

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 24)

May 24, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On May 13, 2021, the district court for the Northern District of Georgia granted American Family Insurance Company's and Midvale Indemnity Company's motion to dismiss a COVID-19 business interruption claim filed by the operators of two barbeque restaurants. The court concluded that the plain meaning of the phrase "direct physical loss" requires that there be "actual, physical damage to the covered premises" and the plaintiffs failed to allege any change to the physical condition of property due to COVID-19 closure orders. Order at 11. The court further found that the policy's unambiguous virus exclusion bars coverage because the plaintiffs "claim no losses that were not caused, at least indirectly, by the virus." *Id.* at 16.

On May 17, 2021, the district court for the Southern District of Indiana granted Cincinnati Insurance Company's and Cincinnati Casualty Company's motion to dismiss a COVID-19 business interruption lawsuit by a dental practice with prejudice. The court found that the plaintiff must plead "physical loss" or "physical damage" that is "actual and demonstrable harm" to trigger coverage, and that the plaintiff's reading otherwise was "especially strained." Order at 15. Loss without demonstrable harm ignores the word "physical," and the "period of restoration" in the policy "unmistakably contemplates actual and demonstrable physical harm." *Id.* at 16-17. Additionally, civil authority coverage was not triggered because the virus' mere presence does not constitute "damage" and the practice was still able to operate as an essential business, even under the government's closure orders. *Id.* at 19.

On May 18, 2021, the district court for the Southern District of Florida granted Continental Casualty Company's motion to dismiss a COVID-19 business interruption claim filed by the owner and operator of a hair salon. The court concluded that the plaintiff's allegation that its operations were suspended by the COVID-19 pandemic and government closure orders in response to the pandemic failed to state a claim because it did not allege "actual, physical damage to its insured property." Order at 8.

On May 18, 2021, the district court for the District of Vermont granted The Cincinnati Insurance Company's motion to dismiss a dental office's putative COVID-19 business interruption class action. The court held, "[l]ike most courts that have reviewed similar pleadings and related policies," the plaintiff's factual allegations failed to plausibly allege any physical damage or loss because the plaintiff's alleged injury was "in the form of a virus that disappears naturally after a relatively short period of time" and had "no discernable impact on the covered property." Order at 12-13. The court also rejected the plaintiff's argument that its "all risk" policy covered all harms not specifically excluded by the policy, noting instead that "'all risk' means any risk of the type for which the policy provides coverage." *Id.* at 19.

On May 19, 2021, the district court for the District of Nevada granted Badger Mutual Insurance Company's motion to dismiss several restaurant owner and operators' COVID-19 business interruption claims. The court joined "[n]umerous courts" in "conclud[ing] 'that there needs to be some *physical* tangible injury (like a total deprivation of property) to support loss of property or a *physical* alteration or active presence of a contaminant to support 'damage' to property." Order at 7 (emphasis in original). Because the plaintiffs merely alleged "pure economic losses . . . due to COVID-19-related business closures," the court

held their losses were not covered under their policies. *Id.* at 8. Further, the court found the virus exclusion in plaintiffs policy, which excluded losses “caused by, resulting from, or relating to any virus,” unambiguously precluded coverage for plaintiffs losses. *Id.* at 8-9.

On May 19, 2021, the district court for the Western District of Missouri granted State Auto Property & Casualty Company, Inc’s motion for judgment on the pleadings on several restaurants’ COVID-19 business interruption claims. Because the plaintiffs did not show a direct physical loss or actual change to the property, the complaint failed to state a plausible claim for relief. Order at 10. The mere speculation that the coronavirus was on the premises was not enough. *Id.*

On May 20, 2021, the district court for the Southern District of Florida granted Great American E&S Insurance Company Inc.’s motion to dismiss a mall’s COVID-19 business interruption complaint. The court found no coverage for the coronavirus as a pollutant or biological agent because there was no allegation the virus was deliberately released with intent to injure. Order at 4-5. Because the court found the plaintiff did not plead sufficient facts to trigger coverage, it did not have to reach the question of whether the communicable disease exclusion applies. *Id.* at 5.

New Business Interruption Class Actions:

A salon owner and operator filed a class action against The Cincinnati Insurance Company in federal court (W.D. Pa.) for declaratory relief and breach of contract. The plaintiff’s “all-risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 15-26. The complaint alleges the plaintiff suffered a covered physical loss because “the ubiquitous nature of the COVID-19 virus” and the related state business closure and capacity limitation orders rendered the plaintiff’s property unusable for its intended purpose. *Id.* at ¶¶ 47-48, 51-53. The complaint proposes a nationwide class of “[a]ll policyholders in the United States who purchased commercial property coverage, including business or interruption income (and extra expense) coverage from [Cincinnati] 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 ¶ 54.

New Business Interruption Suits Against Insurers:

A community-based health system and a specialty orthopedic hospital sued Zurich American Insurance Company and American Guarantee and Liability Insurance Company in federal court (N.D. Ind.) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides time element, extra expense, civil authority, decontamination costs, ingress/egress, tenants prohibited access, interruption by communicable disease, and protection of patients’ coverage. Complaint at ¶¶ 31-36. The Complaint alleges that the plaintiffs suffered a “direct physical impact,” which included “losses and damages caused by COVID-19 including the documented presence of COVID-19 in its locations and facilities and threatening and infecting its employees and patients.” *Id.* at ¶ 58.

