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INSIGHT: Disputes Brewing Over Covid-19 Bar, Restaurant Closings



BY PATRICK COLLINS, NIKESH JINDAL, ANNE VOIGTS,
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The Covid-19 pandemic threatens to take a devastating toll on many retailers, including the food service industry, and [especially](#) small restaurant groups and independent restaurants.

Restaurants and bars depend on packed tables and stools—pretty much the opposite of social distancing—to turn a profit. Already operating on slim margins, and faced with government orders in many municipalities and states to shutter their doors, many restaurant and bar owners have sought relief by filing business interruption claims with their insurance carriers.

But many of those insurers have denied coverage. Some have read the scope of coverage narrowly. Others have cited explicit policy language that disclaimed coverage for pandemics. Litigation is already underway to resolve some of these disputes. Still more will come.

Chicago Lawsuit Is Harbinger A [lawsuit](#) filed March 27 in Chicago is a harbinger of this coming wave of litigation. (King & Spalding represents the plaintiffs in this suit.) Like many other states, Illinois sought to slow the spread of the pandemic by ordering bars, restaurants, and movie theaters to close to the public.

Big Onion Tavern Group and scores of other Chicago-area bars and restaurants were forced to suspend their businesses almost overnight. They filed a claim with their insurer, Society Insurance, claiming that their policies indemnified them for any losses resulting from this government-mandated closure.

Not to spoil the story, but Society Insurance disagreed. As alleged in the complaint, even before receiv-

ing claims, Society Insurance's CEO directed its agency partners that Society Insurance's policies would not cover losses due to a "governmental imposed shutdown due to COVID-19 (coronavirus)."

Under this view, their policies only covered suspension due to "direct physical loss of or damage," and the pandemic was not a "direct physical loss." Thus, after receiving claims from Big Onion Tavern and other insureds, Society Insurance denied coverage as a matter of course after minimal investigation.

Big Onion Tavern and other plaintiffs filed suit, seeking a declaratory judgment that their policies covered losses due to the pandemic. The complaint contended that unique elements of the Society Insurance policy weighed in favor of recovery:

- Its policy is an "all risk" policy that provides broad coverage for losses caused by any cause unless expressly excluded.

- Unlike policies issued by other carriers, Society's policy did not have an express exclusion disclaiming coverage for pandemics.

- The policy also expressly covered "the actual loss of Business Income" sustained by an insured "due to the necessary suspension" of its operations because of "direct physical loss of or damage to covered property" at the insured's premises.

- Courts within Illinois have held that the presence of a dangerous substance in a property constitutes "physical loss or damage." *See, e.g., Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622, 625–26 (Ill. Ct. App. 1999), as modified on denial of reh'g (Dec. 3, 1999).

The plaintiffs in this case are not alone. Indeed, in just the last few weeks, lawsuits on behalf of many other

bars and restaurants have poured in from [coast](#) to [coast](#).

Particular Policy Language Means Clear Guidance Unlikely Because these lawsuits turn on particular policy language, across-the-board resolutions will likely elude courts, and parties on both sides looking for guidance may not find clear, across-the-board rules to help them make decisions.

Claims like those in the Chicago case, which stem from a policy that did not disclaim pandemic-related coverage, stand a better chance of success than policies with more expansive exclusions. (Even so, insurers whose policies disclaim coverage for pandemics might not be immune from suit, as evidenced by a recent D.C. Superior Court [suit](#).)

Trickier are those cases in between: where the policy did not expressly disavow coverage, but the coverage provided by the policy itself is more narrow. Plaintiffs in these cases will likely try to invoke [canons of construction](#) that read contractual ambiguities against carriers.

Depending on the wording of the specific provisions, and potential broad reading under the canon of construction interpreting ambiguities against the drafting insurer, this could lead to recovery. And recovery might also depend on the state or the policy's choice-of-law provision: while Illinois courts have described the pres-

ence of a dangerous substance as a “physical loss or damage,” not all courts may have reached this question.

The future of many bars and restaurants on one hand (and for that matter many other retailers)—and their insurance companies on the other—will turn on how courts grapple with these issues.

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