CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of January 11)

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Federal Courts Dismiss COVID-19 Business Interruption Claims

On January 7, 2021, the district court for the Northern District of Illinois granted Charter Oak Fire Insurance Company's motion to dismiss a restaurant's proposed class action complaint. The court held that the virus exclusion was "unambiguous," "dispositive," and required the complaint's dismissal "because there is simply no doubt as to [its] meaning." Order at 5–6. With language so "clear, sweeping, and all-encompassing," the court found the plaintiff's ambiguity arguments unavailing. *Id.* at 6–7. It dismissed the case with prejudice. *Id.* at 8.

On January 5, 2021, the district court for the Northern District of Georgia granted Owners Insurance Company's motion to dismiss a hair salon's business interruption claim for financial losses it allegedly suffered arising from the COVID-19 stay-at-home orders. The court held that the business income coverage extends only to losses stemming from "direct physical loss of or damage to" property, which requires actual, tangible damage under "the plain meaning of the words." Order at 8. The salon alleged only that its property experienced a "physical impact" and that the coronavirus was likely on the property. *Id.* at 11. But the court held that "the mere threat of exposure is insufficient to trigger coverage," and it could not "rewrite the contract to manufacture additional coverage." *Id.* at 9–10, 12. Even if the plaintiff had pled that it detected the coronavirus on its surfaces, the court held it would not fulfill the "physical loss of or damage" requirement because routine cleaning would eliminate the virus. *Id.* at 12. As it pertains to the orders, "the loss must arise to actual damage, and it is not plausible how government orders meet that threshold when the salon merely suffered economic losses, not anything tangible, actual or physical." *Id.* at 13–14. The policy did not include a civil authority provision. *Id.* at 5.

On January 4, 2021, the federal district court for the Northern District of Georgia granted Twin City Fire Insurance Company's and Hartford Casualty Company's motion to dismiss a COVID-19 business interruption class action complaint filed by dental offices. The court concluded that the complaint failed to allege a direct physical loss or damage where there was no allegation of a tangible alteration to any physical edifice or equipment, or even an allegation that COVID-19 actually entered the dental offices. Order at 14-15. The court further found that the claim for civil authority coverage would fail even if there had been a plausible allegation of physical loss, because the complaint made clear that the plaintiffs "have never been specifically prohibited from accessing their dental offices or from offering limited procedures during the COVID-19 pandemic." *Id*. at 19.

On January 4, 2021, the federal district court for the Northern District of California granted Blackboard Insurance Company's motion to dismiss an event venue's COVID-19 business interruption claim. The court concluded that the plaintiff's allegation that its venue became dangerous, unsafe, and unusable as a result of COVID-19 closure orders failed to plausibly plead a direct physical loss of or damage to property and that a detrimental economic impact from an inability to use its venue was insufficient to trigger coverage. Order at 4. The court also found that the policy's virus exclusion barred coverage because the closure orders "were in response to the COVID-19 pandemic, a 'cause of loss' that falls within the Virus Exclusion." *Id*. at 5.

On January 4, 2021, the federal district court for the Middle District of Florida granted Scottsdale Insurance Company's motion to dismiss the COVID-19 business interruption claims of two restaurant owners, whose cases had been consolidated. The court found that the plaintiffs failed to allege a direct physical loss to their properties or to a property other than the insured premises, as required by the policies' civil authority provisions, concluding that the need to clean a property to remove particles "does not mean the property suffered direct physical damage or loss." Order 16-17. The court further concluded that the policies' virus exclusions applied, as "the pandemic was, at the very least, a contributing cause to the loss." *Id*. at 18.

On December 22, 2020, the federal district court for the Northern District of Illinois granted Aspen Specialty Insurance Company's motion to dismiss a hotel's COVID-19 business interruption claim, holding that there was no coverage under the policy's business income, extra expense, or civil authority provisions. The court found that the plaintiff had not alleged any direct physical loss of or damage to its property. Order at 6. The court explained that its holding was in line with the overwhelming majority of courts, and reasoned that the plaintiff had merely alleged that the suspension of its business was due to government civil orders, "not for any reason related to the hotel property." *Id.* at 7-8.

