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Covid-19 Business Income Claim Survives Motion to Dismiss in Texas Federal Court

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In the midst of the COVID-19 pandemic, a district court in Texas declined to fully reject a class action challenge to an insurer's virus exclusion for business income loss coverage. *Independence Barbershop, et al. v. Twin City Fire Ins. Co.*, No. A-20-CV-00555-JRN, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020)

Independence Barbershop, located in Austin, Texas, was forced to temporarily close its business in March 2020 due to a statewide order issued by Texas Governor Greg Abbott in response to the COVID-19 pandemic. Due to this closure and the resulting loss of business, Plaintiff sought coverage from its insurer, Twin City Fire Insurance Company, for business income loss. The insured relied on a clause in the policy covering "direct physical loss of or physical damage to" its business. Twin City, however, rejected the claim, asserting that the COVID-19 virus did not cause property damage to the insured's business, and even if it did, the policy excludes coverage for losses related to a virus. The insured filed suit, seeking class certification and designation as Class Representative, damages for breach of contract, and a declaratory judgment.

Twin City filed a motion to dismiss, primarily arguing that the policy's "Virus Endorsement" would dispose of the entirety of Plaintiff's claims. This endorsement excludes coverage for business losses caused by a virus. However, the court found that losses from the COVID-19 pandemic cannot be boiled down to just a "virus." The court iterated four potential "causes" for these losses: SARS-CoV-2 (the virus itself), COVID-19 (the disease caused by the virus), the COVID-19 pandemic, and the government shutdowns as a result of the pandemic. Nonetheless, the court determined that the "virus" need not be the only cause of the loss in order to preclude coverage, but it just needs to be a contributing one, and the Court determined it was.

The court rejected Plaintiff's argument that the doctrine of regulatory estoppel could apply if the evidence showed that the insured had misled state regulators about the scope of the virus endorsement. The Court cited *SnyderGeneral Corp. v. Great American Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996), in finding that Texas has continually disfavored use of this doctrine and that there was no basis to apply it.

The court found, however, that the insured plead a "plausible" claim for relief pertaining to coverage under the Virus Endorsement relating to "Time Element Coverage." That provision provides thirty days of business income coverage if "loss of damage to property caused by [. . .] virus" causes a suspension of operations and if the Time Limit Coverage applies. The insured asserted that Time Element Coverage is "a term of art in the insurance industry referring to coverages measured in time, including Business Interruption and Civil Authority coverages." Twin City argued against this assertion because, it claimed, allowing independent recovery under this provision would render the Virus Endorsement moot. Without analyzing the merits of the insured's argument, the court found that the presence of the Time Element Coverage clause in the policy was enough for the insured to have a plausible claim for relief and allowed the insured to continue on this claim alone.

Finally, the insured's efforts to certify a nationwide class survived the motion to dismiss. Twin City argued that it was inappropriate for the insured, a Texas company suing a Texas insurer under Texas law, to represent a nationwide class of insureds from other states under the law of other states because the insured lacks standing. The court agreed with the insured that, while the insured must establish standing, the fact that a suit happens to be a class action adds nothing to the question of Article III standing, and there was no indication that the insured lacks the standing to bring its own claim. Instead, the court explained that Rule 23 of the Federal Rules Civil Procedure is the appropriate framework to determine the issue. Therefore, the court allowed the insured to continue to seek class certification, the appropriateness of which would be determined at a later time.