

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now, Week of July 19, 2021

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#### Courts Dismiss COVID-19 Business Interruption Claims

On July 7, 2021, the Circuit Court of Cook County, Illinois granted with prejudice State Farm Fire and Casualty Company's motion to dismiss Unique Concepts, LLC's COVID-19 business interruption class action complaint. The court found that the policy's virus exclusion barred coverage, as the exclusion applies, not only when a virus causes loss, but "also applies when the [COVID-19] closure orders caused the loss." Transcript at 14. The court determined that the closure orders would not have occurred absent the virus and that it made "no difference that the virus exclusion doesn't use the word pandemic." *Id.* at 15.

On July 8, 2021, the district court for the Northern District of Illinois granted West American Insurance Company's motion for judgment on the pleadings of the operator of the Great Steak & Potato Company's COVID-19 business interruption complaint. Although government closure orders limited access to the insured property, the court held this did not constitute a direct physical loss to the property and thus did not trigger coverage. Order at 8. A direct physical loss must have "some sort of change in the physical condition or location" of the property. *Id.* at 4. The court also found that the policy required that there must be a physical change to the property "and not merely the restoration of the property's use after a period of nonuse." *Id.* at 7.

On July 8, 2021, the district court for the Northern District of Illinois granted Twin City Fire Insurance Company's motion for judgment on the pleadings of a gym's COVID-19-related business interruption complaint. The court held that the gym suffered no physical change to the property. Order at 6. Even if the coronavirus particles caused physical damage, the court held the virus exclusion would apply to bar coverage. *Id.* at 9.

On July 8, 2021, the district court for the Northern District of Illinois granted Twin City Fire Insurance Company's motion to dismiss a gym's COVID-19-related business interruption claims. The court held that the plaintiff failed to plead physical loss or damage, but even if it did, the virus exclusion applied to preclude coverage. Order at 10. The tangible changes the gym made after the closure orders, like blocking off sections of the property, erecting barriers, and installing plexiglass, did not constitute physical loss or damage. *Id.* at 6-7. "The studio remains in perfect repair, having suffered no loss or damage." *Id.* at 7.

On July 13, 2021, the district court for the Northern District of California granted Nautilus Insurance Company's motion to dismiss a comedy club's business interruption complaint. The court held that "temporarily closing a business due to government closure orders during the pandemic does not constitute a direct loss of property." Order at 6. If the court interpreted direct physical loss to include loss of use, the court held it "would render the language 'period of restoration' meaningless." *Id.* at 9. And while customers may have been able to "potentially claim 'direct physical loss of' access to the premises, customers were not the insured entity." *Id.* at 8.

On July 13, 2021, the district court for the Northern District of Texas granted Cincinnati Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the owner of three restaurants. The court found that the plaintiff failed to plausibly plead that it suffered a direct physical loss or damage so as to trigger coverage under the policy, as it did "not

sufficiently allege[] that COVID-19 caused a distinct, demonstrable, physical alteration to the restaurants,” Order at 12, and “did not allege anything about COVID-19 itself that has threatened the physical structures of its restaurants.” *Id.* at 15.

On July 13, 2021, the district court for the Northern District of Texas granted Aspen American Insurance Company’s motion to dismiss a dentist’s COVID-19 business interruption class action complaint. The court rejected the plaintiff’s contention that the presence of COVID-19 by itself is sufficient to constitute a tangible injury that triggers coverage under the policy, and concluded that she failed to plausibly plead that her property suffered injury due to the presence of COVID-19. Order at 10-11. The court explained that the plaintiff alleged that “she was forced to reduce her patient capacity and institute remedial measures to prevent the spread of COVID-19 among humans,” not that the insured property “suffered direct physical damage or loss due to COVID-19.” *Id.* at 13.

