

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of January 4)

January 5, 2021

Supreme Court of California Denies Petition to Transfer

On December 23, 2020, the Supreme Court of California, en banc, denied the plaintiff's petition to transfer to the Supreme Court a COVID-19 business interruption appeal filed against California Mutual Insurance Company, now pending in the California Court of Appeals.

Courts Dismiss COVID-19 Business Interruption Claims

On December 30, 2020 the federal district court for the Southern District of Alabama granted Mt. Hawley Insurance Company's motion to dismiss a drama studio's COVID-19 business interruption complaint. After determining that certification to the Alabama Supreme Court was unnecessary, the court held that the plaintiff's claims must be dismissed because they failed to allege a direct physical loss of or damage to its covered properties. Order at 8-9. The court found that (a) "a reasonable insured would not understand a 'direct physical loss of property' to have occurred due to the [s]tate's" closure orders, and (b) a reasonable insured would not understand the closure order to require a "repair" under the policy's "period of restoration" provision. *Id.* at 10-13.

On December 30, 2020, the federal district court for the Central District of California granted Travelers Casualty Insurance Company of America's motion to dismiss a surgery practice's COVID-19 business interruption complaint. The court held that the plaintiff's claim failed because it did not plead facts demonstrating direct physical loss for damage to its covered properties. Order at 6-8. The court also denied the plaintiff's request for leave to amend, because "the case turns on the legal interpretation of the insurance contract at issue." *Id.* at 9.

On December 28, 2020, the federal district court for the Northern District of California granted State Farm General Insurance Company's motion to dismiss a dental practice's COVID-19 business interruption complaint. Finding the policy language "plain and unambiguous," the court held that the virus exclusion bars coverage for "any loss caused by virus that can induce physical distress, illness, or disease, such as COVID-19." Order at 5. The court dismissed the plaintiff's attempt to distinguish between the virus itself and the droplets that contain the virus, finding "no meaningful difference." *Id.* at 7-8. Without allegations of "distinct, demonstrable physical alteration" of the property or allegations of permanent dispossession, the plaintiff's claims failed to allege a direct physical loss to the property. *Id.*

On December 28, 2020, the federal district court for the Southern District of Florida granted Certain Underwriters at Lloyd's, London's motion to dismiss a Miami restaurant's COVID-19 business interruption claims. The plaintiff's failure to articulate an actual or tangible physical loss led the court to hold that the plaintiff failed to meet its burden of showing a direct physical loss or damage. Order at 5-6. The court held that the loss did not trigger coverage under the policy because under Florida law and the plain language of the policy, a loss of functionality or intended use does not constitute a physical loss or damage. *Id.* at 6-7.

On December 30, 2020, the federal district court for the Southern District of Florida granted a motion to dismiss a Miami Beach salon’s business interruption claim under an all-risk policy. Relying on Eleventh Circuit precedent, the court held that “the damage or loss must be actual.” Order at 7. While the plaintiff alleged its losses included business operation suspension, loss of access, loss of business income, extra expenses, and diminished value and use of the salon, it failed “to allege the Policy’s threshold requirement for coverage: direct physical loss or damage to its property or any nearby property.” *Id.* The court found no basis in the policy or law to support the plaintiff’s assertion that the policy covered the salon’s losses. *Id.*

On December 23, 2020, the Superior Court of California, County of Riverside, sustained Continental Casualty Company’s demurrer to a salon’s COVID-19 business interruption claim. The court concluded that, under California law, losses from an inability to use property do not amount to direct physical loss of or damage to property and that physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” Order at 3. The court also rejected the plaintiff’s contention that it was entitled to civil authority coverage due to the prevention of access to its property by closure orders, because the closure orders arose out of an effort to slow the spread of the coronavirus, not physical loss or damage to property. *Id.* at 4.

New Business Interruption Suits Against Insurers:

The owners and managers of shopping centers sued Certain Underwriters at Lloyd’s London in California state court (Los Angeles County) for breach of contract and breach of the implied covenant of good faith and fair dealing. The “all risk” policy allegedly provides business interruption, extra expense, civil authority, ingress/egress, and contagious disease coverage. Complaint at ¶¶ 36, 41, 44, 45, 46. The Complaint alleges that the plaintiffs suffered direct physical loss of or damage to insured property because of the presence of coronavirus and “the resulting illnesses, contamination, and property damage caused by the virus.” *Id.* at ¶ 97.

A restaurant sued Certain Underwriters at Lloyd’s London in Florida state court (Palm Beach County) for breach of contract. The policy allegedly provides business income coverage. Complaint at ¶ 7. The Complaint alleges that the plaintiff sustained business losses as a result of the suspension of its operations due to COVID-19 closure orders and that the insurer “chose not to pay Plaintiff for the Loss.” *Id.* at ¶¶ 9-14.

The operator of delicatessens sued Erie Indemnity Company and Erie Insurance Exchange in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, contingent business interruption, business personal property, and civil authority coverage. Complaint at ¶¶ 14, 21. The Complaint alleges that COVID-19 is a dangerous substance and that its presence at each of the plaintiff’s locations “caused ‘physical loss or damage.’” *Id.* at ¶ 25.

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