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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 31)

June 2, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On May 26, 2021, the district court for the Eastern District of Pennsylvaniagranted Sentry Insurance Group's motion to dismiss several automobile dealerships' COVID-19 business interruption claims. Noting its agreement with "numerous decisions" in the past sixth months, the court held the policy term "direct physical loss" requires "an explicit nexus between the purported loss and the physical condition of the insured property." Order at 8-9. Because the plaintiffs conceded their losses were not actually caused by the COVID-19 virus itself, the court found plaintiffs failed to state a claim under their policies' business interruption or civil authority provisions. *Id.* at 12-13. Further, even assuming plaintiffs had adequately alleged a covered cause of loss, the court found the policies' civil authority provisions would not have applied because Pennsylvania's COVID-19 civil authority orders "were not issued 'in response to dangerous physical conditions' or to give any civil authority unimpeded access." *Id.* at 13-14. The court also found the virus exclusions in plaintiffs' policies unambiguously applied to COVID-19 and rejected plaintiffs' reasonable expectation argument, reasoning that "because the Policy is unambiguous, . . . [plaintiffs'] expectations of coverage were not reasonable." *Id.* at 14-15.

On May 24, 2021, the district court for the Northern District of New York granted Union Insurance Company's motion to dismiss a COVID-19 business interruption class action complaint filed by the operator of an inn and restaurant. The court rejected the plaintiff's argument that the interruption of its business operations as a result of COVID-19 closure orders, which deprived it of its ability to use its property for its intended purpose, constituted "direct physical loss of or damage to property" as contemplated by the policy, because that language "does not cover mere 'loss of use' that is unconnected to any physical damage, alteration or compromise to the insured property." Order at 15. Under New York law, the phrase direct physical loss of or damage to property "unambiguously *cannot* refer to mere 'loss of use' that is unconnected to any direct, physical compromise of Plaintiff's property." *Id*. at 18 (emphasis in original). The court further found that civil authority coverage was not available because "the New York Closure Order did not completely deny access to Plaintiff's property, but merely restricted its use, it did not 'prohibit access' within the meaning of the Civil Authority Provision," *id*. at 21, and the order issued with the goal of limiting future transmission of the COVID-19 virus statewide "does not fall within the scope of the Civil Authority Provision under New York law," as it was not issued because of any damage to a specific property near Plaintiff's business. *Id*. at 22.

On May 24, 2021, the district court for the District of New Jersey denied a motion to vacate filed by hotel and restaurant franchise owners of the court's earlier order and opinion granting American Guarantee & Liability Insurance Company's motion to dismiss their COVID-19 business interruption claim. Construing the motion as a motion for reconsideration, the court found no basis to revisit its earlier opinion, which held that the plaintiffs failed to allege facts that support a showing that their properties were physically damaged. Specifically, they did not identify any intervening change in the relevant law or new evidence that was unavailable at the time of the court's earlier decision, and their contention that the court engaged in inappropriate fact-finding in determining that the plaintiffs' properties had not suffered "physical loss or damage" was without merit, as the court did not engage in fact-finding "but rather limited its analysis to review of the adequacy of the Plaintiffs'

pleadings and found them wanting" because the "general statements that the COVID-19 virus was on surfaces and in the air at the properties is insufficient to show property loss or damage as required under the relevant Policy." Order at 2-3.

On May 28, 2021, the district court for the Western District of Washington granted various insurers' motions to dismiss COVID-19 business interruption claims in consolidated actions of hundreds of businesses in Washington state. The court concluded that COVID-19 does not cause direct physical damage to property, as all that is needed to decontaminate is to wipe the virus off surfaces with disinfectant, Order at 17, and that closure orders did not cause physical loss because they limited use of property but did not cause dispossession of property. *Id*. at 20. The court further concluded that the policies' virus exclusions barred coverage, as the COVID-19 virus caused the closure orders and, therefore, was the efficient proximate cause of the losses. *Id*. at 30.

