

Client Alert

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

June 7, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On June 3, 2021, the district court for the District of Connecticut granted Hartford Fire Insurance Company's motion to dismiss a hospitality group's putative nationwide class action complaint for COVID-19 related damages. The court held that the losses sustained from government closure orders do not trigger civil authority coverage because the group failed to plead how the orders caused property damage, "a condition precedent to triggering Business Income and Extra Expense coverage under the Policy." Order at 9. Showing no specific lost or damaged property or prohibited access by the orders, the group could not meet its burden of showing "demonstrable physical harm," which was unambiguously required under the policy. *Id.* at 9-10. Because the orders were issued to limit the spread of the coronavirus and promote social distancing rather than because of physical damage in the immediate area, the orders did not trigger the civil authority provision. *Id.* at 20.

On June 2, 2021, the district court for the Western District of Washington granted Evanston Insurance Company's motion to dismiss a medical clinic's COVID-19 business interruption putative class action with prejudice. Finding "COVID-19 does not cause physical loss or damage," the court held that coverage was precluded under the policy. According to the court, even if the clinic adequately pled physical loss or damage, coverage would have been barred because of the virus exclusion.

On June 4, 2021, the district court for the Eastern District of Kentucky granted Cincinnati Insurance Company's motion to dismiss a dental clinic's COVID-19 business interruption claim. The court concluded that the plaintiff's purely economic losses failed to satisfy the policy's direct physical loss requirement and that it had not and could not allege that it suffered a direct loss to its property. Order at 14. The court further concluded that civil authority coverage was unavailable because "the economic loss from the Executive Order is not a Covered Cause of Loss because it is not a tangible loss to its property or any other." *Id.* at 16.

New Business Interruption Suits Against Insurers:

A non-profit, community-based health system and a specialty orthopedic hospital sued Zurich American Insurance Company and American Guarantee and Liability Insurance Company in Indiana state court (Allen County) for declaratory relief, breach of contract, and bad faith. The policies allegedly provide time element, extra expense, civil authority, decontamination costs, ingress/egress, tenants prohibited access, interruption by communicable disease, and protection of patients coverage. Complaint at ¶¶ 31-36. The Complaint alleges that the plaintiffs have been subject to multiple pandemic-related health orders that significantly disrupted its business operations, which are "in addition to and as part of the direct physical impact, losses and damages

caused by COVID-19 including the documented presence of COVID-19 in its locations and facilities and threatening and infecting its employees and patients.” *Id.* at ¶ 58.

A real estate investment company sued Affiliated FM Insurance Company in Rhode Island state court (Providence County) for breach of contract, anticipatory breach of contract, and declaratory judgment. The plaintiff’s “all risks” policy allegedly provides property, decontamination cost, communicable disease, rental income, extra expense, attraction property, civil authority, and ingress/egress coverage. Complaint at ¶¶ 7, 14. The complaint alleges that plaintiff suffered covered physical losses in addition to those already covered under the policy’s communicable disease extension because: (i) the coronavirus is able “to affix itself to surfaces inside buildings” and “remain suspended in the air for extended periods of time,” and (ii) the federal government’s alleged failure to timely respond to the pandemic allowed the virus to proliferate in areas where the plaintiff owned properties. *Id.* at ¶¶ 46, 49, 63.

An investment group sued RSC Insurance Brokerage, Inc. d/b/a Risk Strategies Company in the Eastern District of Louisiana for breach of contract and/or negligence of and/or detrimental reliance. The insurer allegedly denied the plaintiff’s claim because they are not insureds under the policy and therefore cannot receive coverage for their COVID-19 related losses under the policy. Complaint ¶ 9.

Wynn Resorts, Limited sued Factory Mutual Insurance Company in Nevada state court (Clark County) for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, and violating the Nevada Unfair Claims Practices Act. The hotel’s “all risks” commercial property policy allegedly include property damage, communicable disease response, time element, extra expense, civil or military authority, contingent time element extended, ingress/egress, and interruption by communicable disease coverage. Complaint ¶¶ 116, 123, 131-32, 135-36, 139, 144. It also allegedly contains a contamination exclusion. *Id.* ¶ 178. Wynn alleges it “incurred substantial property and financial losses” because of the coronavirus on and near its premises, but the insurer allegedly denied coverage. *Id.* ¶¶ 4, 191.

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