

Pa. Ruling Strengthens Arguments For COVID Loss Coverage

By **Jordan Rand** (April 16, 2020)

The COVID-19 pandemic is inarguably interrupting the way we live as well as the way we do, or don't do, business. An extraordinarily high-stakes question, however, is whether the staggering losses experienced during the pandemic stem from "direct physical loss of or damage to property," a prerequisite to business interruption and other property-based insurance coverages.



Jordan Rand

An inordinate amount of ink — or more accurately toner — has been spilled searching for an answer. In *Friends of DeVito v. Wolf*, the Pennsylvania Supreme Court provided one. Policyholders' business losses during the pandemic are indistinguishable from those caused by earthquakes, fires and the other casualty events for which property-based insurance coverage has always been intended to provide coverage.

Coverage Analysis Before the DeVito Decision

In any coverage analysis, the threshold inquiry is whether the policy grants coverage for a loss. There are at least three coverage grants to which an insured might reasonably look for coverage associated with revenue losses experienced during the COVID-19 pandemic: (1) business interruption; (2) contingent business interruption; and (3) civil authority.

These coverage grants are typically property-based coverages — coverage must be triggered by some type of physical property damage. A typical business interruption coverage grant obligates an insurer to pay for the actual loss of [b]usiness [i]ncome you sustain due to the necessary suspension of your operations ... caused by direct physical loss of or damage to property at your premises."

Contingent business interruption coverage is also triggered by physical damage, though at a dependent property, like a manufacturing facility without which an insured's business operations cannot continue. Civil authority coverage applies when the government bars access to an insured's property because of its proximity to any physically damaged premises even if that premises is not a dependent property. While these coverages have other important differences and requirements, the unifying prerequisite to establishing a covered claim is physical property damage.

In the absence of specifically applicable precedent, coverage analyses to date have predominantly focused on cases addressing losses caused by ammonia, asbestos or other agents that do not cause clearly observable structural damage.[1]

Many of these decisions support the view that COVID-19 contamination across broad geographic regions constitutes physical damage to property. But in the face of an event that so many have labeled unprecedented, the lack of case law specifically addressing the pandemic itself has hampered truly meaningful coverage analyses.

The Pennsylvania Supreme Court Weighs In: *DeVito v. Wolf*

On April 13, the Pennsylvania Supreme Court provided critical insight on the legal characterization and consequences of the COVID-19 pandemic in *Friends of Danny DeVito v.*

Wolf.[2]

In *Devito*, business owners asked the Pennsylvania Supreme Court to invalidate Gov. Tom Wolf's order of March 16, shutting down all nonlife-sustaining businesses. In declining to do so, the court rejected a number of constitutional challenges. The valuable guidance for policyholders, however, stems from the court's threshold inquiry whether Wolf had statutory authority to issue the order.

Emergency executive powers are statutory, and they are triggered by the occurrence of a natural disaster. The Emergency Code defines natural disaster as follows:

Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.[3]

Following a natural disaster, the governor "gains broad powers, including, inter alia, controlling the ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein."

The business owners argued that the COVID-19 pandemic is not sufficiently similar to the specifically enumerated natural disasters so as to constitute another "catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life." The court rejected this argument and held that the pandemic is a natural disaster that triggers emergency executive authority.

The court reasoned in part that:

[T]he specific disasters in the definition of 'natural disaster' themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve "substantial damage to property, hardship, suffering or possible loss of life." In this respect, the COVID-19 pandemic is of the 'same general nature or class as those specifically enumerated,' and thus is included, rather than excluded, as a type of "natural disaster."

The court concluded that the "COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions."

The business owners then argued that, even if the pandemic is a natural disaster, the governor's emergency power "does not include any ability to close their businesses" because it "only authorizes the governor to act in a 'disaster area,' and there have been no disasters in the areas in which their businesses are located."

The court rejected this argument as well, holding that each county in which the petitioners did business had been properly classified as a disaster area. It reasoned that "COVID-19 cases have been reported in the counties in which [p]etitioners' businesses are located (Allegheny, Northampton and Warren Counties). In fact, COVID-19 cases have now been reported in all counties in the Commonwealth."

The court further observed:

More fundamentally, [p]etitioners' argument ignores the nature of this virus and the manner in which it is transmitted. The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including [p]etitioners' businesses) where two or more people can congregate is within the disaster area.

The court also specifically rejected the notion that the actual presence of the disease in a particular location is a prerequisite to being shut down. The court reasoned that "COVID-19 spreads 'exponentially.'"

