

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of February 15)

February 17, 2021

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

On February 8, 2021, the district court for the Central District of California granted Continental Casualty Company's motion to dismiss with prejudice a dental appliance manufacturer's COVID-19 business interruption claims. First, the court held that the plaintiff did not state a claim for coverage under the policy's civil authority endorsement because the civil authority orders cited in the complaint did not prohibit access to the plaintiff's place of business or cause any direct physical loss of or damage to its property. Order at 8-10. Second, the court held that the plaintiff did not state a claim for coverage under the policy's business income and extra expense conditions for the same reasons. *Id.* at 10. Lastly, the court dismissed the plaintiff's unfair competition and punitive damages claims, because the plaintiff had not otherwise pled a violation of a statute or common law. *Id.* at 11.

On February 10, 2021, the federal district court for the District of New Jersey granted Zurich American Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by automobile dealerships. The court concluded that the policy's unambiguous virus exclusion precluded coverage and rejected the plaintiffs' contention that the exclusion did not apply because New Jersey's COVID-19 closure orders were the efficient proximate cause of their alleged losses, rather than COVID-19. Order at 11-14.

On February 10, 2021, the Superior Court of California, County of San Francisco, sustained Sentinel Insurance Company's demurrer to a restaurant's COVID-19 business interruption claim. The court concluded that the policy's plain and unambiguous virus exclusion barred coverage for losses caused directly or indirectly by a virus, rejecting the contention that the exclusion had a territorial limitation whereby it would only apply to losses caused by a virus on the insureds' premises. Order at 3.

On February 10, 2021, the district court for the Eastern District of Michigan granted Hanover Insurance Group, Inc.'s and Citizens Insurance Company of America's motion to dismiss a putative class action complaint for COVID-19 business interruption losses filed by a dental practice. First, the court found that because Hanover was not a party to the policy and therefore owed no coverage obligations to the plaintiff, the plaintiff lacked standing to pursue a claim against Hanover. Order at 9-10. Turning to the claims against Citizen, the court held that the virus exclusion precluded coverage for the claim. *Id.* at 11, 13. The plaintiff had pled that Governor Gretchen Whitmer's executive orders were the "sole cause" of its losses rather than the coronavirus itself. *Id.* at 4. According to the court, even if the virus was not the sole or immediate cause, it "played a concurrent role," barring coverage under the policy. *Id.* at 18. The court also rejected the plaintiff's argument that the virus exclusion was limited to instances in which the property was physically contaminated, finding nothing in the text to support the contention. *Id.* at 20-21.

On February 10, 2021, the New York Supreme Court (Nassau County) granted Great American Insurance Group's and Great American Insurance Company of New York's motions to dismiss a COVID-19 business disruption complaint. The court agreed "with the majority view that loss of use of the Premises due to COVID-19 related government orders does not constitute 'direct physical loss of or damage to the property' that would trigger Business Income coverage." Order at 14. The court also held that

the claim did not trigger civil authority coverage because the plaintiff was not prohibited from accessing its premises from direct physical loss of or damage to a neighboring property. *Id.*

On February 9, 2021, the district court for the Northern District of Texas granted Cincinnati Insurance Company's motion to dismiss a restaurant group's COVID-19 business interruption complaint. Finding the plaintiff failed to allege "the presence of COVID-19 caused any distinct, demonstrable physical alteration" to the property, the court held that the claim did not trigger coverage under the policy. Order at 2.

On February 8, 2021, the federal district court for the Northern District of California granted Sentinel Insurance Company's motion to dismiss a class action business interruption claim filed by the operator of a restaurant. The court concluded that the plaintiff failed to allege physical loss or damage to its property resulting from COVID-19 closure orders because direct physical loss in California requires a "distinct, demonstrable, physical alteration of the property" or a "physical change in the condition of the property." Order at 7. The court rejected the plaintiff's argument that it could present extrinsic evidence that COVID-19 causes physical damage to property, as it failed to allege that "physical damage is what caused it to suspend operations or incur extra expense" and the allegations "indicate that it would have taken the same actions due to the Closure Orders regardless of whether COVID-19 particles were present on its property." *Id.* at 10. The court further found that the policy's virus exclusion unambiguously applied, although it did not rely on the exclusion to conclude that recovery was barred. *Id.* at 15.

