

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of October 25, 2021

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Courts Dismiss COVID-19 Business Interruption Claims

On October 14, 2021, the Supreme Court of New York, New York County, granted Lexington Insurance Company's, Arch Specialty Insurance Company's, Aspen Specialty Insurance Company's, Ategrity Specialty Insurance Company's, Allied World National Assurance Company's, Evanston Insurance Company's, Starr Specialty Lines Insurance Agency's, and Interstate Fire & Casualty Company's motion to dismiss a furniture company's COVID-19 business interruption claim. The court concluded that there was no "direct physical loss, damage or destruction" to property caused by COVID-19, and that "Covid-19 and any of the essential hygiene procedures necessary to facilitate the operation of [the business] simply does not constitute anything covered by the policies." Order at 1. The court further found that it was "clear that were this not to be the case, the pollution and contamination exclusion would still apply." *Id.* at 2. The case is *Raymours Furniture Co. Inc. v. Lexington Ins. Co., et al.*

On October 14, 2021, the district court for the Central District of California granted Federal Insurance Company's motion to dismiss a human rights organization's COVID-19 business interruption counterclaim. The court found the organization did not show its property sustained any "direct physical loss or damage" and has not shown any "distinct, demonstrable, physical alteration" to the property. Order at 5. The court held that "a property's mere unsustainability or economic business impairment does not qualify as a physical loss or damage." *Id.* at 6. The case is *Federal Insurance Co. v. Simon Wiesenthal Center, Inc.*

On October 15, 2021, the Circuit Court of Cook County, Illinois granted Zurich American Insurance Company's motion to dismiss a hotel operator's COVID-19 business interruption claim. The court concluded that the complaint failed to allege a direct physical loss as required by the policy. Transcript p. 63. The case is *Cadillac Funding Assocs., LLC v. Zurich Am. Ins. Co.*

On October 15, 2021, the district court for the Southern District of California granted Sentinel Insurance Company, Limited's motion for judgment on the pleadings of a trade show exhibit company's claims for business interruption losses due to COVID-19. Ruling in the insurer's favor, the court found loss of use, without "distinct, demonstrable, physical change" does not qualify as "direct physical loss or damage." Order at 13. Because the virus particles can be cleaned and disinfected, it "does not constitute a physical change to the property." *Id.* The case is *Mostre Exhibits, LLC v. Sentinel Insurance Company, Limited.*

On October 18, 2021, the Superior Court of New Jersey, Bergen County, granted Zurich American Insurance Company's motion to dismiss healthcare providers' COVID-19 business interruption claim. The court concluded that, to establish direct physical loss or damage to property, "the insured must show that the functionality of the property itself was destroyed or eliminated because of a physical impact on the property," Order at 9, and that the plaintiffs failed to allege direct physical loss or damage, as they did "not allege that the coronavirus caused physical alterations to property." *Id.* at 7. Additionally, the court concluded that the policy's contamination exclusion "is fatal to Plaintiffs' claims." *Id.* at 16-17. The case is *Valley Health Sys. Inc. v. Zurich Am. Ins. Co.*

On October 18, 2021, the district court for the Eastern District of Virginia granted Twin City Fire Insurance Company’s motion to dismiss a hair salon’s COVID-19 business interruption claim. Noting the “extensive and well-reasoned authority” supporting its holding, the court found the virus exclusion in the plaintiff’s policy barred its claims. Order at 13. The case is *Adorn Barber & Beauty LLC v. Twin City Fire Ins. Co.*

On October 18, 2021, the Superior Court of New Jersey (Bergen County) granted Zurich American Insurance Company’s motion to dismiss several healthcare providers’ COVID-19 related business loss claims. The court held that the providers did not show they suffered a direct physical loss or damage to property because they did not identify any property that needed repair or replacement. Order at 4. Additionally, the court noted the plaintiffs did not allege that the coronavirus caused physical alterations to their property, and that the “mere presence” of the virus does not qualify as direct physical loss or damage. *Id.* at 4–5. Finally, the court held that the contamination exclusion was “fatal” to the providers’ claims. *Id.* at 9. The case is *Valley Hospital Foundation, Inc. v. Zurich American Insurance Co.*