It observed:

From the date respondents filed their answer to the Emergency Application (March 26, 2020) to the date they filed their brief (April 3, 2020) the number of reported cases increased from 1,687 to 7,016 and the number of deaths increased from 16 to 90. ... To punctuate the point ... as of [April 13], 24,199 of Pennsylvania's citizens have been confirmed to have been infected and 524 have died. ... The virus can live on surfaces for up to four days and can remain in the air within confined areas and structures.

The court therefore found that the governor could lawfully shutter properties even absent confirmed contamination because there is a significant risk of the spread of the virus at even locations where contamination has not been confirmed.

Simply stated, the COVID-19 pandemic is indistinguishable from any other natural disaster that might trigger the proper exercise of emergency executive authority.

DeVito Strengthens Policyholder Arguments for Business Interruption and Other Property-Based Coverages

Just as the commonality of harms caused by other natural disasters and the COVID-19 pandemic triggers emergency executive powers, the similarities identified by the court strengthen policyholders' arguments that pandemic-related harms constitute physical damage that trigger insurance coverage. Specifically, the DeVito decision supports at least two critical arguments supporting the position that shuttered businesses have experienced losses caused by covered property damage.

The COVID-19 Pandemic is Indistinguishable From Other Covered Casualty Events

The court's holding that the COVID-19 pandemic is a natural disaster, indistinguishable from other casualty events for which property-based insurance coverage has always been intended to provide coverage, dramatically undermines carriers' position that this is not the type of occurrence for which coverage was intended to apply. If the COVID-19 pandemic is sufficiently similar to an earthquake, tornado or fire so as to constitute a natural disaster triggering emergency executive powers, it must likewise be sufficiently similar to these occurrences to trigger coverage under insurance policies issued with precisely these events in mind.

The court, moreover, based its finding on the commonality of harms caused by these events. Like earthquakes, fires and tornados, the pandemic is hurting people and harming property, whether at an insured premises or in a broader disaster area. With the Supreme Court having held that the pandemic is indistinguishable from other casualty events that

routinely trigger business interruption and other similar coverages, policyholders have gained a clear advantage. Though the harms occurring during the pandemic are unprecedented in magnitude, they are precisely the types of harms that have for more than a century triggered insurance coverage.

Actual Contamination at an Insured Premises Is Not Required

The DeVito ruling also undermines the argument that the actual presence of the virus at an insured's property is dispositive as to whether the insured's loss has been caused by physical property damage. Entire counties in which businesses operate have been deemed disaster areas.

Due to the extraordinary communicability of the virus, its long incubation period and its ability to survive for up to four days on physical surfaces, the issue is not merely whether a particular location has been contaminated. Rather, the issue is whether a property has been rendered unusable by virtue of physical damage either at that location or in the broader disaster area in which it is located.

Based on the court's reasoning, there is virtually no place in the Commonwealth that is not suffering losses caused by physical damage. That is the very rationale for shut down and stay at home orders. It is not the actual presence of the virus that is dispositive. It is the damage inherent in congregating in any property located in an area where the virus is so pervasive as to be presumed to be physically present almost everywhere.

Even a deep cleaning of a specific property cannot eradicate this damage. Because the areas in which Pennsylvania businesses operate have been declared, and now held, to be physically unsafe, the losses flowing from that fact are being caused by physical property damage.

Conclusion

The pandemic, though unprecedented in magnitude, is no different from other casualty events for which property-based insurance has always been intended to provide coverage. Concededly, the physical damage requirement is a threshold inquiry, and various exclusions may require analysis even after a policyholder establishes a covered claim.

The first step in the coverage analysis, however, is substantially clearer now. We may not have previously experienced an event that caused such widespread damage. But we have experienced this type of damage. And following DeVito, it became significantly more likely that we have coverage for it.

Jordan Rand is a partner at Klehr Harrison Harvey Branzburg LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See, e.g., *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed.Appx. 823 (3d Cir. 2005) (bacterial contamination of a house); *Port Auth. of NY and NJ v. Affiliated FM Ins. Co.*, 311 F.3d 225 (3d Cir. 2002) ("Where the presence of large quantities of asbestos in the air of a

building is such as to make the structure uninhabitable and unusable, there has been a distinct loss to its owner.”); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 6675934 (D.N.J. 2014) (holding ammonia discharge at packaging facility constituted physical damage triggering business interruption coverage even absent structural damage because it “physically transformed the air...so that it contained an unsafe amount of ammonia...[and] rendered the facility unfit for occupancy”).

[2] 68 MM 2020, 2020 WL1847100.

[3] 1135 Pa.C.S. § 7102.