

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of March 8)

March 9, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On February 25, 2021, the federal district for the Northern District of California granted Vigilant Insurance Company's motion to dismiss a concert operator's COVID-19 business interruption claim. The court concluded that the plaintiff's losses were not caused by "direct physical loss or damage" to its facilities, as its auditoriums shut down in response to COVID-19 closure orders, not the presence of coronavirus on facility surfaces. Order at 1.

On February 26, 2021, the federal district court for the Southern District of Florida granted Certain Underwriters at Lloyd's motion to dismiss a restaurant's COVID-19 business interruption claim. The court held the plaintiff did not suffer a "direct physical loss" because "[t]he harm from COVID-19 stems from having living, breathing human beings inside one's business—it is not damage done to the physical business itself, it is damage done to other living, breathing human beings." Order at 13–14.

On March 1, 2021, the federal district court for the Northern District of Georgia granted Cincinnati Insurance Company's motion to dismiss a dentistry's COVID-19 business interruption claim. The court found that the plain meaning of the phrase "direct physical loss" requires "actual, physical damage to the covered premises," Order at 14, and concluded that the plaintiff's allegations fell far short of alleging actual physical damage to its premises where it did not even allege that it had a confirmed case of the virus in its office. *Id.* at 16.

On March 4, 2021, the federal district court for the Central District of California granted in part Farmers Group's motion to dismiss, dismissing a bar and grill's COVID-19 business interruption claim. The court found the bar's virus exclusion "plainly defeats Plaintiffs' theory that the coronavirus itself triggers" coverage under the plan at issue. Order at 8–9.

On February 26, 2021, the federal district court for the Northern District of Ohio granted Westfield Insurance Company's motion to dismiss a commercial real estate company's proposed nationwide class action business interruption complaint. Reiterating that "[t]he Court must give effect to *all* terms in the context of the Policy language," the court held that reading "direct physical loss" to include economic losses "stretches the Policy language beyond its plain meaning and requires the Court to read the word 'physical' out of the Policy language." Order at 16–17. Additionally, the court reasoned, it "may not read words *into* the Policy language." *Id.* at 17. Instead, the insured's property must suffer "some sort of tangible, actual harm, not intangible or ephemeral effects." *Id.* at 22. The court held civil authority coverage does not apply because the insured did not allege any damage to surrounding property. *Id.* at 32. Finally, even if coverage was triggered, the virus exclusion "on its face" unambiguously excludes coverage. *Id.* at 34. Because the policy did not provide coverage for the plaintiff's losses, the court dismissed the bad faith claim. *Id.* at 36.

On February 25, 2021, the federal district court for the District of Nevada granted U.S. Insurance Company's and Professional Indemnity Agency, Inc.'s motion to dismiss a Las Vegas restaurant chain's COVID-19 related business interruption case. The court held that coverage applied to ingestible items, not food service. Order at 6. The court looked at the plain policy language, which

defined the products insured as “all *ingestible* products for human consumption or any of their ingredients or components.” *Id.* at 4. Even if the policy included food service as an insured product, the court held that the civil authority exclusion applied to eliminate coverage. *Id.* at 6.

New Business Interruption Class Actions:

The owner and operator of a cryotherapy business sued Evanston Insurance Company in federal court (W.D. Wash.) for breach of contract and declaratory judgment. Plaintiff’s property and business interruption policy allegedly provides business income, extra expense, civil authority, and business equipment and machinery coverage. Complaint at ¶ 14. The Complaint alleges plaintiff suffered covered losses because state business closure and capacity limitation orders “rendered [p]laintiff’s property unusable for its intended and insured purpose.” *Id.* at ¶ 64. Plaintiff proposes 8 nationwide classes of Evanston policyholders based on the type of policy provision allegedly breached and the type of remedy sought. *Id.* at ¶ 84. Each nationwide class also contains a proposed statewide class for plaintiffs from the state of Washington. *Id.*

