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CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of June 6, 2022

June 6, 2022

Courts Dismiss COVID-19 Business Interruption Claims

On June 1, 2022, the Supreme Court of Wisconsin unanimously reversed a lower court's denial of a motion to dismiss several restaurants' COVID-19 business interruption class action complaint. "As the overwhelming majority of the other courts that have addressed the same issue have concluded, the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not 'alter the appearance, shape, color, structure, or other material dimension of the property,'" said the court. Order at 8. It also held that "[f]or a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt, or replaced." *Id.* at 9. It said that COVID-19 is not a "physical peril that (makes merely) entering a structure hazardous." *Id.* at 10. "Indeed, despite the continuing presence of the virus, in-person dining operations were no longer prohibited" after the orders were invalidated. *Id.* at 14. "Thus, assuming the presence of COVID-19 particles constitutes 'contamination,' that contamination did not cause [the policyholder] to suspend its operations, as the policy requires." *Id.* The case is *Colectivo Coffee Roasters, Inc. v. Society Insurance*.

On June 3, 2022, the U.S. Court of Appeals for the First Circuit affirmed the dismissal of a COVID-19 business interruption claim asserted by SAS International Ltd. against General Star Indemnity Company. Relying on the Supreme Judicial Court of Massachusetts' conclusion that "direct physical loss of or damage to" property requires "some 'distinct, demonstrable, physical alteration of the property" in *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022), the court concluded that the insured did not plausibly allege "direct physical loss of or damage to" covered property, as its factual allegations alleged no more than "a presence of the virus that is evanescent or may be addressed through simple cleaning." Opinion at 7-8, 10. The case is *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*

On June 3, 2022, the First Circuit affirmed the dismissal of a seafood restaurant's COVID-19 business interruption lawsuit. Relying on *Verveine Corp. v. Strathmore Insurance Co.*, it extended the Massachusetts' high court's reasoning to claims for the "evanescent presence" of a virus that can easily be cleaned and removed, finding "no grounds" on which the facts were distinguishable. Order at 14. It also held the absence of a virus exclusion in the policy does not imply coverage for virus claims. *Id.* at 18. The case is *Legal Sea Foods, LLC v. Strathmore Insurance Co.*

On May 27, 2022, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of a hotel operator's COVID-19 business interruption claim. The court concluded that the hotel operator failed to allege the requisite "direct physical loss or damage" to property to trigger coverage and that such loss or damage "does not extend to the mere presence of COVID-19 particles in the air or on surfaces." Opinion at 7. The case is *Abbey Hotel Acquisition, LLC, et al. v. Nat'l Surety Corp.*

On May 27, 2022, the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a restaurant operator's COVID-19 business interruption putative class action claim. Relying on its own precedent in *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's, London* and the Florida Third District Court of Appeal's decision in *Commodore, Inc. v. Certain Underwriters at Lloyd's, London*, the court concluded that the policy "requires direct physical loss or damage to the covered property, and the losses

here resulted from intangible harm caused by COVID-19" and, therefore, the insured "failed to plead that its losses and expenses are covered under the policy." Opinion at 6. The case is *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*.

On May 27, 2022, the Seventh Circuit affirmed the district court's dismissal of a childcare center's COVID-19 business interruption complaint. The court said it had "already considered and rejected these precise arguments" twice. Order at 2. It found that "COVID-19 has a negligible impact on physical property" and leaves the property "physically unchanged" because it can "be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." *Id.* There also was no complete physical dispossession of the insured property. *Id.* There is no coverage under the communicable disease provision because the closure orders were done "as a prophylactic measure" rather than because of the presence of the virus at the property. *Id.* The case is *Green Beginnings, LLC v. West Bend Mutual Insurance Co.*

On June 2, 2022, the Eleventh Circuit unanimously affirmed a grant of judgment on the pleadings for an insurer sued by several gyms for their COVID-19-related business income losses. Relying on its earlier decision in *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's of London*, the court said that the gyms' "arguments are a non-starter—binding precedent mandates the franchisees show a 'tangible alteration of the insured propert(y)' and that losses stemming from suspension of operations and extra expenses incurred in response to COVID-19 closure orders do not count." Order at 6. The case is *PF Sunset View, LLC v. Atlantic Specialty Insurance Co.*

On June 3, 2022, the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a restaurant owner and operator's COVID-19 business interruption claim. Noting that "[s]o far, every federal and state appellate court to consider the issue (including this one) has held that the presence of Covid-19 causes a business's property intangible harm, rather than direct physical harm," the court held the plaintiff's allegations of "'loss of use based on intangible and incorporeal harm due to COVID-19 and the closure orders that were issued by state and local authorities' is not enough" to state a claim. Opinion at 2, 7. The case is *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*

On June 6, 2022, the Supreme Court of the United States denied Goodwill Industries of Central Oklahoma's petition for a writ of *certiorari* in connection with its COVID-19 business interruption claim against Philadelphia Indemnity Insurance Company. In its petition, Goodwill claimed that the Court should review its case to provide guidance on whether federal courts have been giving adequate consideration to state high courts on pandemic-related coverage questions. The case is *Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins. Co.*

New Business Interruption Suits Against Insurers:

On June 1, 2022, two nonprofit organizations sued Brotherhood Mutual Insurance Services, LLC in Kentucky state court (Boone County) for breach of contract, declaratory relief, and bad faith for their COVID-19-related business interruption losses. Their policy allegedly contains earnings and donations and extra expense coverage. Complaint ¶¶15–26. Because of the government shutdown orders, plaintiffs allege their policies cover their lost earnings under the civil authority coverage part. *Id.* ¶¶ 31, 34. The case is *Answers in Genesis, Inc v. Brotherhood Mutual Insurance Services, LLC*.

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