

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of September 7)

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Three Federal Courts Dismiss COVID-19 Business Interruption Claims

On September 2, 2020, the U.S. District Court for the Southern District of Florida granted Allied Insurance Company of America's motion to dismiss a dentist's COVID-19 business interruption claim. The court concluded that the claim was barred by the policy's virus exclusion, which expressly excludes insurer liability for loss or damage caused directly or indirectly by any virus. The court reasoned that, under the plain language of the exclusion, neither Florida's COVID-19 closure order nor the disinfection of the dental office qualifies as a covered cause of loss because the alleged damages result from a virus.

On September 3, 2020, the U.S. District Court for the Northern District of Michigan granted State Farm's motion to dismiss a COVID-19 business interruption class action complaint filed by the operator of a chiropractic office. The court concluded that "accidental direct physical loss to Covered Property" "plainly requires Plaintiff to demonstrate some tangible damage to Covered Property," which the complaint did not allege. The court further concluded that the policy's exclusion for any loss that would not have occurred but for some "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease" would negate coverage in any event, rejecting the plaintiff's contention that Michigan's closure order itself was the sole proximate cause of loss, because the closure order would not have occurred but for COVID-19.

On September 2, 2020, the U.S. District Court for the Central District of California granted Travelers Indemnity Company's motion to dismiss a restaurant's COVID-19 business interruption claim. According to the court, "[u]nder California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage only occurs when property undergoes a 'distinct, demonstrable, physical alteration.'" The court concluded that "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as a physical loss or damage."

Steadfast Seeks Declaration of No Coverage For Class Action Suit Against Tour Company Due to COVID-19 Cancellations

On August 28, 2020, Steadfast Insurance Company filed a complaint against an educational tour company, seeking a declaration that it has no duty to defend or indemnify the tour company under a Travel Agents and Tour Operators Professional Liability policy with respect to an underlying class action complaint brought by parents of children whose educational tours were cancelled as a result of COVID-19 travel restrictions. The class action plaintiffs allege that the insured cancelled scheduled trips and refused to grant full refunds. Steadfast alleges that no coverage is owed because, among other reasons, the class action plaintiffs do not allege a negligent act or omission and their claims are precluded by the policy's exclusion for claims caused by or arising out of breach of contract.

New Business Interruption Suits Against Insurers:

The owner of an apparel and fashion company with locations in Pennsylvania and New York sued The Hanover Insurance Group, Inc. and The Hanover American Insurance Company in federal court (E.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 25-27. The policy contains an exclusion for “loss or damage caused by or resulting from any virus, bacterium or other microorganism.” *Id.* at ¶72. The Complaint alleges that the defendants wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶103-104.

The owner of optical offices in Philadelphia sued Twin City Fire Insurance Company in federal court (E.D. Pa.), seeking a declaration that its insurance policy provides coverage for “any current and future closures of businesses such as Plaintiff’s in Pennsylvania due to physical loss or damage from the Coronavirus and/or the pandemic and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured property.” Complaint at ¶96. The “all risk” policy allegedly provides business income, extra expense, contamination, and civil authority coverage. *Id.* at ¶¶14-17. The policy also contains a virus exclusion that applies to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶32. The Complaint alleges that the “plaintiff made a claim under the policy, and upon information and belief, Defendant has no intention of paying the claim.” *Id.* at ¶43.

The owner of museums and historic sites in Pennsylvania sued Federal Insurance Company in federal court (W.D. Pa.), seeking a declaration that its insurance policy provides coverage “for any current and future civil authority closures of businesses in the Commonwealth of Pennsylvania due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Property. Complaint at ¶71. The “all risk” policy provides business income, extra expense, contamination, and civil authority coverage. *Id.* at ¶¶ 14-15. The Complaint alleges that the defendant rejected the plaintiff’s claim for coverage. *Id.* at ¶12.

The owners of various medical practices and treatment facilities with locations in Pennsylvania and New Jersey sued Continental Casualty Company and CNA Financial Corporation in federal court (E.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶32-34. The policy does not contain a virus exclusion. *Id.* at ¶6. The Complaint alleges that the defendants wrongfully denied the plaintiffs’ claim for coverage. *Id.* at ¶¶89-90.