A restaurant owner and operator sued Firstline National Insurance Company in Pennsylvania state court (Allegheny County) for declaratory relief. The plaintiff’s “all-risk” policy allegedly provides business income, extra expense, and civil authority coverage. *Id.* at ¶¶ 13-16. The complaint alleges plaintiff suffered a covered physical loss because state civil authority orders required the plaintiff to suspend its business operations and because COVID-19 “made the Insured Property unusable in the way it had been used before the Pandemic.” *Id.* at ¶¶ 85-89. The complaint also asserts that the policy’s virus exclusion does not apply because:

(i) insurers allegedly “do not consider the term ‘virus’ . . . to include a pandemic in which there is omnipresent contamination by a virus as a covered loss,” (ii) the plaintiff’s “losses were not solely caused by a virus,” and (iii) state regulatory approval of the virus exclusion language was allegedly procured through fraud. *Id.* at ¶¶ 28-31.

A group of fifty-eight universities sued sixteen insurers in Washington state court (Pierce County) for declaratory judgment and breach of contract. The plaintiffs’ “all-risk” policies allegedly provide communicable disease and interruption by communicable disease coverage. Complaint at ¶¶ 2, 10-12. The complaint alleges plaintiffs suffered covered physical loss or damage under their policies because COVID-19 was present on their properties, state and federal civil authority orders caused plaintiffs to “lose the normal use and function of their campuses and other properties,” plaintiffs were required to modify physical behaviors by implementing social distancing measures, and plaintiffs were required to mitigate the threat or physical presence of COVID-19 on physical surfaces in their covered properties. *Id.* at ¶ 32.

Several apparel designers sued Affiliated FM Insurance Company in New York state court (New York County) for breach of contract. The plaintiffs’ “all-risk” policy allegedly provides business interruption, civil or military authority, communicable disease, extended period of liability, ingress/egress, and supply chain coverage. Complaint at ¶¶ 158-61. The plaintiffs allege that they suffered lost revenue from the various civil authority orders requiring them to close. *Id.* ¶¶ 164-65, 167.

The largest bowling entertainment center sued AIG Specialty Lines Insurance Company, Everest Indemnity Insurance Company, Landmark American Insurance Company, and Starr Surplus Lines Insurance Company for breach of contract and declaratory judgment in New York state court (New York County). The plaintiff’s policies’ included business interruption, extra expense, civil authority, ingress or egress, and time element coverage. Complaint at ¶¶ 58-66. The plaintiff incurred expenses in mitigating the losses caused from COVID-19 but still suffered loss and damage. *Id.* ¶¶ 106-07. After submitting claims for its sustained losses, the insurers denied coverage. *Id.* ¶¶ 108-09.

An Indian tribe sued Factory Mutual Insurance Company for declaratory judgment and breach of contract in Minnesota state court (Scott County). The tribe’s “all-risk” commercial property policy covers business interruption, time element, business earnings loss, communicable disease, ingress/egress, and extra expense. Complaint at ¶¶ 42, 49-50, 55, 58. The tribe operates a casino and hotel, where it decided to suspend operations in the wake of the COVID-19 pandemic to prevent the spread of the virus. *Id.* ¶¶ 37-38. According to the plaintiff, the coronavirus structurally altered the property and forced it to make substantial changes. *Id.* ¶¶ 72-73. But it also asserts a structural alteration is not necessary to trigger coverage. *Id.* ¶ 75.

Several Florida restaurants and bars sued Starr Surplus Lines Insurance Company in New York state court (New York County) for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment. The plaintiffs’ “all-risk” policy allegedly provides time element, business interruption, civil authority, ingress/egress, and extra expense coverage. Complaint ¶¶ 42-48. Because they were forced to reduce operations at their locations because of the government’s closure orders, they filed a claim for business interruption coverage, which was denied. *Id.* ¶ 3. Plaintiffs allege they suffered “physical loss of or damage to” property because of the actual presence of virus droplets in the air and on their surfaces. *Id.* ¶ 37. The plaintiffs allege that the insurer’s denial of their claim without investigation constituted bad faith. *Id.* ¶ 57.

A restaurant operator sued Starr Surplus Lines Insurance Company in Louisiana state court (Orleans Parish) for payment of insurance proceeds, negligence, and penalties and attorney’s fees. The plaintiff’s “all risk policy” allegedly insures against business income losses and extra expenses. Complaint at ¶¶ 61-63. The plaintiff alleges it suffered direct physical loss and

damage from the loss of use, damage to the property due to the presence of the coronavirus in and around the plaintiff's locations, and corresponding governmental orders requiring suspension of its operations. *Id.* ¶¶ 78-83.

Insurers File Declaratory Actions

Federal Insurance Company sued Simon Wiesenthal Center, Inc. and its film division in federal court (C.D. Cal.) for declaratory relief. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 9. The Complaint alleges that there is no coverage under the policy for the defendants' COVID-19 claim because there was no direct physical loss or damage to property. *Id.* at ¶ 29. The defendants had previously filed suit against the insurer and voluntarily dismissed that lawsuit without prejudice to give the parties "the option and time to attempt an amicable resolution" but "the parties have not been able to resolve this dispute, and must now resume their prior litigation." *Id.* at ¶ 1.

Zurich American Insurance Company, General Security Indemnity Company of Arizona, Faraday Capital Limited, AIG Specialty Insurance Company, Lexington Insurance Company, and Westport Insurance Company sued WM Bolthouse Farms, Inc. in federal court (E.D. Cal.) for declaratory relief. The policies allegedly provide time element, extra expense, civil authority, ingress/egress, contingent time element, decontamination costs, and protection and preservation of property coverage. Complaint at ¶¶ 15, 18, 22, 25, 27. The Complaint alleges that there is no coverage for the defendant's COVID-19 claim because "the Coronavirus/COVID-19 and/or any federal, state, or local government order issued in response to the COVID-19 pandemic did not cause physical loss of or damage to property," *id.* at ¶ 14, and the policies' contamination exclusion bars coverage. *Id.* at ¶ 30.

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