Crowell

Client Alert

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

October 5, 2020

More Federal Courts Dismiss COVID-19 Business Interruption Claims

On September 28, 2020, the U.S. District Court for the Middle District of Florida granted Certain Underwriters at Lloyds' motion to dismiss the COVID-19 business interruption claim of a company that designs and fabricates trade show displays. The court held that the plaintiff's allegation that it suffered lost income as a result of cancelled trade shows due to Florida's COVID-19 closure orders failed to adequately allege direct physical loss or damage to insured property. The court explained that, under the plain language of the plaintiff's policies, "actual, concrete damage is necessary" and there were no facts alleged describing how property suffered any actual physical loss or damage. Order at 7, 10. The court also concluded that any amendment to the complaint would be futile under the circumstances. *Id*. at 10.

On September 29, 2020, the U.S. District Court for the Southern District of Iowa granted Cincinnati Insurance Company's motion to dismiss a dentistry's COVID-19 business interruption claim. The court found that the plaintiff failed to allege any "physical" or "accidental" loss, because it contended that its loss was caused by COVID-19 and government actions that suspended non-emergency dental procedures, which do not amount to direct loss to covered property. Order at 2.

On September 30, 2020, the U.S. District Court for the Eastern District of Pennsylvania granted Hartford Casualty Company's motion to dismiss a law office's COVID-19 business interruption claim. The court found that the policy's virus exclusion barred coverage: "Plaintiffs explicitly allege that their losses are caused by the Coronavirus, and yet do not reference this exclusion or dispute that the Coronavirus is a virus," recognizing that "[t]he Policy language here . . . is conspicuously displayed, clear, and unambiguous." Order at 18-19. The court also found that "[t]o the extent that Plaintiffs allege that the governmental closure orders are a separate cause of loss, Plaintiffs provide no explanation as to why the Civil Authority coverage would not be precluded by the virus exclusion. Nor could they. The virus exclusion is 'added to Paragraph B.1. Exclusions of . . . the Special Property Coverage Form.' The Civil Authority coverage is part of the Special Property Coverage Form." *Id*. at 21 (internal citations omitted).

On September 16, 2020, the United States District Court for the Central District of California granted AmGuard Insurance Company's motion to dismiss a restaurant's COVID-19 business interruption claim. The Order followed the court's September 10, 2020 tentative ruling. In its tentative, the court noted that, while plaintiff conceded lack of "physical damage" as required by the policy, the parties disputed whether plaintiff had suffered a "physical loss." Tentative Ruling at 4. The court rejected plaintiff's contention that the term "physical loss of" does not require a tangible alteration to the property. It held that to do so would make the terms "loss of" and "damage to" redundant, reasoning that "[t]his would be a major expansion of insurance coverage," and that it

"places too much weight on the need to avoid surplusage, and asks a handful of words – 'loss,' 'of,' and 'to' – to do too much work." *Id*. at 5. The court also noted that "[t]he weight of California law also appears to require some tangible alteration, no matter whether the trigger language uses 'loss' or 'damage.'" *Id.* at 6.

Illinois Court Dismisses COVID-19 Business Interruption Claim

On September 29, 2020, the Circuit Court of the 18th Judicial Circuit of Illinois granted State Farm's motion to dismiss a restaurant's claim for business interruption losses due to Illinois' COVID-19 closure order and dismissed the claim with prejudice. Ruling from the bench, the court determined that the policy's direct physical loss language "unambiguously requires some form of actual physical damage to the insured premises to trigger coverage" and noted that Illinois case law interpreting the word "physical" holds that alleged intangible or incorporeal losses are not covered. Transcript at 27. Accordingly, the court found that the restaurant could not prove any covered loss resulting from an inability to access its property. *Id*. at 28. The court also concluded that the policy's virus exclusion would bar coverage, even if the plaintiff had pled facts that would fall within the insuring agreement. *Id*. at 31.