The owner of hotels located in California, Arizona and Georgia sued Affiliated FM Insurance Company in Rhode Island state court (Providence), seeking a declaration that its insurance policy provides coverage “for any current and future closures of business such as plaintiffs’ in Arizona, California, and Georgia due to physical loss or damage from the Coronavirus and/or the pandemic and the Policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured properties.” Complaint at ¶116. The “all risk” policy allegedly provides business income, extra expense, contamination, and civil authority coverage. *Id.* at ¶¶23-26. The policy contains a virus exclusion that applies to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶42. The Complaint alleges that the plaintiff submitted a claim for coverage, and that the defendant has issued a reservation of rights and failed to acknowledge that coverage exists. *Id.* at ¶19.

Baylor College of Medicine sued Houston Casualty Company in Texas state court (Harris County), asserting claims for breach of contract, declaratory relief, violation of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, civil authority, and ingress and egress coverage. Complaint at ¶¶12-14. The Complaint specifically alleges that “[s]everal individuals with confirmed cases of coronavirus...have been physical present in covered properties on [the plaintiff’s] campus.” *Id.* at ¶30. The Complaint also alleges that the defendant wrongfully denied the plaintiff’s claim for coverage, in part based on the policy’s pollution and microorganism exclusions. *Id.* at ¶¶35-36.

The owners and operators of a nightclub sued Chubb Limited and Westchester Surplus Lines Insurance Company in federal court (S.D. Fla.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶ 18. The plaintiffs allege that the policy was renewed in February 2020 with knowledge that COVID-19 was beginning to spread throughout the world and that they opted to ensure that they were covered in the event the virus impacted their business by paying a higher premium for a policy without a virus exclusion, while their prior policy contained a virus exclusion. *Id.* at ¶ 23. The Complaint alleges that COVID-19 caused direct physical loss and damage to the plaintiffs’ premises and that the insurer denied coverage without adequate justification. *Id.* at ¶¶ 47, 49.

A salon sued Safety Specialty Insurance Company in Florida state court (Broward County), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, extended business income and civil authority coverage. Complaint at ¶ 15. The Complaint alleges that coverage is triggered because COVID-19 and Florida’s closure orders have caused physical property loss and damage to the insured property and that coverage is provided for future civil authority orders that result in future suspensions or curtailments of business operations. *Id.* at ¶ 24.

A dental practice sued Cincinnati Insurance Company in Florida state court (Alachua County) for breach of contract. The “all risk” policy allegedly provides coverage for a business interruption resulting from a mandated government order. Complaint at ¶ 5. The Complaint alleges that Florida’s COVID-19 closure order caused the plaintiff to suffer monetary damages by interrupting its business and that the insurer has refused to make the plaintiff whole. *Id.* at ¶¶ 7, 15.

A printing company sued Nationwide Insurance Company of America in Florida state court (Palm Beach County) for declaratory relief. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 14. The Complaint alleges that the COVID-19 pandemic is physically impacting property and that any “effort by the [insurer] to deny the reality that the pandemic causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.” *Id.* at ¶ 26.

A provider of mobile enterprise computing products and services sued Factory Mutual Insurance Company in federal court (N.D. Ill.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides communicable disease response, protection and preservation of property, gross earnings/gross profits, extra expense, civil authority, and contingent time element coverage. Complaint at ¶ 11. The Complaint alleges that COVID-19 closure orders caused the plaintiff and its customers and suppliers “to alter the physical layouts of their properties in a way that renders them less useful than they would have been in the absence of such orders and have damaged each location that has been subject to such orders” and required the plaintiff to seek supplies from suppliers that are more expensive than those it would have otherwise used. *Id.* at ¶¶ 22, 28.

