# CLIENT ALERT

## Insurers' COVID-19 Notepad: What You Need to Know Now (Week of June 28)

**Jun.28.2021**

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

On June 17, 2021, the Court of Common Pleas for Philadelphia County, Pennsylvania granted Valley Forge Insurance Company's motion for summary judgment and dismissed a law firm's COVID-19 business interruption claim. The court "agree[d] with those courts that have found that 'loss of use' of the property alone . . . is not enough to trigger coverage," instead holding that a loss of use "must have some direct nexus to the physical condition of the covered premises for coverage to apply." Opinion at 5-6. The court also denied the plaintiff's claim for civil authority coverage because there was no evidence COVID-19 was present at the property, the relevant state civil authority orders were not issued in response to any direct physical loss or damage, and the orders did not completely deny the plaintiff access to its office. *Id.* at 8. Finally, the court found that the plaintiff's claim was barred by the plain language of the policy's virus exclusion. *Id.* at 9-10.

On June 18, 2021, a Florida trial court (Miami-Dade County) granted Zurich American Insurance Company and several other insurers' motion for summary judgment on a hotel's COVID-19 business interruption complaint. Finding the hotel never alleged that the coronavirus was on its property, the mere presence of the coronavirus is not "direct physical loss of or damage to property," and the hotel has always been in possession of its property and remained open even with the emergency orders, the court held that the hotel was not uninhabitable or substantially unusable. Order at 6. Because the hotel provided no evidence that it suffered "direct physical loss of or damage to property," and "[n]o reasonable jury could conclude under the facts . . . that the physical characteristics of the Hotel have changed," the court determined summary judgment was warranted. *Id.*

On June 21, 2021, the district court for the Eastern District of Michigan granted Cincinnati Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the owners and operators of restaurants. The court concluded that the plaintiffs failed to allege that COVID-19 or related closure orders caused physical loss or damage to their property, because the mere presence of the virus does not physically alter the appearance, shape, color, structure, or other material dimension of property and, therefore does not amount to a direct physical loss, and the plaintiffs did not allege that the closure orders had a tangible impact on their property but, instead, only that they resulted in a temporary loss of use. Order at 9-10. Moreover, the alleged loss of use did not constitute direct physical loss because COVID-19 did not "render[] Plaintiffs' property uninhabitable or substantially unusable for their intended purpose," as it did not impact the functionality of the property. *Id*. at 13.

On June 21, 2021, the district court for the Eastern District of Michigan granted Cincinnati Insurance Company's motion to dismiss a restaurant operator's COVID-19 business interruption claim. The court found that the presence of coronavirus does not amount to direct physical loss as required by the policy because it "does not physically alter the appearance, shape, color, structure, or other material dimension of the property" and "may be eliminated simply by cleaning and disinfecting surfaces." Order at 10. Additionally, the court found that loss of use of the restaurant as a result of COVID-19 closure orders did not amount to direct physical loss or damage because the closure orders did not render the property substantially unusable for business purposes. *Id*. at 14.

On June 21, 2021, the district court for the Eastern District of Missouri granted Sentinel Insurance Company's motion to dismiss a law firm's COVID-19 business interruption claim. The court held that the policy's virus exclusion, which excluded losses "caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus," unambiguously precluded coverage for the plaintiff's claim. Order at 10-11.

On June 21, 2021 the district court for the Northern District of California granted Falls Lake Fire and Casualty Company's and Falls Lake National Insurance Company's motion to dismiss a San Francisco theater's COVID-19 business interruption complaint. The court found that the policy covered "loss of income due to untenantability only" when it was "caused by direct physical loss, damage, or destruction . . . to real or personal property," which was not alleged here. Order at 4-5. Additionally, without alleging physical damage to neighboring properties, "the requisite causal link" for Civil Authority or Ingress/Egress coverage was not present. *Id.* at 6.

On June 23, 2021, the district court for the Southern District of New York granted XL Insurance America, Inc's motion to dismiss a restaurant operator's COVID-19 business interruption claim. The court concluded that the complaint failed to plausibly allege that the restaurant suffered a covered loss under the policy's direct physical loss requirement as a result of COVID-19 closure orders, because the phrase direct physical loss "describes tangible loss and cannot reasonably be read to encompass a regulatory restriction against certain uses." Order at 6. The court further found that the policy's unambiguous virus exclusion applied to preclude coverage, as the exclusion "applies to 'any virus' that induces or is capable of inducing illness, and is not, as the [plaintiff] urges, limited to small or routine exposures or incidents of on-site contamination." *Id*. at 12-13.

**New Business Interruption Suits Against Insurers:**

Dental clinic operators sued Cincinnati Insurance Company in federal court (E.D. Ark.) for breach of contract. The "all risk" policy allegedly provides business income and civil authority coverage. Complaint at ¶¶ 4, 5. The Complaint alleges that the "presence of COVID-19 caused direct physical loss of or damage to the covered property under Plaintiffs' Policy by damaging and denying the full use of the covered property and by causing a necessary suspension of business operations." *Id*. at ¶ 59.

A federally-recognized sovereign Indian tribe and its economic development corporation, which operates several businesses, including a hotel, casino, and gas stations, sued Lexington Insurance Company, Underwriters at Lloyd's, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Endurance Worldwide Insurance Ltd, Sompo International, Arch Specialty Insurance Company, Evanston Insurance Company, Allied World National Assurance Company, RSUI – Landmark American Insurance Company, and XL Insurance America, Inc. in California state court (Humboldt County) for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, and unfair business practices under Cal. Bus. & Prof. Code § 17200 *et seq*. The "all risk" policies allegedly provide business interruption, extra expense, civil authority, tax revenue interruption, and ingress/egress coverage. Complaint at ¶¶ 76, 80, 84, 86. The Complaint alleges that the plaintiffs "have suffered a direct physical loss of and damage to their property because Plaintiffs have been unable to use their property for its intended purpose." *Id*. at ¶ 78.

A Native American gaming authority sued Factory Mutual Insurance Company in Connecticut state court (District of New London) for breach of contract and breach of the implied covenant of good faith and fair dealing. The "all risk" policy allegedly provides communicable disease response, protection and preservation of property, and time element coverage. Complaint at ¶¶

31-38. The Complaint alleges that the actual presence of communicable disease "within insured property constitutes 'insured physical loss or damage' to such insured property as this phrase is used in the Policy." *Id* at ¶ 40.

A healthcare provider network and its subsidiaries sued American Guarantee and Liability Insurance Company in Pennsylvania state court (Allegheny County) for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, and statutory bad faith. The plaintiffs' policy allegedly provides, among other things, "Protection of Patients," extra expense, and communicable disease coverage. Complaint at ¶¶ 57, 63-65. The complaint alleges plaintiffs suffered covered physical losses under the interruption by communicable disease sublimit as well as other provisions of the policy because COVID-19 was present at plaintiffs' properties and because state civil authority orders imposed various COVID-19 related limitations on plaintiffs' business operations. *Id.* at ¶¶ 97, 109-13, 119. The complaint also alleges AGLIC acted in bad faith by "engaging in evasive, dilatory, inconsistent, and litigious tactics." *Id.* at ¶ 127.

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