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Ninth Circuit Court of Appeals Submits Second Certified Question to California Supreme Court On COVID-19 Related Insurance Coverage

February 14, 2023

On February 7, 2023, the Ninth U.S. Circuit Court of Appeals ("9th Circuit") sent a certified question to the California Supreme Court on an issue in a pending case relating to insurance coverage for COVID-19-related business shutdowns. This is the second time within the past 45 days that the 9th Circuit has done so, having submitted a different question to the California Supreme Court in another COVID-19 coverage case on December 28, 2022.

The certified question sent on **February 7, 2023,** relating to a pending dispute between French Laundry Partners and its insurer, The Hartford, asks, "[i]s the virus exclusion in French Laundry's insurance policy unenforceable because enforcing it would render illusory a limited virus coverage provision allowing for the possibility of coverage for business losses and extra expenses allegedly caused by the presence and impacts of COVID-19 at an insured's properties, including the loss of business due to a civil authority closure order?"

The certified question sent on **December 28, 2022,** relating to a pending dispute between concert organizer Another Planet Entertainment and its insurer Vigilant Insurance Co., asks "[c]an the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?"

The topics of the two certified questions are not the main points here. Instead, it is the uncertainty that remains as COVID-19-related insurance cases make their way through Courts – in California and elsewhere – that is paramount. Indeed, in its February 7, 2023, submission to the California Supreme Court, the 9th Circuit stressed:

Courts at both the state and federal levels are grappling with the application of California insurance contract interpretation law to coverage for losses from business shutdowns due to government closure orders in response to COVID-19. While both state and federal courts have published opinions providing some guidance, there remains much uncertainty as to how California law applies in many scenarios. The prevalence of and uncertainty surrounding COVID-19 insurance litigation is underscored by our certification to the Supreme Court of California on December 28, 2022, in another case asking whether the actual or potential presence of the COVID-19 virus can constitute 'direct physical loss or damage to property' for the purposes of coverage under an insurance policy.

The stakes are high in COVID-19 coverage cases, which center on an insured's loss of business due to government closure orders. After more than two years of litigation across the nation, uncertainty remains. The 9th Circuit's sending of two certified questions to the California Supreme Court in the past 45 days is a manifestation of this and an effort to, in the words of the 9th Circuit, "gain some efficiencies through concurrent consideration of our certification in [the French Laundry] case." Time will tell what the California Supreme Court decides to do in these two instances and whether more certified questions will come from Federal Courts to State Supreme Courts as courts seek clarity and consistency in handling COVID-19-related insurance coverage cases.

If you are still grappling with claims associated with losses due to government closure orders in response to COVID-19 or other comprehensive general liability or property insurance coverage issues, please feel free to contact us for a consultation.