

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now - Week of October 11, 2021

Oct.11.2021

#### Courts Dismiss COVID-19 Business Interruption Claims

On September 30, 2021, the district court for the District of Maryland granted Travelers Property Casualty Company of America's motion to dismiss a restaurant company's COVID-19 business interruption claim. The court concluded the plaintiffs' failed to allege any "direct physical loss of or damage to property" as required by the policy, as "[t]here are no facts alleged demonstrating that any of Plaintiffs' property was physically harmed in any respect or requires repair or replacement at any of their restaurants," and rejected the plaintiffs' argument that "loss of use" of their property is a "direct physical loss." Order at 6. The case is *ThinkFood Group, LLC, et al. v. Travelers Prop. Cas. Co. of Am.*

On October 1, 2021, the district court for the Southern District of New York granted National Surety Corporation's motion to dismiss a hotel's COVID-19 business interruption claim. The court concluded that "[d]irect physical loss or damage' unambiguously requires tangible alteration to the covered property," Order at 4, and that "there is simply no legal support for Plaintiffs' contention that [it] encompasses a loss of business caused by the spread of COVID-19 or by governmental action designed to reduce such spread." *Id.* at 5. The case is *Abbey Hotel Acquisition, LLC, et al. v. Nat'l Surety Corp.*

On October 4, 2021, the Supreme Court of the State of New York, Westchester County, granted thirteen insurers' motions to dismiss a medical and behavioral health services provider's COVID-19 business interruption claims. Noting that "all New York courts applying New York law have . . . soundly rejected the argument that business closures due to the presence of the COVID-19 virus or due to New York State Executive Orders constitute physical loss or damage to property," the court rejected the plaintiff's arguments for coverage and held that "the mere presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself." Order at 9. The case is *Wellpath Holdings, Inc. v. XL Ins. Am., Inc. et al.*

On October 5, 2021, the Superior Court of New Jersey, Bergen County, granted several insurers' motion to dismiss a COVID-19 business interruption claim filed by the owner and operator of various hotels. The court held that the plaintiffs' allegations regarding the presence of COVID-19 at their locations was insufficient to establish direct physical loss or damage to property as a matter of law, as "direct physical loss" requires "physical loss or damage to property – either through (1) structural alteration to property or (2) sever[e] physical contamination of the property, such as from the physical presence on the property of dangerous levels of asbestos or deadly fumes, causing the property to lose its essential function." Order at 10. The court further found coverage was barred by one policy's pollution and contamination exclusion and another policy's biological, chemical, or nuclear exclusion. *Id.* at 16-17. The case is *Highgate Hotels, L.P., et al. v. Liberty Mut. Fire. Ins. Co., et al.*

### **New Business Interruption Suits Against Insurers:**

A real estate investment management company sued American Guarantee and Liability Insurance Company in Connecticut state court (District of Stamford) for declaratory relief and breach of contract. The “all risk” policy allegedly provides time element, extra expense, civil authority, ingress/egress, suspension of business activities, decontamination cost, contingent property damage, and protection and preservation of property coverage. Complaint at ¶ 31. The Complaint alleges that the insured “incurred substantial covered losses as a consequence of loss of or damage to its property as a result of direct exposure of (and actual adverse physical alteration of) its own covered Property,” which “actual adverse physical alteration of its property as a result of the SARS-CoV-2 virus adhering to the property has resulted in loss due to the adherence of the SARS-CoV-2 virus to physical property and resulting adverse physical alteration of the property, requiring either remediation or disposal and replacement.” *Id.* at ¶ 61. The case is *Westport Capital Partners LLC v. Am. Guarantee & Liability Ins. Co.*

An airline sued American Home Insurance company in New York state court (New York County) for breach of contract and declaratory judgment. The plaintiff’s “all risks” policy allegedly provides business income, extra expense, attraction property, contingent time element, ingress/egress, civil authority, soft costs, expediting expense, preservation of property, and spoilage coverage. Complaint at ¶¶ 24-73. The complaint alleges the plaintiff suffered covered physical losses because the presence of coronavirus on the plaintiff’s property impaired the functionality and use of the property. *Id.* at ¶ 11. The case is *Spirit Airlines v. Am. Home Assurance Co.*

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