

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of March 1)

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Courts Dismiss COVID-19 Business Interruption Claims

On February 24, 2021, the Ohio Court of Common Pleas, Cuyahoga County granted Hiscox Insurance Company's motion for judgment on the pleadings in connection with a COVID-19 business interruption claim filed by the owner and operator of a nail salon. The court concluded that the claim was barred by the policy's clear and unambiguous virus exclusion, which specifically excludes coverage for any loss or damage caused directly or indirectly by a virus. Order at 4.

On February 19, 2021, the District of Massachusetts granted General Star Indemnity Company's motion to dismiss a real estate business's COVID-19 business interruption claim. Finding that the phrase "direct physical loss of or damage to" property requires "some enduring impact to the actual integrity of the property," the court held the phrase "does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm." Order at 6. According to the court, a reading that construes the language to include loss of use without tangible damage would distort the text's plain meaning. *Id.* at 7–8. The court also held that the lack of a virus exclusion does not create coverage under the policy. *Id.* at 10.

New Business Interruption Class Actions:

The operator of a New York City photography business sued Valley Forge Insurance Company in federal court (E.D Pa.) for declaratory relief. Specifically, plaintiff seeks a declaration that the civil authority provision in its all-risk policy covered state COVID-19-related business closure and capacity limitation orders. Complaint at ¶ 87. According to the complaint, these orders were covered because COVID-19 prevented physical access to and use of plaintiff's property, suspended plaintiff's business at its properties, and made the properties "substantially unusable and uninhabitable." *Id.* at ¶ 61. The complaint alleges class certification is appropriate because Valley Forge allegedly "has taken steps to discourage the Class from submitting claims under their policies." *Id.* at ¶ 77. The putative nationwide class is defined as "[a]ll insureds of Defendant who have suffered business interruption and lost income as a result of Civil Authority Orders issued in response to the COVID-19 pandemic." *Id.* at ¶ 69.

New Business Interruption Suits Against Insurers:

A diverse group of businesses, including restaurants, salons, car dealerships and custom framing businesses, sued Farmers Group Inc. and Truck Insurance Exchange in California state court (Los Angeles County) for declaratory relief. The "all risk" policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶ 51, 54. The Complaint alleges that "the pandemic caused direct physical loss of or damage to Plaintiffs' operations by physically impairing, detrimentally altering, rendering them nonfunctional, and by depriving them of the ability to function and operate." *Id.* at ¶ 3. The Complaint further alleges that the pandemic is a natural disaster and that business losses caused by the pandemic are indistinguishable from losses caused by other natural disasters, such as earthquakes, hurricanes, and fires. *Id.* at ¶ 61.

The owners and operators of assisted living communities sued Continental Casualty Company in Colorado state court (Denver County) for breach of contract, violation of C.R.S. §§ 10-3-1115 & 1116, and bad faith. The “all risk” policy allegedly provides business interruption, extra expense, civil authority, and ingress-egress coverage. Complaint at ¶¶ 69, 70. The Complaint alleges that the plaintiffs’ business depends upon the ability to provide social programming, experiences, and services to senior citizens, and that as a result of COVID-19’s presence in the insured properties and related closure orders, the plaintiffs suffered a direct physical loss “because they have been unable to occupy and use their physical property to the full extent they would have otherwise been able to.” *Id.* at ¶¶ 61, 123.

A New York art and music education non-profit sued Cincinnati Insurance Company in federal court (W.D. Pa.) for declaratory relief. Plaintiffs seek a declaration that its all-risk policy covered losses allegedly suffered following state and local business closure orders. Complaint at ¶ 71. According to the complaint, these losses were covered because COVID-19 made plaintiffs’ property “substantially unusable and uninhabitable” and because plaintiffs had to alter and reduce operations. *Id.* at ¶¶ 62, 64.

The owners and operators of a dentistry practice sued Aspen American Insurance Company in federal court (W.D. Pa.) for declaratory relief. As in the suit discussed immediately above, plaintiffs seek a declaration that its all-risk policy covered losses allegedly suffered following state and local business closure orders. Complaint at ¶ 81. According to the complaint, these losses were covered because COVID-19 made plaintiffs’ property “substantially unusable and uninhabitable” and because plaintiffs had to alter and reduce operations. *Id.* at ¶¶ 62, 64.

The owners and operators of two multi-state restaurant chains sued Continental Casualty Company in Texas state court for declaratory relief, breach of contract, breach of implied covenant of good faith and fair dealing, unfair and deceptive trade practices, and prompt payment. Plaintiffs’ policy allegedly covers property and “time element” business interruption, civil authority, ingress and egress, loss reduction expense, and extra expense losses. Complaint at ¶ 66. The complaint alleges plaintiffs suffered covered physical losses because respiratory droplets containing COVID-19 “altered [plaintiffs’] insured properties, including indoor air,” and because state business closure and capacity limitation orders limited access to plaintiffs’ properties. *Id.* at ¶¶ 158, 168.

A catering company sued Cincinnati Insurance Company in Kentucky state court (McCracken Circuit Court) for breach of contract and bad faith. The policy allegedly provides business income and extra expense coverage. Complaint ¶ 5. Because the government allegedly ordered the plaintiff to cease business operations because of the COVID-19 pandemic, the plaintiff filed a claim with its insurer for the lost business income, which Cincinnati denied. *Id.*

Seventeen restaurants sued Everest Indemnity Insurance Company in New Jersey state court (Atlantic County) for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing. The restaurants’ “all-risk” policies allegedly provide time element, extra expense, and civil authority coverage. Complaint ¶¶ 28, 32–33. According to the plaintiffs, the loss and damage caused by COVID-19 and the resulting closure orders caused them to limit operations and triggered coverage under the policy. *Id.* ¶¶ 60, 64. The presence of COVID-19 on the property purportedly caused actual damage to the property, which, the plaintiffs allege, triggered coverage under the policy. *Id.* ¶¶ 344–45. Additionally, the “loss of functionality” qualifies as physical damage, according to the plaintiffs. *Id.* ¶ 349. Even though the plaintiffs submitted a claim nine months ago, the insurer purportedly has not yet investigated or responded to the claim, which the plaintiffs assert constitutes bad faith. *Id.* ¶ 360.

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