

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now - Week of November 8, 2021

November 9, 2021

Courts Dismiss COVID-19 Business Interruption Claims

On November 2, 2021, the district court for the Northern District of Ohio granted Zurich American Insurance Company's motion for summary judgment in a COVID-19 business interruption claim where the court had initially ruled in favor of the insured restaurant operators. The new ruling granting summary judgment to the insurer in *Henderson Road Rest. Svs.* came after the Sixth Circuit vacated the pro-policyholder order and directed the district court to review the parties' summary judgment arguments in light of the Sixth Circuit's decision in *Santo's Italian Café LLC v. Acuity Ins. Co.* Order at 1. This time, the court concluded that *Santo's* "mandates that summary judgment be entered in favor of Zurich," *id.* at 7, as the court discerned "no basis upon which *Santo's* is distinguishable from the undisputed facts here." It said the Sixth Circuit made clear in *Santo's* "that mere loss of use is insufficient to trigger insurance coverage for 'direct physical loss' of 'property' under the ordinary meaning of those words." *Id.* at 10. The case is *Henderson Road Rest. Sys., Inc., et al. v. Zurich Am. Ins. Co.*

On October 14, 2021, the district court for the Western District of Louisiana granted State Farm Fire and Casualty Company's motion to dismiss a travel agency's COVID-19 business interruption complaint. The court held the policy's virus exclusion precluded coverage. Following other courts within the Fifth Circuit, the court held "the presence of the virus in a building [does] not cause or equate to physical damage or loss sufficient to trigger coverage." Order at 9–10. The case is *Travel Machine Louisiana, LLC v. State Farm Fire & Casualty Co.*

On November 1, 2021, the district court for the Middle District of Florida granted Zurich American Insurance Company's motion to dismiss a restaurant group's COVID-19 business interruption counterclaim. The court followed the Eleventh Circuit's recent decision in *Gilreath Fam. & Cosm. Dentistry v. Cincinnati Ins. Co.* and held the plaintiff did not suffer a direct physical loss under its policy. Order at 7-8. The case is *Zurich Am. Ins. Co. v. Tavistock Rests. Grp., LLC.*

On November 1, 2021, the district court for the District of New Jersey granted Sentinel Insurance Company, Limited's motion for judgment on the pleadings in a COVID-19 business interruption claim filed by the owner and operator of a dental practice. The court concluded that "Sentinel's Virus Exclusion unambiguously bars Plaintiff's claim for losses caused by the COVID-19 virus." Order at 6. The case is *Cedar Run Orthodontics, P.A. v. Sentinel Ins. Co., Ltd.*

On November 1, 2021, the district court for the Eastern District of Missouri granted Zurich American Insurance Company's motion to dismiss a college's proposed class action for COVID-19 business interruption related losses. The court found that the school's decision to transition to online classes did not qualify as a "direct physical loss of" property under its insurance policies. Order at 10. "Nothing physical happened to the property. Rather, there only was a change in circumstances. The coronavirus pandemic, the associated opinions of industry groups, and the public may have caused a modification of the way Plaintiff conducted its business, but the transitory reduction of the properties' functionality, based on no direct physical occurrence, does not amount to a loss of the properties under the plain meaning of the policies." *Id.* The court reasoned that if mere changes in circumstance constituted direct physical loss, then coverage would trigger every time property could not be "used for

its intended purpose.” *Id.* at 11. As for the policyholder’s argument that the policy contained geographically limiting language in its contamination exclusion, the court called the argument “unfounded.” *Id.* at 13. “[W]hile titles cannot change the policy, they are there for reference.” *Id.* The case is *Lindenwood Female College v. Zurich American Insurance Co.*

On November 1, 2021, the district court for the Eastern District of Pennsylvania granted Steadfast Insurance Company’s motion to dismiss an environmental liability claim brought by a casino, racetrack, and gambling facility owner and operator based on COVID-19 losses. The court found the plaintiff failed to allege a “new pollution event” under its policy where the complaint failed to allege COVID-19 was present in a building at a covered location. Order at 6-7. The court also found the plaintiff failed to state a claim for cleanup cost coverage under the policy’s civil authority provisions because the complaint only sought recovery of lost revenues. *Id.* at 13-14. The case is *Greenwood Racing Inc. v. Am. Guarantee & Liab. Ins. Co.*

New Business Interruption Suits Against Insurers:

A commercial retail and real estate management company sued Zurich American Insurance Company in Pennsylvania state court (Philadelphia County) for declaratory judgment. The plaintiff’s policies allegedly provide, among other things, business income/time element, extra expense, and civil authority coverage. Complaint at ¶¶ 83-91. The complaint alleges the plaintiff suffered covered physical losses “due to the actual presence of COVID-19” on plaintiff’s properties “and the ongoing threat of immediately impending COVID-19 and resulting loss or damage.” *Id.* at ¶ 93. The case is *Goodman Mgmt., LLC v. Zurich Am. Ins. Co.*

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