

Lawyer Insights

Running Out the Clock: The Period of Limitation in COVID-19 Insurance Lawsuits May Soon Come to an End

Most insurance policies have a 2 year suit limitation period, meaning COVID suits are about to expire if they aren't soon filed.

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COVID-19 may have arrived in different parts of the country at different times, but it infected the American psyche all at once on March 13, 2020, when—confronted with the preceding days' news of Tom Hanks' recent positive test and the NBA's decisions to suspend the remainder of the season—America shut down for (a planned) two weeks to “slow the spread.” With the two-year anniversary of Friday, March 13, 2020, upon us, a new question arises: How long do policyholders who have not yet filed a COVID-19 recovery lawsuit have to file one? The answer—as with

most legal questions involving insurance, which is governed by state law—varies by jurisdiction and based on the language used in the specific policy.

COVID-19 raced across the country, impacting not only people but also property. In response, commercial property policyholders filed insurance claims for their losses arising from COVID-19. The insurers denied coverage, many policyholders sued, and litigation continues across the country. Some policyholders, though, have taken a wait-and-see approach and are now deciding whether and when to sue. The time for waiting may soon end.

Policies often include a built-in “period of limitation,” which defines how long a policyholder has to file a lawsuit, often allowing policyholders two years to file a lawsuit. Some of those periods of limitation are mandated under state law and adopted into the policy, while others are creatures of the contracts in which they reside. For the most part, so long as the period of limitation is reasonable and otherwise consistent with state law, courts will enforce it.

Yet periods of limitation are not as straight forward as they may seem at first pass. Policyholders must look closely at the words of their policy and the controlling state law to determine exactly how long they have to file suit.

For example, many periods of limitation (both contractual and statutory) begin to run at the “inception of the loss.” But courts have split on what “inception of the loss” means. Some have ruled that “inception of the loss” means the day on which the insurer denies coverage. Others have ruled that the “inception of the loss” begins on “the date on which the loss occurs” or the “date of casualty.”

But even within the “date of casualty” rule, there is variation. Some courts have ruled that the date of casualty controls even if the loss is not discovered until after the period of restoration has run. Others, like

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California, define “inception of the loss” as beginning on the date of casualty or when a reasonable policyholder would have discovered the loss.

Thus, within the COVID-19 context, the period of limitation might begin on the day that SARS-CoV-2 arrived on the policyholder’s property. It might begin on the day the policyholder discovered, or could reasonably have discovered, that COVID-19 was on its property. Or it might begin on the day that the insurer denied coverage for the policyholder’s claim for coverage. One question still open is whether policyholders can simply write off any losses that predate the period of limitation, so that they seek coverage for only those losses within the last two years, regardless of whether there were also earlier, unclaimed losses.

What’s more, the period of limitation may be tolled. Equitable tolling of the period of limitation began in jurisdictions that count the inception of the loss as beginning at the date of casualty. In *Peloso v. Hartford Fire Insurance Co.*, the New Jersey Supreme Court adopted an equitable tolling rule to protect the policyholder’s right to sue. The policy at issue included a one-year period of limitation. But it also required the policyholder to wait until the insurer had denied the claim to file suit, which took up almost the entire year after the date of the casualty. To protect the policyholder’s right to a one-year period of limitation—which was required under New Jersey law and incorporated into the policy—the New Jersey Supreme Court ruled that the period of limitation was tolled from when the policyholder gives notice until the insurer denies coverage.

Some states followed suit, tolling the period of limitation from the time the policyholder notifies the insurer of the claim until the time the insurer officially denies the claim. Other courts demurred, instead strictly enforcing the period of limitation.

In sum, the period of limitation landscape is treacherous. Policyholders who sit on their right to sue stand at risk of losing it. But it is not always clear when the period of limitation begins to run. In COVID-19 cases, did the period of limitation begin to run on the date SARS-CoV-2 arrived on the policyholder’s property? Did it begin to run on March 13, 2020, when reasonable policyholders were alerted that SARS-CoV-2 was likely on their property? Or did it begin to run, likely months later, when the insurer officially denied the policyholder’s claim for coverage for COVID-19-related losses? Answers will vary by state.

Policyholders who have made claims on their insurance companies for COVID-19-related losses, but who have not yet filed suit to recover those losses, should work with coverage counsel to ensure that they are still within the period of limitation.

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