

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of March 29)

March 29, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On March 24, 2021, the district court for the District of Massachusetts granted Fireman's Fund Insurance Company's and Allianz Global Risk United States Insurance Company's motion to dismiss restaurant and retail sales businesses' COVID-19 complaint. The court held that "construing the language 'physical loss of' to cover the deprivation of a property's business use absent any tangible damage distorts the plain meaning of the Policy." Order at 9–10.

On March 19, 2021, the district court for the Northern District of California granted Affiliated FM Insurance Company's motion for judgment on the pleadings of an Outback Steakhouse franchisee's pandemic-related business interruption complaint. The court held that neither the presence of the coronavirus nor the government's subsequent shutdown orders caused the franchisee of 100 Outback Steakhouse restaurants to suffer "physical loss or damage" to its properties. Order at 7–8. The court found that the virus' presence did not change the properties because it could be easily cleaned and removed. *Id.* at 9. The properties were also not "unusable" because they remained open for takeout, delivery, and outdoor dining. *Id.* at 9–10.

On March 22, 2021, the district court for the Southern District of West Virginia granted AssuredPartners Capital, Inc.'s motion to dismiss a bridal shop's COVID-19 business interruption case. The court found that the insurance broker did not commit the "unreasonable misconduct that is required to" act in bad faith by not procuring COVID-19-related coverage for losses under a business interruption policy with civil authority coverage. Order at 4–5. The court also found that the store failed to show the broker deceived it, acted with malice, or misrepresented the insurance policy and thus did not breach a fiduciary duty. *Id.* at 5. Instead, the court held that "neither the tort of bad faith nor the UTPA penalize a person for making a simple mistake in good faith." *Id.*

On March 23, 2021, the district court for the Northern District of Ohio granted Owners Insurance Company's motion to dismiss a bridal shop's COVID-19 business interruption claims. The district court held that "tangible harm is necessary to trigger coverage" because the policy covered only "direct physical loss of or damage to" property. Order at 9. In contrast, "equating loss of intended use of property with physical loss of property would result in an unreasonable interpretation" of the policy. *Id.* at 12. Because the plaintiff's claims were "all premised upon the theory that Owners improperly denied [plaintiff's] claims seeking coverage for its COVID-19 related economic losses," the court held the plaintiff failed to state a plausible claim for physical loss or damage under the policy. *Id.* at 13.

On March 22, 2021, the district court for the Northern District of Illinois granted Liberty Mutual Insurance Company's motion for judgment on the pleadings in a salon's COVID-19 business interruption claim. The court found that coverage was barred by the policy's unambiguous virus exclusion and rejected the plaintiff's contention that the exclusion was inapplicable due to its losses being caused by closure orders, as that would mean that the losses were at most "an indirect result of the Coronavirus and thus are still excluded." Order at 3-4.

On March 22, 2021, the Superior Court of Arizona, Maricopa County, granted Cincinnati Insurance Company’s motion to dismiss a theater operator’s COVID-19 business interruption claim. The court found that the plaintiff had failed to allege direct physical loss or damage to property as a result of COVID-19 and related closure orders because direct physical loss or damage requires “a showing of actual or tangible harm to the property.” Order at 4-5. The court further concluded that civil authority coverage was unavailable because the restrictions imposed did not prohibit the plaintiff from accessing its property but, instead, only restricted the way it operated its business. *Id.* at 6.

On March 25, 2021, the district court for the District of New Jersey granted Zurich American Insurance Company’s motion to dismiss an automobile dealership’s COVID-19 business interruption claim. The court concluded that the policy’s unambiguous virus exclusion barred coverage, Order at 13, and that the policy’s civil authority coverage had also not been triggered because COVID-19 was not a covered cause of loss. *Id.* at 7.

New Business Interruption Class Actions:

The operator of an event space, bar, and restaurant filed a class action against Cincinnati Insurance Company and two of its subsidiaries in federal court (W.D. Pa.) for breach of contract and declaratory relief. Plaintiff’s all-risk policy allegedly provides, among other things, business income, extra expense, and civil authority coverage. Complaint at ¶¶ 15, 23, 25. Plaintiff alleges it suffered covered losses because state business closure orders required plaintiff to “discontinue its primary use of” its property or, alternatively, because “the ubiquitous nature of the COVID-19 virus caused a direct physical loss or damage to” plaintiff’s property. *Id.* at ¶¶ 54–55. The complaint proposes a nationwide class of “all policyholders in the United States who purchased commercial property coverage, including business or interruption income (and extra expense coverage) from” Cincinnati and who were denied coverage following a state civil authority order. *Id.* at ¶ 58.

New Business Interruption Suits Against Insurers:

A chiropractic office sued Erie Insurance Property and Casualty Company in Pennsylvania state court (Allegheny County) for breach of contract, declaratory judgment, and injunctive relief. Plaintiff’s all-risk policy allegedly provides business interruption, income protection and civil authority coverage. Complaint at ¶¶ 5, 7, 10. The complaint alleges that the coronavirus and related state government orders caused damage to plaintiffs’ property because plaintiff’s owners came into contact with individuals “contaminated with COVID-19” and because plaintiff was ordered to close its business and furlough employees. *Id.* at ¶ 18, 20–24.