New Business Interruption Class Actions:

An automobile dealership filed a class action complaint against Falls Lake National 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 ¶¶ 22, 24. The Complaint alleges that physical loss of, or damage to, property “may be reasonably interpreted to occur when a covered cause of loss threatens or renders property unusable or unsuitable for its intended purpose or unsafe for ordinary human occupancy and/or continued use.” *Id.* at ¶ 21. The proposed class is defined as “[a]ll policyholders in the United States who purchased commercial property coverage, including business or interruption income (and extra expense) coverage from Defendant 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.” *Id.* at ¶ 53. The case is *Mancari’s Chrysler Jeep, Inc. v. Falls Lake Nat’l Ins. Co.*

The owners and operators of a salon filed a class action against Twin City Fire Insurance Company in federal court (W.D. Pa.) for declaratory relief and breach of contract. The plaintiffs’ “all-risk” policy allegedly provides business income, extra expense, dependent property, and civil authority coverage. Complaint at ¶¶ 15-25. The Complaint alleges that state civil authority orders constituted a covered physical loss because they required the plaintiffs, and class members, to “discontinue [their] primary use” of covered property. *Id.* at ¶ 51. Alternatively, the Complaint asserts that “the ubiquitous nature of the COVID-19 virus caused a direct physical loss or damage” under the plaintiffs’ policy because it rendered covered property unusable for its intended purpose. *Id.* at ¶ 52. The plaintiffs propose a nationwide class of “[a]ll policyholders . . . who purchased commercial property coverage, including business or interruption income (and extra expense) coverage from Defendant 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.” *Id.* at ¶ 55. The case is *Martin v. Twin City Fire Ins. Co.*

An indoor swim club filed a class action complaint against Sentinel Insurance Company in federal court (C.D. Cal.) 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 “[p]hysical loss of, or physical damage to, property may be reasonably interpreted to occur when a covered cause of loss threatens or renders property unusable or unsuitable for its intended purpose or unsafe for ordinary human occupancy and/or continued use.” *Id.* at ¶ 22. 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 ¶ 58. The case is *Academy Swim Club, Inc. v. Sentinel Ins. Co., Ltd.*

New Business Interruption Suits Against Insurers:

Two live entertainment companies sued certain underwriters at Lloyd’s for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment. The plaintiffs’ “all-risk” policies allegedly provide event cancellation coverage. Complaint at ¶¶ 20-37. The Complaint alleges the plaintiffs’ suffered covered losses because “over 110 engagement[s]” were canceled “following government restrictions on gatherings.” *Id.* at ¶¶ 38-39. The Complaint also alleges certain underwriters at Lloyd’s breached their duties of good faith and fair dealing by failing to adequately investigate plaintiffs’ claims and by asserting unreasonable grounds for denying coverage. *Id.* at ¶ 74, 76. The case is *Feld Entertainment, Inc. v. Certain Underwriters at Lloyd’s London.*

A criminal background check service sued TNFC, Inc. for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. The plaintiff’s policy allegedly provides business income and extra expense coverage. Complaint at ¶ 8. The complaint alleges the plaintiff suffered a covered loss because state courthouse closures prevented the plaintiff from accessing public records necessary to provide its services. *Id.* at ¶ 19. The complaint also asserts TNFC denied plaintiff’s claim in bad faith because it allegedly failed to consider data submitted in support of plaintiff’s claim and did not interpret the policy terms in a reasonable manner. *Id.* at ¶¶ 28, 30. Finally, the complaint alleged TNFC made fraudulent representations when, after being informed that the plaintiff was struggling to make premium payments due to “COVID-19-related business losses,” TNFC allegedly represented that it would “recognize its obligations under the Policy as to any claim that was submitted to TNFC prior to nonpayment of any premium owed.” *Id.* ¶¶ 33-34. The case is *Crimcheck Holdings, LLC v. TNFC, Inc.*

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