

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of July 12)

July 13, 2021

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

On July 7, 2021, the district court for the Eastern District of Missouri granted Selective Insurance Company of America's motion to dismiss a St. Louis synagogue's COVID-19 business interruption complaint. According to the Court, the Eighth Circuit Court of Appeals decision in *Oral Surgeons PC v. Cincinnati Insurance Company* required more than a mere loss of use, which the synagogue failed to plead. Order at 4-6.

On July 7, 2021, the district court for the Western District of New York granted Hartford Fire Insurance Company's motion to dismiss a restaurant and a hotel owner and operator's COVID-19 business interruption claim. The court found the complaint failed to state a claim because: (i) the complaint failed to allege sufficient facts regarding physical loss or damage to neighboring property, (ii) "courts interpreting similar Civil Authority coverage provisions have uniformly concluded that the New York executive orders were issued not in response to specific instances of physical loss or damage to property but rather in response to the spread of the coronavirus," and (iii) the complaint failed to allege state civil authority orders "specifically prohibited" the plaintiffs from accessing their premises. Order at 8.

On July 2, 2021, the New Jersey Superior Court (Ocean County) granted eight insurers' motion for summary judgment and dismissed two boardwalk and amusement park businesses' COVID-19 business interruption claims. The court held the plaintiffs failed to allege physical loss. Order at 11-12. Similarly, the court found the plaintiffs' losses were not covered by the policy's civil authority provisions because plaintiffs' loss of use "d[id] not fall under a covered cause of loss." *Id.* at 12. The court also found plaintiffs' claims were barred by the policy's "loss of use," virus, and pollution exclusions. Order at 12-15.

On July 2, 2021, the Circuit Court of Fairfax County, Virginia granted Zurich American Insurance Company and Interstate Fire & Casualty Company's motion for demurrer and dismissed a hotel owner and operator's COVID-19 business interruption claim in a ruling from the bench. The court "simply disagree[d]" with the plaintiff's argument that "a presence of a virus" causes physical loss or damage. Transcript at 86:15-87:2. The court also found the policy's contamination exclusion, which excluded losses caused by "any irritant," and the policy's pollution exclusion both barred plaintiff's claim. *Id.* at 87:3-88:2.

On July 2, 2021, the district court for the Central District of California granted Affiliated FM Insurance Company's motion for judgment on the pleadings in a children's toy manufacturer's COVID-19 business interruption claim. The court concluded that business interruption coverage was unavailable because the insured alleged no facts showing that its property underwent a distinct, demonstrable, physical alteration and rejected its contention that "physical loss" encompasses a "loss of the full range of rights and advantages of using or accessing its business property because of COVID-related government restrictions." Order at 4.

On July 7, 2021, the district court for the Central District of California granted Zurich American Insurance Company's motion for judgment on the pleadings in a restaurant chain's COVID-19 business interruption claim. The court concluded that the insured

failed to plead that it suffered a covered loss, because direct physical loss under the policy requires “a physical change or effect on or near the premises” or “an intervening physical force which ‘made the premises uninhabitable or entirely unusable’” and the complaint alleged no facts about how COVID-19 damaged or effected the insured’s property. Order at 10-11.

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

Nordstrom sued six insurers in Washington state court (King County) for declaratory judgment and breach of contract. Nordstrom’s “all-risk” policies allegedly provide property and business interruption coverage. Complaint at ¶¶ 4.6-4.7. The complaint alleges Nordstrom suffered “direct physical loss” under its policies because COVID-19 related civil authority orders “deprived Nordstrom of the use of its insured property.” *Id.* at ¶ 4.9.

A public university sued Factory Mutual Insurance Company in Washington state court (Whitman County) for breach of contract, common law bad faith, violations of the Washington Consumer Protection Act, and declaratory relief. The plaintiff’s “all risks” policy allegedly provides property damage, time element, interruption by communicable disease, and communicable disease response coverage. Complaint at ¶¶ 10-19. The complaint alleges the plaintiff suffered covered physical losses because the presence of COVID-19 on and around the plaintiff’s property caused plaintiff to suspend operations at insured locations and because state civil authority orders rendered insured properties unusable. *Id.* at ¶¶ 97-99. The complaint also alleges Factory Mutual acted in bad faith and in violation of the Washington Consumer Protection Act by denying plaintiff’s claim without reasonable basis or investigation. *Id.* at ¶¶ 119, 122.

The operator of bars and restaurants sued Zurich American Insurance Company in Illinois state court (Cook County) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income and civil authority coverage. Complaint at ¶ 7. The Complaint alleges that the insured suffered a covered loss because it could not host customers at its properties, *id.* at ¶ 28, and that the policy’s microorganism exclusion is inapplicable “because [it] lost the use of its physical premises due to the Executive Orders of the Governor.” *Id.* at ¶ 30.

A dental clinic sued Twin City Fire Insurance Company in Florida state court (Palm Beach County) for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, and violation of Florida’s Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Act. The “all risk” policy allegedly provides business interruption and civil authority coverage. Complaint at ¶¶ 9, 10. The Complaint alleges that the actual presence of COVID-19 at and around the insured’s location triggers coverage under the policy, *id.* at ¶ 31, and that the “COVID-19 Pandemic has caused physical loss and physical damage to property, including Plaintiff’s property.” *Id.* at ¶ 33. The Complaint further alleges that the insurer failed to conduct an investigation into whether the plaintiff sustained physical loss or damage before denying the claim. *Id.* at ¶ 59.

Puma North America, Inc., a sports lifestyle brand, sued Zurich American Insurance Company in federal court (N.D. Ill.) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption, civil authority, contingent time element, decontamination costs, ingress/egress, and protection and preservation of property coverage. Complaint at ¶ 4. The Complaint alleges that “no amount of diligence can actually prevent coronavirus from causing physical loss or damage to surfaces and air within PUMA’s insured properties,” *id.* at ¶ 36, and that the “presence of the coronavirus causes a physical, tangible alteration to property, and amounts to physical loss and/or damage to property.” *Id.* at ¶ 37.

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