath & Beyond, Inc.

United States District Court, E.D. Louisiana. September 2, 2020
Slip Copy 2020 WL 5229494

After a Zoom eviction trial, Judge Fallon denied eviction finding that BB&B attempted to comply to provide required sales documents and the 8-day late tender of rent cured the problem under the pandemic circumstances.

Banco Santander (Brasil), S.A. v. American Airlines, Inc.

United States District Court, E.D. New York. August 21, 2020
Slip Copy 2020 WL 4926271

Sealing order of trade secret agreement—BS trying to escape an affinity credit card contract which required the monthly purchase of a specified miles from AA, BS wants to terminate under Force majeure/common law.

Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.

United States District Court, S.D. Florida. September 9, 2020Slip Copy2020 WL 5411353

Tenant's Motion to Dismiss eviction denied finding force majeure involved factual questions that could not be resolved on MTD, in addition, that Kirkland's failed to directly link government closure to non-payment of rent, concluding that there must be a direct cause and effect relationship.

Exemplar by industry:

Zhao v. CIEE, Inc.

United States District Court, D. Maine. August 31, 2020Slip Copy2020 WL 5171438

Combination of travel and school! Study abroad program in Amsterdam thwarted due to COVID. Motion to Dismiss on breach of contract granted.

NetOne, Inc. v. Panache Destination Management, Inc.

United States District Court, D. Hawai'i. June 5, 2020Slip Copy2020 WL 3037072

Trips and travel: rewards group cancelled the group trip to Hawaii, sought return of deposit. Sj denied because of lack of record on breach, and no breach, no refund.

Pinero v. Zapata

District Court of Appeal of Florida, Third District. August 19, 2020--- So.3d ---- 2020 WL 4810767

Trial court which extended time to comply with mediated settlement agreement due to COVID reversed for rewriting the contract. Deadlines are deadlines unless flexibility reserved.

Pacific Collective LLC v. ExxonMobil Oil Corporation et al

2:20CV03887 United States District Court, C.D., California

\$8 million deal with Exxon, Pacific suing asserting Exxon wrongfully refused to extend deadlines due to COVID and instead wrongfully attempt to terminate agreement.

Pandemic as kitchen sink

Future Street Limited v. Big Belly Solar, LLC

United States District Court, D. Massachusetts. July 31, 2020 Slip Copy 2020 WL 4431764

Illustrates a complete commercial meltdown regarding intelligent waste/recycling in which COVID is asserted within a blizzard of other allegations.

Friends of Danny DeVito v. Wolf

Supreme Court of Pennsylvania. April 13, 2020 227 A.3d 872

COVID orders are not "takings." Involved a political candidate, real estate agent, and golf club.

Zoom trial?

Forescout Technologies, Inc. v. Ferrari Group Holdings, L.P.

Court of Chancery of Delaware. July 14, 2020 Not Reported in Atl. Rptr. 2020 WL 3971012

Unpublished opinion from Delaware Chancery dealing with interlocutory appeal—can a Zoom trial be mandated?

*Refunds: Class Actions against virtually every college and university in the country,
Gyms and sports clubs*

Fun ones to watch: Minor League Baseball and NBA

2020 WL 3433102 (E.D.Pa.) (Trial Pleading)

United States District Court, E.D. Pennsylvania.

CHATTANOOGA PROFESSIONAL BASEBALL LLC d/b/a Chattanooga Lookouts; Agon Sports and Entertainment LLC; Boise Hospitality and Food Services LLC; Boise Professional Baseball LLC; Columbia Concessions & Catering LLC; Columbia Fireflies LLC d/b/a Columbia Fireflies; Eugene Emeralds Baseball Club Inc. d/b/a Eugene Emeralds; Evans Street Baseball Inc. d/b/a Binghamton Rumble Ponies; Fort Wayne Professional Baseball LLC d/b/a Fort Wayne TinCaps; Fredericksburg Baseball LLC d/b/a Fredericksburg Nationals; Greenjackets Baseball LLC; Greenjackets Hospitality Food & Beverage Services LLC; Greenville Drive LLC; Idaho Falls Baseball Club Inc. d/b/a Idaho Falls Chukars; Inland Empire 66ers Baseball Club of San Bernardino Inc. d/b/a Inland Empire 66ers; Panhandle Baseball Club Inc. d/b/a Amarillo Sod Poodles; SAJ Baseball LLC; San Antonio Missions Baseball Club Inc. d/b/a San Antonio Missions; 7th Inning Stretch LLC d/b/a Stockton Ports; 7th Inning Stretch LP d/b/a Delmarva Shorebirds,
Plaintiffs,

v.

PHILADELPHIA INDEMNITY INSURANCE CO.; Acadia Insurance Co.; National Casualty Co.; Scottsdale Indemnity Co.; Scottsdale Insurance Co., Defendants.

No. 2:20CV03032.

June 23, 2020.

And Judge Stern's NBA case.