

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of October 4)

October 4, 2021

Four More Appellate Rulings Find No Coverage For COVID-19 Business Interruption Claims

Four more federal appellate court rulings finding no coverage for COVID-19 business interruption claims were issued last week. The Sixth Circuit found no coverage in *In re: Zurich American Insurance Co.*, a summary of which can be found [here](#), while the Ninth Circuit found no coverage in *Mudpie, Inc. v. Travelers Casualty Insurance Company of America, Selane Products, Inc. v. Continental Casualty Company, and Chattanooga Professional Baseball LLC, et al. v. National Casualty Company*. Summaries of these decisions can be found [here](#).

District Courts Dismiss COVID-19 Business Interruption Claims

On September 24, 2021, the district court for the Southern District of New York [granted](#) Travelers Indemnity Company of America's motion to dismiss a COVID-19 business interruption class action complaint filed by a property management company. The court concluded that the complaint failed to plead a "direct physical loss of or damage to property," and found the plaintiff's theory that loss of use constitutes "direct physical loss" to be "plainly incorrect as a matter of law." Order at 4. The court further concluded that the claim was precluded by the policy's virus exclusion. *Id.* at 5-6. The case is *Poughkeepsie Waterfront Dev., LLC v. The Travelers Ind. Co. of Am., et al.*

On September 24, 2021, the district court for the Southern District of Ohio [granted](#) Cincinnati Insurance Company's motion to dismiss four consolidated COVID-19 business interruption suits brought by seven different plaintiffs. The court found the plaintiffs' "preferred construction of their insurance contracts simply cannot contend with the plain and ordinary meaning of 'direct physical loss.'" Order at 20. Because "[n]either government closure mandates nor the presence of the virus or disease in insured property constitutes a 'direct physical loss,'" the court held plaintiffs failed to state a claim under any coverages in their policies. *Id.* at 20-22. The consolidated case is *Troy Stacy Enters. Inc., et al. v. The Cincinnati Ins. Co., et al.*

On September 28, 2021, the district court for the Northern District of California [granted](#) Sentinel Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption class action complaint. The court held that the policy's virus exclusion "unambiguously forecloses coverage of Plaintiff's alleged losses due to either COVID contamination or the Closure Orders." Order at 3. The court further held that, even if the virus exclusion did not apply, the plaintiff failed to plausibly allege it is entitled to coverage, because none of its alleged losses are sufficient to meet the policy's "direct physical loss of or physical damage to property" requirement, which "unambiguously requires 'a physical change in the condition or a permanent dispossession of the property.'" *Id.* at 8. The case is *Protégé Restaurant Partners LLC v. Sentinel Ins. Co., Ltd.*

On September 29, 2021, the district court for the Eastern District of Pennsylvania [granted](#) Seneca Insurance Company, Inc.'s motion for summary judgment on a COVID-19 business interruption claim filed by a Philadelphia bar, restaurant, and nightclub. The court concluded that the undisputed evidence established that the plaintiff did not experience physical loss or damage

within the meaning of the policy, Order at 8, and that, even if it could establish physical damage, “its claims are expressly excluded by the Virus Exclusion” and “are also excluded by the Ordinance or Law Exclusion.” *Id.* at 9. The case is *Walnut Ace, LLC v. Seneca Ins. Co.*

On September 30, 2021, the district court for the Northern District of Ohio granted Liberty Mutual Insurance Company’s motion to dismiss a restaurant operator’s COVID-19 business interruption class action complaint. The court held that “neither the government shut-down orders nor the physical presence of COVID-19 particles constitutes a ‘direct physical loss of or damage to’ property,” as the “thrust of Ohio law interpreting language similar to the provisions at issue is that a tangible harm to property is necessary to invoke insurance coverage for property damage.” Order at 10. The case is *Torre Rossa, LLC v. Liberty Mut. Ins. Co.*

New Business Interruption Suits Against Insurers:

A private college sued Travelers Indemnity Insurance Company in North Carolina state court (Guilford County) for declaratory judgment, breach of contract, and breach of the implied covenant of good faith and fair dealing. The plaintiff’s policy allegedly provides property, business income, extra expense, and civil authority coverage. Complaint at ¶¶ 42, 58. The complaint alleges the plaintiff suffered a covered loss because it suspended normal operations “[i]n response to COVID-19.” *Id.* at ¶¶ 25-30. The case is *Guilford College v. Travelers Ind. Ins. Co.*

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