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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of December 21)

December 22, 2020

Courts Dismiss COVID-19 Business Interruption Claims

On December 17, 2020, the district court for the Middle District of Florida granted DTW 1991 Underwriting Limited's motion to dismiss a bar's COVID-19 business interruption complaint. According to the court, because the plaintiff did not suffer any tangible damage, and instead alleged that its loss was tied to the government shutdown orders, the loss was only economic, which "is not the type of loss that [the] Defendant undertook to pay for based on the plain meaning of the language in the policy." Order at 15. Finding amendment would be futile, the court dismissed the case with prejudice. *Id.* at 17.

On December 14, 2020 the federal district court for the Northern District of California granted The Hartford Financial Services' motion to dismiss a COVID-19 business interruption claim. The court held that the policy's "virus exclusion" was plain and unambiguous and barred coverage for the plaintiff's alleged business losses. Order at 2-3. The court rejected the plaintiff's argument that the exclusion only related "to contamination on the insured premises, rather than "risks associated with a pandemic." *Id.* at 4. The court also rejected the plaintiff's argument that the doctrine or regulatory estoppel barred enforcement of the exclusion. *Id.* at 5-6. Next, the court held that the plaintiff had also not sufficiently alleged coverage under the policy's limited virus provision. *Id.* at 7. Lastly, the court held that the plaintiff did not adequately plead fraud-based claims. *Id.* at 11-12.

On December 14, 2020, a magistrate judge for the federal district court for the Western District of Texas recommended that the district court grant State Automobile Mutual Insurance Company and Rucker-Ohlendore Insurance's motion for judgment on the pleadings and dismiss two restaurants' COVID-19 business interruption claims. The court found that there was no coverage under the policy's business income provision because the complaint failed to allege that there was a suspension of business operations stemming from a "direct physical loss of or damage to property." Order at 8. The court recommended that the district court deny the plaintiffs' leave to amend as futile. *Id.* at 19.

On December 14, 2020, the federal district court for the District of New Jersey granted Fireman's Fund Insurance Company's motion to dismiss a music production company's declaratory judgment complaint. The court held the policy "unambiguously limits coverage to physical loss or damage to" commercial property. Order at 3. Without a showing of physical property damage, the plaintiff could not meet its burden to show "direct physical loss or damage." *Id.* Additionally, the court held that the policy clearly excludes coverage for damage arising from a virus, and because the plaintiff's losses are "inextricably" linked to the coronavirus, it dismissed the complaint with prejudice. *Id.*

On November 4, 2020, the Superior Court of New Jersey granted Blackboard Insurance Company's motion to dismiss a business interruption complaint. The court held that "even assuming that discovery could prove all of plaintiff's allegations true, this would only establish a loss of use of property[,] and there's no coverage under New Jersey Law for loss of use . . . standing alone without some physical impact on property." Transcript at 6:18–23. According to the court, because the government shutdown orders "do not create any distinct demonstrable physical impact on the property," the property did not suffer physical damage. *Id.* at 7:2–7. Finding a reasonable insured would understand that government-mandated use restrictions do not equate to a

tangible property alteration, the court held the claim clearly fell outside the scope of the policy. *Id.* at 7:19–8:6. The court also held that applying its plain meaning, the civil authority provision did not apply, and the virus exclusion would still preclude coverage for the claims. *Id.* at 8:15–17, 10:16–21. Finally, the plaintiff's regulatory estoppel argument failed because it "does not void clear and unambiguous language provisions or provide a basis for recision [sic]." *Id.* at 11:24–12:1. The court dismissed the complaint with prejudice. *Id.* at 12:7–8. The plaintiff filed a notice of appeal on December 15, 2020.

On December 11, 2020, the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida granted The Cincinnati Indemnity Company's motion to dismiss a dentistry's COVID-19 business interruption claim. The court concluded that the policy did not provide coverage for purely economic losses resulting from the COVID-19 pandemic, finding that "there needs to a distinct, demonstrable, physical alteration of the structural integrity of the property in order to have direct physical loss or damage to the property," Order at 8, and under Florida law "if the property can be cleaned, it has not sustained direct physical loss or damage." *Id*. at 10. In addition to a lack of direct physical loss, the court found that the policy's civil authority coverage was not triggered because there was no prohibition of access to the insured premises, as its operations were only limited. *Id*. at 11.

On December 14, 2020, the federal district court for the Eastern District of Michigan granted Aspen American Insurance Company's motion to dismiss a dentist's COVID-19 business interruption claim. The court concluded that the ordinary meaning of the policy's direct physical loss language "makes clear that a mere loss is insufficient to implicate coverage" and that coverage is "limited to instances where tangible damage to physical property has occurred." Order at 11. The court further concluded that the policy's civil authority coverage was not triggered because the plaintiff failed to establish that the applicable COVID-19 closure order was a direct result of damage to existing property as opposed to an attempt to slow the spread of coronavirus. *Id*. at 13.

On December 15, 2020, the federal district court for the Southern District of New York granted Sentinel Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the operator of an art gallery. The court concluded that the policy plainly does not cover the plaintiff's losses, because the allegations in the complaint could not plausibly support an inference "that COVID-19 and the resulting Civil Orders physically damaged Plaintiff's property." Order at 5.

New Business Interruption Suits Against Insurers:

A restaurant sued Cincinnati Insurance Company in Colorado state court (Pitkin County) for declaratory relief, breach of contract, bad faith, and violation of C.R.S. § 10-3-1115. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 73-85. The Complaint alleges that the restaurant incurred and continues to incur covered losses "as a result of the suspension of its operations caused by direct loss to property at its premises due to the presence of COVID-19." *Id.* at ¶ 80.

The owner of a restaurant sued Covington Specialty Insurance Company in Florida state court (Broward County) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 29, 33, 34. The Complaint alleges that the plaintiff's property suffered direct physical loss of or damage to property "because COVID-19 impaired the property by making the Restaurant unusable in a way it had been used prior to the outbreak of COVID-19." *Id*. at ¶ 43.

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