Virus Coverage Prospects Are Bright For Ind. Policyholders

By **George Plews, Greg Gotwald and Christopher Kozak** (April 20, 2020)

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Many organizations have policies marketed as business interruption, business income or event cancellation insurance. The insuring agreements in these policies are extremely broad — promising to pay for things like direct physical loss, physical damage or direct loss to property caused by or resulting from any covered cause of loss.

Yet in the wake of mounting COVID-19 business losses — many caused by government edicts — insurers are denying coverage on the grounds that there is no physical loss or physical damage because there is no visible harm to the property. They are also invoking various exclusions even if this insuring agreement is satisfied.

These denials are unconvincing, particularly under Indiana law. Policyholders buy casualty insurance precisely to guard against unexpected losses caused by things like the COVID-19 pandemic. These losses are textbook examples of "unforeseen, unusual, and unexpected injur[ies]" happening while all of us are "pursuing the usual and ordinary routine of [our] daily vocation."[1]

In many cases, the policyholder has lost the entire use of the insured property due to shelter-in-place orders, mandatory cleaning or other, less extreme government measures. Some may face bankruptcy. Coverage denials for Hoosier policyholders should be the exception, not the rule, in this situation. This article explains why.

For at least a century before COVID-19 emerged, the Indiana Supreme Court recognized that the core purpose of insurance is to protect people and businesses from unexpected loss.[2] The court said:

The purpose of accident insurance is to protect the insured against accidents that occur while he is going about his business in the usual way, without any thought of being injured or killed, and when there is no probability, in the ordinary course of events, that he will suffer injury or death. The reason men secure accident insurance is to protect them from the unforeseen, unusual, and unexpected injury that might happen to them while pursuing the usual and ordinary routine of their daily vocation, or the doing of things that men do in the common everyday affairs of life.[3]

The Indiana courts have reaffirmed this principle again and again for over a century.[4]

Indiana's courts have enforced this principle by construing insurance policies strictly against insurers attempting to deny or limit coverage, especially in (but not limited to) exclusions.[5] Thus, "[w]here any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given."[6] Any language that purports to limit coverage "must be clearly expressed to be enforceable."[7]

The rigorous protection of policyholders' rights has made Indiana's coverage law one of the best in the country. Our courts have held that insurers seeking to exclude coverage for

environmental harm, for example, must specifically list the contaminants they desire to avoid, rather than use vague exclusionary language which, if "read literally ... would negate virtually all coverage."[8]

The Indiana Court of Appeals employed similarly strict scrutiny when it held (1) that the term "suit" in a commercial general liability policy included coercive agency action outside of a court of law, and (2) that the policy term "damages" includes equitable remedies and not just money judgments.[9]

Hoosier policyholders should not take COVID-19 denials at face value. In Indiana, "[a]n insurance policy should be so construed as to effectuate indemnification ... rather than to defeat it."[10]

Start with the "direct physical loss" argument. Many courts, in Indiana and elsewhere, have held that direct physical loss includes things like a home rendered uninhabitable by a brown recluse colony, a building with dangerous levels of asbestos fibers or gasoline fumes, or erosion or falling rocks that make premises unsafe. As one federal court observed, under this generous language, one would struggle to think of damage not covered by the coverage grant.[11]

While most insurers have denied that COVID-19 losses are a result of either physical damage or physical loss, even physical damage does not block a claim. Indiana law demonstrates that the word "damage" is ambiguous.[12] A person of average intelligence could read the term "physical damage" and reasonably conclude that her physical inability to use his restaurant, theater or storefront to make a living counts as damage to their physical assets, and would be covered.[13]

This is reinforced by the nature of insurance policies. Policyholders buy broad, all-risk policies to protect their businesses from completely unexpected disasters like the current pandemic.[14] But "[t]he insurance companies write the policies; we buy their forms or we do not buy insurance."[15]

"Physical loss" and "physical damage" are precisely the kind of terms that a drafting party uses to leave a contract deliberately obscure so that it can decide at a later date what meaning to assert.[16] They are broad enough to allow agents to sell policies, yet just vague enough to allow the insurer to assert that its coverage-limiting interpretation is the correct one. This is why Indiana law mandates coverage unless the insurer's reading is the only reasonable interpretation of the policy.[17] Here, it is not the only reasonable one.

Insurers also have invoked a series of exclusions to avoid these generous insuring agreements. These include communicable disease or virus exclusions, ordinance or law exclusions, and acts or decisions exclusions. Indiana's strict scrutiny exposes chinks in the insurers' armor.

The communicable disease or virus exclusions come in varying types and may or may not apply. Some seem to apply broadly to losses arising from any "transmission of a communicable disease." Others purport to bar coverage for "loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or microorganism."

