

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of April 12)

Apr.12.2021

Courts Dismiss COVID-19 Business Interruption Claims

On April 9, 2021, the district court for the Central District of California granted Topa Insurance Company's motion to dismiss a restaurant and nightclub's COVID-19 related claim. According to the court, the policy "clearly condition[ed] recovery on physical loss or damage to the insured premises" (Order at 5), and the complaint alleged only that the coronavirus "prevented it from using its property for" its intended purpose, which is not enough to "allege direct physical loss or damage." *Id.* at 6. The court held that "even if the Policy covered permanent dispossession, which it does not, Caribe has not alleged permanent dispossession, nor could it, as COVID-19 safety orders only temporarily restricted Caribe's use of its premises." *Id.* A temporary economic impairment does not qualify as "physical loss or damage." *Id.* at 7.

On April 8, 2021, the district court for the Eastern District of Pennsylvania granted the Harford Mutual Insurance Company's motion to dismiss several hotel operators' COVID-19 business interruption complaint. The court held there was no physical loss from shutting down because of government closure orders. Order at 9–10. The policy requires "some sort of physical damage to the property that is the subject of a repair, rebuilding or replacing," and "[t]he effects of the COVID-19 pandemic on Plaintiffs do not fall within that definition" because the coronavirus "can be largely remediated by mask wearing, social distancing and disinfecting surfaces." *Id.* at 9. Finding that plaintiffs "were not required to close" or "limit their operations because of" a neighboring property's dangerous physical condition or damage, the court held that the orders addressed the spread of the coronavirus rather than a "direct physical loss." *Id.* at 9–10. Even if the properties had suffered physical loss, the virus exclusion still applied to preclude coverage because the coronavirus "causes physical illness and distress." *Id.* at 10.

On April 7, 2021, the district court for the District of Massachusetts allowed Strathmore Insurance Company's motion to dismiss a restaurant operator's COVID-19 business interruption class action claim. The court found that the plaintiff failed to plead facts sufficient to show direct physical loss of or damage to property because direct physical loss requires some enduring impact to the integrity of property, and the "COVID-19 virus does not impact the structural integrity of property in a manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property." Order at 7.

New Business Interruption Class Actions:

A number of bars and restaurants filed a class action complaint against Crusader Insurance Company in California state court (San Francisco County) for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. The "all risk" policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶ 25, 30, 35, 40, 45, 50, 55, 61, 66, 71, 76. The Complaint alleges that the global pandemic, compliance with closure orders, and the presence of COVID-19 on plaintiffs' property "have caused and continue to cause direct physical loss of Plaintiffs' insured property in that much of it has been rendered useless or uninhabitable, and its functionality has been severely reduced or eliminated." *Id.* at ¶ 23. The proposed class is defined as all bars and restaurants in California that "(a) purchased comprehensive

insurance policies from Crusader which included coverage for business interruption; (b) suffered a loss of insured property as a direct result of one or more Governmental Orders and the presence of the COVID-19 virus on the property; (c) filed a claim for lost business income; and (d) were denied coverage by Crusader.” *Id.* at ¶ 101.

New Business Interruption Suits Against Insurers:

A native American tribe and its entertainment authority sued Westport Insurance Corporation, Crum & Forster Specialty Insurance Company, Western World Insurance Company, Ironshore Specialty Insurance Company, QBE Specialty Insurance Company, Starr Surplus Lines Insurance Company, Ategrity Specialty Insurance Company, Tokio Marine America Insurance Company, Landmark American Insurance Company, The Princeton Excess and Surplus Lines Insurance Company, Homeland Insurance Company of New York, Allied World National Assurance Company, Empire Indemnity Insurance Company, and Certain Underwriters at Lloyd's, London in California state court (San Bernardino County) for declaratory relief and breach of contract. The “all risk” policies allegedly provide business interruption, extra expense, civil authority, contingent business interruption, ingress/egress, and loss adjustment expense coverage. Complaint at ¶¶ 108, 111, 116, 120, 125, 128. The Complaint alleges that the “presence or suspected presence of SARS-CoV-2 and COVID-19 causes physical loss and damage because, among other things, physical droplets containing the SARS-CoV-2 reside in (and attach to) the air and on the fixtures and surfaces of the Casino and other properties, thus altering, damaging, and rendering the physical property unfit and unsafe for its intended use if not mitigated.” *Id.* at ¶ 11. The Complaint further alleges that two of the plaintiffs’ all risk insurers added virus or communicable disease exclusions to their policies and those two insurers are not named as defendants, while all of their other all risk insurers “did not include such exclusions and, therefore, expressly agreed to cover such losses as part of their insurance policies.” *Id.* at ¶ 14.

