

Client Alert

Insurers' COVID-19 Notepad: What You Need to Know Now, Week of August 16, 2021

August 16, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On August 11, 2021, the district court for the District of Oregon granted Oregon Mutual Insurance Company's motion to dismiss a restaurant owner and operator's putative COVID-19 business interruption class action. The court rejected the plaintiff's argument that "direct physical loss or damage" to covered property included "a 'loss of functionality of undamaged property for its intended purposes,'" and instead held that the plaintiff failed to allege any covered physical loss or damage to its property because the Plaintiff "d[id] not allege that its restaurants or the business property located inside them was lost, destroyed, or physically changed in any manner." Order at 16, 19-20.

On August 6, 2021, the district court for the District of New Jersey granted Sentinel Insurance Company Limited's motion for judgment on the pleadings in a COVID-19 business interruption claim filed by the owner and operator of a beauty salon. The court concluded that the policy's virus exclusion "clearly and unambiguously bars coverage for [the insured's] claims." Order at 4.

On August 9, 2021, the district court for the District of New Jersey granted Twin City Fire Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the operator of laundry service stores and plants. The court concluded that the claim was barred by the policy's virus exclusion, which "unambiguously applies to loss stemming from the COVID-19 pandemic." Order at 13. The court further dismissed the plaintiff's bad faith claim, as the insurer was legally correct in denying coverage. *Id.* at 18.

On August 11, 2021, the district court for the Middle District of Florida granted Aspen American Insurance Company's motion to dismiss a dentist's COVID-19 business interruption claim. The court concluded that the policy's direct physical loss provision requires "an actual, demonstrable, physical alteration of property," Order at 7, and that the insured could not plausibly allege that a virus caused direct physical damage to property. *Id.* at 9. According to the court, the insured's loss of income did not arise "from some physical damage to the dental business's (or any other) property," and the threat of infection from the coronavirus "did not and cannot cause direct physical damage to non-living things." *Id.* at 12-13.

On August 11, 2021, the district court for the Central District of California granted Federal Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the Los Angeles Lakers. The court concluded that, under California law, a direct physical loss contemplates an actual change in insured property, and the Lakers failed to allege any facts to support its claim that the presence of COVID-19 at the Staples Center and surrounding transportation stations constituted a "direct physical loss or damage" under the policy, as its allegations that the presence of COVID-19 physically altered the property were "merely legal conclusions couched as factual allegations." *Id.* at 3-4.

On August 13, 2021, the district court for the Northern District of Illinois granted Continental Casualty Company's motion to reconsider the court's earlier order denying its motion to dismiss a barbershop's COVID-19 business interruption claim. The court concluded that the insured's allegations that alterations made to their property, such as installation of plexiglass and an outdoor patio, constituted "direct physical loss of or damage to" property were insufficient to state a claim for relief, because the plain wording of that phrase requires either a permanent disposition of the property due to a physical change or physical injury requiring repair. Order at 2. According to the court, the changes alleged "are more properly classified as improvements to the properties, not losses or damages directly caused by COVID-19." *Id.* at 3.

On August 12, 2021, the district court for the Southern District of Florida granted Hartford Casualty Insurance Company's motion to dismiss a salon's proposed class action suit over COVID-19 business interruption losses with prejudice. "[E]ven if Bourcier's salon physically changed, that is, Bourcier moved the salon's furniture around, added hand sanitizer stations and plexiglass, or enhanced the air filtration system, it still cannot be said that there was actual damage to the property." Order at 10. The salon's losses involved loss of use, which do not constitute direct physical loss. *Id.* at 9. The court also found no coverage under the civil authority provision because the government did not completely prohibit access to the property. *Id.* at 14.

On June 29, 2021, the district court for the Southern District of California granted American Fire and Casualty Company's and Ohio Security Insurance Company's motion to dismiss a class action COVID-19 business interruption complaint with prejudice. Because the plaintiffs were not permanently dispossessed of their property, it does not trigger business income and extra expense coverage. Order at 3. The court found that the plaintiffs also did not plausibly allege that governmental orders prohibited access to their property, and even if they had, the orders were not because of direct physical loss or damage, or the presence of the coronavirus, at a neighboring property. *Id.* at 4. Thus, civil authority coverage was also not triggered. *Id.*

New Business Interruption Suit Against Insurers:

A sovereign tribal nation sued Lexington Insurance Company, Underwriters at Lloyd's, London, Aspen Specialty Insurance Company, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Endurance Worldwide Insurance Ltd., Arch Specialty Insurance Company, Evanston Insurance Company, Allied World National Assurance Company, and XL Insurance America, Inc. in California state court (Riverside County) for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair competition. The "all risk" policies allegedly provide business interruption, extra expense, rental income, ingress/egress, and civil authority coverage. Complaint at ¶ 14. The Complaint alleges that the presence of COVID-19 on property "caused and continues to cause physical loss and/or damage to property by causing, among other things, a distinct, demonstrable, physical change and/or tangible alteration to property, causing Insured Locations to remain in an unsafe and hazardous condition." *Id.* at ¶ 19.

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