Appeal of COVID-19 FCA Test Case Headed to UK Supreme Court

On October 2, the court approved an appeal of the Financial Conduct Authority's COVID-19 business interruption test case decided two weeks ago. As reported previously, the FCA brought a test case against eight insurers to clarify whether 21 policy wordings, potentially affecting 700 types of policies, 60 insurers, 370,000 policyholders, and billions in claims provided coverage for business interruption losses due to government-ordered COVID-19 closures. The FCA brought the test case against QBE, Hiscox, RSA, MS Amlin, Ecclesiastical, Argenta, Zurich, and Arch. Zurich and Ecclesiastical chose not to join the appeal, stating that the court found in their favor. The appeal will be heard by the UK Supreme Court.

New Business Interruption Class Actions:

A café and a salon filed a class action complaint against Westfield National Insurance Company in federal court (N.D. Ill.) for declaratory relief, breach of contract, bad faith, unjust enrichment, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The "all risk" policies allegedly provide business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶¶ 33-35. The Complaint alleges that the insurer's denials of coverage "were based on the false and blanket assertion that 'there has been no direct physical loss of or damage to property'" and that the insurer failed to conduct a reasonable investigation of the plaintiffs' claims. *Id*. at ¶¶ 41-42. The Complaint further alleges that the policies' virus exclusions are inapplicable because they cannot function to exclude claims caused by COVID-19 closure orders, as opposed to loss or damage caused by a virus, *id*. at ¶ 51, and that if the insurer prevails against coverage "then these Plaintiffs and all other similarly situated in a Nationwide Class must receive a rebate of premium for the windfall that Westfield kept for itself by reduced claims due to Closure Order shutdowns, partial operations mandates and other constraints." *Id*. at ¶ 7. The proposed class is defined as "all businesses in the United States who are insureds of Defendant under commercial insurance policies and who have experienced a complete or

partial shutdown of their business operations as a result of a Closure Order issued by a State or local governmental authority on or after March 1, 2020, to the present." *Id*. at ¶ 123.

New Business Interruption Suits Against Insurers:

The operator of a clothing store sued The Ohio Security Insurance Company in Indiana state court (Marion County)for declaratory relief and breach of contract. The policy allegedly provides building, personal property, business income, extended business income, extra expense, civil authority, and business income from dependent properties coverage. Complaint at ¶ 30. The Complaint alleges that the presence of people infected with COVID-19 "renders property unsafe and unusable and causes direct physical damage and direct physical loss to property." *Id*. at ¶ 10.

The owner and operator of a dental practice sued Cincinnati Insurance Company in federal court (E.D. Ky.) for breach of contract, violation of Kentucky's Unfair Claims Settlement Practices Act, bad faith, violation of KRS § 304.12-235, violation of Kentucky's Consumer Protection Act, and punitive damages. The policy allegedly provides business income, extra expense, civil authority, ingress and egress, dependent property, and sue and labor coverage. Complaint at ¶¶ 16, 24, 28, 32, 35. The Complaint alleges that the plaintiff's loss of use of the insured property and inability to function as intended constitutes a direct physical loss. *Id*. at ¶ 22.

A salon sued Bankers Insurance Company in Louisiana state court (Orleans Parish) for declaratory relief, breach of contract, and bad faith. The "all risk" policy allegedly provides business income and extra expense coverage. Complaint at ¶ 23. The Complaint alleges that the insurer could have included a virus exclusion if it did not intend to cover COVID-19 losses, because the policy was issued in March 2020 after the insurer "was undoubtedly aware that businesses across the world were shuttering their doors due to widespread physical infestation of COVID-19." *Id*. at ¶ 27. The Complaint further alleges that the plaintiff suffered and will continue to suffer a direct physical loss "as a result of the pervasive physical presence, and transmission of, COVID-19, as well as all other effects of COVID-19 on Plaintiff's business." *Id*. at ¶ 34.

A restaurant sued American Automobile Insurance Company in New Jersey state court (Union County) for breach of contract, bad faith, violation of the New Jersey Consumer Fraud Act, and violation of the New Jersey Unfair Claims Settlement Practices Act. The "all risk" policy allegedly provides business income, extra expense, civil authority, and supplemental business income coverage. Complaint at ¶ 3. The Complaint alleges that, as a direct and proximate result of New Jersey's COVID-19 closure order, "the insured premises had become uninhabitable and/or contaminated as a result of a covered cause of loss, resulting in 'loss of use.'" *Id*. at ¶ 6.