A hotel operator sued five insurance companies in Pennsylvania state court (Philadelphia county) for declaratory judgment, breach of contract, and bad faith. Plaintiff’s primary and excess all-risk policies allegedly provides, among other things, gross earnings, extra expense, time element, civil authority, and ingress/egress coverage. Complaint at ¶¶ 36, 40, 42, 44, 52. One of plaintiff’s primary policies also allegedly provides communicable disease coverage. *Id.* at ¶ 148. The complaint alleges plaintiff suffered covered physical losses due to “the presence of the SARS-CoV-2 virions, and the closure or curtailment of operations” at plaintiff’s hotels due to civil authority orders in 12 states. *See id.* at ¶¶ 76–119. The complaint also alleges that Ace American Insurance Company, which provided the primary policy with communicable disease coverage, acted in bad faith by denying coverage and “acting in a one-sided manner” by “exposing [plaintiff] to severe losses.” *Id.* at ¶ 169.

A dental practice and its owner sued Hartford Lloyd’s Insurance Company in federal court (E.D. Tex.) for breach of contract, breach of the implied duty of good faith and fair dealing, “gross negligence and/or malice,” and prompt payment. Plaintiffs’ policy allegedly provides, among other things, first-party property, business personal property, business income, and extra expense coverage. Complaint at ¶ 9. The complaint alleges plaintiffs suffered a covered “suspension” of business activities due to federal, state, and local civil authority orders. *Id.* at ¶¶ 13–21, 24. The complaint also alleges Hartford Lloyd’s failed to act in good faith because it had “no reasonable basis for denying or delaying payment” and did not “fairly and objectively” investigate plaintiffs’ claims. *Id.* at ¶¶ 41–42. Further, this conduct was malicious, plaintiffs claim, because it allegedly “involved an extreme degree of risk.” *Id.* ¶ 46.

A health system sued American Guarantee and Liability Insurance Company in federal court (W.D. Va.) for breach of contract and declaratory judgment. Plaintiff’s all-risk policy allegedly provides, among other things, property damage, time element, civil authority, decontamination cost, and ingress/egress coverage. Complaint ¶ 120, 136, 144–45. The complaint alleges plaintiff suffered “direct physical loss of or damage to its property” due to (1) “the certain or virtually certain presence of COVID-19 . . . throughout” its various properties; (2) “state, local and agency governmental orders that drastically limited [plaintiff’s] use of its property;” (3) “the need to modify physical behaviors” at its properties; and (4) “the need to mitigate the threat or actual physical presence of the Coronavirus” on various surfaces in plaintiff’s properties. *Id.* at ¶ 16.

A healthcare facility operator sued American Guarantee and Liability Insurance Company in federal court (S.D. Cal.) for declaratory relief, breach of contract, breach of the duty of good faith and fair dealing, and negligent misrepresentation. The “all risk” policy allegedly provides time element, communicable disease interruption, decontamination cost, protection and preservation of property, civil authority, protection of patients, and professional fees coverage. Complaint at ¶ 10. The Complaint alleges that, as a result of COVID-19 closure orders, the plaintiff “suffered, among other covered losses, a ‘direct physical loss of’ and/or ‘damage to’ its ‘interest in Personal Property and/or its ‘interest in buildings (or structures),’ including, but not limited to, its interest in the discretionary use of personal protective equipment and other resources, buildings, and facilities.” *Id.* at ¶ 20.

A cigar club sued Crusader Insurance Company in California state court (San Francisco County) for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The policy allegedly provides business income and civil authority coverage. Complaint at ¶¶ 13, 14. The Complaint alleges that “COVID-19 and the coronavirus cause physical loss and damage by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, including its surfaces, and by rendering property unusable, uninhabitable, unfit for intended function, dangerous and unsafe.” *Id.* at ¶ 23.

A restaurant operator sued Zurich American Insurance Company in Illinois state court (Cook County) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides decontamination cost, time element, extra expense, and civil authority coverage. Complaint at ¶¶ 22–34. The Complaint alleges that the “presence of COVID-19 particles renders physical property unsafe and impairs its value, usefulness, and/or normal function, causing direct physical harm to property and resulting in direct physical loss and physical damage to property.” *Id.* at ¶ 18.

A catering company sued Certain Underwriters at Lloyd’s London in Louisiana state court (Jefferson Parish) for declaratory relief and breach of contract. The “all-risk” policy allegedly provides business income, extra expense, and civil authority coverage and excludes losses for microorganisms. Complaint ¶¶ 10–11, 15. According to the plaintiff, it was forced to close its business under the government shutdown orders but Lloyd’s denied coverage for its losses. *Id.* ¶¶ 19–20, 39.

A Michigan limited liability company sued Houston Casualty Company in Michigan state court (Oakland County) for a declaratory judgment, breach of contract, and bad faith. The event cancellation policy allegedly includes coverage for additional marketing expenses. Complaint ¶ 11. The company filed a claim with the insurer for the cancellation of the 2020 North American International Auto Show due to the COVID-19 pandemic. *Id.* ¶¶ 6, 8. Although the insurer allegedly made two claims payments, it did not pay any of the additional marketing expenses limits. *Id.* ¶ 17.

The New York Botanical Garden sued Allied World Assurance Company (U.S.) Inc. in New York state court (Bronx County) for declaratory judgment, breach of contract, and breach of the implied covenant of good faith and fair dealing. The botanical garden allegedly purchased a blanket pollution legal liability policy for business interruption and contingent business interruption coverage arising out of a “pollution incident,” including viruses. Complaint ¶ 7. After submitting its claim, the insurer purportedly denied the policyholder’s claim despite its assertion that COVID-19 constitutes a virus under the policy. *Id.* ¶¶ 8, 45.

Cincinnati Insurance Company Files Declaratory Action

Cincinnati Insurance Company sued the operator of a dental office in federal court (N.D. Ala.) for declaratory relief. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 28. The Complaint alleges that there has been “no physical alteration or structural damage to property at [the insured’s] property or premises, or to other property or premises that would potentially trigger the availability of coverage under the Policy.” *Id.* at ¶ 30.

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