CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of December 7)

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Federal Courts Dismiss COVID-19 Business Interruption Claims

On December 3, 2020, the federal district court for the District of Kansas granted The Cincinnati Insurance Company's motion to dismiss a headwear wholesale distributor's COVID-19 property loss claims and dismissed the claims with prejudice. According to the Court, mere diminution in value or impairment of use alone "unambiguously" do not constitute "direct loss." Order at 14. The Court found that the plaintiff "wholly ignore[d] the modifiers 'direct' and 'physical' that precede both 'loss' and 'damage'" and that case law supported requiring actual, tangible damage to or intrusion on the insured property. *Id.* at 9–11, 13. As the stay at home orders "certainly" do not constitute a physical intrusion, and the plaintiff only speculated whether the virus contaminated the property, the claims did not survive a motion to dismiss. *Id.* at 14, 17. Even if the virus had physical attached to the property, it did not qualify as direct, physical loss because it can be eliminated. *Id.* at 18. Additionally, the civil authority provision did not apply because there was no allegation of damage to the surrounding property or that the stay at home orders formally prevented the plaintiff from accessing the property. *Id.* at 19–20. An "indirect effect" of restriction or access is "insufficient." *Id.* at 20.

On December 2, 2020, the federal district court for the Western District of Missouri granted Lexington Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption claim under an "all-risk" policy. The Court held the policy "plainly" requires a "physical alteration of property" or "a tangible impact that physically alters property." Order at 5–6. Even if the claim fell within the "direct physical loss of or damage to property" provision, the insurer met its burden of proving the pollution and contamination exclusion applied. *Id.* at 7. Reading the policy as a whole, the Court held the pollution exclusion "expressly" excluded loss or damage caused by a virus. *Id.* at 8, 11.

On November 30, 2020, the federal district court for the Eastern District of Pennsylvania granted Travelers Property Casualty Company of America's motion for judgment on the pleadings, disposing of a COVID-19 business interruption claim a chain of day spas in Pennsylvania, New Jersey, and Delaware filed. The Court held that the policy's virus exclusion was "unambiguous" in applying to COVID-19 and barred coverage for the insured's claim. Order at 5, 8. It also held that even if the virus exclusion did not apply, the insured could not show that COVID-19 or the corresponding shutdown orders caused it physical damage or reparable loss because it could not point to an end point for a period of restoration. *Id.* at 7. Lastly, the court determined that the insured failed to plead facts that qualified for coverage under the policy's civil authority provision, which requires a closure order due to damage or a dangerous physical condition at a nearby property rather than a shutdown order applying to the insured's own property. *Id.* at 8.

On November 19, 2020, the federal district court for the Northern District of Illinois granted The Cincinnati Insurance Company's motion to dismiss COVID-19 business interruption claims filed by a tavern in Chicago. The tavern was considered a non-essential business and forced to close under an order by Governor J.B. Pritzker. The Court held that loss of use of property, with no physical change to the property, does not constitute direct physical loss or damage. Order at 11. The "period of restoration"

provision "clearly implie[d] a requirement of loss to property rather than loss of property," and so the loss of use under Governor Pritzker's order did not trigger coverage under the policy. *Id.*

On November 17, 2020, the federal district court for the Southern District of Florida granted United National Insurance Company's motion to dismiss a commercial enterprise in the restaurant industry's COVID-19 business interruption coverage claims. The court held that the plaintiff had failed to allege that it suffered any direct physical loss as a result of an involuntary business closure. The court did not address Defendant's alternative argument that the plaintiff's claims were barred by the policy's virus and pollutant exclusions.

On November 30, 2020, the federal court for the Middle District of North Carolina granted Travelers Casualty Insurance Company of America's motion for judgment on the pleadings for various Greensboro-area restaurant owners and operators' COVID-19 business interruption claims. The court deferred ruling on the motion as to the claims of two of the plaintiffs for procedural reasons, but held that the claims of the remaining plaintiffs were barred by the policies' virus exclusions.

On November 30, 2020, the federal district court for the Western District of Missouri granted Continental Casualty Company's motion to dismiss a flower shop's COVID-19 business interruption claim without prejudice. The court concluded that the phrase "direct physical loss" requires "some physical event or force on, in or affecting the property in question and not mere 'loss of use,'" Order at 6, and that the weight of authority "demonstrates that stay at home orders and the existence of COVID-19 alone, does not qualify as 'direct physical loss of or damage to' property." *Id*. at 8. The operative complaint failed to state a claim, because it did not allege that there was a physical loss of or physical damage to the plaintiff's business, *id*. at 9, but the court granted leave to amend because it could not "say – depending on the facts – that it is legally impossible for Plaintiff to state a claim." *Id*. at 11.

On November 20, 2020, the federal district court for the District of Arizona granted Nationwide Mutual Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the owner of several restaurant franchises. The court concluded that the policy's virus exclusion barred coverage for losses directly or indirectly caused by a virus and rejected the plaintiff's argument that discovery must be allowed into how the virus exclusion's scope and meaning were represented to insurance regulators, because the plaintiff failed to identify any ambiguity in the exclusion. Order at 7-9.

On November 24, 2020, the federal district court for the Central District of California granted Continental Casualty Company's motion to dismiss a dental appliance manufacturer's COVID-19 business interruption claim. The court concluded that the plaintiff's allegations of loss from an inability to use property do not amount to "direct physical loss of or damage to property" under California law and, therefore, neither the civil authority nor business income policy endorsements provided coverage. Order at 8-11. The court granted the plaintiff leave to amend its complaint. *Id*. at 12.

