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CLIENT ALERT

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

April 22, 2021

Supreme Court of Ohio Accepts Certified Question on COVID-19 Business Interruption Issues

On April 14, 2021, the Supreme Court of Ohio accepted the question certified to it by the district court for the Northern District of Ohio in *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, No. 4:20-CV-1275. The Supreme Court of Ohio will answer the following question: "Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?" Order at 5. Merit briefing commences within 40 days of the order accepting certification. *Id*. Ohio joins the District of Columbia in having COVID-19 business interruptions issues before its highest court.

Courts Dismiss COVID-19 Business Interruption Claims

On April 16, 2021, the district court for the Middle District of Florida granted Scottsdale Insurance Company's motion to dismiss a bar's COVID-19 business interruption complaint with prejudice. Finding the virus exclusion applies broadly to bar coverage for losses resulting from a virus, "the virus need not be present in or on the premises at issue for the exclusion to apply." Order at 5. Because the plaintiff pled that the governmental shutdown orders were instituted to prevent the spread of the coronavirus, the court held that the plaintiff "recognizes that COVID-19" ultimately caused its loss, and thus, coverage was excluded. *Id.*

On April 15, 2021, the district court for the Northern District of Illinois granted Motorists Commercial Mutual Insurance Company's motion to dismiss a mattress store's COVID-19 related business interruption complaint with prejudice. The court rejected the plaintiff's argument that regulatory estoppel should apply, finding no Illinois court has explicitly endorsed regulatory estoppel. Order at 3. Even so, the plaintiff failed to plausibly allege any contradictory or inconsistent statements about the application of the virus exclusion. *Id.* at 3–4.

On April 15, 2021, the district court for the Northern District of New York granted Affiliated FM Insurance Company's cross-motion for judgment on the pleadings and denied a casino's motion for partial summary judgment. The court found that civil authority coverage was not triggered for losses that occurred after it closed due to a positive COVID-19 case at a nearby college. Without pleading "actual not suspected" presence of communicable disease, the casino's claim failed. Order at 14. "[T]he mere presence or spread of the novel coronavirus is insufficient to trigger coverage when the policy's language requires physical loss or physical damage." *Id.* at 13. The court held that was no physical loss or damage to the casino or the neighboring college. *Id.* at 14.

On April 15, 2021, the district court for the Northern District of Alabama granted The Cincinnati Insurance Company's motion to dismiss a restaurant and bar's COVID-19-related business interruption claim. The court held that the plain meaning of "physical damage" was "a perceptible, material harm to property" and the plain meaning of the policy terms "physical loss" and "physical

damage" required property damage that was "material and perceptible, not theoretical or invisible." Order at 8–9. Thus, the court found the plaintiff did not suffer any covered physical loss or damage because it "did not have to repair, rebuild, or replace any property the virus touched." *Id* at 10–11.

On April 14, 2021, the district court for the District of Maryland granted Great Northern Insurance Company's motion for judgment on the pleadings in a COVID-19 business interruption claim filed by the operator of a vehicle auction facility and denied the plaintiff's motion for summary judgment and motion to certify questions of law to the Court of Appeals of Maryland. The court found that, while Maryland courts have not directly opined on the meaning of "direct physical loss or damage" to property in the context of a commercial property policy, it did not need to certify the question to the Maryland high court and could resolve the case through a straightforward application of Maryland contract law. Order at 14. The court held that a mere loss of use of property is not "physical damage" within the meaning of Maryland law and that the plaintiff is not entitled to coverage because the COVID-19 virus did not physically alter covered properties or surrounding areas in a manner that would trigger coverage under the plain language of the policy. *Id*. at 27.

On April 14, 2021, the district court for the District of New Jersey granted Sentinel Insurance Company's motion to dismiss a law firm's COVID-19 related business interruption claims. The court rejected plaintiff's argument that it should not take judicial notice of the fact that COVID-19 is a virus and held that the disputed policy's virus exclusion unambiguously barred plaintiff's claims because COVID-19 was "the but for cause of [p]laintiff's alleged losses." Order at 10 n.6, 13.

