

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 3)

May 4, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On April 28, 2021, the district court for the Eastern District of Pennsylvania granted Hartford Underwriters Insurance Company's motion to dismiss several restaurants' amended COVID-19 business interruption complaint with prejudice. Because the plaintiffs admitted the coronavirus was not present at their restaurants or any neighboring properties, the court held the plaintiffs failed to plead physical loss or damage and thus did not trigger business income or civil authority coverage. Order at 5, 15, 17. Additionally, closure orders, which still allowed the restaurants to conduct takeout, delivery, and drive-through services, did not impact the physical condition of the properties or lead to them being "uninhabitable or unusable for their intended purpose." *Id.* at 14. While the court acknowledged the "ruling may unfortunately present an obstacle in the path to recovery for plaintiffs' businesses," it held that it "must, of course, reach the result that is consistent with the applicable contracts at issue and applicable jurisprudence." *Id.* at 25.

On April 23, 2021, the district court for the Eastern District of Louisiana granted Twin City Fire Insurance Company's motion for judgment on the pleadings of a men's clothing store's COVID-19 business interruption complaint. The court held the policy's time element provision does not trigger coverage for losses barred by the virus exclusion. Order at 23. In coming to its conclusion, the court said the virus exclusion was "unambiguous" and thus "valid and binding upon the parties." *Id.* at 19–20. Additionally, without pleading the stores were actually contaminated by the virus, the court held that the plaintiffs failed "to plausibly allege property damage beyond economic losses." *Id.* at 24. Finally, the court found that the plaintiffs did not allege the elements required for civil authority coverage. *Id.* at 26.

On April 27, 2021, the district court for the Northern District of California granted Hartford Fire Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the owners and operators of two restaurants. The court concluded that the policy's plain and unambiguous virus exclusion barred coverage, as the complaint alleged that COVID-19 was the direct or indirect cause of loss. Order at 4. The court further rejected the plaintiffs' contention that an additional coverage for limited Fungus, Wet Rot, Dry Rot, Bacteria and Virus coverage applied, because the plaintiffs' request for coverage did not fit within one of the specified causes of loss categories described in that additional coverage section. *Id.* at 5-6.

On April 15, 2021, the district court for the Central District of California granted Travelers Indemnity Company of Connecticut's motion to dismiss a COVID-19 business interruption claim filed by the owner and operator of a museum. The court found the plaintiff's allegation that it suffered physical loss due to COVID-19 closure orders "plainly insufficient to constitute direct physical loss or damage because a business closure is an interference with Plaintiff's use of its museums but is not itself a distinct, demonstrable, physical alteration of its property." Order at 6. The court further held that the policy's unambiguous virus exclusion barred coverage. *Id.* at 9.

On April 29, 2021, the district court for the Northern District of Illinois granted the Cincinnati Insurance Company's motion to dismiss a restaurant owner and operator's COVID-19 business interruption claim. The court held that "under the plain language

of [plaintiff's] Policy, the presence of the virus in the air or on surfaces does not constitute physical damage or physical loss," as the virus's presence does not concretely or tangibly alter covered property. Order at 10-11. Because plaintiff failed to allege any such tangible damage to its property or nearby properties, the court held the complaint failed to state claims for coverage under the policy's business income or civil authority provisions. *Id.* at 12-15. The court also dismissed the plaintiff's bad faith denial claim, finding that it "is neither vexatious or unreasonable to . . . deny coverage based on a position that prevails." *Id.* at 16.

New Business Interruption Class Actions:

A restaurant operator filed a class action against Erie Insurance Company and one of its subsidiaries in federal court (W.D. Pa.) for declaratory judgment. Plaintiff's policy allegedly provides personal property, business income, extra expense, and civil authority coverage. Complaint at ¶ 8. The complaint alleges plaintiff suffered a covered loss because the presence of COVID-19 and related civil authority orders prohibited access to plaintiff's property. *Id.* at ¶ 28. The complaint proposes a nationwide class of "all insureds of [Erie] who have suffered business interruption and lost income as a result of the COVID-19 pandemic and the issuance of Civil Authority Orders issued in response to the COVID-19 pandemic." *Id.* at ¶ 90.

A dental practice filed a class action against Sentinel Insurance Company in federal court (W.D. Wash.) for declaratory judgment and breach of contract. Plaintiff's "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 14. The complaint alleges plaintiff suffered covered direct physical loss or damage to its property because the presence of COVID-19 particles in the air renders property unsafe and unusable and because state civil authority orders forced plaintiff to temporarily suspend its business. Complaint at ¶¶ 32-34, 53-58. The complaint proposes 8 different nationwide classes based on the various types of coverages at issue in the suit and the types of relief sought, each with a Washington state subclass. *Id.* at ¶ 78.

New Business Interruption Suits Against Insurers:

An optometry practice sued a subsidiary of Oxford Insurance Company in federal court (M.D. Tenn.) for declaratory judgment, breach of contract and the duty of good faith and fair dealing, and bad faith. Plaintiff's "Actual Net Loss" policy allegedly provides loss of referrals, income loss, and extra expense coverage. Complaint at ¶¶ 5, 8, 14-16. The complaint alleges plaintiff suffered a covered loss because state COVID-19 orders forced certain key referral sources to temporarily cease business operations. *Id.* at ¶¶ 18-28. The complaint also alleges Oxford acted in bad faith by denying plaintiff's allegedly meritorious claim without conducting an independent investigation. *Id.* at ¶¶ 63-64.

Several car dealerships sued Starr Surplus Lines Insurance Company in federal court (E.D. La.) for declaratory relief, breach of contract, and a breach of statutory duties and the duty of good faith and fair dealing. The plaintiffs' "all-risk" policy allegedly provides business interruption, extra expense, and civil authority coverage and does not contain a virus exclusion. Complaint ¶¶ 11-12, 34, 37, 41. According to the plaintiffs, they sustained a covered loss "as a result of the unprecedented emergency associated with the physical spread of COVID-19 . . . plus the actions, orders, and guidance by federal, state, and local authorities and agencies to stop losses, damages, and . . . harm." *Id.* ¶ 11. Plaintiffs allege COVID-19 was likely present on their properties because employees tested positive for the virus. *Id.* ¶¶ 44, 62. After submitting a claim to their insurer with the requisite information, the insurer allegedly denied the claim without meaningfully investigating the facts or contractual language. *Id.* ¶¶ 70, 74.

An optometrist sued State Farm Fire and Casualty Company for declaratory relief and breach of contract. The “all risk” policy allegedly provides loss of income, extra expense, and civil authority coverage. Complaint ¶¶ 11-13, 28. Due to COVID-19 and the resulting governmental response, the plaintiff claims it suffered physical loss of its property and business interruption. *Id.* ¶ 5. Yet, the insurer denied its claim for business loss and extra expense. *Id.* ¶ 12.

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