

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of June 20, 2022

June 21, 2022

Court Issues Split Ruling in Favor of Insured on COVID-19 Business Interruption Claim

On June 15, 2022, the Louisiana Fourth Circuit Court of Appeal (in a three-two decision) reversed a Civil District Court judgment in favor of certain underwriters at Lloyd's, London on a restaurant owner and operator's COVID-19 business interruption claim. The court found the appellant's policy ambiguous and construed it in favor of the policyholder. Opinion at 16-18. Two members of the five-judge panel dissented. The principal dissent noted that "[w]hile the majority argues that the language is open to more than one reasonable meaning and is ambiguous, the jurisprudence and the plain language of the Policy do not support that conclusion." Dissent at 1. The case is *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*.

Courts Dismiss COVID-19 Business Interruption Claims

On June 20, 2022, the New Jersey Appellate Division affirmed the dismissal of six cases in which the plaintiffs asserted business income losses due to the COVID-19 shutdown orders. The court held loss of use due to government orders did not constitute "direct physical loss of or damage to property," factual allegations did not satisfy the requirements for civil authority coverage, and virus exclusions in the policies applied. Order at 31, 36–37, 51. The court also found that regulatory estoppel did not apply because the insurers and ISO were not inconsistent on their interpretation of the virus exclusion now and with regulators in 2006. *Id.* at 41–42. The cases are *Mac Property Group LLC v. Selective Fire & Casualty Insurance Co.*, *Precious Treasures LLC v. Markel Insurance Co.*, *FAFB, LLC v. Blackboard Insurance Co.*, *Country Diner of Mullica Hill, Inc. v. Wesco Insurance Co.*, *Pearl Three Two LLC v. Wesco Insurance Co.*, and *Mattdogg, Inc. v. Philadelphia Indemnity Insurance Co.*

On June 15, 2022 the Appellate Court of Illinois, First Judicial District, affirmed the dismissal of a restaurant owner and operator's COVID-19 business interruption claim. The court held there was no coverage for losses caused by state civil authority orders, as the "shutdown orders issued because of COVID-19 did not physically alter the appearance, shape, color, structure, or other material dimension of the covered property." Opinion at 21. The case is *Ark Restaurants Corp. v. Zurich Am. Ins. Co.*

On June 9, 2022 the Appellate Court of Illinois, First Judicial District, affirmed the dismissal of an optometry practice's COVID-19 business interruption claim. Noting that its decision was "[c]onsistent with the majority of cases throughout the country," the court "h[e]ld that the policy language here [concerning direct physical loss] does not provide coverage due to the COVID-19 virus or government-imposed COVID-19 closure orders in the absence of any showing of a physical alteration to property." Opinion at 15. The case is *Ortiz Eye Assocs., P.C. v. Cincinnati Ins., Inc.*

On June 16, 2022, the Seventh Circuit affirmed the dismissal of a mattress company's COVID-19 business interruption claim. The court rejected the insured's contention that the virus exclusion in its policy did not bar coverage because its losses were caused by closure orders, not the coronavirus, finding that "[t]he virus directly caused the government orders which directly caused the alleged losses." Opinion at 11. The case is *AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co.*

On June 14, 2022, the Fourth Circuit affirmed the granting of summary judgment in favor of an insurer on an auto company's declaratory action complaint asserting businesses losses related to the COVID-19 pandemic. The court said there was no reversible error and relied on its earlier decision in *Uncork & Create LLC v. Cincinnati Insurance Co.*, 27 F.4th 926, 933–34 (4th Cir. 2022). The case is *Bel Air Auto Auction, Inc. v. Great Northern Insurance Co.*

On June 13, 2022, the Sixth Circuit affirmed the grant of summary judgment to Zurich American Insurance Company in a COVID-19 business interruption claim filed by restaurant owners and operators. The court found that *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021) controlled and that "a loss of use simply is not the same as a physical loss." Opinion at 8. The case is *Henderson Rd. Rest. Sys., Inc., et al. v. Zurich Am. Ins. Co.*

On June 9, 2022 the Fourth Circuit affirmed the dismissal of a hospitality group's COVID-19 business interruption claims. The court found no reversible error. Order at 3. It relied on its earlier decision in *Uncork & Create LLC v. Cincinnati Insurance Co.*, 27 F.4th 926, 933–34 (4th Cir. 2022). The case is *Summit Hospitality Grp. v. Cincinnati Insurance Co.*

On June 9, 2022, the Fifth Circuit affirmed the dismissal of a law firm's COVID-19 business interruption claim. The court concluded there was no covered cause of loss because "there was no underlying physical loss or damage to insured property," as COVID-19 "does not physically damage property within the plain meaning of 'physical'" and the insured "was not deprived of its property nor was there a tangible alteration to its property, so there was no underlying 'direct loss' to trigger coverage." Opinion at 4-5. The case is *Ferrer & Poirot, GP, et al. v. Cincinnati Ins. Co.*

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