The owner and operator of a gym sued Allied World Surplus Lines Insurance Company in federal court (W.D. Wash.) for breach of contract and declaratory judgment. Plaintiff’s all-risk policy allegedly provides business income and extra expense, civil authority, and business equipment and machinery coverage. Complaint at ¶¶ 13–14. The Complaint alleges plaintiff suffered covered losses because state business closure and capacity limitation orders “rendered [p]laintiff’s property unusable for its intended and insured purpose.” *Id.* at ¶ 64. Plaintiff proposes 8 nationwide classes of Allied World policyholders based on type of policy provision allegedly breached and the type of remedy sought. *Id.* at ¶ 84.

The owner and operator of a restaurant, bar, and private event space sued Amco Insurance Company in federal court (W.D. Wash.) for breach of contract and declaratory judgment. Plaintiff’s all-risk policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 17. The Complaint alleges plaintiff suffered covered losses because state business closure and capacity limitation orders “rendered [p]laintiff’s property unusable for its intended and insured purpose.” *Id.* at ¶ 55. Plaintiff proposes 8 nationwide classes of Amco policyholders based on type of policy provision allegedly breached and the type of remedy sought. *Id.* at ¶ 79. Each nationwide class also contains a proposed statewide class for plaintiffs from the state of Washington. *Id.*

New Business Interruption Suits Against Insurers:

A restaurant chain sued Zurich American Insurance Company in federal court (C.D. Cal.) for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business interruption and civil authority coverage. Complaint at ¶¶ 73, 74. The Complaint alleges that the presence of coronavirus on surfaces and objects “causes direct physical loss of or damage to property by causing physical harm to and altering property and otherwise making it incapable of being used for its intended purpose.” *Id.* at ¶ 34. The plaintiff had previously filed a business interruption claim under an earlier policy period for which the insurer has moved for judgment on the pleadings. *Id.* at ¶ 4.

A restaurant sued Certain Underwriters of Lloyd’s London in Florida state court (Hillsborough County) for breach of contract. The “all risk” policy allegedly provides business income coverage. Complaint at ¶ 9. The Complaint alleges that the insurer has refused to pay the amount of insurance coverage “owed and necessary to put Plaintiff to its pre-loss condition, including but not

limited to the amount of business income lost as a result of the government mandated suspension of Plaintiff's business." *Id.* at ¶ 14.

A restaurant sued American Property Insurance Company in Florida state court (Hillsborough County) for breach of contract. The "all risk" policy allegedly provides business income coverage. Complaint at ¶ 9. The Complaint alleges that the plaintiff's claim is covered because "[n]one of the terms, provisions, conditions or exclusions in the Policy applies to bar coverage" where "[g]overnment mandated suspension of a business, as a result of a global pandemic is not specifically excluded under the Policy." *Id.* at ¶ 18.

The owner of a hotel in Rome sued Zurich American Insurance Company in federal court (N.D. Ill.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business interruption, extra expense, civil authority, ingress/egress, decontamination cost, and cancellation of bookings coverage. Complaint at ¶ 5. The Complaint alleges that the presence of coronavirus at and surrounding the property "has caused and is continuing to cause physical loss of or damage to the insured property" and that the virus "compromises the physical integrity of the structures it permeates and poses an imminent risk of physical damage to all other structures." *Id.* at ¶¶ 32, 34. The insurer allegedly failed to respond to the plaintiff's claim for coverage. *Id.* at ¶¶ 72-74.

Providers of healthcare-related and ancillary services sued Zurich American Insurance Company in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The "all risk" policies allegedly provide time element, contingent time element, extra expense, civil authority, and protection and preservation of property coverage. Complaint at ¶¶ 34, 36, 38, 39, 41. The Complaint alleges that the presence of coronavirus "causes a distinct, demonstrable, physical alteration to property, thus causing 'direct physical loss of or damage to property' as that phrase is used in the Policies." *Id.* at ¶ 69. The insurer is alleged to have made the deliberate decision not to include a virus exclusion in the policies despite the insurance industry having "long recognized that the presence of a virus on or around property can constitute direct physical loss of or damage to property." *Id.* at ¶ 55.

