

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of November 9)

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Several More Courts Dismiss COVID-19 Business Interruption Claims

On November 2, 2020, the U.S. District Court for the Southern District of Florida granted Hartford Casualty Insurance Company's motion to dismiss a dental practice's COVID-19 business interruption claim. The court concluded that the complaint failed to allege coverage under the plain terms of the policy, stating that "there were no physical harms to the insured premises because Plaintiffs' injuries are purely economic," Order at 11, and that the policy's virus exclusion barred coverage. *Id.* at 16-19.

On November 5, 2020, the Superior Court of New Jersey granted Selective Fire and Casualty Insurance Company's motion to dismiss a bakery's COVID-19 business interruption claim. The court found that the complaint failed to allege any direct physical loss or damage to property and that the insured could not have had a reasonable expectation of coverage, because the policy's virus exclusion was clear and unambiguous. Order at 16.

On November 6, 2020, the U.S. District Court for the Eastern District of Pennsylvania granted Allstate's motion to dismiss a dentist's COVID-19 business interruption claim. The court concluded that the complaint failed to plead physical loss or damage as a result of COVID-19, because the plaintiff's property remained inhabitable and usable, as the plaintiff was able to remain open for emergency procedures. Order at 8. The court further found that the policy's virus exclusion "unambiguously bars coverage for plaintiff's claims due to COVID-19." *Id.* at 10.

On October 30, 2020, the Superior Court of New Jersey granted Blackboard Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption claim. The court announced its statement of reasons on the record but did not set them forth in its order of dismissal.

On November 5, 2020, the U.S. District Court for the District of New Jersey granted Cumberland Mutual Fire Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption class action claim. The court found that the plain language of the policy's virus exclusion unambiguously barred coverage under the policy's business income, extra expense, or civil authority provisions.

On November 4, 2020, the U.S. District Court for the Southern District of Mississippi granted Travelers Casualty Insurance Company of America's motion to dismiss a restaurant's COVID-19 business interruption claim. The court concluded that the plaintiff failed to allege that its insured property was damaged by the virus or that it was permanently dispossessed of any insured property, such that it could not contend that it suffered "loss of property." Moreover, the court found, even if plaintiff was able to show that it suffered a "direct physical loss of or damage to" its property, coverage would be precluded under the policy's virus exclusion.

On November 2, 2020, the U.S. District Court for the Southern District of West Virginia granted The Cincinnati Insurance Company's motion to dismiss a creative events company's COVID-19 business interruption class action claim. The court

concluded that the COVID-19 pandemic and the state of West Virginia’s closure order did not constitute “physical loss or damage” under the terms of the policy.

New Business Interruption Class Actions:

The owner and operator of a restaurant filed a class action complaint against Erie Insurance Exchange in federal court (D.D.C.) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 44-47. The Complaint alleges that the policy’s virus exclusion is inapplicable because the proximate cause of plaintiff’s losses was COVID-19 closure orders, not a virus. *Id.* at ¶ 50. The proposed classes are defined as: (1) “[a]ll entities who have entered into standard all-risk commercial property insurance policies with Erie Insurance Exchange insuring property in the United States, where such policies provide for Additional Income Protection, Extra Expense, or Civil Authority coverage and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities’ stay-at-home or shelter-in-place orders since March 16, 2020;” and (2) “[a]ll entities who have entered into standard all-risk commercial property insurance policies with Erie Insurance Exchange insuring property in the District of Columbia, where such policies provide for Additional Income Protection, Extra Expense, or Civil Authority coverage and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities’ stay-at-home or shelter-in-place orders since March 16, 2020.” *Id.* at ¶ 57.

A gymnastics, cheerleading, and dance facility filed a class action complaint against Arch Insurance Company in federal court (W.D. Mo.) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 60, 62. The Complaint alleges that the “imminent risk of the presence of COVID-19 on property and in the air at the property effectively eliminates the utility and habitability of such property sufficient to constitute direct physical loss of or damage to property within the meaning of the Policy.” *Id.* at ¶ 15. The proposed nationwide class is defined as “[a]ll entities covered by one of the Defendant’s policies in effect during the COVID-19 pandemic” and the proposed Kentucky subclass is defined as “[a]ll entities in Kentucky that are covered by one of the Defendant’s policies in effect during the COVID-19 pandemic.” *Id.* at ¶ 63.

The owner of an early childhood ad infant center in Chicago sued West Bed Mutual Insurance Company on behalf of itself and all others similarly situated in federal court (E.D. Wis.), seeking a declaratory judgment that it is entitled business interruption loss coverage under its insurance policy issued by the defendant. The policy allegedly provides business income, extra expense, civil authority, and communicable disease coverage. Complaint at ¶¶ 5-10. The policy also contains a virus exclusion for “loss or damage caused directly or indirectly by ... any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease.” *Id.* at ¶ 7. The complaint alleges that the defendant denied the plaintiff’s claim for coverage, and that it “systematically denied and/or claimed a reservation of rights refusing to pay on insurance claims brought by [the class] for coverage losses stemming from the COVID-19 pandemic.” *Id.* at ¶¶ 110-112. The nationwide class is divided into business income, civil authority, extra expense, and communicable disease subclasses, as well as declaratory judgment and breach of contract subclasses. *Id.* at ¶ 113.

New Business Interruption Suits Against Insurers:

The owner of a bar and tavern sued Certain Underwriters at Lloyds London in California state court (San Francisco County) for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, bad faith, unfair business practices

under Bus. & Prof. Code § 17200, *et seq.*, and injunctive relief. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶36-43. The Complaint alleges that the plaintiff suffered a direct physical loss of its property when it had to suspend its operations as a result of COVID-19 closure orders. *Id.* at ¶ 67.

