

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of December 13, 2021

December 15, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On December 9, 2021, the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of several cases related to COVID-19-related business interruption losses, ruling in favor of Aspen Specialty Insurance Company, Cincinnati Insurance Company, West Bend Mutual Insurance Company, and Zurich American Insurance Company. Joining the Sixth, Eighth, Ninth, and Eleventh Circuits, the court held that governmental restrictions on the “intended use” of the insured properties “unaccompanied by any physical alteration” does not constitute “direct physical loss” and does not trigger coverage. Sandy Point Order at 13–14. Each policyholder “insured its property, not its ideal use of that property.” *Id.* at 14–15. Additionally, the plaintiffs were unable to show the presence of the coronavirus caused any physical alteration, with the court noting it “need not wade into a debate about engineering or materials science” to conclude that there was no coverage. The policies made clear that “‘direct physical loss’ requires a physical alteration to property.” *Id.* at 10. “While the impact of the virus on the world over the last year and a half can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.” *Id.* at 16. In the group of cases issued on December 9, the Seventh Circuit also applied various exclusions, including the virus exclusion, microorganism exclusion, and law and ordinance exclusion. The cases are *Sandy Point Dental, P.C. v Cincinnati Insurance Co.*, *Bradley Hotel Corp. v. Aspen Specialty Insurance Company*, *Crescent Plaza Hotel Owner, L.P. v. Zurich American Insurance Co.*, and *Mashallah, Inc. v. West Bend Mutual Insurance Co.*

On December 7, 2021, the Court of Appeals of Ohio, Fifth Appellate District affirmed the Court of Common Pleas (Delaware County), which granted motion for judgment on the pleadings. The court agreed with the U.S. Court of Appeals for the Sixth Circuit’s decision in *Santo’s Italian Café LLC v. Acuity Insurance Co.*, 15 F.4th 398 (6th Cir. 2021). and found “the plain and ordinary meaning of the phrase ‘direct physical loss of or damage to’ unambiguously requires a tangible and structural damage to the property.” Order at 18. Thus, the deprivation of particular uses of the property did not constitute “direct physical loss of or damage to” the insured property. *Id.* Because the governmental orders were issued to prevent the spread of the coronavirus rather than “in response to dangerous structural, material, or tangible conditions,” civil authority coverage was also not implicated. *Id.* at 21–23. The case is *Sanzo Enterprises v. Erie Insurance Exchange*.

On December 9, 2021, the district court for the Northern District of Georgia granted Westchester Surplus Lines Insurance Company’s motion for judgment on the pleadings in a COVID-19 business interruption claim filed by the owners and operators of a nightclub, sports bar, restaurant, and bar and grill. The court concluded that a “direct physical loss of or damage to property” occurs “only when there is some actual, tangible alteration to the property itself,” under both Alabama and Massachusetts law. Order at 10. The alleged presence of COVID-19 “cannot be regarded as a physical change to the Plaintiffs’ respective premises, as it has not physically altered their properties.” *Id.* at 11. The case is *The K’s Inc., et al. v. Westchester Surplus Lines Ins. Co.*

On December 8, 2021 the Supreme Court of New York (Erie County) granted American Guarantee and Liability Insurance Company's motion to dismiss the Buffalo Bills' coverage suit related to COVID-19-related business interruption losses. In a short one-page order, the complaint was dismissed with prejudice. Order at 1. The case is *Buffalo Bills, LLC v. American Guarantee and Liability Insurance Co.*

On December 6, 2021, the district court for the Southern District of New York granted Travelers Casualty Insurance Company of America's motion to dismiss a live event sound and stage company owner's COVID-19 business interruption claim. The court found the policy's virus exclusion unambiguously applied. Order at 9. The court also rejected the plaintiff's argument that regulatory estoppel prevented Travelers from taking the position that the virus exclusion applied, noting that "[c]ourts in this Circuit interpreting New York law have repeatedly rejected the doctrine in the context of clear policy language." *Id.* at 9 n.7. The case is *Servedio v. Travelers Cas. Ins. Co. of Am.*

On December 3, 2021, the district court for the Northern District of California granted Sentinel Insurance Company's motion to dismiss a modeling school's COVID-19 business interruption complaint. The court found the insurer's alleged failure to investigate the school's claim cannot form the basis of an unfair competition law when there is no coverage under the policy: "[a]t the risk of stating the obvious, the need to investigate a claim for COVID-19- related business interruption losses is perforce premised on the plausible existence of coverage under the Policies." Order at 11–12. Finding not a single allegation of a specific marketing or sales practice the insurer engaged in, the court said that even if plaintiffs' had made these allegations, the claim is defective because it fail to allege facts that "coverage actually is 'illusory.'" *Id.* at 15. Finally, the insureds provided no support for how the pollution exclusion renders the coverage fraudulent or illusory. *Id.* at 18. The case is *Barbizon School of San Francisco, Inc. v. Sentinel Insurance Company.*

New Business Interruption Suits Against Insurers:

A church sued Brotherhood Mutual Insurance Company in California state court (Orange County) for breach of contract and bad faith. The policy allegedly provides loss of earnings and donation, and civil authority coverage. Complaint at ¶¶ 5-6. The Complaint alleges that the plaintiff suffered a covered loss of earnings and donations as a result of the State of California's civil authority order prohibiting the plaintiff's staff and event participants from accessing the premises, which resulted in the complete interruption of the plaintiff's operations. *Id.* at ¶¶ 6, 8. The case is *Mount of Olives Lutheran Church v. Brotherhood Mut. Ins. Co., et al.*

A food industry trade association sued certain underwriters at Lloyd's, London in Texas state court (Harris County) for declaratory judgment. The plaintiff's "all-risk" policy allegedly provides event cancellation, enforced reduced attendance, and, in certain circumstances, communicable disease coverage. Complaint at ¶¶ 13-17. The Complaint alleges the plaintiff suffered a covered loss because it had "no choice but to cancel" its 2020 trade show due to COVID-19's impact on "business and travel activities." *Id.* at ¶ 21. The case is *Int'l Dairy Deli Bakery Ass'n v. Certain Underwriters at Lloyd's.*

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