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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of February 22)

February 23, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On February 18, 2021, the district court for the Southern District of Illinois granted in part Hartford Financial Services Group's motion to dismiss a dentist's proposed class action for business interruption coverage. The court found based on the complaint allegations, policy, and other judicially noticeable materials that the insurer was not a party to the policy. Order at 7.

On February 17, 2021, the district court for the District of Minnesota granted Continental Casualty Company's motion to dismiss a franchise owner's COVID-19 business interruption claim with prejudice, finding the plaintiff did not sufficiently allege property contamination. The court found the plaintiff relied on documents outside of the complaint to make broad statements that "essentially all employees have been affected by the virus," but even if the plaintiff had pled those allegations, they did not suffice to give rise to a claim for "direct physical loss." Order at 4.

On February 16, 2021, the district court for the Western District of Missouri granted in part Owners Insurance Company's motion to dismiss a sports store's COVID-19 business disruption claim. In dismissing the count for declaratory judgment that the policy was triggered because of the executive shutdown orders, the Court found that the "orders and the existence of COVID-19, alone, do[] not qualify as 'direct physical loss of or damage to' property[.]" Order at 14.

On February 12, 2021, the Supreme Court of New York (Orange County) granted Utica National Insurance Group's and Utica National Insurance of Texas's motion to dismiss a bus contractor service's business interruption complaint over losses sustained from the COVID-19 pandemic. According to the court, New York courts have held that "a mere loss of use or functionality does not constitute a 'direct physical loss.'" Order at 5. Thus, "the forced closure of the premises for reasons exogenous to the premises themselves is insufficient to trigger coverage" under the policy. *Id.* at 11. The court noted that the plaintiff "unequivocally asserted" COVID-19 did not infect its property, and the mere risk of "imminent harm" to exposure of the virus did not trigger coverage. *Id.* The court also found the plaintiff did not allege that the shutdown orders prohibited access to the property and instead found that because of the nature of the bus service's business, it was an essential business not required to close. *Id.* at 12. Thus, the plaintiff failed to plead the elements necessary to invoke civil authority coverage. Finally, even if coverage existed under the policy, the court held that the exclusions in the policy created "an insurmountable barrier" to coverage. *Id.* at 13.

On February 11, 2021, the district court for the Eastern District of Pennsylvania granted Amco Insurance Company's motion to dismiss a deli's COVID-19 business interruption claim, finding the virus exclusion in the plaintiff's policy "unambiguously applies" to its claim. Order at 1. The exclusion provision stated that: (1) Amco "'will not pay for loss or damage caused directly or indirectly' by [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease" and (2) this exclusion "applies 'regardless of any other cause or event that contributes concurrently or in any sequence to the loss.'" Id. at 3. The plaintiff argued "that the provision is ambiguous because a 'pandemic' and the numerous follow-on

consequences from a pandemic (including government closures) differ meaningfully from a virus," but the court found that "[t]his is a distinction without a difference under the language of the Exclusion." Id. at 6.

On February 17, 2021, the federal district court for the Northern District of Ohio granted Auto Owners Insurance Company's motion to dismiss a COVID-19 business interruption class action complaint filed by the operators of two Ohio restaurants and denied as moot its motion to strike the class allegations. The court concluded that financial or monetary losses resulting from the coronavirus do not constitute "physical loss of or damage to" property under the policy because the virus did not cause any perceptible harm to the property, as physical loss or damage requires a "tangible loss of or harm to the insured property, in whole or in part." Order at 11. The court further found that the policy's unambiguous virus exclusion barred coverage for the lost use of the plaintiffs' property due to the coronavirus unquestionably being a virus that induces or is capable of inducing physical distress, illness, or disease, which was "the rationale for the governmental orders and consumer behavior that occasioned much of the lost income prompting this suit." *Id*. at 23.

New Business Interruption Class Actions:

The owner of a Montgomery County, Pennsylvania barber shop sued Erie Insurance Exchange in federal court (W.D. Pa.), asserting claims for declaratory relief and breach of contract. According to the complaint, defendants' "all risk" policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶ 27, 29–30. The complaint alleges that Erie denied plaintiff's claim for coverage and that it "has, on a widescale and uniform basis, refused to pay its insureds under its business income, civil authority, and extra expense coverages for business income losses suffered due to COVID-19." Id. at ¶¶ 36, 38. The putative nationwide class is defined as "[a]ll persons or entit[i]es that have entered into standard all-risk commercial property insurance policies with Erie throughout the United States, where such policies provide business income, civil authority, and extra expense coverages and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities to stop the spread of COVID-19." Id. at ¶ 43.

New Business Interruption Suits Against Insurers:

A Pennsylvania LLC sued Certain Underwriters at Lloyd's, London and Hiscox in Pennsylvania state court, asserting claims for breach of contract and bad faith denial of benefits under 42 Pa. C.S.A. § 8371. The complaint alleges that the civil authority provisions in plaintiff's commercial policy cover business interruption and extra expense losses suffered due to local and state business closure orders. Complaint ¶ 23, 28–37. Further, according to the complaint, because the plaintiffs' commercial policy "provides coverage against the 'risk' of Direct physical risk," "the policy does not require actual direct physical loss for coverage to be triggered, simply the risk of direct physical loss. Id. ¶¶ 14–15.

Owners and operators of various restaurants in Nashville, Tennessee and Panama Beach, Florida sued Selective Insurance Company of the Southeast, Maxum Indemnity Company, Anderson Benson Insurance & Risk Management, and AmWINS ACCESS Ins. Services in Tennessee state court, asserting claims for declaratory judgment, breach of contract, and negligence and insurance malpractice. The complaint alleges plaintiffs suffered "physical loss of" their properties because they "sustain[ed] a loss of use a[nd] functionality of the properties" due to COVID-19-related business closures and capacity limitations. Complaint at ¶¶ 31–36, 54–56. The complaint also alleges Anderson Benson and AmWINS, two insurance brokers, breached their contracts with plaintiffs and committed negligence and malpractice because they "failed to move the Plaintiffs' insurance to an insurer

which did not utilize a 'virus' exclusion in its policy" despite "knowing of the risks presented by the COVID-19 virus." Id. at ¶¶ 103–04, 111–113.

A landlord sued Certain Underwriters at Lloyd's for breach of contract over loss of rental income sustained from the COVID-19 pandemic. The all-risk policy allegedly provided business income, extra expense, and civil authority coverage, as well as rental value protections. Complaint ¶¶ 5, 38, 41–44. The plaintiff alleges it "suffered losses due to the COVID-19 outbreak and its effects" that "directly led to" state and local government shutdown orders and the plaintiff's economic damages. *Id.* ¶¶ 3, 27. After the plaintiff filed a claim, the insurer denied coverage under the policy. *Id.* ¶¶ 4, 51.

The owner of a comedy club and bar sued Nautilus Insurance Company, Great Divide Insurance Company, and Berkeley Insurance Company in California state court (San Francisco County) for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, bad faith, and unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq*. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 27, 35. The Complaint alleges the plaintiff had to suspend operations as a result of COVID-19 closure orders and "as a result, suffered a direct physical loss of its property, and this was a result of the Closure Orders issued by a Civil Authority, a covered loss." *Id*. at ¶ 61 (emphasis in original).

The owner and operator of a restaurant sued Farmers Insurance 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, and civil authority coverage. Complaint at ¶¶ 16-17. The Complaint alleges that the "continuous presence of the coronavirus on or around Plaintiff's premises has rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss under the insurance policy." *Id*. at ¶ 19.

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