A healthcare office sued General Casualty Company of Wisconsin for declaratory relief in New York state court (Suffolk County). The “all risk” policy allegedly provides property, business personal property, business income and extra expense, contamination, and civil authority coverage. Complaint ¶¶ 16–17, 19. The plaintiff alleges the “pandemic caused direct physical loss of or damage” because it lost use of and suspended operations at its property. *Id.* ¶ 29. The plaintiff asserts the virus and bacterium exclusions do not preclude coverage because its “losses were not directly caused by a virus” but rather civil authority orders. *Id.* ¶ 42. And any application of the exclusions “violates public policy,” according to the plaintiff. *Id.* ¶ 31.

The owner and operator of a group of health clubs sued Zurich American Insurance Company, Travelers Property Casualty Company of America, Interstate Fire & Casualty Company, AIG Specialty Insurance Company, ACE American Insurance Company, Westport Insurance Corporation, Allianz Global Risks US Insurance Company, Certain Underwriters at Lloyd’s London, Tokio Marine America Insurance Company, Endurance American Specialty Insurance Company, and Homeland Insurance Company of New York in Washington State Court (King County) for declaratory judgment and breach of contract. The complaint alleges the plaintiff suffered “at least four” types of direct physical loss or damage to its property: (1) COVID-19 was allegedly present in plaintiff’s health clubs because “over 1,200” of its employees tested positive for the virus; (2) state and local civil authority orders limited plaintiff’s use of its property, “causing it to lose the normal use and function of its property;” (3) plaintiff needed to modify physical behaviors in its property, such as using social distancing, to reduce the risk of COVID-19 transmission; and (4) “through the need to mitigate the threat or actual physical presence of the Coronavirus” on its fitness equipment and in its locker rooms. Complaint at ¶ 16.

The owner of a smoking accessory retailer, a convenience store, and multiple “glass blowing operation[s]” sued Cincinnati Insurance Company and two of its affiliates in federal court (W.D. Wis.) for breach of contract and bad faith. The plaintiff’s policy allegedly provides business interruption coverage. Complaint at ¶ 32. The complaint alleges plaintiff suffered a covered “direct loss” because it was forced to close “various business arms” due to state civil authority orders in Wisconsin and Colorado. *Id.* at ¶¶ 24–31. The complaint also alleges bad faith denial, alleging that Cincinnati failed to adequately investigate plaintiff’s claim or “inform itself of the nature and extent of the business interruption [plaintiff] sustained.” *Id.* at ¶¶ 70, 85, 83, 98.

Beazley and Zurich File Declaratory Actions

Beazley Underwriting, Ltd. sued the owner and operator of fitness centers in federal court (C.D. Cal.) for declaratory relief. The policy allegedly provides time element, extra expense, civil authority, contingent time element, and ingress/egress coverage. Complaint at ¶¶ 31, 32, 34, 35, 36. The Complaint alleges that the insured “did not sustain direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss as required by the Policy,” *id.* at ¶ 43, and that the policy “excludes any losses arising from communicable disease, contamination, loss of market, loss of use, microorganisms, or the threat of anything which endangers or threatens to endanger the health, safety, or welfare of persons, and [the insured’s] losses can be linked to one or more of these exclusions from coverage.” *Id.* at ¶ 44. The insured had allegedly notified the insurer that it intended to file an action for bad faith arising out of the denial of coverage “despite the lack of denial and Beazley’s ongoing effort to obtain information related to the claim.” *Id.* at ¶ 23.

Zurich American Insurance Company sued a development company for declaratory relief in New York state court (New York County). The policy allegedly provides business interruption coverage and includes contamination and loss of use exclusions. Complaint ¶ 25. The defendants had to temporarily suspend business operations because of the coronavirus and resulting shutdown orders. *Id.* ¶ 22. The defendants filed a coverage lawsuit in Texas, but Zurich denies personal jurisdiction exists, so it instead brought this suit in New York. *Id.* ¶¶ 26–27.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Laura Foggan

Partner – Washington, D.C.

Phone: +1 202.624.2774

Email: lfoggan@crowell.com

Rachel A. Jankowski

Associate – Washington, D.C.

Phone: +1 202.624.2647

Email: rjankowski@crowell.com

Samuel H. Ruddy

Associate – Washington, D.C.

Phone: +1 202.624.2564

Email: sruddy@crowell.com

Adam J. Singer

Associate – Washington, D.C.

Phone: +1 202.688.3508
Email: asinger@crowell.com