On February 8, 2021, the district court for the District of New Jersey granted Twin City Fire Insurance Company's motion to dismiss a class action business interruption complaint filed by an ophthalmologic practice with prejudice. The court held that the policy's virus exclusion, which "bars coverage for losses... 'caused directly or indirectly' by the "[p]resence, growth, proliferation, spread or any activity of . . . virus'," barred recovery. Order at 5. Under the circumstances, the court held that the class's claims fail too. *Id.* at 7.

### **New Business Interruption Suits Against Insurers:**

The owner of several restaurants sued The American Insurance Company and Greenwich Insurance Company in Arizona state court (Maricopa County) for declaratory relief and breach of contract. The "all risk" policies allegedly provide business income and extra expense coverage. Complaint at ¶¶ 37, 54. The Complaint alleges that the "undefined phrase 'direct physical loss' is reasonably construed to mean the direct loss of the ability to physically access or use property" and that "[l]osing the ability to access or use one's property is a loss of physical, material rights and advantages, substantial and important." *Id.* at ¶ 117.

A hotel sued Sequoia Insurance Company in California state court (Santa Clara County) for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. The "all risk" policy allegedly provides business income, extra expense, and dependent income coverage. Complaint at ¶ 54. The Complaint alleges that COVID-19 closure orders caused a "direct physical loss of the insured real and personal property" and that the insurer has failed to issue a coverage determination eight months after notice of loss was submitted, which has amounted to "a constructive denial of coverage." *Id.* at ¶¶ 59, 64, 65.

A manufacturing company sued Factory Mutual Insurance Company in federal court (D. Conn.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides time element, civil authority, ingress/egress and communicable disease response coverage. Complaint at ¶¶ 12, 36-38, 43, 56. The Complaint alleges that "'communicable disease' at a location constitutes a physical loss or damage to property under the Policy, as all coverage parts under the Policy provide coverage for losses and/or costs that flow from 'physical loss or damage to property.'" *Id.* at ¶ 36. The Complaint further alleges that the

policy's contamination exclusion is inapplicable because it excludes "only virus contamination resulting from acts of pollution (such as inadvertent or deliberate releases of waste streams from a lab, water-treatment plants, or other facilities)" and not "any of the losses that [the plaintiff] incurred as a consequence of the COVID-19 pandemic." *Id.* at ¶ 99.

Owners of rental properties in Las Vegas sued Federal Insurance Company in Nevada state court (Clark County) for breach of contract in connection with their COVID-19 business interruption claim. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint ¶¶ 35–36, 38. Because of the COVID-19 outbreak and the resulting government shutdown orders, the plaintiffs allege they suffered physical loss and damage, which subsequently led to a loss of rental income. *Id.* ¶ 9, 20–21. They assert that the loss in rental income caused them to suffer a significant business interruption, and even so, the defendant denied their insurance claim. *Id.* ¶¶ 10–11, 43, 45.

New York's largest healthcare provider sued Lexington Insurance Company and Interstate Fire & Casualty Company for breach of contract, declaratory relief, and breach of the implied covenant of good faith and fair dealing. The plaintiff's "all risk" policy alleges provides coverage for, among other things, business income, civil authority, communicable disease, and extra expense. Complaint ¶ 10–11. The plaintiff alleges that it has suffered significant business interruption losses because of the government orders to suspend non-essential operations and elective procedures. *Id.* ¶ 8. Additionally, it claims that it has experienced direct physical loss of and damage because of the presence of COVID-19 on its premises. *Id.*

#### **Declaratory Judgment Actions By Insurers:**

Mt. Hawley Insurance Company sued the owner of a bar and restaurant in Nashville in Tennessee state court (Davidson County), seeking a declaration that it was not obligated to pay the defendant for claimed business interruption damages as a result of the COVID-19 pandemic. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 14. The complaint alleges that there is no civil authority coverage because "the actual impairment of Defendant's operations did not result from an order of civil authority that specifically prohibited access to the insured premises." *Id.* at ¶ 16. The complaint also alleges that there is no coverage pursuant to the policy's exclusions, including a pollution exclusion. *Id.* at ¶¶ 18-20.

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