CLIENT ALERT

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

Apr.06.2021

Courts Dismiss COVID-19 Business Interruption Claims

On March 31, 2021, the district court for the District of New Jersey granted Selective Insurance Group's motion to dismiss a daycare center's COVID-19 related business interruption class action. Finding "no reason to deviate from th[e] growing line of recent opinions," the court held the virus exclusion in plaintiff's policy "clearly and unambiguously bars coverage for [p]laintiff's claim." Order at 7. Because the exclusion provided that Selective "w[ould] not pay for loss or damage caused by or resulting from any virus," the court stated that it could not "ignore the plain language of the [p]olicy, nor rewrite the contract for the benefit of either party." *Id.* at 7-8 (internal quotation marks omitted).

On March 30, 2021, the district court for the Eastern District of Pennsylvania granted Cincinnati Specialty Underwriters Insurance Company's motion to dismiss a sports arena's COVID-19 business interruption claims. The court held that the virus and government closure orders did not cause "direct physical loss" to the arena property. Order at 11. Because the arena only pled financial losses rather than anything physical, the court found it would stretch the provision "beyond its plain meaning." *Id.* at 14.

On March 29, 2021, the district court for the District of New Jersey granted Merchant Mutual Insurance Company's motion to dismiss an ice cream restaurant's pandemic-related business interruption suit. Finding the insurer had "a complete defense to coverage" with the virus exclusion, the court held the policy foreclosed its claim. Order at 9. Because the coronavirus constitutes a virus, the government measures taken to contain it also fall within the exclusion. *Id.* at 10.

On March 26, 2021, the district court for the District of New Jersey granted Federal Insurance Company's motion for judgment on the pleadings, rejecting a minor league baseball team's argument that the presence of the coronavirus within its ballpark rendered the property unusable. The court held that even if it was true the coronavirus was on its property, "the presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage." Order at 3. Without a showing that the team's property was physically damaged, the court found the plaintiff failed to meet its burden of showing the claim is covered by the unambiguous terms of the policy. *Id.*

On March 26, 2021, the district court for the Central District of California granted Hiscox Insurance Company's motion for judgment on the pleadings, rejecting a flower arrangement and event planning business's COVID-19 related claims. The court noted that under California law, "only a distinct, demonstrable physical alteration of property will amount to physical loss or damage that may trigger coverage, and thus alleging detrimental economic impact alone is insufficient for recovery." Order at 5 (internal quotation marks omitted). Because the policy at issue "condition[ed] recovery on physical loss of or damage to the insured premises" and plaintiff only alleged temporary "loss of use of [its] property" due to state civil authority orders, the plaintiff failed to allege a covered loss. *Id*. 6. Even if the plaintiff could have alleged an otherwise covered loss, however, the court found the policy's virus exclusion "plainly and clearly preclude[d] coverage." *Id*. 7.

On March 23, 2021, the district court for the Southern District of Illinois granted Badger Mutual Insurance Company's motion to dismiss a restaurant operator's COVID-19 related business interruption claims. Noting its agreement "with many courts within Illinois and elsewhere," the court "found that the Covid-19 virus does not cause 'direct physical loss or damage to' covered property under a business income loss policy." Order at 5. Because the plaintiff's claim was not covered under the policy, the court also rejected the plaintiff's claims under the Illinois Insurance Code and Illinois Consumer Fraud and Deceptive Practices Act. *Id.* at 6.

On March 26, 2021, the district court for the Eastern District of Wisconsin granted West Bend Mutual Insurance Company's motion to dismiss a COVID-19 business interruption class action claim filed by the owners and operators of childcare and enrichment centers and denied as moot its motion to strike class allegations. The court concluded that, while the plaintiffs are not necessarily required to show that COVID-19 altered the structure of property under the policy's direct physical loss of or damage provision, "they must allege that COVID-19 caused a direct material, tangible, corporeal, or perceptible, loss of or damage to their covered premises" and failed to sufficiently plead facts to support such allegations. Order at 14. The court further found that coverage was unavailable under the policy's communicable disease coverage because the plaintiffs failed to allege "that the government shut down their respective facilities *due to an outbreak* of COVID-19 at the same." *Id*. at 19 (emphasis in original).

On March 25, 2021, the district court for the District of New Jersey granted Fitchburg Mutual Insurance Company's and The Norfolk & Dedham Group's motion to dismiss a COVID-19 business interruption claim filed by the owner and operator of a salon. The court concluded that the policy's virus exclusion precludes any recovery under the policy and rejected the plaintiff's contention that the exclusion does not apply to expenses incurred due to the suspension of its business because the extra expense provision refers to recovery for expenses as distinct from loss of income. Order at 8-10. The court further rejected the plaintiff's regulatory estoppel claim, finding that the plaintiff failed to allege that the insurer made a misrepresentation to New Jersey insurance regulators in applying for approval of the virus exclusion. *Id*. at 13.

