

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now, Week of August 30, 2021

August 30, 2021

#### Courts Dismiss COVID-19 Business Interruption Claims

On August 24, 2021, the district court for the Eastern District of New York granted motions to dismiss filed by Nationwide Mutual Insurance Company and the Ohio Casualty Insurance Company and dismissed with prejudice a pair of COVID-19-related business income cases brought by a restaurant and clothing store. According to the court, “[d]espite the tragic economic impact suffered by these plaintiffs (like so many small businesses), the policy language and the applicable law simply do not provide for coverage.” Order at 2. The court found that neither business pled a direct physical loss of or damage to property, as required under their policies, and that even if they had, the business disruptions were caused by the virus, which was excluded under the policy. *Id.* at 3. The court held that “it is impossible to reasonably interpret” the virus exclusion “in any other way” than to bar coverage for these claims. *Id.* at 3 n.1

On June 28, 2021, the district court for the Eastern District of Michigan granted Conifer Holdings, Inc.’s motion to dismiss a restaurant’s putative class action for COVID-19-related business interruption losses. The court relied on the virus exclusion, which it found unambiguous. Order at 2. While the plaintiff argued the losses were caused by the stay-at-home orders, the court found that the orders were only issued to limit the spread of the coronavirus, and that without the virus, the orders would not have been issued. *Id.* The virus was “an essential link” in the causation chain—“the direct and sole cause” for the business closing its doors. *Id.* Lastly, because Michigan does not recognize a claim for breach of the implied covenant of good faith and fair dealing, the count was dismissed. *Id.* at 3.

On August 26, 2021, the district court for the District of New Jersey granted Employers Insurance Company of Wausau’s motion to dismiss a COVID-19 business interruption claim filed by the operators of airport concessions. The court rejected the plaintiffs’ contention that the policy’s contamination exclusion refers only to viruses and pollutants, and not pandemic diseases caused by viruses, and that it was intended to apply only to localized release or spread of a virus as part of an industrial pollution claim, finding the alleged “distinction between the coronavirus disease (‘COVID-19’) and the virus it is caused by (‘SARS-CoV-2’) is incoherent in the context of the Contamination Exclusion, which applies to viruses and any ‘disease causing . . . agent.’” Order at 7. Rather, the court concluded “the Contamination Exclusion is unambiguous and applies to insurance claims under the Policy for losses due to the COVID-19 pandemic.” *Id.* at 8. The court further found that, even if the contamination exclusion was inapplicable, the plaintiffs still failed to state a claim for relief because “[n]either the government closure orders nor the presence of COVID-19 itself constitute ‘direct physical loss or damage’ or an imminent threat thereof within the meaning of the Policy.” *Id.* at 11.

#### New Business Interruption Suits Against Insurers:

The Trustees of Purdue University sued American Home Assurance Company in Indiana state court (Allen County) for declaratory relief. The “all risk” policy allegedly provides time element, attraction property, contingent time element, extra expense, civil

authority, logistics extra cost, research and development, fundraising expense, and relocation expenses coverage. Complaint at ¶ 46. The Complaint alleges that the “presence of SARS-CoV-2 has physically altered the indoor air and surfaces in Purdue’s facilities (e.g. classrooms, dormitories, offices, stadiums, auditoriums, gyms, and other buildings), damaging them and rendering them unsafe, uninhabitable, and/or unsuitable for their intended purpose,” which has “resulted in an interruption of Purdue’s operations.” *Id.* at ¶ 29.

A supplier and manufacturer of elevators, escalators, moving walkways, and related equipment sued Zurich American Insurance Company in Illinois state court (Cook County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides time element, extra expense, leasehold interest, civil authority, contingent time element, protection and preservation of property, and financial interest of the first named insured coverage. Complaint at ¶¶ 24-42. The Complaint alleges that the “actual, threatened and/or suspected presence in North America, South America, Europe, the Middle East and Asia Pacific of SARS-CoV-2 and/or COVID-19 and/or the series of related orders issued by national and/or state and local civil authorities and guidance and advices from public health authorities in these regions, which have caused and continue to cause physical loss of or damage to [the plaintiff’s] property and third-party property, are Covered Causes of Loss under the Global All-Risk Policy.” *Id.* at 88.

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