On May 27, 2021, the district court for the Eastern District of Michigan granted Cincinnati Insurance Company's motion to dismiss two restaurants' COVID-19 related business interruption claims. The "interruptions to daily life caused by the COVID-19 pandemic" do not amount to "direct physical loss or damage to property." Order at 6. Reading the terms under that "natural meaning," the court found "accidental physical loss or accidental physical damage" required a different loss than the plaintiff experienced. *Id.* at 9. Cleaning costs, furniture rearrangement, lost patrons, and lost income do not constitute "tangible, physical losses" under the policy. *Id.* According to the court, the plaintiff needed to show repair, rebuild, replacement, or relocation under the "period of restoration" provision rather than simply disinfecting and rearranging the property. *Id.* at 9-10.

On May 25, 2021, the district court for the District of Massachusetts granted Ohio Security Insurance Company's motion for judgment on the pleadings of a crystal and rock shop's business interruption complaint. The court held that the business closures the shop suffered did not amount to "direct physical loss of or damage" under the policy, and even if they did, the policy's virus exclusion barred the shop's claims. Order at 6, 8. The closure orders being the proximate cause of the losses did not change the outcome or render the virus exclusion ambiguous. *Id.* at 9.

On May 24, 2021, the district court for the Eastern District of Missouri granted a motion to dismiss filed by Cincinnati Insurance Company, Cincinnati Casualty Company, Cincinnati Indemnity Company, and Cincinnati Financial Corporation in several restaurants' COVID-19 business interruption case. The court held the mere presence of the coronavirus did not constitute direct physical loss or damage to property because it does not physically change the premises, and physical alteration is required to trigger coverage. Order at 5.

New Business Interruption Suits Against Insurers:

A medical center sued Continental Casualty Company for breach of contract and declaratory judgment in Minnesota state court (Olmstead County). The commercial property policy allegedly includes business interruption, contingent business interruption, ingress-egress, time element, and civil authority coverage. Complaint ¶¶ 1, 7, 9. The policy also allegedly contains contaminant or pollutant, microbes, and loss of use exclusions. *Id.* ¶¶ 19-23. The plaintiff alleges it suffered loss when the COVID-19 pandemic hit Minnesota, but Continental denied the claim. *Id.* ¶¶ 10-11.

A communications company sued Allianz Global Risks U.S. Insurance Company in North Carolina state court (Catawba County) for declaratory relief. The "all-risk" policy allegedly provides property damage, time element, extra expense, gross earnings and gross profits, ingress/egress, civil or military authority, protection and preservation of property, and logistics extra cost coverage. Complaint ¶¶ 51-52, 54-86. The plaintiff alleges it was prevented from accessing and using its properties for their

intended purpose, causing it to suffer physical loss or damage. *Id.* ¶ 5. Additionally, it asserts the coronavirus caused it physical loss or damage to its property. *Id.* ¶ 6. Because of the governmental orders and coronavirus, it incurred additional expenses. *Id.* ¶ 8. To date, Allianz has allegedly yet to provide a coverage determination. *Id.* ¶ 13.

A personal injury law firm sued Hartford Insurance Company of the Midwest in the district court for the Eastern District of New York for declaratory relief. The plaintiff allegedly has an all-risk policy that covers building, business personal property, business income and extra expense, extended business income, and civil authority and no virus exclusion. Complaint ¶¶ 14, 16-17, 23. According to the plaintiff, the inability to access its property and loss of use of its property because of the civil authority orders to slow the spread of the coronavirus constitutes loss or damage. *Id.* ¶¶ 37-38, 86-88. Additionally, the property being physically contaminated by the coronavirus and requiring cleaning constitutes a direct physical loss, according to the plaintiff's assertions. *Id.* ¶ 45.

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

Rachel A. Jankowski
Associate – Washington, D.C.
Phone: +1 202.624.2647
Email: rjankowski@crowell.com

Samuel H. Ruddy
Associate – Washington, D.C.
Phone: +1 202.624.2564
Email: sruddy@crowell.com

Adam J. Singer
Associate – Washington, D.C.
Phone: +1 202.688.3508
Email: asinger@crowell.com