The owner and operator of indoor water park resorts sued Zurich American Insurance Company in Illinois state court (Cook County) for declaratory relief and breach of contract. The "all risk" policy allegedly provides time element, extra expense, leasehold interest, civil authority, contingent time element, protection and preservation of property, tenants prohibited access, and ingress/egress coverage. Complaint at ¶¶ 12-21. The Complaint alleges that the plaintiff "incurred direct physical loss of and damage to its Insured Locations, because its resorts were closed as non-essential businesses and/or required to implement occupancy restrictions mandated by government orders." *Id.* at ¶ 50.

An orthopedic medical practice sued Amristar Insurance Company in Utah state court (Salt Lake County) for breach of contract and breach of the implied covenant of good faith and fair dealing. According to plaintiff, its business interruption policy covers property damage, damage to machinery and equipment, civil authority, and loss of off-premises utility services. Complaint at ¶ 16. The Complaint alleges Amristar initially denied coverage, subsequently reversed its coverage determination, delayed adjustment of plaintiff's claim, and then limited coverage to less than plaintiff's alleged losses. *See Id.* at ¶¶ 53, 58-70, 83-86.

A hotel management company and group of hotels sued Zurich American Insurance Company and Interstate Fire & Casualty Company in Virginia state court (Fairfax County) for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment. Plaintiffs' all-risk policies allegedly cover, among other things, business interruption, extra expense, civil authority, "interruption by communicable disease," and contamination losses. Complaint at ¶¶ 63, 66-82. The

Complaint alleges defendants breached their insurance contracts and acted in bad faith by denying plaintiffs' COVID-19-related claims despite allegedly knowing that "the presence of hazardous substances constitutes property damages" and that plaintiffs would expect their policies to cover "losses associated with viruses." *Id.* at ¶¶ 155, 157.

A group of hospital owners and operators sued Zurich American Insurance Company in federal court (W.D. Va.) for breach of contract and declaratory judgment. The Complaint alleges that plaintiffs' property insurance policy contained additional coverages for interruptions by communicable diseases, biocontamination, and decontamination costs. Complaint at ¶ 36. According to plaintiffs, Zurich allegedly breached these additional coverage provisions by denying COVID-19-related biocontamination and decontamination cost claims while also effectively denying coverage under the communicable disease provision "by refusing to continue adjusting" plaintiffs' claims. *Id.* at ¶ 79.

A luxury New York City hotel sued Continental Casualty Company in New York state court (New York County) for declaratory relief and breach of contract. The hotel alleges it was wrongfully denied coverage for its COVID-19 related losses because the presence of COVID-19-infected individuals on the premises made the property unsafe and created a direct physical loss. Complaint ¶ 94. Despite the policy containing a virus exclusion, the hotel alleges the pandemic itself was not excluded. *Id.* ¶ 148. According to the plaintiff, the insurer predetermined it would deny the claim. *Id.* ¶ 149.

The coffee chain, Peet's Coffee & Tea HoldCo. Inc., sued North American Elite Insurance Company in New York State Court (Kings County) for its COVID-19 business related losses. The plaintiff sued for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, and a violation of the New York Deceptive Practices Act. Under the "all risk" commercial property policy it bought, the plaintiff alleges the policy provides time element, civil authority, contingent time element, ingress/egress, attraction property, leasehold interest, interruption by communicable disease and communicable disease response, protection and preservation of property, and professional fees coverage. Complaint ¶¶ 141, 143, 145, 147, 149, 151, 155 164, 166. It also contains contamination and microorganism exclusions. *Id.* ¶¶ 171, 194. Because the plaintiff asserts that the claim was allegedly improper, it alleges that the handling of the claim constitutes bad faith. *Id.* ¶¶ 236–37.

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