On December 3, 2020, the federal district court for the Eastern District of Pennsylvania granted Cincinnati Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the owners and operators of twelve restaurants. The court found that the policies did not provide coverage for the alleged losses because the plaintiffs' premises had not suffered a direct physical loss. Order at 19. According to the court, under Pennsylvania law, an economic loss resulting from an inability to utilize a property as intended "must (1) bear some causal connection to the *physical* conditions of that premises, which conditions (2) operate to completely or near completely preclude operation of the premises as intended." *Id*. (emphasis in original). The court denied the plaintiffs leave to amend, concluding that amendment would be futile.

New Business Interruption Class Actions:

A florist filed a class action complaint against The Hartford Financial Services Group and Sentinel Insurance Company in federal court (S.D. Cal.) for declaratory relief, breach of contract, and bad faith. The "all risk" policy allegedly provides business income, extra expense, civil authority, extended business income, and business income from dependent properties coverage. Complaint at ¶ 30. The Complaint alleges that the plaintiff has suffered covered losses because it "has suffered a suspension and/or cessation of all normal business operations given the response to the global pandemic associated with the spread of COVID-19, including the actions of civil authority." *Id*. at ¶ 59. The proposed classes are defined as: (1) "[a]ll California businesses that purchased Business Income and Extra Expense coverage under a policy of insurance issued by Defendants covering the period of March 2020 through the present that suffered a suspension of business operations due to government prohibitions on the use of their insured premises, and for which Defendants have either actually denied or stated that they will deny a claim for the losses or have otherwise failed to acknowledge, accept as a covered cause of loss, or pay for the covered losses;" (2) "[a]ll California businesses that purchased Extended Business Income coverage under a policy of insurance issued by Defendants covering the period of March 2020 through the present that incurred extra expenses to avoid or minimize the suspension of business operations due to government prohibitions on the use of their insured premises, and for which Defendants have either actually denied or stated that they will deny a claim for the extended business income or have otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses;" and (3) "[a]ll California businesses that purchased Civil Authority coverage under a policy of insurance issued by Defendants, covering the period of March 2020 through the present that suffered an actual loss of Business Income and/or Extra Expense due to government prohibitions on the use of their insured premises, and for which Defendants have either actually denied or stated they will deny a claim for the losses or have otherwise failed to acknowledge, accept as a covered cause of loss, or pay for the covered losses." *Id*. at ¶ 70.

A jeweler filed a class action complaint against The Hartford Financial Services Group and Hartford Casualty Insurance Company in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The "all risk" policy allegedly provides business income, extra expense, civil authority, extended business income, and business income from dependent properties coverage. Complaint at ¶ 31. The Complaint alleges that "[t]here has been a direct physical loss of and/or damage to the covered premises under the Spectrum Policy by, among other things, denying access to the property, preventing customers and employees from physically occupying the property, causing the property to be physically uninhabitable by customers and employees, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises." *Id*. at ¶ 60. The insurer allegedly denied coverage for COVID-19 business interruption losses without regard to the individual circumstances of insureds and made a pre-determination to deny coverage before receiving notices of claims. *Id*. at ¶¶ 67-68. The plaintiff seeks to represent three Illinois statewide classes, consisting of a Business Income Coverage Class, an Extended Business Income Coverage Class, and a Civil Authority Coverage Class. *Id*. at ¶ 75.

New Business Interruption Suits Against Insurers:

A Kentucky recreational facility sued the Cincinnati Insurance Company in Kentucky state court (Jefferson County) for declaratory judgment and breach of contract. The "all-risk" property policy allegedly provides business income, extended business income, extra expense, and civil authority coverage and lacks a virus exclusion. Complaint ¶¶ 8, 16, 20–22, 25–27. The plaintiff allegedly suspended business operations due to state-mandated closure orders. *Id.* ¶¶ 45–52. The plaintiff submitted a claim under its policy for its losses "due to the presence of COVID-19" and the closure orders, which Cincinnati denied. *Id.* ¶¶ 60–61.

The owner of a spice and tea room in Texas sued Continental Casualty Company in Texas state court (Collin County), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. The complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage.

A theatre company sued Hartford Fire Insurance Company in Connecticut state court (District of Hartford)for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, civil authority, and ingress/egress coverage. Complaint at ¶¶ 27, 33, 35. The Complaint alleges that the plaintiff's lost income was not the result of COVID-19 causing property damage but, rather, was "a result of the Executive Orders, which physically prevented Plaintiff's employees and patrons from occupying Plaintiff's theatre and prevented Plaintiff from operating its business," *id.* at ¶ 43, and that "Plaintiff has suffered a 'direct physical loss of or direct physical damage to' its property as a result of the Executive Orders." *Id*. at ¶ 44. The policy's virus exclusion allegedly does not apply because the losses "were not caused by contamination by COVID-19." *Id*. at ¶ 62.

The owners and operators of the Hard Rock Stadium sports and entertainment complex and Miami Dolphins training practice facility sued American Home Assurance 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 ¶¶ 17-19. The Complaint alleges that the plaintiffs have suffered a direct physical loss or damage "because COVID-19 made the HRS Training Complex and the Training Facility unusable in the way that they had been used before COVID-19," *id*. at ¶ 6, and that the insurer failed to conduct a reasonable investigation and "provided no reasonable basis for the denial of Plaintiffs' claim." *Id*. at ¶107.

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