The owner and operator of several restaurants sued Zurich American Insurance Company in New York state court (New York County) for declaratory relief. The "all risk" policy allegedly provides business income and microorganisms coverage. Complaint at ¶¶ 10-11. The Complaint alleges that SARS-CoV-2 contamination devalued the insured's real and personal property by rendering the property unsafe for use and/or occupation and that the insured suffered losses of business income due to its necessary suspension of operations. *Id*. at ¶¶ 22-23.

A business owner sued Sentinel Insurance Company in California state court (San Bernardino Cty.) alleging the insurer wrongfully denied his claim for business interruption losses due to California's COVID-19 closure orders. The policy allegedly provides Business Income, Extra Expense, and Civil Authority coverages. The complaint alleges that in denying the claim, Sentinel "committ[ed] actual fraud against Plaintiff, and further intentionally inflict[ed] emotional distress upon Plaintiff."

The owner of approximately 100 Outback Steakhouse restaurants sued Affiliated FM Insurance Company in federal court (N.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to California and Arizona's COVID-19 closure orders. The "all-risk" policy allegedly provides up to $100 million total limit of liability, and provides Business Interruption, Communicable Disease – Property Damage, Protection and Preservation of Property – Property Damage, Extra Expense, Attraction Property, Civil or Military Authority, Ingress/Egress, Supply Chain, and Professional Fees coverages, and does not contain a virus exclusion. The complaint alleges that the policy "does not require physical presence of COVID-19 at an Insured Location in order to trigger coverage – all that is required is the property's loss of use or loss of functionality for its intended purpose." The complaint further alleges that plaintiff is "currently aware of over 100 employees testing positive for COVID-19 across numerous of its insured locations."

The owner of a bar and restaurant in Pittsburgh sued Erie Insurance Exchange in Pennsylvania state court (Allegheny County), asserting claims for breach of contract, anticipatory breach of contract, and bad faith. The "all risk" policy allegedly provides business income and civil authority coverage. Complaint at ¶¶39-55. The policy does not contain a fungi or bacteria exclusion. *Id.* at ¶56. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage without conducting an investigation, and that it's policy is to "deny all COVID-19 claims in a blanketed fashion." *Id.* at ¶¶ 78-99.

The owner of a restaurant in Pittsburgh sued Cincinnati Insurance Company in federal court (W.D. Pa.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶21-23. The policy does not contain a virus exclusion. *Id.* at ¶32. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶¶78-79.

The owner of a military shipbuilding company and government/industry service provider sued its various insurers and reinsurers in Vermont state court (Franklin County), seeking a declaration that "the property loss or damage, extra expense, interruption by civil or military authority, continent business interruption, extra expenses, and other losses suffered by [the plaintiff] as a result of the Pandemic events are covered under" plaintiff's insurance and reinsurance policies. Complaint at ¶ 6. The "all risk" policies allegedly provide business income, extra expense, civil authority, military authority, and ingress/egress coverage. *Id.* at ¶¶ 34-38. The policy does not contain a virus exclusion. *Id.* at ¶ 43. The plaintiff's complaint also asserts claims against all of its reinsurers. *Id.* at ¶¶ 45. The Complaint alleges that none of the defendants have acknowledged coverage for the plaintiff's losses, and have made public statements indicating that they will deny coverage. *Id.* at ¶ 65.

American Hallmark Files Declaratory Action Against Restaurant in Federal Court

American Hallmark Insurance Company sued a restaurant in federal court (D.N.M.) for declaratory relief. The policy allegedly provides business income, business income from dependent properties, civil authority, extra expense, spoilage, and food contamination coverage. Complaint at ¶ 9 The Complaint alleges that the restaurant's claim for various business interruption and food spoilage/contamination coverages as a result of New Mexico's COVID-19 closure order is not covered, because Hallmark's investigation did not reveal a direct physical loss of or direct physical damage to property and no food poisoning incidents were reported. Complaint at ¶ 5. The Complaint further alleges that the policy's virus exclusion precludes the insured's claims. *Id*.

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