Class Actions Resulting from COVID Claims and Bad Faith: Part 2

With policies containing different terms and each claim involving different factual scenarios, can policyholders establish a class action claim for bad faith?

By **Stacy Manobianca and Andres Avila** | February 11, 2021

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Illinois Bad Faith Insurance Class Action

In Biscuit Café v. Society Insurance, out of the Northern District of Illinois, a group of insured restaurant owners sought to bring a class action against an insurance carrier for wrongfully denying coverage for business losses sustained due to COVID-19-related civil authority closure orders.[1] The representative parties identified two classes: (1) "Essential Businesses" (as defined by an executive order) that have been denied coverage under the carrier's Business Income and Extra Expense policy coverage for losses resulting from closure orders, and (2) "Non-Essential Businesses" that have been denied such designation. The parties limit members to those that have coverage under Society Insurance's Form TBP2 05-15.

Remarkably, the subject policy's "Business Income and Extra Expense" form, unlike similar policies from other carriers, did not include language that barred coverage for loss resulting from virus or disease. Despite the absence of such language, the carrier issued a blanket denial of all claims related to COVID-19 and the closure orders. Tellingly, the "Contamination" provision explicitly covered the costs to clean and sanitize the premises, and defined contamination as a "defect, deficiency, or dangerous condition" in the insured's products,

merchandise, and premises. The representative policyholder emphasized how the virus has been physically present on premises, and since the rapid spread of COVID-19 could not be prevented by cleaning and disinfecting frequently used surfaces in public settings, it was forced to suspend physical access to such surfaces altogether. The carrier did not incorporate this fact into a reasonable investigation of the claim. Indeed, the insurer failed to conduct any investigation at all – just as it had with all insureds who submitted claims for all covered expenses related to COVID-19.

The insurer argued that under the language of the common policy language, business interruption coverage was limited to loss resulting from a "direct physical loss of or damage to covered property," which would require an "alteration in the structural integrity or physical characteristics" of the premises. In other words, the carrier did not characterize the insured's inability to use covered property as a physical loss. Because the structural integrity and visible physical characteristics of the premises were unchanged by the mandatory closure orders, the carrier denied there was a "covered cause of loss." The policyholders allege the carrier used this reasoning to preemptively deny all COVID-19-related claims without fulfilling its duty to conduct a reasonable investigation into the specific facts of each claim.

In addressing the commonality requirement of class action certification, the plaintiffs provided a non-exhaustive list of eleven questions common to all class members, including whether COVID-19 causes a "direct physical loss or damage," whether the closure orders constitute "actions of civil authority," and whether the carrier Society Insurance breached its contracts through a blanket denial of all claims based on losses related to COVID-19 and government closure orders with respect to the class of insureds.

The test for whether common questions predominate is whether the successful adjudication of the plaintiffs' claim will establish a right to recovery for all class members.[2] In this case, the determination of (1) whether COVID-19 causes a direct physical loss or damage, (2) whether the closure orders constitute actions of civil authority, or (3) whether Society Insurance breached its contracts through a blanket denial of all claims based on business loss related to COVID-19 can be applied to resolve the same question for every member of the established class. This suggests there are at least three questions that the court could efficiently resolve in a class action that predominate over the individual questions pertaining to each class member. The question of whether the carrier breached its contracts through a blanket denial of all claims cannot be properly resolved through any individual suit, as these facts would be outside the scope of discovery for any single policyholder claiming bad faith. The resolution of these three questions would either bar or establish a right to recovery for all class members and leans heavily towards strong commonality.

Further, insurers––not the policyholder––are the drafters of the insurance contracts. In good faith, policyholders believe that under the terms of the insurance contract, if they paid their premiums, they were protecting their businesses from losses resulting from an inability to access and conduct regular business. Despite the intent of the insurance policy purchased, the carrier might have acted in bad faith by systemically denying all COVID-19-related claims without first conducting a reasonable investigation to assess whether each claimant's specific facts merit coverage. For instance, did the carrier investigate whether the virus was physically present at the premises in connection with the claim for each member of the class?

The policyholder plaintiffs in Biscuit Café acquired business interruption insurance to protect their source of income. In cases of traditionally covered causes of loss, such as explosions, water damage, or natural disasters, a business is interrupted because it is unable to access the property to conduct business as it had before the event occurred. Similarly, when the

government ordered businesses to stop conducting regular business to stem a global health crisis, the inaccessibility of the covered property caused by the COVID-19 closure orders forced an interruption to their source of income. This argument leans strongly towards triggering coverage for the entire class.

In Biscuit Café, the commonality requirement is likely met because answering the question of what constitutes a physical loss under the policy would either establish or bar a right to recovery for all policyholders who were denied coverage on the same basis, under the same policy terms, and because the insurer handled all incoming claims related to the COVID-19 pandemic the same: by swiftly denying coverage without any investigation.