On January 5, 2021, the federal district court for the Southern District of West Virginia granted State Automobile Mutual Insurance Company's motion to dismiss a restaurant owner's COVID-19 business interruption claims. First, although the amended complaint had been structured as a class action, the court refused to treat it as such because the complaint did not contain allegations to support class certification requirements. Order at 7. The court then held that the complaint did not contain "any allegation that there has been a damage or alteration to the covered properties or even a *threat* of damage or alteration," and thus that there was no coverage for "physical loss or damage" under the policy. *Id.* at 10-11. The court did not reach the issue of whether the policy's virus exclusion barred recovery. *Id.* at 13.

On January 8, 2021, the federal district court for the Southern District of Florida granted Sentinel Insurance Company's motion to dismiss COVID-19 business interruption claims brought by Digital Age Marketing Group. The court held that the policy's virus exclusion unambiguously barred coverage for "direct or indirect damage caused by a virus," which encompassed the COVID-19 virus. Order at 7. The court further held that, regardless of the exclusion, there was no coverage under the policy because the complaint did not allege the existence of "direct physical loss" to the plaintiff's property. *Id.* at 9-10.

On December 21, 2020, the district court for the Northern District of Florida granted Aspen Specialty Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption complaint stemming from government-mandated closure orders. Finding the "language clearly and unambiguously requires actual physical damage to the property," the court held the economic losses caused by the closure orders were not covered because there was no "direct physical loss of or damage to the insured property." *Id.* at 2–3. The court dismissed the complaint with prejudice. *Id.* at 4.

On December 18, 2020, the Superior Court of Massachusetts (Suffolk County) granted Strathmore Insurance Company's motion to dismiss three Boston-area restaurants' COVID-19 business interruption complaint. The court held that coverage was conditioned on proof of "direct physical loss of or damage to property," and the plaintiffs failed to allege any physical damage to the properties. Order at 5. Without allegations that the coronavirus was present in the restaurants, the plaintiffs' "property remain[ed] the same as it was pre-pandemic." *Id.* at 7–8. Under its plain meaning, "physical" did not extend to diminution in value or restrictions on use. *Id.* at 5–6. Because people were not prohibited from accessing the property and the plaintiffs did not allege there was any damage to surrounding property, the civil authority provision was also unavailing to establish coverage. *Id.* at 9.

On December 17, 2020, the district court for the Eastern District of Pennsylvania granted Admiral Indemnity Company's motion to dismiss two Philadelphia restaurants' COVID-19 business interruption complaints with prejudice. Based on the policy language requiring physical damage, the court held that pure economic losses are intangible, and loss of utility and "the mere possibility of the presence of the virus" on nearby properties do not constitute physical property damage. Order at 9–10. The shutdown orders also did not constitute a covered loss because they responded to the COVID-19 crisis rather than property damage to the insured or nearby properties. *Id.* at 11–12. The policy included a governmental orders exclusion, which excluded from coverage any loss or damage caused by a law regulating the use of any property. *Id.* at 12–13. The court found that the shutdown orders fell under this exclusion. *Id.* at 13. Finally, the virus exclusion also precluded coverage. *Id.* at 14.