A manufacturer of trophies and plaques sued Federal Insurance Company in New York state court (Westchester County), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption and

extra expense coverage. Complaint at ¶¶ 4, 6. The Complaint alleges that the presence of COVID-19 caused direct physical loss of and/or damage to the covered premises by “damaging the property, denying access to the property, preventing customers and workers from physically occupying the property, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 56. The insurer allegedly “has, on a widespread and uniform basis, refused to pay its insureds under its Business Income, Extra Expenses, [and] Extended Business Income, for losses suffered due to COVID-19, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations.” *Id.* at ¶ 13.

The operator of music and entertainment venues sued Cincinnati Insurance Company in Oregon state court (Multnomah County), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 11, 12, 15. The Complaint alleges that “direct accidental physical loss to property” as a result of the COVID-19 pandemic caused a necessary suspension of the plaintiff’s operations and/or, in the alternative, Oregon’s closure orders constitute actions of civil authority within the meaning of the policy. *Id.* at ¶¶ 42-45.

The owner and operator of a recording studio and performance venue sued Cincinnati Insurance Company in Oregon state court (Multnomah County), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 11, 12, 15. The Complaint alleges the COVID-19 pandemic caused direct accidental physical loss to property, causing a necessary suspension of operations, including loss of customers and employees, or, in the alternative, property was rendered physically unfit or unsafe for its ordinary and intended use, rendered substantially unusable, and/or lost its physical utility. *Id.* at ¶¶ 41-42.

The operator of a restaurant sued Cincinnati Insurance Company in Oregon state court (Multnomah County), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 11, 12, 15. The Complaint alleges that “direct accidental physical loss to property” as a result of the COVID-19 pandemic caused a necessary suspension of the plaintiff’s operations and/or, in the alternative, Oregon’s closure orders constitute actions of civil authority within the meaning of the policy. *Id.* at ¶¶ 39-43.

An Alabama dental clinic sued The Cincinnati Insurance Company in federal court (S.D. Ala.) alleging the insurer wrongfully denied its claim for business interruption losses due to Alabama’s COVID-19 closure orders. The “all-risk” policy allegedly provides Business Income, Extra Expense, and Civil Authority coverages, and does not contain a virus exclusion. The complaint alleges that “the threat and presence of COVID-19 caused direct physical loss of or damage to the Covered Property,” and that “[t]he issuance of the Civil Authority Orders by Alabama officials recognizes that COVID-19 is physically present throughout Alabama, which rendered businesses and properties, including Plaintiff’s, unsafe or unusable.”

A theater company sued The Cincinnati Insurance Company and its affiliate in Arizona state court (Maricopa Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to Arizona’s COVID-19 closure orders. The “all-risk” policy allegedly provides Business Interruption, Extended Business Income, Extra Expense, Civil Authority, and Ingress and Egress coverages, and does not contain a virus exclusion. The complaint alleges that “[h]arm to the property by infections COVID-19 located on surfaces on Plaintiff’s premises together with Arizona government shutdown orders and [] prevention of

ingress/egress due to presence of and risk of COVID-19 at Plaintiff's premises demonstrates a sufficient showing of direct accidental physical loss or physical damage to the premises insured by Cincinnati."

An Arizona theater company and catering business sued The Cincinnati Insurance Company and its affiliate in Arizona state court (Maricopa Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to Arizona's COVID-19 closure orders. The "all-risk" policy allegedly provides Business Income, Extended Business Income, Extra Expense, Civil Authority, and Ingress and Egress coverages, and does not contain a virus exclusion. The complaint alleges that "Cincinnati unreasonably failed to consider that even absent a physical alteration of its insured's premises, a physical loss may occur simply because the premises is uninhabitable or unusable for its intended purpose."

A restaurant sued Farmers Insurance Company in Arizona state court (Cononino Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to Arizona's COVID-19 closure orders. The policy allegedly provides Business Income and Extra Expense – Partial Slowdown coverages. The complaint alleges that "Farmers knew or should have known of the risk of loss of business COVID[-]19 posed to its insured."

A theater business sued Massachusetts Bay Insurance Company and its insurance broker in California state court (Los Angeles Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California's COVID-19 closure orders. The "all risk" policy allegedly provides Business Income, Extended Business Income, Extra Expense, and Civil Authority coverages, and contains a virus exclusion. The complaint alleges Massachusetts Bay failed to "handle [plaintiff's] insurance claim in a manner consistent with well-established and non-controversial California insurance claims-handling standards" by "abruptly, unreasonably and with disregard for the interests of its insureds, den[ying] the claim in its entirety."

