

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of July 5)

July 6, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On June 29, 2021, the district court for the Southern District of Mississippi granted Sentinel Insurance Company Ltd.'s motion to dismiss a consulting firm's COVID-19 related business interruption complaint. The court found that the virus exclusion precluded coverage and that the firm had not pled a direct physical loss. Order at 6, 8. Although through a "creative construction" the plaintiff attempted to qualify the coronavirus as a "specified cause-of-loss" because it can enter the property "through an explosion, such as an 'explosive cough or sneeze' or falling objects," the court found that "[w]hile a sneeze may contain the virus, it does not cause it." *Id.* at 5–6. Instead, the court held that the firm's "construction of the terms 'explosion' and 'falling objects' are simply unreasonable, especially when" considering the policy as a whole. *Id.* at 6.

On June 28, 2021, the district court for the Northern District of Oklahoma granted Covington Specialty Insurance Company's motion for judgment on the pleadings and dismissed a concert venue owner's putative COVID-19 related class action. The court rejected the plaintiff's claim that it suffered "direct physical loss" of its property. According to the court, loss of use due to "government closure orders" and the presence of COVID-19 on covered property did not constitute "direct physical loss" because "COVID-19 is a virus that harms people, not structures." *Id.* at 14-15. The court also found that Covington did not deny the plaintiff's claim in bad faith because its interpretation of the policy was correct. *Id.* at 19. Finally, the court found that the plain language of the policy's "pathogenic materials" exclusion, which excluded claims for damage caused "directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials," unambiguously barred plaintiff's claim. *Id.* at 19-20.

On June 28, 2021, the district court for the Western District of Oklahoma granted Columbia Mutual Insurance Company's motion for summary judgment on a hotel owner and operator's COVID-19 related business interruption claim. Finding that the policy term "direct physical loss or damage" required tangible damage to covered property, the court held the plaintiff failed to establish any covered loss because the plaintiff did not present any evidence "that the property required repair, rebuilding or replacement and Plaintiff did not resume business at a new permanent location." Order at 9-10, 14. The court also found the policy's virus exclusion and "loss of market" exclusion, which excluded losses "caused by or resulting from . . . [d]elay, loss of use or loss of market," barred the plaintiff's claim. *Id.* at 14-15.

On June 25, 2021, the district court for the Central District of California granted Mitsui Sumitomo Insurance USA, Inc.'s motion to dismiss a restaurant owner and operator's COVID-19 business interruption claim. The court found that COVID-19 closure orders did not cause physical loss of or damage to property because they merely restricted use of property and did not physically alter it. Order at 10-11. The court concluded that the policy's virus exclusion unambiguously applied to preclude coverage, because any alleged loss "caused by the actual or suspected presence of COVID-19 in Plaintiff's restaurants is due to the virus." *Id.* at 13.

On June 29, 2021, the district court for the Northern District of Illinois granted Cincinnati Insurance Company's motion to dismiss a dental office's amended complaint seeking civil authority coverage for its alleged COVID-19 losses. The dismissal follows the

court's earlier dismissal of the plaintiff's original complaint with leave to amend. The court found, as it did in its earlier dismissal order, that COVID-19 closure orders allowed the plaintiff access to its premises to perform essential services and, therefore, civil authority coverage was not available. Order at 3.

On June 30, 2021, the district court for the Southern District of California granted American Fire and Casualty Company's and Ohio Security Insurance Company's motion to dismiss a COVID-19 business interruption class action complaint brought by two restaurant owners. The court concluded that the plaintiffs failed to demonstrate a direct physical loss, as the policies' direct physical loss provision requires "some distinct, demonstrable, physical alteration of the property." Order at 9. The court further concluded that civil authority coverage was unavailable, because the plaintiffs failed to demonstrate a physical loss, failed to show that a government closure order caused the alleged physical loss, and failed to plausibly allege that closure orders prohibited access to their property. *Id.* at 10-11.

New Business Interruption Suits Against Insurers:

The owner of fashion brands Coach and Kate Spade sued Factory Mutual Insurance Company in Maryland state court (Baltimore County) for declaratory judgment and breach of contract. The plaintiff contends it purchased an "all-risk" policy with business interruption/time element, property damage, and communicable disease coverage. Complaint ¶¶ 8, 282. According to the plaintiff, 1,261 of its employees tested positive with the coronavirus, which it alleges is "direct proof" the virus was present on its premises and in the air. *Id.* ¶ 40. After filing its claim, the policyholder received a denial from the insurer except as to the on-site communicable disease coverages, which the plaintiff asserts is a breach of its duty of good faith and fair dealing because of the lack of investigation. *Id.* ¶¶ 349, 351.

A media company sued Factory Mutual 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/time element, extra expense, leasehold interest, rental income, civil authority, decontamination cost, ingress/egress, interruption by communicable disease, and communicable disease response coverage. Complaint at ¶¶ 103-134. The complaint alleges the plaintiff suffered covered physical losses because individuals at plaintiff's properties tested positive for COVID-19, state and local civil authority orders "shutdown [sic] or drastically limited the operations of [plaintiff's] properties," physical behaviors needed to be modified at plaintiff's properties, and plaintiff needed to mitigate the threat of COVID-19 by regularly cleaning physical surfaces at its properties. *Id.* at ¶¶ 75. The complaint also alleges that plaintiff suffered covered losses because its advertisers and customers suffered similar physical loss or damage to their respective properties. *Id.* at ¶¶ 1-2, 76, 84-88.

Insurers File Declaratory Action

General Star Indemnity Company, Ironshore Specialty Insurance Company, Ategrity Specialty Insurance Company, RSUI Indemnity Company, Colony Insurance Company, Endurance American Specialty Insurance Company, Maxum Indemnity Company, Evanston Insurance Company, Crum & Forster Specialty Insurance Company, Scottsdale Insurance Company, Homeland Insurance Company of New York, Hallmark Specialty Insurance Company, Mitsui Sumitomo Insurance Company of America and underwriters at Lloyd's sued a hotel and apartment developer in federal court (C.D. Cal.) for declaratory relief, seeking a declaration that they are not obligated to provide coverage for business losses arising out of the COVID-19 pandemic or related closure orders. The policies allegedly provide business interruption, extra expense, rental value/rental income,

contingent time element, civil authority, ingress/egress, building ordinance law, decontamination costs, professional fees, tenant relocation and move back expense, and interruption by communicable disease coverage. Complaint at ¶¶ 51, 55, 59, 63, 67, 72, 77, 81, 85, 89, 93. The Complaint alleges that “none of [the insured’s] properties has incurred any ‘direct physical loss or damage to’ covered property as the result of COVID-19 or the Government Orders” and that its claimed losses “were not the result of any direct physical loss or damage to any property.” *Id.* at ¶ 41.

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