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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of January 24, 2022

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Courts Dismiss COVID-19 Business Interruption Claims

On January 14, 2021, the Eleventh Circuit affirmed the district court's order dismissing a hotel and restaurant owner and operator's COVID-19 business interruption complaint against Employers Insurance Company of Wasau and Liberty Mutual Insurance Company. The court held that the plaintiff failed to allege any covered physical loss or damage. Order at 5-6. As such, the court similarly held that the plaintiff failed to state claims for bad faith and misrepresentation because coverage was properly denied. *Id.* at 8. Finally, the court held that the plaintiff failed to state a fraudulent suppression claim because there was no fiduciary relationship between the insured and insurers. *Id.* at 8-9. The case is *Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wasau*.

On January 21, 2021, the district court for the Northern District of Texas granted Zurich American Insurance Company's motion to dismiss technology service companies' COVID-19 business interruption claim. The court concluded that the plaintiffs "have not experienced any loss of property that would trigger coverage under the Policy because nothing physical has happened to their property," as "neither the pandemic nor the presence of the virus itself caused physical damage to or tangibly altered Plaintiffs' property." Order at 9. The court further found that the policy's contamination exclusion barred coverage, because "SARS-CoV-2 is a virus that causes COVID-19." *Id*. at 13. The case is *NTT Data Int'l LLC et al. v. Zurich Am. Ins. Co.*

On January 20, 2022, the district court for the Northern District of Illinois granted Cincinnati Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the operators of a fitness center and café. Relying on the Seventh Circuit's conclusion in *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021) that "direct physical loss" requires a physical alteration to property, the court found coverage was unavailable for the plaintiffs' alleged COVID-19 losses. Order at 3. The court further found the plaintiffs' contention that coverage was available because they had to make physical alterations to their property unpersuasive, as the "question is whether there is coverage based on the coronavirus causing the businesses' alleged losses." *Id*. The case is *1500 Busch Parkway LLC, et al. v. The Cincinnati Ins. Co.*

On January 20, 2022, the Supreme Court of New York, New York County granted Starr Surplus Lines Insurance Company's motion to dismiss a bar's COVID-19 business interruption claim. The court concluded that the policy provided no coverage, because New York "precedent sets forth that there is coverage only where there [sic] occurrence causes direct physical harm to the premises and plaintiff's claim fails to surmount that requirement." Order at 2. The case is *SFMB Mgmt., LLC v. Starr Surplus Lines Ins. Co.*

On January 14, 2022, the district court for the Eastern District of Pennsylvania granted Philadelphia Indemnity Insurance Company's motion to dismiss a complaint filed by a daycare for COVID-19 business interruption losses. A single case of the coronavirus does not constitute an "outbreak" under the "communicable disease" provision of the policy, the court found. Order at 9. By dictionary and public health definition, more than one person was required to be sick to qualify as an outbreak. *Id.* at 9–10. Additionally, the daycare had not shown the person was sick because of an outbreak at the school or that the parent

contracted it there, and the shutdown orders were not caused by the single case at the school. *Id.* at 10–11. The court also found there was no physical loss or damage to the property, when the only allegations were for loss of income and loss of use. *Id.* at 14. Finally, the court held that the daycare's "reasonable expectation" for coverage do not overcome the policy's unambiguous language. *Id.* at 20. The case is *BSD-360, LLC v. Philadelphia Indemnity Insurance Co.*

On January 5, 2022, the district court for the Eastern District of Virginia granted Illinois Union Insurance Company's motion for summary judgment in a COVID-19-related business interruption case filed by several hospitality businesses. The court held the policy did not cover losses sustained because of the coronavirus because the virus does not constitute a "pollution condition," which was defined to include specific references to fungi and bacteria, but seems to have purposefully left out "virus." Order at 15. "Reading the Policy as a whole, it is evident that the term 'pollution condition' is confined to environmental pollution. A communicable disease caused by a virus simply does not fall within the ambit of language used to define and effect the purpose of the 'pollution condition' term in the Policy." *Id.* at 13. Because the contract differentiates between "indoor environmental condition" and "pollution conditions," the court held "pollution condition" should not be read liberally. *Id.* at 15. The court found nothing in the businesses' complaint to indicate they would have suspended their operations if the state had not forced them to, including the fact that not a single coronavirus case was documented on the premises until June 2020. *Id.* at 17–18. Lastly, the court found no bad faith on the part of the insurers, even if the plaintiffs were able to show they had wrongly denied coverage. *Id.* at 23–24. The case is *Central Laundry, LLC v. Illinois Union Insurance Co.*

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