On April 13, 2021, the district court for the Eastern District of North Carolina granted West Bend Mutual Insurance Company's motion to dismiss a spa and massage parlor chain's COVID-19 business interruption claim. The court found the policy's Communicable Disease Business Income and Extra Expense Coverage provision inapplicable due to the plaintiff's failure to plausibly allege that COVID-19 was ever present at the insured premises, as the coverage provision "makes clear that covered losses must result from a suspension of operations that took place 'due to an outbreak . . . at the insured premises.'" Order at 6.

On April 13, 2021, the district court for the Eastern District of Virginia granted Evanston Insurance Company's motion to dismiss a logistics company's COVID-19 related business interruption claim. The court found that the plan's virus and organic pathogen exclusions, which excluded any "loss or damage caused by or resulting from any virus" and any "loss or damage caused directly or indirectly by" the "presence, growth, proliferation, spread or any activity of 'organic pathogens,'" unambiguously barred plaintiff's claims "regardless of the meaning of 'direct physical loss.'" Order at 6, 11–12.

On February 19, 2021, the district court for the Northern District of Illinois granted New York Marine and General Insurance Company's motion to dismiss a group of car retail and repair businesses' COVID-19 related business interruption claims. Plaintiffs argued that they suffered covered physical loss or damage because "COVID-19 molecules physically infect surfaces . . . and can remain on infected surfaces for up to four weeks," but the court found that "[a]s a matter of plain English, such temporary contamination does not represent physical loss of or damage to property." Order at 4. Rather, the plain meaning of physical loss or damage under Illinois law required plaintiffs to show an alteration "in appearance, shape, color or other material dimension." *Id.* at 5. The court thus found that "plaintiffs have not and cannot allege direct physical damage." *Id.* at 8. Even if plaintiffs suffered a direct physical loss, however, the court found their claims were barred by the unambiguous language in their policies' virus exclusions, which excluded losses caused by "any virus . . . that induces or is capable of inducing physical distress, illness, or disease." *Id.* at 8-9.

New Business Interruption Suits Against Insurers:

The owner of a group of restaurants sued Certain Underwriters at Lloyds London, HDI Specialty SE, and Indian Harbor Insurance Company in Florida state court (Broward County) for declaratory relief and breach of contract. The policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 17-19. The Complaint alleges that the presence of COVID-19 "caused direct physical loss of and/or damage to the covered premises under the Policy by, among other things, causing direct physical loss of or damage to the Covered Property, denying access to/use of and damaging the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, requiring physical repair and/or alterations to the Covered Property, and/or causing a necessary suspension of business operations on the premises." *Id*. at ¶ 60.

The owner and operator of commercial real estate sued Zurich American Insurance Company and American Guarantee and Liability Insurance Company for declaratory relief, breach of contract, and violation of 255 ILCS 5/155. The "all risk" policy allegedly provides time element, extra expense, leasehold interest, and civil authority coverage. Complaint at ¶¶ 78, 88. The Complaint alleges that "[t]he COVID-19 pandemic and related shutdown orders imposed limitations on the use of all or much of Plaintiff's physical space, thereby constituting a 'direct physical loss of . . . property' under the Policy that was caused by a Covered Cause of Loss," *id.* at ¶ 90, and that the policy's contamination exclusion is inapplicable because "the suspension and direct physical loss of property was not caused by the actual presence of the virus that causes COVID-19 in any of its insured locations." *Id*. at ¶ 103.

The operator of a trampoline park sued Cincinnati Insurance Company, Cincinnati Casualty Company, and Cincinnati Indemnity Company in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 13, 16, 17. The Complaint alleges that the insured "reasonably expected that the Policy included coverage for physical loss and business interruption losses caused by COVID-19 and civil authority shutdowns as a result of COVID-19." *Id*. at ¶ 18.

A doctor's office sued Twin City Fire Insurance Company and the Hartford Financial Services Group, Inc. in federal court (D.N.J.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint ¶¶ 26, 30–32. Because of civil authority orders enacted to prevent the spread of the coronavirus, the plaintiff alleges it had to stop performing non-emergency medical procedures, but the insurers denied its claim for business losses sustained. *Id.* ¶¶ 8, 14.