New Business Interruption Class Action:

A restaurant filed a class action complaint against Mt. Hawley Insurance Company and Renaissance Re Syndicate 1458 Lloyd's in federal court (S.D. Fla.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, extended business income, civil authority, and ordinance or law coverage. Complaint at ¶¶ 19, 20, 22, 23, 27. The Complaint alleges that the plaintiff suffered a direct physical loss of insured property due to the inability to use the restaurant for its intended purpose and due to COVID-19 being present in, and on surfaces within, the restaurant. *Id*. at ¶¶ 48-49. The proposed class is defined as "[a]ll businesses in the State of Florida that were issued insurance policies by Mt. Hawley and/or Lloyd's with Building and Personal Property Coverage Form CP-0010(06/07) or CP 0010(10-12), Business Income (and Extra Expense) Coverage Form CP-0030(06/07) or Business Income with Extra Expense Coverage Form CP 0030(10-12), and Causes of Loss-Special Form CP-1030(06/07) or CP 1030(10-12), whose policies were in effect on and after March 17, 2020, which businesses had their on-premises business operations shut down to the public or restricted by the Florida Governor's Orders of March 17, 2020 and March 20, 2020, who filed claims after that date under the policies' business-income and extra-expense coverage forms, and whose claims were denied by Mt. Hawley because there was allegedly no coverage under the policies." *Id*. at ¶ 107.

New Business Interruption Suits Against Insurers:

A home fashion chain sued Zurich American Insurance Company, AIG Specialty Insurance Company, Allianz Global Risks US Insurance Company, Arch Specialty Insurance Company, Certain Underwriters at Lloyd's, London, General Security Indemnity Company of Arizona, Hartford Fire Insurance Company, and PartnerRe Ireland Insurance Dac., and a number of stock throughput insurers, for breach of contract and declaratory relief. The "all risk" policy allegedly provides time element, extra expense, civil authority, ingress/egress, and communicable disease coverage. Complaint at ¶¶ 94, 95, 102, 111, 123. The Complaint alleges that the coronavirus and COVID-19 caused direct physical loss or damage to the plaintiff's properties and surrounding properties by "altering the physical conditions of properties such that properties were no longer safe or fit for occupancy or use." *Id*. at ¶ 3.

A group of restaurants sued Twin City Fire Insurance Company, Hartford Fire Insurance Company, and The Hartford Financial Services Group, Inc. in Connecticut state court (District of Hartford) for breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Connecticut Unfair Insurance Practices Act. The "all risk" policies allegedly provide business income, extra expense, civil authority, and sue and labor coverage. Complaint at ¶¶ 4-7. The Complaint alleges that the COVID-19 pandemic caused a direct physical loss of or damage to property "by causing the necessary suspension or limitation of operations during a period of restoration." *Id*. at ¶ 85. The insurers are allegedly "using a form denial letter to deny coverage to

all its insureds with policies similar to Plaintiffs' and is otherwise uniformly refusing to pay insureds under its standard policy for losses related to the Pandemic." *Id*. at ¶ 101.

The owner of health clubs located throughout the United States sued its various insurers in Washington state court (King County), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, time element, attraction property, civil authority, decontamination, and ingress/egress coverage. Complaint at ¶¶ 79-95. The policy also contains a "contamination exclusion," and "contamination" is defined to include "pathogen or pathogenic organism bacteria, virus, disease causing or illness causing agent…" *Id.* at ¶¶ 86-87. The complaint alleges that the defendants wrongfully denied the plaintiff's claim for coverage without performing an investigation. *Id.* at ¶¶120-27.

A Maryland college sued Continental Casualty Company and CNA Financial Corporation in Maryland state court (Baltimore County), asserting breach of contract and bad faith claims. The "all risk" policy allegedly provides business income, time element, extra expense, decontamination, ordinance or law, expediting expenses, civil authority, ingress-egress, leasehold interest, and preservation of property coverage. Complaint ¶¶ 36, 49–50, 55–59, 61, 64. The policy contains a "contamination" exclusion but no virus exclusion. *Id.* ¶¶ 3, 162. The plaintiff alleges that the insurers wrongfully denied its claim without performing a "legitimate" investigation and refused to pay for its loss and expenses. *Id.* ¶¶ 152, 190, 201.

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

Rachael Padgett
Associate – Washington, D.C.
Phone: +1 202.688.3441
Email: rpadgett@crowell.com

Adam J. Singer
Associate – Washington, D.C.
Phone: +1 202.688.3508
Email: asinger@crowell.com