

Client Alert

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of November 21, 2022

November 22, 2022

Courts Dismiss COVID-19 Business Interruption Claims

On November 16, 2022, the district court for the Western District of Virginia denied reconsideration of its prior order dismissing a health system's business interruption claim. The court rejected plaintiff's argument that the policy's special coverage for communicable disease suggested that COVID-19 can cause physical losses. Specifically, the court found that cases such as *Sacramento Downtown Arena LLC v. Factory Mutual Ins. Co.* and *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, were distinguishable and rejected the plaintiff's reliance on the "outlier" Louisiana Court of Appeals decision in *Cajun Conti LLC v. Certain Underwriters at Lloyd's London*. Instead, the court sided with "the overwhelming number of cases finding no coverage for COVID-19 business losses." *Id.* at 10-12. The court also rejected plaintiffs' challenges to its reading of the policy's communicable disease coverage as a limited exception to the contamination exclusion. *Id.* at 13-14. It rejected plaintiff's argument that its contamination exclusion was limited to "costs" and did not "exclude coverage for 'loss' caused by the presence of communicable disease." *Id.* at 15, 19. The court found that "a number of courts" disagreed with the plaintiff's reading of the provision. *Id.* at 15-16. The case is *Carilion Clinic v. Am. Guar. & Liab. Ins. Co.*

On November 7, 2022, the district court for the Eastern District of Louisiana granted Starr Surplus Lines Insurance Company's motion to dismiss a restaurant operator's COVID-19 business interruption claim. The court concluded that the plaintiff failed to state a claim because its policy requires it "to have suffered direct *physical* loss or damage to recover for loss or damages under the Policy" and the Fifth Circuit has held that COVID-19 related damages cannot constitute direct physical loss or damage under Louisiana law. Order at 3 (citing *Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252, 258-60 (5th Cir. 2022)) (emphasis in original). The case is *Ammari of Louisiana, L.L.C. v. Starr Surplus Lines Ins. Co.*

On November 9, 2022, the Southern District of Illinois granted reconsideration of an order denying West Bend Mutual Insurance Company's motion to dismiss a salon's COVID-19-related business interruption lawsuit in light of two Seventh Circuit decisions. Because Illinois' executive shutdown orders were meant to broadly mitigate the spread of the coronavirus and were not connected to an outbreak specifically on the salon property, coverage was not triggered under the communicable disease provision. Order at 6. The case is *Treo Salon, Inc. v. West Bent Mutual Insurance Co.*

On November 14, 2022, the district court for the District of Oregon adopted a magistrate judge's findings and recommendation to dismiss and dismissed COVID-19 business interruption claims filed by restaurants in three consolidated cases. The court concluded that "[c]ourts in Oregon have construed the phrase 'direct physical loss of or damage to property' and similar phrases to require some degradation in the condition of the property to

invoke coverage” and the plaintiffs failed to state a claim because they alleged only economic losses. Order at 4-5. The cases are *Good George, LLC v. Cincinnati Ins. Co., Ringside, Inc. v. Cincinnati Cas. Co., and Mississippi Productions, Inc. v. Cincinnati Ins. Co.*

On November 14, 2022, the district court for the Western District of Virginia denied two medical centers’ motion for partial summary judgment in their COVID-19 business interruption claim against American Guarantee and Liability Insurance Company. The court “join[ed] the chorus of courts that have found that governmental shutdown orders—like the Virginia Order—do not implicate the [Interruption by Communicable Disease] endorsement.” Order at 5. According to the court, “the ICD endorsement requires that the government order declare a part of the insured premises ‘uninhabitable’ and ‘prohibit’ access to those locations” and the “Virginia Order did no such thing.” *Id.* at 6. Therefore, “Plaintiffs’ claims are not covered by the ICD endorsement[.]” *Id.* at 8. The case is *Danville Regional Med. Ctr., LLC, et al. v. Am. Guarantee & Liability Ins. Co.*

On November 15, 2022, the Eastern District of Louisiana granted Starr Surplus Lines Insurance Company’s motion to dismiss a restaurant owner’s COVID-19-related business interruption decision. The company failed to show a direct physical loss, which is necessary to trigger coverage under the policy. The court found that *Cajun Conti LLC v. Certain Underwriters at Lloyd’s London* (5th Cir. 2022) because “the presence of COVID-19 does not cause ‘physical loss of or damage to’ property,” an issue the Fifth Circuit did not decide. Order at 8-9. The case is *Khodr Investments, LLC v. Starr Surplus Lines Insurance Co.*

On November 6, 2022, the district court for the Western District of Pennsylvania granted Utica National Insurance Group’s motion to dismiss a university’s COVID-19 business interruption claim. Based on an “abundance of case law,” the court held the virus exclusion in plaintiff’s policy barred coverage. Order at 10. The court also found the plaintiff failed to plead direct physical loss of or damage to covered property “because there was no physical impact to the structures (the dormitories) at issue in this case.” *Id.* at 12. The case is *Found. for Ind. Univ. of Pa. v. Utica Nat’l Ins. Grp.*

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