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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 17)

May 18, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On May 7, 2021, the district court for the Northern District of Illinois granted Westfield National Insurance Company's motion to dismiss a Chicago bakery and a salon's complaint alleging coronavirus-related business interruption losses. Determining the virus exclusion unambiguously bars coverage for loss indirectly caused by the coronavirus, the court found meritless the plaintiffs' argument that the government closure orders, rather than the virus, caused their losses. Order at 7-8. Including the virus exclusion within the policy "undercuts" any argument "that Westfield unjustifiably denied" their claims. *Id.* at 10.

On May 10, 2021, the Circuit Court of Cook County, Illinois granted with prejudice Motorists Commercial Mutual Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the operator of automobile dealerships and repair shops. The court found that business interruption coverage was not available because there was neither direct physical loss of nor damage to the plaintiffs' property due to the presence of COVID-19 on the surfaces of the premises, as "Covid-19 impacts human health and behavior but not physical structures." Order at 7-8. The court further concluded that coverage was barred by the policy's virus exclusion, which "could not be more clear," as it states that the insurer will not pay for loss or damage caused by or resulting from any virus. *Id.* at 10.

On May 11, 2021, the district court for the Eastern District of Missouri granted The Cincinnati Insurance Company's motion to dismiss several restaurants' COVID-19 business interruption claims. The Court found the plaintiffs failed to allege a covered physical loss under their policy for two reasons. First, the Court held that the "'loss of use' of the property is insufficient" to constitute a physical loss because such a loss required a "physical change" to the covered property. Order at 11. Second, the Court held that the presence of COVID-19 virus on plaintiffs' premises similarly could not constitute a physical loss, reasoning that even if "the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated." *Id.*

On May 11, 2021, the district court for the Northern District of Texas granted Continental Casualty Company's motion to dismiss a hospital's COVID-19 business interruption petition. The court held government orders requiring elective surgeries to be cancelled do not qualify as "physical loss of or damage to" property, which unambiguously requires actual, concrete physical changes to the property. Order at 7. Because of the requirement to rebuild, repair, or replace, the court found the policy specified there must be tangible or material damage. *Id.*

On May 12, 2021, the district court for the District of New Jersey denied a clothing company's motion for partial judgment on the pleadings in its COVID-19 business interruption claim against Factory Mutual Insurance Company and granted Factory Mutual's cross-motion for judgment on the pleadings. The court concluded that the plaintiff failed to make specific allegations regarding a physical loss as required by the policy, rejecting its contention that restrictions imposed by COVID-19 closure orders or the presence of the coronavirus in or around its properties were sufficient to allege a physical loss. Order at 5-6. The court

further found that the policy's unambiguous contamination exclusion barred coverage, even if the plaintiff had sufficiently pleaded a physical loss. *Id*. at 7.

On May 13, 2021, the district court for the Eastern District of Pennsylvania granted Union Insurance Company's motion to dismiss a vending service provider's COVID-19 business interruption claim. The court concluded that the policy's direct physical loss of or damage to property provision requires either "a distinct, demonstrable, physical alteration of the property" or something that does not necessarily affect the physical structure but makes the property's function "nearly eliminated or destroyed, or the structure is made useless or uninhabitable," Order at 6-7, and found that the plaintiff could not show that COVID-19 caused any such physical alteration or uninhabitability. *Id*. at 6-8. The court further concluded that coverage was barred by the policy's unambiguous virus exclusion. *Id*. at 10.

On May 14, 2021, the district court for the Eastern District of Pennsylvania granted State Auto Property and Casualty Insurance Company's motion for judgment on the pleadings and dismissed a sandwich restaurant chain's COVID-19 business interruption claim. Finding that the policy term "direct physical loss" naturally "contemplates an explicit nexus between the purported loss and the physical conditions of the covered premises," Order at 8, the court held the plaintiff failed to allege a covered loss because its "inability to use [its] properties as dine-in restaurants" constituted "intangible, not physical" losses, *id.* at 10. Even if the plaintiff had alleged a physical loss, however, the court found the plaintiff's claim would have been barred by the policy's "ordinance or law" exclusion, which excluded coverage "for loss or damage caused directly or indirectly by . . . [t]he enforcement of any ordinance or law . . . [r]egulating the construction, *use*, or repair of any property." *Id.* at 11 (emphasis in original). Finally, the court rejected the plaintiff's argument that it had a reasonable expectation of coverage under the policy, holding the plaintiff failed to plead any facts supporting that allegedly reasonable expectation. *Id.* at 12-14.

