

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of April 26)

April 26, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On April 22, 2021, the district court for the Western District of New York granted Philadelphia Indemnity Insurance Company's and Philadelphia Consolidated Holding Corporation's motion to dismiss a martial arts studio's COVID-19 business interruption complaint. It held that "direct physical loss or damage" requires physical damage, and the mere presence of coronavirus on the property and government-imposed occupancy limits do not constitute physical loss. Order at 7–8. The court found that the coronavirus did not physically change the premises to trigger coverage. *Id.* at 8. Because the plaintiffs failed to plead the virus lives within the insured property, "the reduction in business activity mandated by the state shutdown orders is best described as an instance of widespread economic loss due to restrictions on human activities, not the consequence of a direct physical loss or damage to the insured premises." *Id.* at 12.

On April 22, 2021, the district court for the Southern District of New York granted Cincinnati Insurance Company's motion to dismiss a deli's complaint for business interruption losses related to COVID-19. According to the court, "[t]he key word in the Policies is 'physical,'" and with nothing more than conclusory allegations that the insured properties suffered physical loss or damage from the coronavirus, the complaint failed to allege business interruption coverage or a breach of contract. Order at 4. Additionally, because the restaurants could open for takeout, delivery, and limited outdoor dining, the court held civil authority coverage did not apply because the plaintiffs were afforded access to their properties. *Id.* at 8.

On April 20, 2021, the district court for the Eastern District of Texas granted Continental Casualty Company's motion to dismiss a COVID-19 business interruption claim filed by the owner and operator of a spice and tea room. The court concluded that the plaintiff could not plausibly state a claim because the policy's terms "require demonstrable harm to property to trigger coverage," Order at 6, and the plaintiff did not allege any "distinct, structural alteration" to its property. *Id.* at 7. The court further rejected the plaintiff's argument that a loss of access to property was sufficient to trigger coverage, because "loss of access, or even restricted access, is not tangible alteration of structures that 'direct physical loss' contemplates." *Id.*

New Business Interruption Suits Against Insurers:

A restaurant sued Cincinnati Insurance Company in Connecticut state court (District of Hartford) for declaratory relief, breach of contract, breach of the duty of good faith and fair dealing, and violation of the Connecticut Unfair Trade Practices Act. The "all risk" policy allegedly provides business interruption, extra expense, and extended business income coverage. Complaint at ¶¶ 14-16. The Complaint alleges that the "presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property." *Id.* at ¶ 34.

The owner of a fitness center, spa and lounge sued Cincinnati Insurance Company in federal court (N.D. Ill.) for breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶

22-26. The Complaint alleges that the “presence of COVID-19 in the air and on surfaces has caused direct physical loss of or damage to property and made Plaintiffs’ business uninhabitable, unsafe and unfit for their intended uses.” *Id.* at ¶ 37.

A company that provides video and audio production services for live sports, entertainment, and corporate events sued Vigilant Insurance Company in Pennsylvania state court (Allegheny County) for breach of contract. Plaintiff’s policy allegedly provides, among other things, building and personal property, mobile equipment, business income, extra expense, ingress/egress, civil authority, and dependent business premises coverage. Complaint at ¶¶ 17-26. The complaint alleges plaintiff suffered covered physical loss or damage to its covered property “[d]ue to the presence of the virus [on its property], the governmental orders proclaiming state-wide disaster areas and requiring non-essential businesses to shut down, and the resulting cancellation of the live sporting events, entertainment, music and corporate events [plaintiff] would otherwise have produced.” *Id.* at ¶ 76.

The operator of a Las Vegas casino sued Affiliated FM Insurance Company in Rhode Island state court (Providence County) for declaratory relief, breach of the covenant of good faith and fair dealing, and insurer bad faith refusal to pay a claim. Plaintiff’s “all risk” policy allegedly provided, among other things, business interruption, extra expense, attraction property, civil authority, expediting costs, communicable disease, and ingress/egress coverage. Complaint at ¶ 13. Plaintiff’s policy also allegedly contains a provision covering the “cleanup, removal and disposal of [the] presence of communicable disease.” Complaint at ¶ 52. The complaint alleges plaintiff suffered covered physical loss or damage under the policy because “[t]he COVID-19 virus is a tangible, physical object” that deprived nearby nursing homes of their functionality and because state civil authority orders required plaintiff to cease operations at most of its insured property. *Id.* at ¶ 50, 53-54, 85. The complaint also alleges AFM acted in bad faith by “intentionally conduct[ing] a pretextual investigation” and “fail[ing] to request or consider relevant facts relating to [p]laintiff’s entire claim under the policy language.” *Id.* at ¶ 109.

The owner and operator of a carpet manufacturing, importing, and wholesale business sued Affiliated FM Insurance Company in Rhode Island state court (Providence County) for declaratory relief, breach of contract, and bad faith. Plaintiff’s “all-risk” policy allegedly provides, among other things, business interruption, business personal property, business income, extra expense, and civil authority coverage. Complaint at ¶¶ 19, 22-23, 25. The complaint alleges plaintiff suffered a covered physical loss due to “the presence of, or inherent risk of the existence of, the COVID-19 [sic] molecule within or immediately around the Covered Properties,” as well as the state civil authority orders that allegedly prohibited access to its covered property. *Id.* at ¶¶ 37, 46-47. The complaint also alleges AFM acted in bad faith by allegedly misrepresenting language in plaintiff’s policy and ignoring information plaintiff supplied in support of its claim. *Id.* at ¶¶ 119-22.

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