A dental practice sued Cincinnati Insurance Company in federal court (D. Conn.) for breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Connecticut Unfair Insurance Practices Act. The “all risk” policy allegedly provides business income, extra expense, civil authority, ingress and egress, and sue and labor coverage. Complaint at ¶ 9. The Complaint alleges that the “likely presence of the SARS-CoV-2 and/or the imminent threat of the COVID-19 Pandemic has caused physical loss of or damage to property.” *Id.* at ¶ 28. The insurer is allegedly “using a form denial letter to deny to all its insured[s] with policies similar to Plaintiff’s and is otherwise uniformly refusing to pay insureds under its standard policy for losses related to COVID-19.” *Id.* at ¶ 71.

The owner and operator of a restaurant sued Certain Underwriters at Lloyd’s, London in federal court (S.D. Fla.) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income and civil authority coverage. Complaint at ¶ 26. The Complaint alleges that the presence of COVID-19 “renders physical and personal property unsafe and impairs the value, usefulness, or function of said property resulting in direct physical loss or damage to that property.” *Id.* at ¶ 16.

A dentist sued Sentinel Insurance Company and The Hartford Insurance Company in federal court (N.D. Ga.) for declaratory relief. The “all risk” policy allegedly provides business personal property, business income, extra expense, and civil authority coverage. Complaint at ¶¶ 12-14. The Complaint alleges that “[a]ny effort by the Defendants to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.” *Id.* at ¶ 20.

A group of restaurants sued Zurich American Insurance Company in Illinois state court (St. Clair County) for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and dependent income coverage. Complaint at ¶ 51. The Complaint alleges that the suspensions of the restaurants’ business due to COVID-19 closure orders caused direct physical loss “including spoiled food and the loss of use of the dining room in each of the insured premises and the bar in those premises that have one.” *Id.* at ¶ 59.

The owner and operator of hotels and restaurants sued Hartford Fire Insurance Company in Kentucky state court (Jefferson County) for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Kentucky’s Unfair Claims Settlement Practices Act, violation of KRS § 304.12-235, reformation due to mistake, and fraud. The “all risk” policy allegedly provides crisis management, attraction properties, civil authority, business income, extra expense, ingress and egress, and communicable disease coverage. Complaint at ¶¶ 26-28. The Complaint alleges that losses resulting from the COVID-19 pandemic and the issuance of closure orders is a “crisis event” as defined by the policy and that there “is also ‘physical loss or damage’ at insured locations and property owned by others upon which [the plaintiffs] rely, which triggers dependent property coverages contained in the Policy.” *Id.* at ¶ 69. The insurer is alleged to have “tried to slip a virus exclusion into the Policy after the effective date, just as COVID-19 was making its way into the United States” where the plaintiff did not agree to a virus exclusion being in the policy. *Id.* at ¶¶ 30-31.

The owner of the Mercedes-Benz stadium, training facilities, and various sports camps sued Factory Mutual Insurance Company and Affiliated FM Insurance Company in Rhode Island state court (Providence/Bristol County), asserting claims for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, civil authority,

ingress/egress, attraction, contingent time element, communicable disease, and supply chain coverage. Complaint at ¶¶ 29-36. The plaintiffs allege that, due to the pandemic, they were unable to use their facilities to hold sporting events, concerts, entertainment events, private events, training camps, and sports camps. *Id.* at ¶¶ 3-4. The complaint also specifically alleges that an employee at the stadium contracted COVID-19 and exposed other employees to the virus. *Id.* at ¶¶45-52. The complaint further alleges that the defendants engaged in bad faith conduct in denying the plaintiff’s claim for coverage by “(1) predetermining that they would not cover Plaintiffs’ (or any insureds’) business interruption/time element claims related to COVID-19 even prior to conducting any investigation, as unearthed in an internal memo circulated to adjusters at both companies; and (2) developing a scheme to make Plaintiffs believe that only the Communicable Disease Additional Coverages . . . apply, if at all, to Plaintiffs’ claims.” *Id.* at ¶¶ 144-174.

Mt. Hawley Insurance Company sued its policyholder, the owner of a bar and restaurant in Nashville, in federal court (M.D. Tenn.), seeking a declaratory judgment that it is not obligated under the policy for the defendant’s alleged losses arising from the COVID-19 pandemic. The policy allegedly provides business income, extra expense, and civil authority coverage. *Id.* at ¶¶14. The complaint alleges that the defendant submitted a claim under the policy for loss of business income associated with COVID-19, which the plaintiff denied. *Id.* at ¶¶9-12.

Certain Underwriters at Lloyd’s, London sued its policyholder, the owner of bars and restaurants with locations throughout Texas, in Texas state court (Tarrant County), seeking a declaratory judgment that it has no further obligations to the defendant in connection with business interruption loss arising from the COVID-19 pandemic. The policy allegedly provides business interruption coverage, defined to include coverage for loss resulting from a “public announcement of an actual, suspected or alleged food borne illness, accidental contamination, or malicious contamination.” Complaint at ¶10. The policy also allegedly contains a pandemic event endorsement. *Id.* at ¶5. The complaint alleges that the plaintiff agreed to provide coverage for the plaintiffs’ losses under the pandemic event endorsement, but that the defendant has taken the position that is entitled to additional coverage under the policy. *Id.* at ¶¶7-9.

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