On May 14, 2021, the district court for the Eastern District of Pennsylvania granted Hartford Underwriters Insurance Co.'s motion for judgment on the pleadings and dismissed a hair salon's COVID-19 business interruption proposed class action complaint. "When the 'structure continues to function[,]' there is no physical loss" triggering coverage. Order at 11. Accordingly, "to read the insurance policies as covering losses from the Closure Orders would render the Policy's use of the word 'physical' meaningless or superfluous." *Id.* at 16. The court also rejected the insured's argument that "all risks" not specifically excluded are covered, finding it reversed the burden of proof. *Id.* at 9. Finally, the court declined to reach whether the pandemic qualified as a virus under the virus exclusion or whether the exclusion applied, since there was no covered loss. *Id.* at 22.

New Business Interruption Class Actions:

A hotel operator filed a class action complaint against Zurich North America and Zurich American Insurance Company in federal court (N.D. Ill.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 23, 26. The complaint alleges that "the ubiquitous nature of the COVID-19 virus caused a direct physical loss or damage to Plaintiff's Covered Properties" by rendering property unusable for its intended purpose. *Id*. at ¶ 59. The complaint further alleges that the policy's virus exclusion does not preclude coverage to the extent that COVID-19 closure orders, in and of themselves, constitute direct physical loss of or damage to property, *id*. at ¶ 64, and that the insurer should be estopped from enforcing the virus exclusion based on the principles of regulatory estoppel and public policy. *Id*. at ¶ 65. The proposed class is defined as "[a]ll policyholders in the United States who purchased commercial property coverage, including business income, extra expense and/or action of civil authority coverage from Defendants and who have been denied coverage under their policy for lost business income after being ordered by a governmental entity, in

response to the COVID-19 pandemic, to shut down or otherwise curtail or limit in any way their business operations, or after having sustained a loss due to an action by civil authority." *Id*. at ¶ 75.

New Business Interruption Suits Against Insurers:

A group of hotel owners and operators sued Affiliated FM Insurance Company in Rhode Island state court (Providence County) for declaratory judgment, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay a claim. The plaintiff's "all risks" policy allegedly provides, among other things, business interruption, extra expense, attraction property, civil authority, expediting costs, communicable disease, and ingress/egress coverage. Complaint at ¶¶ 25, 104. The complaint alleges the presence of COVID-19 "in proximity to the insured properties" constituted a physical loss because the spread of COVID-19 among nearby nursing home residents and employees "deprived [these] facilities of their functionality" and because various state civil authority orders required plaintiffs to cease operation at "most of the insured properties." *Id.* at ¶¶ 91-92. The complaint also alleges AFM acted in bad faith by refusing to consider specific facts related to plaintiffs' claim, placing "arbitrary requirements" on coverage under plaintiffs' policy, and denying plaintiffs' claim without a reasonable basis to do so. *Id.* at ¶¶ 141-55.

A gift shop supply company sued The Cincinnati Insurance Company in Texas State Court (Dallas County) for breach of contract, violations of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The plaintiff's policy allegedly provides business income and commercial property coverage. Complaint at ¶¶ 10-12. The complaint alleges plaintiff suffered a covered loss because its customers were exposed to COVID-19 and because COVID-19 "contaminated the surfaces of real and personal property at each of [plaintiff's] customers." *Id.* at ¶¶ 40-41, 44. The complaint also alleges that Cincinnati Insurance acted in bad faith by refusing to indemnify plaintiff without a reasonable basis. *Id.* at ¶ 78.

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