On March 22, 2021, the district court for the Southern District of Illinois granted Badger Mutual Insurance Company's motion to dismiss a restaurant and bar's COVID-19 business interruption class action complaint. The court concluded that "reductions in usefulness or in profits due to the COVID-19 pandemic and any related closure orders do not constitute 'direct physical loss of or damage to' insured properties." Order at 9. Because it found that no initial coverage grant had been triggered, the court did not address the applicability of the policy's civil authority or virus or bacteria exclusions. *Id*.

New Business Interruption Class Actions:

A hair salon and personal care business filed a class action against Ace Property and Casualty Insurance Company in federal court (W.D. Wash) for declaratory judgment and breach of contract. Plaintiff's all-risk policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 13, 15. The complaint alleges plaintiff suffered covered "physical damage or direct physical loss" of its property for two reasons. First, the complaint argues plaintiffs suffered a covered loss because "[t]he presence of any COVID-19 droplets or particles on physical surfaces" and the presence of people carrying COVID-19 on plaintiff's premises rendered its covered property "unsafe and unusable." *Id.* at ¶¶ 32-37. Second the complaint argues plaintiff suffered a covered loss because state civil authority orders "rendered [p]laintiff's property unusable for its intended and insured purpose." *Id.* at ¶ 62. Plaintiff proposes 8 different nationwide classes based on the type of provision at issue and the type of relief sought, each with a Washington statewide subclass. *Id.* at ¶ 86.

The owner and operator of a dental practice filed a class action complaint against Aspen American Insurance Company in federal court (D. Conn.) for declaratory relief, breach of contract, and breach of the implied duty of good faith and fair dealing. The "all risk" policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 33-37. The Complaint alleges that the phrase "direct physical loss of or damage to" in the policy is ambiguous as applied to the coronavirus and, therefore, must be construed against the drafter and in favor of coverage. *Id*. at ¶ 43. The proposed class is defined as "[a]ll persons and entities that (a) have 'Business Income Coverage' under an Aspen commercial property policy written on form ASPDTPR001 (01/17) or any other Aspen policy with the same operative language, (b) made a claim under that policy for COVID-19-related property losses, and (c) were denied coverage for that claim." *Id*. at ¶ 52.

New Business Interruption Suits Against Insurers:

The operator of hotels and lodging accommodations sued Zurich American Insurance Company in Connecticut state court (District of Danbury) for breach of contract and breach of the covenant of good faith and fair dealing. The "all risk" policy allegedly provides business income, extra expense, civil authority, contingent time element, ingress/egress, and preservation of property coverage. Complaint at ¶¶ 14-26. The Complaint alleges that "[l]oss of use of property due to the presence of SARS-CoV-2 or the imminent risk of the presence of SARS-CoV-2 constitutes direct physical loss of or damage to property for purposes of first-party property insurance." *Id*. at ¶ 132. The insurer allegedly "did not engage in any meaningful investigation of the Covered Properties related to the claimed losses" and has neither denied nor agreed to coverage eleven months following notice of loss. *Id*. at ¶ 154.

The operators of a vacation rental home sued Olympus Insurance Company in Florida state court (Manatee County) for declaratory relief. The policy allegedly provides lost rental income, remediation costs, and civil authority coverage. Complaint at ¶ 7. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a vacation home rental unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policy." *Id*. at ¶ 8.

A vacation home rental corporation sued Various Underwriters at Lloyd's London in Florida state court (Manatee County) for declaratory relief. The policy allegedly provides lost rental income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a vacation home rental unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policy." *Id*. at ¶ 7.

A vacation home rental corporation sued Fednat Insurance Company in Florida state court (Manatee County) for declaratory relief. The policy allegedly provides lost rental income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a vacation home rental unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policy." *Id*. at ¶ 7.

The operator of a restaurant sued Scottsdale Insurance Company in Florida state court (Hillsborough County) for declaratory relief. The policy allegedly provides business income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a restaurant unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personalty, as those terms are used in the Policy." *Id*. at ¶ 7.

The operator of a restaurant sued Colony Insurance Company in Florida state court (Hillsborough County) for declaratory relief. The policy allegedly provides lost income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a restaurant unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policy." *Id*. at ¶ 7.

A vacation home rental corporation sued Mt. Hawley Insurance Company in Florida state court (Manatee County) for declaratory relief. The policies allegedly provide lost rental income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a vacation home rental unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policies." *Id*. at ¶ 7.

A vacation home rental corporation sued Fednat Insurance Company in Florida state court (Manatee County) for declaratory relief. The policy allegedly provides lost rental income, remediation costs, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the "actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured's use as a vacation home rental unreasonably dangerous under the prevailing scientific community's knowledge rendering a complete or partial loss of the use of the insured property and causes 'direct physical loss or damage to' the insured premises and personality, as those terms are used in the Policy." *Id*. at ¶ 7.

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