

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of June 21)

June 21, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On June 11, 2021, the district court for the Northern District of Illinois granted Citizens Insurance Company of America's motion to dismiss a dental office's COVID-19-related business income complaint. According to the court, the plaintiff "believes that it purchased an 'all risk' policy that 'cover[s] all damage from all sources unless specifically excluded. But that's not what the policy says." Order at 7. Although the plaintiff believes it bought a policy covering "anything and everything that interrupts its business," the court found it instead purchased a policy that covers only certain business losses. *Id.* at 7-8. "The policy is chockfull of textual clues that there must be loss of or damage to a thing, meaning a tangible object." *Id.* at 8. Adopting the plaintiff's reading "would, in effect, rewrite the policy and wipe away the requirement of something physical happening to property." *Id.* at 10. Economic injury does not equate to physical loss of or damage, and "[l]oss and loss of use do not mean the same thing." *Id.* at 12. Even had the plaintiff alleged direct physical loss, the virus exclusion would apply because "the virus was at least indirectly responsible for [the plaintiff's] inability to legally use its property." *Id.* at 17. There is no separating "the 'pandemic' from the virus that caused it." *Id.* at 18.

On June 14, 2021, the district court for the Southern District of Florida granted Zurich American Insurance Company's motion for judgment on the pleadings of an investment company's COVID-19 business interruption complaint. The court found that the policyholder failed to plead how the coronavirus physically affected its properties, alleging only a "conclusory assertion" that the coronavirus damaged its premises without showing how the pandemic and its related orders caused "a direct physical loss or damage" to property. Order at 9. "[F]ederal district courts in Florida and throughout the Eleventh Circuit have held, uniformly, that losses arising from the 'presence' of COVID-19, and related Public Health Orders in response to the pandemic which limit access to properties, are not a 'direct and physical loss.'" *Id.* at 8. The court held "there is no way to plausibly allege the physical manifestation of economic headwinds caused by the COVID-19 pandemic." *Id.* at 11.

On June 15, 2021, the Connecticut Superior Court granted Hartford Fire Insurance Company's motion for summary judgment in a declaratory action it filed against a shoe company that had submitted a claim for COVID-19 related losses. The court concluded that coverage was unavailable under the two policies at issue, a package policy and a marine policy. With respect to the package policy, the virus exclusion "unambiguously applies to the alleged facts in this case even without the direct or indirect concurrent causation language," as "there can be no doubt that the cause of the defendants' damages is the COVID-19 virus as opposed to any of the other extraneous factors" urged by the policyholder. Order at 9. With respect to the marine policy, the court found that the policy provided no coverage for the policyholder's loss of access to its property or the fact that its inventory became outdated or diminished in value, because "the words 'direct' and 'physical' in an insurance policy limit an insurance company's coverage obligations to physical damage to the property itself." *Id.* at 18.

On June 16, 2021, the district court for the Eastern District of Pennsylvania granted American Fire and Casualty Company's motion for judgment on the pleadings of a tavern's putative class action business interruption complaint due to COVID-19. The

court found that the tavern’s interpretation of “‘direct physical loss of or damage to property’ to include the loss of use of the property is not a reasonable alternative interpretation.” Order at 9-10. The plaintiff never lost access to its property because of physical loss of or damage to neighboring property. *Id.* at 14. Had the tavern adequately pled direct physical loss or damage, the virus exclusion unambiguously barred coverage because the coronavirus either directly or indirectly caused the losses. *Id.* at 17.

On June 17, 2021, the Court of Common Pleas of Philadelphia County, Pennsylvania sustained Philadelphia Indemnity Insurance Company’s preliminary objections to a COVID-19 business interruption claim filed by the owners and operators of minor league baseball teams and dismissed the plaintiffs’ complaint. The court concluded that economic loss is not in itself physical loss under the policies and that, in order for there to be coverage, “there must also have been direct physical loss or damage to real or personal property that caused or resulted in economic loss.” Order at 7-8. Coverage was, therefore, unavailable because neither the governmental closure orders nor the fact that Major League Baseball teams failed to supply players for the 2020 minor league baseball season “caused any physical alteration or impact to the MiLB Insureds’ real or personal property, nor to nearby real or personal property, nor did those events render real or personal property completely uninhabitable or unusable.” *Id.* at 8. The court further concluded that, even if contamination of stadiums by the virus constituted direct physical loss or damage, coverage was “clearly barred by the Policies’ Virus Exclusion.” *Id.* at 9.

New Business Interruption Suits Against Insurers:

A group of health and fitness club landlords and operators sued Hartford Fire Insurance company in Virginia state court (Norfolk County) for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing. The plaintiffs’ property insurance policy allegedly provides business income, extra expense, future earnings, civil authority, and “Fungus, Wet Rot, Dry Rot, Bacteria and Virus” coverage. Complaint at ¶¶ 29-43. The complaint alleges the plaintiffs suffered covered physical losses because “the effects of the COVID-19 pandemic, orders of civil authorities, and a combination of the two” caused plaintiffs to “los[e] access to and the use and functionality of their properties.” *Id.* at ¶ 120. The complaint also alleges Hartford breached the covenant of good faith and fair dealing by denying the plaintiffs’ claims based on “undefined, ambiguous, and contradictory Policy terms” and by failing to conduct an adequate investigation of the plaintiffs’ claims. *Id.* at ¶ 151. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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