But the Supreme Court of Indiana's 1996 decision in American States Insurance Co. v. Kiger shows that Indiana courts are skeptical of such broad exclusionary language — COVID-19 usually shutters businesses not due to the actual presence of the disease, but to its high transmissibility, i.e., the risk that patrons could become infected and damage the public

health. Thus, the loss is not a result of the actual virus, but a result of the public health emergency. Under these circumstances, blocking all coverage for COVID-19 closures is not clearly expressed by this language, a requirement under Indiana law.[18]

Another specific flaw in the virus and disease exclusions is that they do not specifically bar coverage for loss of use or denial of access prompted by a virus. Insurers may contend that the exclusion implies that, but an insurer's reading is only controlling if it is the only reasonable interpretation of policy language.[19]

If the insurer can be more specific, then under Indiana law, it must be more specific.[20] It cannot extend an exclusion by implication.[21] Indiana cases, from Kiger to State Automobile Mutual Insurance Co. v. Flexdar in the Indiana Supreme Court in 2012, establish that this notice requirement has real teeth: Where more specific exclusions exist that would explicitly address the case an insurer seeks to exclude under more general language, the policy is ambiguous and must be construed in favor of coverage.[22]

The ordinance or law exclusions typically attempt to bar coverage because of the policyholder's "compliance with any ordinance or law ... [r]egulating the ... use ... of any building or law." An ordinance or law is a legislative rule passed by a body like the General Assembly or a city council. It does not refer to a unilateral coercive order by the executive branch, much less in the "clea[r] and unmistakabl[e]" terms required by Indiana law.[23]

The acts or decisions exclusion purports to limit coverage for loss caused by "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." This exclusion's sheer overbreadth renders it questionable under Indiana law. All losses, except for acts of God, are caused by acts or failures to act by persons, organizations or governments. Because this exclusion "read literally ... would negate virtually all coverage," it is ambiguous and likely is not enforceable.[24]

These are only a sampling of the relevant exclusions at issue and the reasons they do not apply to the COVID-19 outbreak and its aftermath. Each policy is different. But the overriding lesson is that policyholders should not assume that the insurance company's interpretation of the policy is legally enforceable, even if it seems reasonable.

The insurer's position is only legally correct if it is the only reasonable interpretation of the policy. Especially in Indiana, whose courts guard policyholder rights carefully, the insurer's position may not be the only reasonable one. Coverage may well be available for Hoosier businesses suffering from COVID-19 losses.

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[1] Elsey v. Fidelity & Cas. Co. , 120 N.E. 42, 43 (Ind. 1918).

[2] Id.

[3] Id. (emphasis added).

[4] Masonic Acc. Ins. Co. v. Jackson , 164 N.E. 628, 631 (Ind. 1929); Am. Income Ins. Co. v. Kindlesparker , 200 N.E. 432, 436 (Ind. Ct. App. 1936); Pearlmen v. Mass. Bonding & Ins. Co. , 130 N.E.2d 54, 57 (Ind. Ct. App. 1955); Freeman v. Commonwealth Life Ins. Co. , 286 N.E.2d 396, 397 (Ind. 1972); Eli Lilly & Co. v. Home Ins. Co. , 482 N.E.2d 467, 470 (Ind. 1985); Tate v. Secura Ins. , 587 N.E.2d 665, 668 (Ind. 1992); Bosecker v. Westfield Ins. Co. , 724 N.E.2d 241, 244 (Ind. 2000); Wagner v. Yates, 912 N.E.2d 805, 812 (Ind. 2009); State Auto. Mut. Ins. Co. v. Flexdar , 964 N.E.2d 845, 848 (Ind. 2012).

[5] E.g., Eli Lilly & Co., 482 N.E.2d at 470 ("Ambiguous policy language should be interpreted to further the policy's basic purpose of indemnity. The language should be strictly construed against the insurer.").

[6] Masonic, 164 N.E. at 631.

[7] Flexdar, 964 N.E.2d at 848.

[8] Am. States Ins. Co. v. Kiger , 662 N.E.2d 945, 948 (Ind. 1996); Flexdar, 964 N.E.2d at 851-52 (holding that TCE, although widely recognized as harmful, was not excluded by a general definition of "pollutant").

[9] Hartford Acc. & Ins. Co. v. Dana Corp. , 690 N.E.2d 285, 295-97 (Ind. Ct. App. 1997).

[10] Masonic, 164 N.E. at 631.

[11] K.V.G. Props., Inc. v. Westfield Ins. Co. , 900 F.3d 818, 820-21 (6th Cir. 2018).

[12] Cf. Dana, 690 N.E.2d at 297 (holding that "damages" is ambiguous and includes equitable relief and not just legal damages).

[13] Travelers Indem. Co. v. Summit Corp. of Am. , 715 N.E.2d 926, 936 (Ind. Ct. App. 1999) (affirming another staple of Indiana coverage law: "Policy terms are interpreted from the perspective of an ordinary policyholder of average intelligence.").

[14] See Elsey, 120 N.E. at 43.

[15] Kiger, 662 N.E.2d 947.

[16] Restatement of Contracts §206, cmt. a.

[17] Carter v. State Farm Fire & Cas. Co. , 407 F. Supp. 3d 780, 783 (S.D. Ind. 2019) (Indiana law).

[18] Flexdar, 964 N.E.2d at 848.

[19] Carter, 407 F. Supp. 3d at 783.

[20] In re USA Gymnastics, Inc., 2019 Bankr. LEXIS 3972, *25 (Bankr. S.D. Ind., Oct. 24, 2019) (rejecting, under Indiana law, insurer's attempt to expand generally worded exclusion where other policies specifically put the policyholder "on notice" of the specifically excluded conduct).

[21] Summit, 715 N.E.2d at 936.

[22] See id.; Flexdar, 964 N.E.2d at 852; USA Gymnastics, 2019 Bankr. LEXIS 3972, *25.

[23] See Asbury v. Ind. Union Mut. Ins. Co. , 441 N.E.2d 232, 237 (Ind. Ct. App. 1981).

[24] Kiger, 662 N.E.2d at 948.