Massachusetts Bad Faith Insurance Class Action

Insurer conduct that can give rise to a bad faith claim in Massachusetts includes (1) improper denial of coverage; (2) improper change of position on coverage; (3) failure to investigate the claim; (4) failure to settle after policyholder's liability has become "reasonably clear" in the underlying case;[3] and (5) failure to communicate. In McLaughlin v. Am. States Ins. Co., 55 N.E.3d 1007, 1015 (Mass. App. Ct. 2016) the court found that the question of whether and when an insured's liability became reasonably clear is based on an objective assessment of the facts known or available at the time, and is independent of how a jury in a separate trial views the insured's liability. A successful Massachusetts bad faith claim under Chapters 93A and 176D can result in up to treble money damages, injunctive relief, attorneys' fees, and revocation of license.[4]

In May 2020, a class action suit similar to that of Biscuit Cafe was filed against the insurance carrier Hartford Financial Services Group and its subsidiaries, Hartford Fire Insurance Company and Twin City Fire Insurance Company, for "systemic and uniform refusal" to pay policyholders for business losses caused by COVID-19 closure orders.[5] The representative party, Rinnigade Art Works, is a graphic design business that was insured under an "all-risk" property insurance policy, which included provisions for Business Income, Extra Expense, Business Income from Dependent Properties, and Civil Authority coverages. The complaint identified four classes for policyholders (businesses) pertaining to each of these four provisions and added a subclass for all policyholders that have any of the four coverages and are also located in the state of Massachusetts. Members of the classes must have experienced a suspension of business and denied coverage under such policies.

In Massachusetts, the commonality requirement is met if the claims of all class members are "sufficiently cohesive to warrant adjudication by representation."[6] The plaintiff asserts a number of questions that would predominate over any individual members' questions, including whether the Defendants breached its duty to investigate through a uniform and blanket denial of all claims related to COVID-19 and the subsequent closure orders. In this suit, the plaintiff has not limited the class to include only those that held policies under a specific form, like the plaintiffs in Biscuit Café had with insurance form TBP2 05-15. This may make it more difficult to satisfy the commonality requirement. Even if the members all have–for example–Civil Authority provisions, if the specific forms employed under each policy are different, the language may still vary enough that the facts of one case satisfies the coverage conditions under one form, while those same facts applied to a different form does not.

Further increasing the difficulty of satisfying the commonality requirement is the fact that the plaintiff names three different insurance companies, rather than one single company as is the case in Biscuit Café. Although the plaintiff claims Hartford Fire Insurance and Twin City Fire

Insurance are subsidiaries of Hartford Financial Services, the very fact that these entities are organized separately suggests that the method by which each entity conducts business varies, and increases the likelihood that these entities are not using the exact same insurance forms as each other. However, for the benefit of policyholders, it may be shown that all affiliated entities of the same insurer are guided by the same claims handling principles and guidelines mandated by their parent company.

So, what do the Three Amigos have in common?

The Three Amigos, COVID-19 insurance claims, bad faith, and class actions, play off each other in a very unique way. Many procedural, legal and novel questions arise in addressing such intersectionality. In the insurance coverage front, policyholders across the country continue to press for arguments to persuade that the presence COVID-19 on property triggers the insuring agreement of all risk direct physical loss or damage policies. Adding a bad faith claim makes the analysis all the more complex, particularly with respect to the garden variety of bad faith insurance requirements from state to state. Adding class certification to the mix may promise a swift resolution for many policyholders, but it does not come easy. Many policyholders are already struggling to succeed on their COVID-19 insurance coverage related claims. However, if policyholders are able to demonstrate a pattern and practice coverage denial by insurers failing to conduct a reasonable investigation of each claim, courts may be willing to grant class certification in order to make fewer rulings in the interests of judicial economy. In situations where insurers made broad-sweeping, blanket denials of all claims a class action might be a more conducive mechanism for demonstrating bad faith.

For plaintiffs seeking to establish a class action to address insurer bad faith in investigating COVID-19-related claims, policyholders should seek to narrow the scope of the policy language to be analyzed by specifically identifying the insurance forms at issue, and limiting the defendant insurers to a single insurer that conducted business in a uniform way across the company. This will decrease the likelihood that the class action certification would be denied for lack of commonality and increase the chances of success of meeting the three amigos: COVID-19 insurance coverage, and insurance bad faith, resulting in significant damages awards and justice for the class member policyholders.

Footnotes

1. In Illinois, class action certification is governed by section 2-801 of the Illinois Code of Civil Procedure. These certification rules mimic Fed. R. Civ. P. 23. Under section 2-801, the class must meet four prerequisites including numerosity, commonality, adequacy, and appropriateness.
2. Weiss v. Waterhouse Securities, Inc., 804 N.E.2d 536, 543 (2004).
3. Mass. Gen. Laws Ann. 176D, §3(9)(f).
4. Id.
5. Rinnigade Art Works v. Hartford Financial Services Group, Case No.: 20-cv-10867-IT.
6. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 364 (2008).

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