A healthcare provider sued XL Insurance America, Inc., Princeton Excess and Surplus Lines Insurance Company, Crum & Forster Specialty Insurance Company, Everest Indemnity Insurance Company, Certain Underwriters at Lloyd's, Independent Specialty Insurance Company, Interstate Fire & Casualty Company, General Security Indemnity Company of Arizona, United Specialty Insurance Company, Lexington Insurance Company, Homeland Insurance Company of New York, HDI Global Specialty SE, Western World Insurance Company, and Safety Specialty Insurance Company for breach of contract and declaratory judgment in New York state court (Westchester County). The "all risks" policy allegedly provide extra expense and professional fees and claims preparation costs coverage. Complaint ¶¶ 74, 83, 113. The plaintiff alleges that policies unambiguously provide coverage for the losses, but in the alternative, "are reasonably susceptible to multiple interpretations." *Id.* ¶¶ 121, 124.

A laundry service sued Allianz Global Corporate & Specialty, Allianz Global Risks US Insurance Company, and the American Insurance Company for declaratory judgment, breach of contract, breach of the covenant of good faith and fair dealing, a violation of the Nevada Unfair Claims Practices Act, and punitive damages in Nevada state court (Clark County). The policy allegedly provides business income and extra expense, civil authority, dependent property, and crisis management coverage. Complaint ¶¶ 69–116. According to the complaint, the coronavirus' physical presence at the resorts it serviced and the resulting closure orders and capacity limits triggered coverage under the policy, yet the insurer repeatedly denied the plaintiff's claim. *Id.* ¶¶ 48–50, 53, 55, 57, 59.

The owner and operator of an Italian restaurant sued Nationwide Mutual Insurance Company in federal court (M.D. Pa.) for breach of contract and declaratory relief. Plaintiff's "all-risk" policy allegedly provided, among other things, property, business personal property, business income, extra expense, and civil authority coverage. Complaint at ¶¶ 21, 23. The complaint alleges that the "risk of COVID-19 entering [plaintiff's] Property and contaminating the surfaces is [a] direct physical loss" under the policy, as is any "restriction of use" of that property due to the virus or related civil authority orders. *Id.* at ¶¶ 56, 61,73-74.

A real estate investment trust sued Zurich American Insurance Company and American Guaranty and Liability Insurance Company in Pennsylvania state court (Philadelphia County) for declaratory judgment, breach of contract, and insurer bad faith. Plaintiff's policy allegedly provides decontamination cost, land and water contaminant cleanup, interruption by communicable disease, property, indoor air quality testing, and extra expense coverage. Complaint at ¶ 19. The complaint alleges the plaintiff suffered covered direct physical losses "by virtue of the confirmed presence of COVID-19" at a number of its properties. *Id.* at ¶ 75. The complaint also alleges that Zurich and AGLIC acted in bad faith because they allegedly conducted a claims investigation "with respect to which [their] ultimate conclusion was predetermined and unalterable irrespective of the facts developed" and because they allegedly lacked a reasonable basis for denying coverage. *Id.* at ¶¶ 90–91.

The owners and operators of two preschools sued Truck Insurance Exchange in Texas state court (Collin County) for breach of contract, unfair settlement practices, prompt payment, and breach of the implied duty of good faith and fair dealing. Plaintiffs' "all-risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 6, 12, 14. The complaint alleges that state stay-at-home orders, "[t]he pandemic, [and] consumer fear" caused plaintiffs to suffer a covered direct physical loss of their properties. *Id.* at ¶ 12. The complaint also alleges the policy's virus exclusion does not apply because it is "not a pandemic exclusion" or, in the alternative, is unconscionable and therefore unenforceable. *Id.* at ¶¶ 17, 21. The complaint also alleges Truck engaged in unfair settlement practices and acted in bad faith by supposedly misrepresenting the scope of plaintiffs' policy and failing to investigate and evaluate plaintiffs' claim. *Id.* at ¶¶ 27, 36

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