On July 13, 2021, the district court for the Western District of Kentucky granted United Fire Group and United Fire & Casualty Company’s motion for summary judgment and dismissed a brewing company’s COVID-19 business interruption claim. The court found the plaintiff failed to show any direct physical loss under the policy because the plaintiff’s economic losses and alleged inability to access its property did not amount to “tangible harm or damage to the property.” Order at 12-13. The court similarly found the policy’s civil authority provision inapplicable because there was no evidence of direct physical losses to neighboring property, nor was there evidence that any applicable civil authority order was issued “to enable a civil authority to have uninterrupted access to the damaged property.” *Id.* at 15. Finally, the court rejected the plaintiff’s reliance on the reasonable expectations doctrine because the use of “direct physical loss” throughout the policy rendered United Fire’s intent to exclude coverage “unequivocally conspicuous.” *Id.* at 18.

On July 15, 2021, the Supreme Court of the State of New York (Kings County) granted Wesco Insurance Company’s motion to dismiss a Brooklyn building owner’s COVID-19 business interruption complaint. The court found that the plaintiff pled no direct physical damage to its property, only economic losses, and that the insurer “is correct that economic loss, in relation to the restrictions stated, which is not associated with physical damage to property, does not trigger coverage for loss of business income.” Order at 5. Additionally, coverage was not triggered under the civil authority provision because there was no allegation that a government actor denied the owner or its tenants access to the building. *Id.* at 7. Finally, even had the plaintiff properly pled physical loss or damage, the court held the virus exclusion would apply to preclude coverage. *Id.* at 8.

### **New Business Interruption Suits Against Insurers:**

The owner of a restaurant sued Colony Insurance Company in Florida state court (Hillsborough County) for declaratory relief and breach of contract. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 9, 18. The Complaint alleges that the “presence of COVID-19 caused a direct physical loss of and/or damage to the covered premises under the Policy by, among other things, damaging the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 37.

The owners and operators of hotels, nightclubs, private air hangars, and a casino sued Westchester Surplus Lines Insurance Co., Guideone National Insurance Co., Starr Surplus Lines Insurance Co., Axis Surplus Insurance Co., Certain Underwriters at Lloyd’s, London, Ironshore Specialty Insurance Co., Lexington Insurance Co., Ace American Insurance Co., Interstate Fire & Casualty Co., Allianz Global Risks US Insurance Co., Indian Harbor Insurance Co., Liberty Specialty Markets Bermuda Ltd., Colony Insurance Co.,

PICC Property and Casualty Company Limited, Endurance American Specialty Insurance Co., Hallmark Specialty Insurance Co., Hamilton Insurance Services (Bermuda) Ltd., General Security Indemnity Company of Arizona, Princeton Excess and Surplus Lines Insurance Co., Crum & Forster Specialty Insurance Co., Western World Insurance Co., Argo Re Ltd., Westport Insurance Corp., Chubb Bermuda Insurance Ltd., Scottsdale Indemnity Co., Everest Indemnity Insurance Co., QBE Specialty Insurance Co., XL Bermuda Ltd., Maxum Indemnity Co., Allianz Underwriters Insurance Co., HDI Global Specialty SE, and Safety Specialty Insurance for declaratory relief. The policies allegedly provide business interruption, extra expense, lost rental value, lost royalties, soft costs, contingent time element, leader property, civil authority, and ingress/egress coverage. Complaint at ¶¶ 28, 30, 32. The Complaint alleges that “SARS-CoV-2 contamination alters property and renders it unsafe for use and/or occupation,” *id.* at ¶ 54, and that the insureds “lost full or partial use of the Insured Properties when they were rendered unsafe for use and/or occupation due to SARS-CoV-2 contamination or the immediate threat of contamination,” *id.* at ¶ 56, as well as due to COVID-19 closure orders. *Id.* at ¶ 57.

Yelp Inc. sued Federal Insurance Company for breach of contract and declaratory relief in New Jersey state court (Union County). The “all-risk” policy allegedly provides business income, extra expense, building or personal property, civil authority, and ingress and egress coverage and contains no virus exclusion. Complaint ¶¶ 1, 72, 93, 96. Yelp claims the coronavirus impaired its operations by forcing it to close its offices, and “Federal has repudiated coverage and unreasonably withheld payment to Yelp.” *Id.* at ¶¶ 1-2.

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