

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of August 2)

Aug.02.2021

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

On July 28, 2021, the district court for the Eastern District of Arkansas granted Cincinnati Insurance Company's motion to dismiss a dental facility's COVID-19-related business interruption complaint. The court found the policy unambiguous. Order at 2. Because the plaintiffs did not allege the presence of COVID-19 in its buildings, it did not suffer direct physical loss or damage. *Id.* at 2–3.

On July 27, 2021, the district court for the Southern District of Indiana granted Fireman's Fund Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by hotel owners and dismissed their complaint with prejudice. The court concluded that the phrase "direct physical loss" to property "requires a harmful alteration in the appearance, shape, color, composition, or other material dimension of the property, excluding situations in which an intervening force plays some role." Order at 8. Coverage was not available because the insured's allegations attributed its lost revenue to "changes in human behavior, not a harmful physical change to [the hotel] or the property located within it." *Id.* at 8-9.

On July 26, 2021, the district court for the Middle District of Florida granted Westchester Surplus Lines Insurance Company's motion for judgment on the pleadings of a pub's COVID-19 business interruption lawsuit. Agreeing with the "legion of cases" in the Middle District, the court reasoned it "need not reinvent the wheel" based on the plain language of the contract. Order at 4–5. "Rather, it is enough to conclude—as all those have—neither COVID-19 nor corresponding governmental health precautions caused a 'direct physical loss of or damage to'" the insured's property. *Id.* at 5.

On July 26, 2021, the district court for the District of Massachusetts granted Mapfre Insurance Company's motion to dismiss a salon owner's COVID-19 business interruption claim. The court found that the plaintiff failed to plausibly allege any covered physical loss or damage to covered property and that the policy's virus exclusion unambiguously barred recovery on the plaintiff's claim. Docket No. 32.

On July 23, 2021, the district court for the Southern District of Texas granted American Home Assurance Company's motion to dismiss the University of St. Thomas's business interruption complaint with prejudice. Finding the phrase "direct physical loss or damage" unambiguous, the court held "[t]he only reasonable interpretation" is "a distinct, demonstrable, physical alteration of the property." Order at 8–9. The court also found it "implausible" that the coronavirus' presence on campus caused direct physical loss or damage. *Id.* at 10.

On July 19, 2021, the district court for the Southern District of Florida granted Aspen Specialty Insurance Company's motion to dismiss a cigar bar owner and operator's COVID-19 business interruption claim. The court found the complaint failed to allege any "actual, physical damage" to covered property that would trigger coverage under the plaintiff's policy. Order at 7-8.

On July 16, 2021, the district court for the Central District of California accepted a film production company’s stipulation dismissing its COVID-19 business interruption claims without prejudice. Order at 1.

**New Business Interruption Suits Against Insurers:**

A nationwide pizza chain sued Affiliated FM Insurance Company in Rhode Island state court (Providence County) for declaratory judgment and breach of contract. The plaintiff’s “all risk” policy allegedly provides, among other things, business interruption, civil authority, decontamination cost, extra expense, and communicable disease coverage. Complaint at ¶ 13. The complaint alleges that COVID-19 caused plaintiff to suffer covered physical losses because the virus “produc[es] physical change in the condition of the surfaces and properties—from safe and touchable to unsafe and deadly.” *Id.* at ¶ 6.

A Native American tribe sued 15 insurers in Wisconsin state court (Dane County) for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing. The plaintiff’s “all risk” tribal property insurance policy allegedly provides property, business interruption/time element, extra expense, ingress/egress, civil authority, and tax revenue interruption coverage. Complaint at ¶¶ 41-53. The complaint alleges the plaintiff suffered covered physical losses because: (i) “the probability of illness for any patron if the [plaintiff’s] Propert[ies] were physically used made the Propert[ies] uninhabitable and/or unusable,” and (ii) state, local, and tribal civil authority orders prohibited access to plaintiff’s covered properties. *Id.* at ¶¶ 11, 130-31. The complaint also alleges the defendants breached the implied duty of good faith by failing to adequately investigate and adjust the plaintiff’s claims. *Id.* at ¶ 151.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Laura Foggan**

Partner – Washington, D.C.  
Phone: +1 202.624.2774  
Email: [lfoggan@crowell.com](mailto:lfoggan@crowell.com)

**Rachel A. Jankowski**

Associate – Washington, D.C.  
Phone: +1 202.624.2647  
Email: [rjankowski@crowell.com](mailto:rjankowski@crowell.com)

**Samuel H. Ruddy**

Associate – Washington, D.C.  
Phone: +1 202.624.2564  
Email: [sruddy@crowell.com](mailto:sruddy@crowell.com)

**Adam J. Singer**

Associate – Washington, D.C.  
Phone: +1 202.688.3508  
Email: [asinger@crowell.com](mailto:asinger@crowell.com)