Three restaurants sued Farmers Group Inc. and two of its subsidiaries in California state court (San Francisco Cty.) alleging the insurer wrongfully denied their claims for business interruption losses due to California's COVID-19 closure orders. The policies allegedly provide Lost Business Income and Civil Authority coverages, and contain virus exclusions. The complaint alleges that the policies' virus exclusion does not preclude coverage because "it is limited to harm 'caused by or resulting from' a virus. This means independent actions taken in connection with the virus, by governmental authorities, customers, suppliers, employees, and others, are not covered by the exclusion."

New Business Interruption Class Action Filings:

A bar and restaurant in Philadelphia sued Utica First Insurance Company on behalf of itself and all others similarly situated in federal court (E.D. Pa.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶27-31. The policy also contains a "virus or bacteria" exclusion." *Id.* at ¶73. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶¶70-71. The nationwide class is defined as all policyholders who purchased coverage from the defendant "who have been denied coverage under their policy for lost business income due to action of any civil authority, in response to the COVID-19 pandemic, which required them to shut down or otherwise curtail or limit in any way their business operations." *Id.* at ¶86.

The owner of a restaurant chain with locations in southwest Florida sued Colony Insurance Company on behalf of itself and all others similarly situated in federal court (E.D. Va.) asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extended business income, extra expense, and civil authority coverage. Complaint at ¶¶21-33. The policy does not contain a virus exclusion. *Id.* at ¶23. The nationwide class is divided into business income, civil

authority, extra expense, extended business income, and sue and labor subclasses, as well as breach of contract and declaratory judgment subclasses, dependent on whether the defendant has yet denied coverage. *Id.* at ¶53. The Complaint alleges that the defendant denied the plaintiff's claim for coverage, and that it "has, on a wide scale basis ... refused to provide ... coverage due to COVID-19 and the resultant executive orders by civil authorities that have required the suspension of business." *Id.* at ¶¶55-56. The nationwide class is divided into business income, extra expense, civil authority, contamination, and sue and labor subclasses, as well as breach of contract and declaratory relief subclasses. *Id.* at ¶¶58-59.

The owner of a café in Pennsylvania sued Erie Insurance Exchange on behalf of itself and all others similarly situated in federal court (W.D. Pa.), seeking a declaration that "losses incurred in connection with [state] closure orders and the necessary interruption of [class members'] businesses stemming from the COVID-19 pandemic are insured losses under their policies," and that the defendant is obligated to pay for the losses incurred. The "all risk" policy allegedly provides business income, extra expense, contingent business interruption, dependent properties, and civil authority coverage. Complaint at ¶¶12-24. The Complaint alleges that the defendant denied the plaintiff's claim for coverage. *Id.* at ¶¶52-53. The nationwide class is divided into income protection, civil authority, extra expense, and contingent business interruption subclasses. *Id.* at ¶55.

A pair of delicatessens filed a class action complaint against Cincinnati Insurance Company in federal court (S.D.N.Y.), asserting claims for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, deceptive business practices under N.Y. Gen. Bus. Law § 349 *et seq.* and unfair trade practices under Conn. Gen. Stat. § 42-110a *et seq.* The "all risk" policies allegedly provide business income and civil authority coverage. Complaint at ¶¶ 57, 64. The Complaint alleges that the insurer's "categorical treatment, failure to investigate in good faith, and denial of Plaintiffs' and the Class members' claims appears to be part of a broader strategy being employed by the insurance industry generally, to broadly deny claims for business interruption coverage related to the Coronavirus pandemic." *Id.* at ¶ 100. The proposed class is defined as "[a]ll persons or entities in the United States (including its territories and the District of Columbia) who own an interest in a business that served food on the premises and were insured by Defendant in March 2020, made (or attempted to make) a claim with Defendant arising from lost business income (or other losses related to business interruption) at that business related to COVID-19, and did not receive coverage for that claim." *Id.* at ¶ 101.

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